ADDENDUM

Minute of Board Action

July 18, 2014

In *NLRB v. Noel Canning, a Division of the Noel Corp.*, No. 12-1281, _ S. Ct. _, 2014 WL 2882090 (June 26, 2014), the Supreme Court held that three Board members who received recess appointments on January 4, 2012 were not validly appointed. During the time period from January 4, 2012 until August 5, 2013, when the Board regained a quorum after the confirmation of five Presidentially-appointed Board Members, the Board acted on numerous administrative, personnel, and procurement matters including but not limited to appointments of various Regional Directors, Administrative Law Judges, and Senior Executives, and restructurings of regional and headquarters offices. Prior to the recess appointments of January 4, 2012, the Board issued an Order contingently delegating certain authorities to other NLRB officials.[1]

We believe that all the administrative, personnel and procurement matters described above were timely and appropriate. Nevertheless, in an abundance of caution, with a full complement of five Board Members we now confirm, adopt and ratify *nunc pro tunc* all administrative, personnel and procurement matters approved by the Board or taken by or on behalf of the Board from January 4, 2012 to August 5, 2013, inclusive. This action is intended to remove any question that may arise concerning the validity of the administrative, personnel, and procurement matters undertaken during that period.

In a further abundance of caution, and in an effort to bring an end to ongoing litigation regarding the actions of the Board and its personnel between January 4, 2012 and August 5, 2013, having considered the relevant supporting materials, the Board hereby expressly authorizes the following actions:

1. The selection of Dennis Walsh as Regional Director for Region 4 (Philadelphia);
2. The selection of Margaret Diaz as Regional Director for Region 12 (Tampa);
3. The selection of Mori Rubin as Regional Director for Region 31 (Los Angeles);
4. The selection of Kenneth Chu, Christine Dibble, Melissa Olivero, Susan Flynn, and Donna Dawson as Administrative Law Judges;
5. The Amendment of Statement of Organization and Functions and the Restructuring of National Labor Relations Board's Field Offices described in notices published in the Federal Register on December 6, 2012, and July 24, 2013, 77 Fed Reg. 72886 and 78 Fed Reg. 44602, and all related actions in furtherance thereof;

[1] See Order Contingently Delegating Authority to the Chairman, the General Counsel, and the Chief Administrative Law Judge, 76 Fed. Reg. 73719 (Nov. 29, 2011).

6. The Restructuring of National Labor Relations Board's Headquarters' Offices described in the notice published in the Federal Register on July 25, 2013, 78 Fed Reg. 44981; and

7. The Further Amendment to Memorandum Describing Authority and Assigned Responsibilities of the General Counsel described in the notices published in the Federal Register on July 23, 2012 and August 1, 2012, 77 Fed Reg. 43127 and 77 Fed Reg. 45696.

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

Nancy Schiffer, Member

STATUTORY ADDENDUM

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HENDRICKSON TRUCKING CO.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	**Case Nos. 17-1226**
	)	**& 17-1234**
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
INTERNATIONAL BROTHERHOOD	)	
OF TEAMSTERS, LOCAL 1038	)	
	)	
Intervenor	)	
_____	)	

STATUTORY ADDENDUM

National Labor Relations Act, 29 U.S.C. § 151, et. seq.

Section 7 (29 U.S.C. § 157 2
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....2
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....2
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....2
Section 10(a) (29 U.S.C. § 160(a)) 2
Section 10(e) (29 U.S.C. § 160(e)) 3
Section 10(f) (29 U.S.C. § 160(f)) 3

Administrative Procedure Act, 5 U.S.C. § 500, et. seq.

Section 554(d) (5 U.S.C. § 554(d) 4

NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157): Rights of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the Act (29 U.S.C. § 158): Unfair Labor Practices.

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

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

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization…;

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

…

Section 10 of the Act (29 U.S.C. § 160): Prevention of Unfair Labor Practices.

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any

industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

…

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive….

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside….

ADMINISTRATIVE PROCEDURE ACT

Section 554 of the APA (5 U.S.C. § 554): Adjudications

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HENDRICKSON TRUCKING CO.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	Nos. 17-1226 & 17-1234
	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos.
	)	07-CA-086624
Respondent/Cross-Petitioner	)	07-CA-095591
	)	
and	)	
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 1038	)	
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 29th day of June, 2018

From: Employment Law360
To: Ring, John
Subject: High Court Skeptical Calif. Law Applies To Oil Rig Labor Row
Date: Wednesday, April 17, 2019 3:39:06 AM

<

EMPLOYMENT

/td>

Wednesday, April 17, 2019

TOP NEWS

High Court Skeptical Calif. Law Ap plies To Oil Rig Labor Row

An offshore drilling worker tried to convince skeptical U.S. Supreme Court justices Tuesday that applying California state labor law to an offshore oil rig would not make language in the Outer Continental Shelf Lands Act pointless.

Read full article »

New NLRB Advice Memos Tackle Worker Vs. Union Issues

The NLRB's Division of Advice has released a new batch of guidance memos that blessed several challenges from workers taking aim at their unions, backed a New Jersey hospital's change to how it handled worker complaints and punted "unit packing" claims against Domino's Pizza.

Read full article »

The Many Ways Firms Are Failing To Address H arassment

Law firms are dropping the ball in numerous ways when it comes to responding to sexual harassment and other workplace misconduct, a Duane Morris LLP employment partner told the Association of Legal Administrators' annual conference Tuesday.

Read full article »

EEOC Scolded Over Missing Pay Data Compliance Info

A D.C. federal judge gave the U.S. Equal Employment Opportunity Commission a slap on the wrist Tuesday for removing information from its website to help employers comply with pay data collection, but held off on setting a deadline for when the data needs to be collected.

Read full article »

Calif. Panel Won't Undo Disney Win Over Background Checks

A California state appeals court has upheld Walt Disney Parks & Resorts' win in a class action accusing it of running background checks on job hopefuls that were based on illegal disclosure forms, saying the applicants fell short of showing that the company knowingly flouted the Fair Credit Reporting Act.

Read full article »

Companies' Class Action Costs Hit 10-Year High, Survey Says

The cost of dealing with class actions has reached its highest level since the 2008 recession, driven by an increase in both the number and complexity of class action suits, according to a survey of nearly 400 companies conducted by defense firm Carlton Fields PA published Tuesday.

Read full article »

IN-DEPTH

News Analysis

Riding #MeToo Wave, State Courts Get Their Ships In Order

Law360 Pro Say Podcast

Listen to our new podcast here

New Cases

Discrimination (44)
Labor (30)

LAW FIRMS

Barran Liebman
BrownGreer PLC
Burns & Levinson
Carlton Fields
Clark Hill
Cohen & Malad
Devin H. Fok Law
Duane Morris
Foley Hoag
Gibbs Law Group LLP
Girardi & Keese
Harmon & Davies PC
Kellogg Hansen
Kirkland & Ellis
Lewis Brisbois
Locks Law Firm
Morgan & Morgan
Nelson Mullins
Norton Rose Fulbright
Paul Hastings
Pitt McGehee
Potter Anderson
Quinn Emanuel
Richards Layton

Most state court systems have already been rolling out their own changes in the wake of federal #MeToo reforms, but making judges accountable for sexual misconduct won't happen overnight. (This article is part of a series examining sexual harassment in state courts.)

Read full article »

Q&A

EEOC's Lipnic On Sexual Harassme nt In The Courthouse

Here, the head of the EEOC talks to Law360 about being in the midst of a movement, why court employees are particularly vulnerable to harassment and why the judiciary should take action now. (This article is part of a series examining sexual harassment in state courts.)

Read full article »

DISCRIMINATION

6th Circ. Revives Mich. Assistant Pr incipal's Sex Bias Suit

The Sixth Circuit on Tuesday revived a gender discrimination lawsuit brought by a Michigan assistant principal who claimed she was transferred and asked to resign for tipping a colleague off about a possible harsh evaluation, though a male colleague got a slap on the wrist for doing nearly the same thing.

Read full article »

Postal Service Defeats Worker's Promotion Bias Suit

A New Jersey federal judge awarded the U.S. Postal Service a win Tuesday in a longtime employee's suit alleging she didn't receive a promotion because of discrimination based on her race, sex and other factors.

Read full article »

Pet Food Co. Must Face Ex-Worker's Racial Bias Suit< /a>

A Washington federal judge on Tuesday rejected a pet food company's attempt to end a suit claiming that a Chinese American regional manager was fired in retaliation for complaining about racial discrimination and harassment, including an alleged comment that "his people" eat dogs.

Read full article »

Ariz. Paramedic Lands $3.8M In B reastfeeding Retaliation Suit

A former Tucson, Arizona, paramedic has secured a $3.8 million jury verdict in a retaliation lawsuit claiming the Tucson Fire Department turned against her after she asked for assignments at fire stations with areas to express breast milk.

Read full article »

10th Circ. Backs Toss Of Ex-SBA Empl oyee's Sex Bias Suit

The Tenth Circuit has affirmed the dismissal of a former U.S. Small Business Administration employee's gender discrimination suit, agreeing with the lower court that she failed to comply with all the presuit requirements for bringing a Title VII case.

Read full article »

NONCOMPETES

Chancery Sanctions Ex-Panera IT Execs For Trashing Records

The Delaware Chancery Court sanctioned three former Panera LLC information technology executives Tuesday for deleting or destroying records sought by Panera for its case in increasingly bitter litigation over enforcement of "no-compete" rules for its ex-employees.

Seeger Weiss
Shumaker Loop
Sidley Austin
Simpson Thacher
Steinhilber Swanson
Sullivan & Worcester
Wood Smith

COMPANIES

American Bar Association
BNSF Railway Co.
Cato Institute
Credit Suisse Group AG
Domino's Pizza Inc.
Facebook
General Motors
International Brotherhood of Electrical Workers
International Brotherhood of Teamsters
Legal Momentum
NFL Enterprises LLC
National Women's Law Center
Panera Bread Company
Parker Drilling Company
Raytheon Co.
Reed Elsevier
Royal Dutch Shell PLC
Sterling Talent Solutions
The Boeing Co.
The Walt Disney Co.
United Parcel Service Inc.
Walt Disney Parks & Resorts Worldwide Inc.

GOVERNMENT AGENCIES

California Supreme Court
Delaware Court of Chancery
Equal Employment Opportunity Commission
Executive Office of the President
Federal Trade Commission
National Labor Relations Board
Small Business Administration
U.S. Attorney's Office
U.S. Department of Justice
U.S. Department of Labor
U.S. Office of Government Ethics
U.S. Postal Service
U.S. Supreme Court
United States Bankruptcy Court for the Southern District of New York
United States District Court for the Easter n District of Pennsylvania

Read full article »

Jiffy Lube Says Its No-Poach P rovision Isn't Anti-Competitive

Jiffy Lube has urged a Pennsylvania federal court to toss a former worker's suit challenging a no-poach provision in its past franchise agreements, saying the provision is above-board and that the company no longer enforces it anyway.

Read full article »

WORKER SAFETY

Analysis

NFL Moved Goal Posts With New Concus sion Rules, Attys Say

Newly adopted medical rules in the NFL concussion settlement will likely make it harder for retired players to receive payouts, leaving their attorneys fearful of slowly losing the "administrative knife fight" that has broken out around the landmark deal.

Read full article »

BANKRUPTCY

21st Century Oncology Ch. 11 Reopene d For Noncompete Suit

A New York bankruptcy judge Tuesday reopened 21st Century Oncology's Chapter 11 case, ruling that a dispute over noncompete agreements that were included in the Florida cancer treatment chain's reorganization plan belongs in bankruptcy court.

Read full article »

EXPERT ANALYSIS

Joint Employer Rules Are Devel oping, But Still Far From Clear

Proposed rules from the U.S. Department of Labor and the National Labor Relations Board regarding joint employer status bear similarities, but discrepancies in how joint employer factors are described and other subtle differences may lead to varied interpretations, say Natalie Chan and Katherine Roberts of Sidley Austin.

Read full article »

Series

Why I Became A Lawyer: A Circuitous Path To Th e Law

Instead of going to college after high school, I followed in my father’s footsteps and became an electrician. Later I became an electrical engineer, and then an IP attorney. Every twist and turn along the way has made me a better lawyer, says Joseph Maraia of Burns & Levinson.

Read full article »

LEXIS PRACTICE ADVISOR

Employer Considerations When Using Garden Leave Clauses

Garden leave — when a departing employee remains on company payroll and cannot compete with the employer — is an attractive alternative to regular noncompetes. Elisaveta Dolghih of Lewis Brisbois discusses the advantages and disadvantages of garden leave provisions and provides drafting best practices.

Read full article »

LEGAL INDUSTRY

Interview

Judiciary's Integrity Chief Talks Improving Workplace Culture

A new office intended to improve federal courts' handling of workplace complaints is up and running under its first leader, Jill Langley. In her first interview since the Judicial Integrity Office's opening, Langley discusses what she's learned about the judiciary's workplace culture and how she hopes to improve it.

Read full article »

Law Firms May Gain A Tool To Compar e Themselves To Others

Law firms may soon have a shared taxonomy when it comes to operational and back-office work with which they can accurately compare themselves to other firms and industrywide benchmarks, according to a Tuesday presentation at the Association of Legal Administrators' annual conference in Grapevine, Texas.

Read full article »

Trump Ambassador Pick Earned $14M From Kirk land, Quinn

Christopher Landau, an appellate lawyer tapped by President Donald Trump to serve as the next ambassador to Mexico, earned approximately $11 million from Kirkland and $3 million from Quinn Emanuel in 2017 and 2018, according to a recent financial disclosure.

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JOBS

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From: Martin, Andrew
Subject: Legal News FYI 04-17-19
Date: Wednesday, April 17, 2019 6 55:40 AM
Attachments: image001.png

Wednesday, April 17, 2019

United States: NLRB: Employer's Reasons For Policy Changes Kept Union's Information Request Alive Even After Proposals

Mondaq Business Briefing 17 Apr 2019 06:23

Information requests in the realm of labor relations are simple in heory but can be complicated in practice. We have seen how the topics of information sought by a union can cause skirmishes, sometimes deliberately so. We also have seen that it almost...

Volkswagen, United Auto Workers tangle over Chattanooga plant election questions before new vote

Chattanooga Times/Free Press (Chattanooga, TN) 16 Apr 2019 18:36

Updated at 6:28 p.m. on Tuesday, April 16, 2019, with more information. Lawyers for Volkswagen and the United Auto Workers are making new charges and counter-charges related to another possible union vote at the VW Chattanooga factory. The union is...

Blog Post: New NLRB Advice Memos Tackle Worker Vs. Union Issues

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 16 Apr 2019 18:01

The NLRB's Division of Advice has released a new batch of guidance memos that blessed several challenges from workers taking aim at their unions, backed a New Jersey hospital's change to how it handled worker complaints and punted "unit packing" ...read...

READ THIS WITH YOUR LAW360 ID

Case: Labor Relations/Picketing (9th Cir.)

BloombergLaw - Labor Relations News 16 Apr 2019 17:46

The NLRB properly found that a UNITE HERE! local unlawfully blocked or impeded hotel employees, or others while employees were present, from entering or exiting the Aston Waikiki Beach Hotel. The union argued that its conduct was "brief and merely...

Full Speed Ahead for DOL on Wage-and-Hour Guidance and Rule Changes

National Law Review 16 Apr 2019 17:32

The U.S. Department of Labor (DOL) has kept employers on their toes this spring. During March and the early part of April, the DOL has engaged in a flurry of activity using its rulemaking authority and non-binding opinion letter function to regulate and...

Case: Labor Relations/Refusal to Bargain (D.C. Cir.)

BloombergLaw - Daily Labor Report 16 Apr 2019 15:17

The NLRB didn't err in finding that a hauling company unlawfully implemented its own last best offer in bargaining with a Teamsters local. The D.C. Circuit has long recognized that an employer's failure to provide requested information that affects...

Blog Post: Joint Employer Rules Are Developing, But Still Far From Clear

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 16 Apr 2019 09:26

Proposed rules from the U.S. Department of Labor and the National Labor Relations Board regarding joint employer status bear similarities, but discrepancies in how joint employer factors are described and other subtle differences may lead to varied...

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Employer Rules Prohibiting Employees from Criticizing Employer or Discussing Discipline Violated NLRA: NLRB Division of Advice

Thomson Reuters Practical Law : Labor & Employment 16 Apr 2019 00:00

The Office of the General Counsel of the National Labor Relations Board (NLRB) recently released an advice memorandum concluding that an employer violated Section 8(a)(1) of the National Labor Rela ions Act (NLRA) by maintaining overbroad work rules...

READ THIS WITH YOUR WESTLAW ID

NLRB LIBRARY Your Primary Source

Legal News FYI monitors news, cases, and legislative developments of interest to the NLRB. To be added to or removed from the distribution list contact Andrew Martin. Please note that these are external links and the Agency takes no responsibility for their content.

From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: First Move: LGBT Bias Protections Land at Eighth Circuit
Date: Wednesday, April 17, 2019 7:09:59 AM

What you need to know to start your day.

LGBT Bias Protections Land at Eighth Circuit

By Patricio Chile

Does it violate federal civil rights law to rescind a job offer based on the applicant's orientation? The Eighth Circuit today will become the latest appeals court to grapple over whether or not federal law on sex discrimination also precludes sexual orientation bias.

- **Sparring Sides:** Oral arguments are set for *Horton v. Midwest Geriatric Management*. Horton's claim that a St. Louis company withdrew his job offer after discovering his sexual orientation has drawn support from several big name companies, Erin Mulvaney reports.

- **Circuit Split:** The Seventh Circuit two years ago became the first federal appeals court to rule that sexual orientation should be protected under Title VII of the 1964 Civil Rights Act. The Second Circuit followed suit almost one year later. In between those decisions, the Eleventh Circuit took the opposite view.

AI RAISES NEW WORKPLACE BIAS RISKS

JPMorgan Chase, Unilever, and other employers are increasingly turning to artificial intelligence-based tools to diversify their job applicant pool and root out bias in hiring practices. But relying on AI-based tech in hiring and recruitment may inadvertently trade some forms of bias for others.

- **Tough Consequences:** Employers could face litigation and the wrath of government agencies if they don't make appropriate accommodations for certain workers, especially for workers with disabilities, Jaclyn Diaz reports.

- **Planning Ahead:** Employers should have a plan to prevent bias that may arise from using AI-based tools, especially as the technology becomes more available, more advanced, and more integrated into the hiring process.

Students view mobile devices while waiting to speak to a representative during a career fair at the New York University Polytechnic School of Engineering in the Brooklyn borough of New York, Feb. 12, 2015.
Photographer: Michael Nagle/Bloomberg via Getty Images

WHAT ELSE WE'RE WATCHING

- **Age Bias:** Amazon.com was accused of laying off an account specialist because of her age, and Urban Outfitters was sued over allegations that it tolerated the age-biased attacks against an apparel sourcing expert of Chinese descent, according to two complaints filed in federal courts. Read more in "New Work Suits."

- **Pay Data:** The EEOC isn't equipped to handle a May 31 deadline for certain businesses to submit pay data broken down by race, gender, and ethnicity, the agency's chief data officer told a federal judge in Washington yesterday.

- **Tesla Arbitration:** A Ninth Circuit panel remained silent when counsel for Tesla Inc. argued that a race discrimination case against the automaker should be forced into arbitration. Robert Iafolla has the story.

- **Visa Demand:** The Trump administration has made several efforts to scale back the H-1B skilled guestworker program. If the results of this year's visa lottery are any indication, demand for the visas is just as high as ever, Laura Francis reports.

- **Pay Bias:** A federal appeals court in New York will hear arguments today in *Lenzi v. Systemax*, where the EEOC will argue as a friend-of-the-court that workers pressing pay bias claims under Title VII of the 1964 Civil Rights Act don't have to prove "equal pay for equal work."

- **Wage Law:** The U.S. Supreme Court appeared divided yesterday over whether California's offshore oil rig workers should be subject to the state's more rigorous wage and hour law or the federal standard, Erin Mulvaney reports.

- **Volkswagen Union:** Representatives from Volkswagen and the United Auto Workers will meet today for a National Labor Relations Board hearing as the union attempts to organize the company's Chattanooga, Tenn., facility. The union is seeking an election as soon as this month.

- **Law Firm Diversity:** Major law firms are gaining in promoting and advancing women and offering family friendly policies but improvement is slow, the annual Yale Law Women report showed. Stephanie Russell-Kraft has the story.

DAILY RUNDOWN

Top Stories

Old Dominion Must Face Trial Over ‘No Weapons’ Policy Firing
An Old Dominion Freight Line Inc. sales manager may be able to convince a jury the company lacked good cause and violated its own policies when it fired him for allegedly failing to enforce its “no weapons” rule, a federal judge ruled.

Lane Bryant Loses Bid for Certification Hearing in Overtime Suit
Lane Bryant Inc. failed to convince a federal judge to set a hearing to weigh whether a group of workers’ collective action for unpaid overtime wages should be conditionally certified.

Discrimination

Grocery Bag Maker Can’t Force Worker to Arbitrate Bias Claims
A Spanish-speaking packing production manager with a plastic bag manufacturer may take her age and religious discrimination claims to court, the California Court of Appeal ruled.

Tucson Paramedic Wins $3.8M in Breastfeeding Rights Case
A federal jury awarded a Tucson, Ariz., paramedic $3.8 million after finding she was denied a private place to express breast milk and otherwise mistreated when she returned from pregnancy leave.

Wage & Hour

Personal Care Aides Win in Overtime, Worker Classification Suit
The Department of Labor has prevailed in a lawsuit claiming that 44 home care aids were misclassified as independent contractors and not paid overtime wages.

Harassment & Retaliation

Phoenix Officer Gets More Time to Defend $1.5M Retaliation Win
A Phoenix police sergeant has until April 26 to respond to the city’s attempt to overturn a jury verdict awarding him $1.5 million for supporting a female subordinate’s sexual harassment complaint.

Teacher in New York Prison Gets Sex Harassment Win Upheld
A federal judge declined to overturn a jury's finding that the New York Department of Corrections and Community Supervision subjected one of its female employees to a hostile work environment.

State & Local Laws

Crump's Law: Six Months of Cancer Leave for Arkansas Firefighters
Little Rock, Ark., firefighter Nathaniel Crump battled against Stage 4 colon cancer and fires all at once, after being told he needed to return to work after exhausting his leave.

WORKFLOWS

Drinker Biddle announced the arrival of deal adviser James F. Fitzsimmons to the Florham Park, NJ office from Budd Larner | **Hogan Lovells** said that Arwen Handley, most recently Managing Director and global Head of Group Investigations Governance, Reporting and Whistleblowing Management at UBS, will join as a partner in May 2019 | **Sidley Austin** added Tai-Heng Cheng and Simon Navarro as partner and counsel in its international arbitration practice in New York from Quinn Emanuel Urquhart & Sullivan | **BakerHostetler** hired Douglas Eingurt to the firm's mergers and acquisitions group and its private equity and venture capital team in Atlanta from Dentons | **Dentons** announced Monday that finance partner Mary Wilson has become the firm's first female U.S. managing partner | **Littler** hired litigator Courtney Williams as an associate in Nashville from Bass, Berry & Sims PLC | **McGuireWoods** appointed senior counsel and commercial litigator Angela Zimmern as its pro bono director; she currently serves as pro bono co-coordinator for its Charlotte office | **Wilson Sonsini Goodrich & Rosati** said that Wanda Woo has joined the firm's corporate and securities practice as partner in the Hong Kong office | **Seyfarth Shaw** added Martin Hopkins and Ana Cid Velasco to its international employment law practice in London from Eversheds Sutherland | **Eversheds Sutherland** has added Tony Anderson, Charlie Clarence-Smith and Henry Burkitt to its international employment group from Pinsent Masons | **White & Case** hired Fergus Wheeler as a partner its Global Banking Practice in London | **Simpson Thacher & Bartlett** said that former JPMorgan Chase & Co. general counsel and vice chairman Stephen Cutler has been appointed to head the firm's government and internal investigations practice

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From:	Morning Shift
To:	Ring, John
Subject:	POLITICO"s Morning Shift: DOJ blocks asylum seekers" bond hearings — Stop & Shop apologizes to customers for New England strikes — Automation delay at Port of L.A.
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QUICK FIX

— The Justice Department said it will deny bond to tens of thousands of asylum seekers.

— Stop & Shop's president apologized to customers as its strike stretches into its seventh day.

— Driverless vehicles are on hold at Port of Los Angeles.

GOOD MORNING! It's Wednesday, April 17, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

DOJ BLOCKS ASYLUM SEEKERS' BOND HEARINGS: "In a move that could keep tens of thousands of asylum seekers locked up, the Justice Department said Tuesday that it will deny a large class of undocumented immigrants a bond hearing to argue for their release," POLITICO's Ted Hesson reports. "The opinion, by Attorney General William Barr, adheres to the Trump administration's stance that migrants caught at the border should be detained whenever possible" and "reverses a 2005 immigration court ruling that guaranteed bond hearings for certain migrants."

"It strips away the ability of an immigration judge to look at the merits of the case and determine in a bond hearing whether the person is going to be a flight risk or a threat to the community," Andrew Free, a Nashville-based immigration attorney told Hesson. More here.

UNIONS

STOP & SHOP PRESIDENT APOLOGIZES FOR STRIKE: Mark McGowan, Stop & Shop's president, sent an e-mail to customers Monday apologizing for the "inconvenience" caused by a strike of 31,000 workers that reaches its seventh day today. Jaclyn Reiss reports for the Boston Globe that "McGowan acknowledged 'the valuable role our associates play' in the stores, but still defended the company's

offerings in contentious contract negotiations."

The strike is making it hard to keep the store's New England locations open. McGowan said in the email that: "Bakery, Customer Service, Deli, and Seafood counters will not be operational, and we currently have a limited meat selection. Our gas stations are also closed at this time."

The five United Food & Commercial locals representing the striking workers argued in a written statement Tuesday that "Stop & Shop's latest proposal will drastically increase out-of-pocket health care costs, kick approximately 1,000 employees' spouses off of their health care plan, and make it more challenging for 31,000 people to provide for themselves and their families." More from the Globe here.

PORT DRIVERLESS VEHICLES ON HOLD IN LA: "The Port of Los Angeles' Harbor Commission delayed a decision Tuesday over whether to approve a permit that would open the way to automation in North America's largest terminal," following a protest of 1,200 dockworkers, Margot Roosevelt reports for the Los Angeles Times.

It was the second delay requested by Mayor Eric Garcetti on a "controversial" construction permit for shipping firm Maersk "to replace about 100 diesel tractors, which are operated by members of the International Longshore and Warehouse Union, with driverless electric vehicles, potentially eliminating hundreds of jobs.... If Maersk is allowed to automate, the rest of the port complex's 13 terminals will probably follow suit, the union contends." More here.

JOBS, JOBS, JOBS

SPRINT T-MOBILE MERGER IN JEOPARDY?: Justice Department antitrust enforcement staff have told T-Mobile and Sprint that their planned $26 billion merger "is unlikely to be approved as currently structured," Drew FitzGerald and Brent Kendall report for The Wall Street Journal. Last month, 37 House Democrats urged federal regulators to block the merger, arguing that the deal will "destroy jobs and drive down wages." The merger, if approved, would shrink the U.S. wireless market to three major players (the others being AT&T and Verizon). The Justice Department's antitrust division is currently "considering whether the deal would present an unacceptable threat to competition," FitzGerald and Kendall write.

The Communication Workers of America estimates the consolidation will eliminate 30,000 jobs, and researchers at the Economic Policy Institute and the Roosevelt institute, two left-leaning think tanks, estimate that it will lower wireless workers' average weekly earnings by up to 7 percent in a ffected labor markets. T-Mobile CEO John Legere tweeted in response to the Journal's report: "The premise of this story, as summarized in the first paragraph, is simply untrue. Out of respect for the process, we have no further comment." More from the Journ al here.

IMMIGRATION

DEMOCRATS WANT ANSWERS ON CBP PARDON OFFER: Democrats on the House Judiciary Committee are probing President Donald Trump's reported offer to pardon Customs and Border Protection Commissioner Kevin McAleenan if he acted illegally to block asylum seekers, POLITICO's Ted Hesson reports. McAleenan is now leading DHS in an acting capacity following the departure of former Homeland Security Secretary Kirstjen Nielsen. "In a letter to McAleenan, Judiciary Chairman Jerry Nadler (D-N.Y.) and other Democrats asked the new acting secretary to turn over a list of all DHS employees present during a meeting with Trump in Calexico, Calif., where the pardon exchange reportedly took place," Hesson reports. "The lawmakers said the alleged conversation suggests Trump 'views the pardon power as a political tool, or even worse, as an expedient mechanism for circumventing the law or avoiding the consequences of his own conduct.'" More here.

TRUMP CAMPAIGN TARGETING OLDER VOTERS ABOUT IMMIGRATION: Nearly half (44 percent) of the Trump campaign's Facebook ad budget targets users who are more than 65 years old, with most of those ads mentioning immigration, Sara Fischer reports for Axios. Data from Bully Pulpit Interactive found "Trump is using nativist language around immigrants in 54 percent of his ads." By comparison, Democrats have spent only 27 percent of their Facebook ad budgets on older users. More here.

COFFEE BREAK

— "Steel importers ask Supreme Court to review Trump's tariffs," from POLITICO

— "Employee Wellness Programs Yield Little Benefit, St udy Shows," from The New York Times

— "US wants to build more tents at border to detain migrants," from The Associated Press

— "T-Mobile-Sprint Deal Runs Into Resistance From DOJ Antitrust Staff," from The Wall Street Journal

THAT'S ALL FOR MORNING SHIFT!

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Cc:	Coffman, Jill H.; Owens, Daniel J.; Yashiki, Dale K
Subject:	Ninth Circuit decision in UNITE HERE! Local 5, Board Case 20-CB-163657 (reported at 365 NLRB No. 169)
Date:	Wednesday, April 17, 2019 2:11:08 PM
Attachments:	Unite Here Local 5_18_70029_FINAL NLRB brief.pdf.pdf

In an unpublished memorandum opinion that issued on Monday, April 15, 2019, the Ninth Circuit enforced the Board's order issued against this union that began a campaign in February 2015 to organize employees at the Aston Waikiki Beach Hotel in Waikiki, Hawaii. In doing so, the court agreed with the Board that the union's picketing unlawfully blocked or impeded access to the hotel.

As part of its organizing campaign, the union held pickets on a weekly basis in front of the hotel's *porte cochere*, which is a one-way, u-shaped driveway used by vehicles and pedestrians to access the hotel. Typically, 15 to 40 picketers attended the smaller pickets each week, and larger pickets were attended by 75 to 200 picketers once or twice a month. Regardless of the picket size, the union used a procedure by which picketers marched in an oblong circle on the sidewalk where it crossed the *porte cochere*'s entrance or exit driveways while carrying signs, chanting slogans, and banging on cans or using other noisemaking instruments. The pickets would stop marching every 1 to 4 minutes to allow cars driven by hotel guests or valets to enter or exit the driveway. The Board (Chairman Miscimarra and Member McFerran; Member Peace, dissenting) found that the union, during its picketing over several months, violated Section 8(b)(1)(A) of the Act by blocking or impeding hotel employees, or others while employees were present, from entering or exiting the hotel property.

On review, the court held that the Board's unfair-labor-practice finding was supported by substantial evidence, and rejected the union's argument that any obstruction was only minor or de minimis. The court explained: "Short delays, occurring regularly over the course of months and affecting workers during their performance of work duties, as well as others in the presence of employees, is sufficient to reasonably find that such actions violated the NLRA."

The court's unpublished opinion is here, and the Board's brief to the court is attached.

Nos. 18-70029 & 18-70324

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITE HERE! LOCAL 5

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT OF
AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 18-70029 & 18-70324

UNITE HERE! LOCAL 5

Petitioner/Cross-Respondent

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NATIONAL LABOR RELATIONS BOARD

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ON PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT OF
AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of UNITE HERE! Local 5 ("the Union") for review, and the cross-application of the National Labor Relations Board ("the Board") for enforcement, of a Board Decision and Order issued against the Union on December 16, 2017, and reported at 365 NLRB No. 169. (ER

1.)[1] The Board had jurisdiction over the proceeding below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended ("the Act"), 29 U.S.C. § 151, et seq. The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). Venue is proper because the unfair labor practices occurred in Honolulu, Hawaii. The petition and cross-application were timely because the Act places no time limit on the initiation of review or enforcement proceedings.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board's finding that the Union violated Section 8(b)(1)(A) of the Act by blocking or impeding hotel employees, or others while employees were present, from entering or exiting the hotel's property.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the Act are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Following the investigation of charges filed by Aqua-Aston Hospitality, LLC d/b/a Waikiki Beach Hotel and Hotel Renew ("the Company"), the Board's

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[1] "ER" references are to the Excerpts of Record filed by the Union and "SER" references are to the Supplemental Excerpts of Record filed by the Board with this brief. "Br." references are to the Union's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

General Counsel issued two complaints alleging that the Union had violated Section 8(b)(1)(A) of the Act by blocking or impeding hotel employees, or others while employees were present, from entering or exiting the hotel's property. (ER 5, 12.) After separate hearings, both administrative law judges found that the Union had violated the Act as alleged. (ER 1, 11, 13.) On review of the now-consolidated cases, the Board affirmed the judges' rulings, findings, and conclusions, and adopted the recommended Orders, with modifications. (ER 1.)

II. THE BOARD'S FINDINGS OF FACT

A. Background: Parking and Access at the Company's Aston Hotel; the Union's Picketing Campaign at the Aston

The Company operates and manages the Aston Waikiki Beach Hotel ("the Aston"), a hotel in Waikiki, Hawaii. (ER 5; SER 2-3.) The Aston is located on the corner of Kalakaua Avenue and Paoakalani Avenue, both one-way streets, with its entrance off Paoakalani Avenue. (ER 5; ER 92.) To access the Aston, pedestrians and vehicles pass through the hotel's *porte cochere*, or covered driveway. The Aston's *porte cochere* is a one-way, u-shaped driveway with a designated vehicular entrance and exit off Paoakalani Avenue. Vehicles entering or exiting the *porte cochere* cross the public sidewalk that runs alongside Paoakalani Avenue. (ER 5; ER 93-94.)

The Aston offers guest parking in a garage that only its valets may access; guests may not self-park or retrieve their vehicles from the garage, which is located

around the corner from the hotel.[2] (ER 5, 12; ER 92, SER 4.) Guests instead must drop off and pick up their vehicles from inside the *porte cochere*, where Aston's valet service is located. (ER 5, 12; SER 5-6, 36.) To park a guest's vehicle, valets depart the *porte cochere* via its designated exit, crossing the public sidewalk where it bisects the driveway, turn right onto Paoakalani Avenue, and follow an indirect route (due to one-way streets) to the Aston's garage. (ER 5-6; ER 92, 94.) To retrieve a vehicle, valets follow a circuitous route (again due to one-way streets) from the garage back to Paoakalani Avenue, where they turn right to enter the *porte cochere*, again crossing the public sidewalk along Paoakalani Avenue. (ER 6; ER 92-93.) The Company employs approximately 16 valets/bell employees, who work in or near the *porte cochere* either at the curbside bell desk or in the hotel lobby. (ER 6; SER 36, 70.)

In February 2015, the Union commenced an organizing campaign that included near weekly union-sponsored rallies and/or pickets in front of or around the Aston. (ER 6; SER 7, 31, 71, 112-15.) The smaller pickets ranged from 15 to approximately 40 individuals and the larger pickets between 75 and 200 individuals. (ER 6, 12; SER 9, 112-15.) The Union staged the smaller weekly pickets in the mornings and the larger pickets once or twice a month in the

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[2] Limited short-term parking in the *porte cochere* is available to waiting taxis, vehicles that valets recently retrieved but guests have not picked up, and vehicles belonging to patrons at the Aston's restaurant. (ER 5; ER 34.)

afternoons. (ER 6; SER 7-9, 112-15.) For the smaller pickets, the Union generally maintained a picket line at the *porte cochere*'s exit; on occasion, it maintained the picket line at the entrance. (ER 6; SER 8, 112-15.) For larger pickets, the Union maintained picket lines at the *porte cochere*'s entrance and exit. (ER 6; SER 9-10, 112-15.) Regardless of size, picketers marched in an oblong circle on the sidewalk where it crossed the *porte cochere*'s entrance or exit driveways while carrying signs, chanting slogans, and banging on cans or using other noisemaking instruments. (ER 6, 12; SER 11, 72, 77-78.) The signs included messages such as "No Respect" and "No Union Contract." (ER 6, 12; SER 27-28, 43, 72.)

The Union designated a "captain" for each picket line, a trained individual responsible for monitoring and directing the picket line and stopping vehicular traffic. (ER 6, 12; ER 54, SER 11-12, 47-48, 53, 55-57.) When a vehicle approached, the captain placed himself between the vehicle and the picket line and raised a hand, palm outward, to signal that the vehicle must stop. (ER 6, 12; ER 57-58, 88, SER 12-14, 62.) The captain indicated to the picketers that they should continue marching in the oblong circle, generally permitting a small picket line to complete two full rotations and a larger picket line to complete one full rotation. (ER 6, 12; SER 49-50, 58-60, 64-65.) After one to four minutes, the captain would call "break," a signal to the picketers to finish marching, move away from the *porte cochere* driveway, and allow the waiting vehicle to pass. (ER 6, 12; SER

14.) The picket line captain exercised discretion over how long to stop a vehicle while the picketers continued to march. (ER 6; SER 61-62, 68-69, 75.) A captain could break the line as soon as a vehicle approached, but the practice was to make vehicles wait in order to draw attention to the picketing. (ER 12; ER 69, SER 63, 66-69, 74, 76.) During the pickets, all vehicles—whether driven by valets, guests, taxi drivers, or the general public—were stopped and made to wait before entering or exiting the Aston's *porte cochere*. (ER 6; ER 61, 70, SER 78-79.)

B. The August Picket

On August 18, 2015, the Union picketed the Aston for 1 hour in the afternoon, with approximately 170 union members participating. The Union maintained picket lines at the *porte cochere*'s entrance and exit and picketers also marched on both sides of Kalakaua Avenue. A majority of picketers carried signs, chanted, and used noisemaking devices, and some had bullhorns. The Company contacted the local police department to assist with crowd control and noise. (ER 7; SER 15-20, 33-34, 107-11.)

During the August 18 picket, picket line captains stopped 15 to 20 vehicles attempting to enter or exit the Aston's driveway. (ER 7; SER 18-20.) Andrew Smith, who works for Universal Protection Services, is the Aston's head of security. Smith personally timed some vehicles stopped by Daniel Kerwin, the Union's director of internal organizing, who served as picket line captain at the

entrance. (ER 7; ER 62-63, SER 2, 19-20, 46.) Kerwin made multiple vehicles wait between three and four minutes before allowing them to enter the *porte cochere*. (ER 7; SER 19-20.) In addition, vehicular traffic backed up on Paoakalani Avenue because the picket line blocked vehicles attempting to enter the driveway. (ER 7; SER 19.)

C. The October Pickets

On October 3, 2015, the Union picketed for roughly 1 hour in the morning at the Aston *porte cochere*'s exit, with approximately 17 individuals participating. Picketers carried signs, chanted, including through bullhorns, and used noisemaking devices. The Company contacted the local police department to assist with crowd control and noise. (ER 7; SER 20-24, 102-06.) Smith personally timed the vehicles stopped by Victor Gonzales, a union organizer serving as picket line captain. (ER 7; SER 22, 51-52.) During the October 3 picket, Gonzales stopped six or seven vehicles attempting to exit the Aston's driveway and forced those vehicles to wait between two and four minutes before they could pass. (ER 7-8; SER 22, 104-05.)

On October 14, the Union picketed for roughly 1 hour in the morning at the Aston *porte cochere*'s exit, with approximately 21 individuals participating. As before, picketers carried signs, chanted, including through bullhorns, and used noisemaking devices, and the Company contacted the local police three times to

assist with crowd control and noise. (ER 8; SER 24-27, 97-101.) During the October 14 picket, picket line captain Gonzales stopped a vehicle attempting to exit and, after less than a minute, the vehicle reversed and exited the *porte cochere* through its entrance. (ER 8; SER 25-27, 99, 119.) Gonzales also stopped another vehicle for approximately one-and-a-half minutes before allowing it to pass. (ER 8; SER 119.)

On October 24, the Union picketed for roughly 1 hour in the morning at the Aston *porte cochere*'s exit, with approximately 23 individuals participating. Once again, picketers carried signs, chanted, including through bullhorns, and used noisemaking devices, and the Company contacted the local police to assist with crowd control and to "protect[] . . . the working [h]otel employees." (ER 8; SER 92-96.) During the October 24 picket, picket line captain Gonzales stopped three to four vehicles attempting to exit and forced those vehicles to wait approximately three minutes before they could pass, as timed by Aston security officers. (ER 8; SER 95.)

On October 30, the Union picketed for roughly 1 hour in the morning at the Aston *porte cochere*'s exit, with approximately 17 individuals participating. As before, the Company contacted the local police to assist with crowd control and noise and "for the safety of working [h]otel employees." (ER 9; SER 27-30, 86-91.) During the October 30 picket, picket line captain Gonzales stopped seven or

eight vehicles attempting to exit and forced those vehicles to wait between one and two minutes. (ER 9; SER 28, 88-90.) After waiting for a while, one vehicle accelerated toward the picket line as if it was going to strike the picketers. (ER 9; SER 88-89.) Additionally, after waiting for approximately one minute, another vehicle reversed and exited the *porte cochere* through its entrance. (ER 9; SER 89.) Randy Tolentino, bell captain at the Aston, valeted guest vehicles that morning and he was stopped three times by the picket line. (ER 9; SER 29-30, 35, 37-41.) Tolentino observed fellow valets being stopped at the picket line. (ER 9; SER 41.)

D. The December Pickets

On December 7, the Union picketed for roughly 1 hour in the morning at the Aston *porte cochere*'s exit, with approximately 17 individuals participating. The picketers again carried signs, chanted, including through bullhorns, and used noisemaking devices, and the Company contacted the local police to assist with crowd control and noise and "for the safety of non-working hotel employees." (ER 9; SER 81-85.) During the December 7 picket, picket line captain Gonzales stopped Tolentino for between two and four minutes while he was valeting a vehicle. (ER 9; SER 42-44.) Gonzales also stopped one other vehicle for approximately two minutes, as timed by Aston security officers. (ER 9; SER 83-

84.) At least four guests and one valet drove vehicles out of the entrance because of the picket line at the exit. (ER 9; SER 83-84.)

On December 15, the Union picketed for roughly one hour in the morning at the Aston *porte cochere*'s exit. (ER 12 & n.3; SER 186-90.) During the picket, the picket line captain stopped seven vehicles attempting to exit and forced those vehicles to wait between one and three minutes, as timed by Aston security officers. (ER 12; SER 188-89.) No valets were stopped, but valets and bell employees would have been able to observe the picket line stopping those vehicles from the valet/bell stand in the *porte cochere*. (ER 13; SER 139-40, 149-50.)

E. The January Pickets

On January 9 and 16, 2016, the Union picked for roughly one hour in the morning at the Aston *porte cochere*'s exit. (ER 12 & n.3, 13; SER 176-85.) During the January 9 picket, the picket line captain stopped one vehicle for approximately one minute, as timed by Aston security, and two vehicles exited through the entrance because of the picket line. (ER 13; SER 136-37, 153, 183-84.) During the January 16 picket, the picket line captain stopped two vehicles for approximately one minute each and at least eight vehicles exited the *porte cochere* through its entrance because of the picket line. (ER 13; SER 139, 154, 158, 178-79.) No valets were stopped on either date, but valets and bell employees would

have been able to observe the picket line stopping those vehicles from the valet/bell stand. (ER 13; SER 139-40, 149-50.)

On January 29, the Union picketed for roughly 1 hour in the afternoon at the Aston *porte cochere*'s entrance and exit, with approximately 60 individuals participating. (ER 12 & n.3; SER 166-75.) During the January 29 picket, the picket line captain at the exit stopped at least seven vehicles driven by valets and forced those valets to wait approximately one to two minutes each, as timed by Aston security. (ER 12; SER 122-34, 142-47, 152.) In addition, the picket line captain stopped numerous other vehicles attempting to exit, similarly delaying those vehicles one to two minutes each. (ER 12; SER 152, 169-70.) As before, valets and bell employees would have been able to observe the picket line stopping those vehicles from the valet/bell stand. (ER 13; SER 139-40, 149-50.)

III. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Miscimarra and Member McFerran; Member Peace, dissenting) found that the Union had violated Section 8(b)(1)(A) of the Act by blocking or impeding hotel employees, or others while employees were present, from entering or exiting the hotel's property. (ER 1, 11, 13.) The Board's Order requires the Union to cease and desist from the unfair labor practice found and from, in any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the

Act. Affirmatively, the Order requires the Union to post a remedial notice in English, Ilocano, and Tagalog at its offices in Honolulu, Hawaii, and distribute it electronically. In addition, if the Company wishes, the Union must provide a sufficient number of signed copies of the notice so that the Company may post them at its facility in all places where it customarily posts notices to employees. (ER 1.)

STANDARD OF REVIEW

The Board bears "primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). *Accord Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1150 (9th Cir. 2003) (citing *Curtin Matheson*). "So long as the Board's interpretation [of the Act in a case] is 'rational and consistent' with the statute, its rulings are afforded 'considerable deference.'" *Id.* at 1151.

The Court will uphold the Board's legal conclusions "as long as they are reasonably defensible." *NLRB v. Int'l Bhd. of Elec. Workers, Local 48*, 345 F.3d 1049, 1054 (9th Cir. 2003). The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion," and is "more than a mere scintilla, but less than a preponderance."

Local 48, 345 F.3d at 1054-55 (quoting *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001)). As to a factual finding, the "court may not 'displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.'" *United Nurses Ass'ns of Cal. v. NLRB*, 871 F.3d 767, 777 (9th Cir. 2017) (quoting *Universal Camera*, 340 U.S. at 488). Given the Board's "special expertise" in the field of labor relations, the Court will defer to "reasonable derivative inferences drawn by the Board from the credited evidence." *NLRB v. Carson Cable TV*, 795 F.2d 879, 881 (9th Cir. 1986).

SUMMARY OF ARGUMENT

Under the Act, employees have a right to refrain from "any or all" union activities, including the right to freely cross a picket line. In turn, unions cannot engage in conduct that would reasonably tend to restrain or coerce employees' exercise of that right. Here, the Board found that the Union violated the Act by blocking or impeding employees, or others while employees were present, from entering or exiting the hotel's *porte cochere* where its picketing stopped traffic.

Substantial—and undisputed—evidence supports the Board's finding that the Union "deliberately, repeatedly, and persistently" blocked on-duty valet employees and others from crossing its picket line. Based on the totality of the circumstances, the Board reasonably found that the Union's blocking tended to

restrain or coerce employees' right to refrain from union activity, including freely crossing a picket. The Board's finding is consistent with precedent that similar widespread and repeated picket-line blocking unlawfully restrained or coerced employees.

In finding the unfair labor practice, the Board reasonably rejected various claims made by the Union, including that its conduct was de minimis. The Union engaged in widespread and repeated blocking or impeding of employees (and others in the presence of employees), the type of conduct the Board previously has found unlawful. The Board explicitly stated, contrary to the Union's assertion here, that it was not applying a per se rule that all blocking or impeding access is unlawful. Instead, the Board emphasized that its finding was based on the specific facts of the case and in accordance with relevant precedent.

The Union incorrectly asserts that various requirements must be met to find blocking unlawful. In doing so, it sets up and knocks down a series of straw-man claims—that there must be a "nexus" between its picketing and employees' rights or that a strike, violence, or threats must be present in conjunction with blocking for the blocking to be unlawful. Board law does not require certain factual circumstances, as suggested by the Union, in order to find unlawful blocking. Although the Union identifies cases with arguably more egregious conduct than here, they do not purport to create a categorical floor under which lesser union

conduct is not restraining or coercive. Because substantial evidence supports the Board's finding of restraint or coercion, there is no basis to the Union's claims that the Board exceeded its jurisdiction in finding its conduct unlawful.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE UNION VIOLATED SECTION 8(b)(1)(A) OF THE ACT BY BLOCKING OR IMPEDING EMPLOYEES, OR OTHERS WHILE EMPLOYEES WERE PRESENT, FROM ENTERING OR EXITING THE HOTEL'S PROPERTY

A. A Union Violates Employees' Right to Refrain from Union Activity by Blocking or Impeding Employees, or Others in Their Presence, from Crossing a Picket Line

Section 7 of the Act grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157. At the same time, however, Section 7 guarantees employees "the right to refrain from any or all of such activities." *Id.* Section 8(b)(1)(A) makes it "an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in [S]ection 7 . . . ." 29 U.S.C. § 158(b)(1)(A).

In accordance with the foregoing, "employees have a statutory right to pass through picket lines without physical hindrance," *Sheet Metal Workers Local 19*

(Delcard Assocs.), 316 NLRB 426, 431 (1995), such as when reporting for or departing from work, or in performance of their job duties. *Int'l Bhd. of Elec. Workers, Local Union No. 98 (Tri-M Grp., LLC)*, 350 NLRB 1104, 1104, 1107 (2007) (employee blocked by picket line while attempting to access dumpster on public street), *enforced*, 317 F. App'x 269 (3rd Cir. 2009); *Int'l Union of Operating Eng'rs, Local Union No. 17 (Hertz Equip. Rental Corp.)*, 335 NLRB 578, 584 (2001) (employees blocked by picket line while attempting to report to, and depart from, work). Where a union blocks or impedes employees from freely crossing its picket line, thereby coercing employees into union activity, the Board, with court approval, has found that the union interfered with employees' right to refrain from union activity, in violation of Section 8(b)(1)(A). *See, e.g.*, *Dist. 30, United Mine Workers v. NLRB*, 819 F.2d 651, 655 (6th Cir. 1987) (per curiam); *NLRB v. Serv. Emps. Int'l Union, Local 254*, 535 F.2d 1335, 1337 (1st Cir. 1976); *Local Union No. 98*, 350 NLRB at 1107-08.

In addition to prohibiting misconduct affecting employees, Section 8(b)(1)(A) prohibits "misconduct when directed toward nonemployees so long as the acts were committed in the presence of employees . . . ." *Local Joint Exec. Bd. of Las Vegas (Casino Royale, Inc.)*, 323 NLRB 148, 159 (1997). As the Board explained in analogous circumstances, although directed at non-employees, such union misconduct reasonably tends to coerce employees because "employees

would regard [the misconduct] as an indication of what may befall them if they fail to support the [picketing]." *Id.* (second alteration in original) (internal quotation marks omitted). Therefore, a union may violate Section 8(b)(1)(A) if, in the presence of employees, its picket line blocks or impedes other individuals' (i.e. non-employees') ingress or egress. *See Shopmen's Local Union No. 455 (Stokvis Multi-Ton Corp.)*, 243 NLRB 340, 340, 343, 346, 348 (1979) (picketing blocked third-party drivers but finding employees would have been present based on time of day).

In determining whether a union has violated Section 8(b)(1)(A), the Board employs an objective test. It examines whether the ostensibly unlawful conduct, here blocking or impeding employees from freely crossing a picket line, would reasonably tend to restrain, coerce, or intimidate employees in the exercise of their Section 7 right to refrain from union activity. *Local 254*, 535 F.2d at 1337; *Local Union No. 98*, 350 NLRB at 1107; *Metro. Reg'l Council of Phila. & Vicinity, United Bhd. of Carpenters & Joiners (Society Hill Towers Owners' Ass'n)*, 335 NLRB 814, 814-15 (2001), *enforced*, 50 F. App'x 88 (3rd Cir. 2002); *Local Joint Exec. Bd.*, 323 NLRB at 159.

Applying those principles, the Board has found unlawful a range of union blocking. Thus, the Board has found a violation of Section 8(b)(1)(A) where a union repeatedly blocked or impeded employees attempting to cross a picket line at

their workplace. *See, e.g.*, *Local Union No. 17*, 335 NLRB at 583 (during months-long picket, "numerous occasions" when union blocked employees' ingress or egress). At the same time, a union may violate Section 8(b)(1)(A) by one instance of blocking or impeding a single employee at a picket line. *See, e.g.*, *Local Union No. 98*, 350 NLRB at 1104 (one employee stopped at picket line during single instance of unlawful blocking). In addition, while blocking or impeding an employee at a picket line for a lengthy period of time supports a violation of Section 8(b)(1)(A), so may a delay of just a few minutes. *Compare Local Union No. 98*, 350 NLRB at 1108 (employee blocked for approximately 30 minutes), *with Metal Polishers, Buffers, Int'l Local 67 (Alco-Cad Nickel Plating Corp.)*, 200 NLRB 335, 336 (1972) (employees blocked between 1 and 5 minutes).

A Board finding that a union's blocking or impeding of employees constitutes a violation of Section 8(b)(1)(A) does not depend on the existence of additional unlawful conduct, such as threats or physical violence. *See Local Union No. 98*, 350 NLRB at 1107 ("the Board has been clear that the mere absence of violence is not a defense" to the unfair labor practice); *Int'l Local 67*, 200 NLRB at 336 & n.10 (finding violation notwithstanding lack of violence because "absence of physical violence does not lessen the restraining effect" of blocking employees). A violation of Section 8(b)(1)(A) likewise does not require that the picketing have occurred in connection with a strike. *See, e.g.*, *Local Union No. 98*, 350 NLRB at

1105-08 (finding unfair labor practice notwithstanding absence of strike); *Int'l Bhd. of Elec. Workers, Local 98 (MCF Servs., Inc.)*, 342 NLRB 740, 750-52 (2004) (same), *enforced*, 251 F. App'x 101 (3rd Cir. 2007). In sum, "[i]t is well settled that picketing which interferes with or blocks the ingress and egress of employees and others at a place of employment, or which, in effect, forces employees to 'run a gauntlet,' is inherently coercive and in contravention of the Act." *NLRB v. United Mine Workers*, 429 F.2d 141, 146 (3d Cir. 1970) (citing cases).

B. The Union Violated Section 8(b)(1)(A) by Repeatedly Blocking or Impeding Employees, or Others While Employees Were Present, from Entering or Exiting the Aston's *Porte Cochere*

Substantial evidence supports the Board's finding (ER 1, 11, 13) that the Union violated Section 8(b)(1)(A) by blocking or impeding employees, or others while employees were present, from entering or exiting the hotel's property. Specifically, the credited evidence—which the Union does not dispute (*see, e.g.*, Br. 13-15, 18-19, 27)—demonstrates that during the October 30, December 7, and January 29 incidents, the Union blocked or otherwise impeded at least 11 vehicles driven by valets for 1 to 2 minutes each, including one incident where the picket line blocked the valet for between 2 and 4 minutes. (ER 9, 12; SER 29-30, 37-44, 122-34, 142-47, 152.)

In addition, the credited (and similarly undisputed) evidence fully establishes that over the course of the 10 dates discussed above (*see* pp. 6-11), the Union blocked or otherwise impeded at least 44 vehicles driven by non-employees, such as guests or taxi drivers, for between 1 and 4 minutes. (ER 7-9, 12-13; SER 18-20, 22, 28, 83-84, 88-90, 95, 104-05, 119, 136-37, 139, 152-54, 158, 169-70, 178-79, 183-84, 186-90.) As the Board found, valets and bell employees would have been able to observe the Union picket line blocking and impeding vehicles driven by non-employees at the *porte cochere*'s exit. (ER 6, 13; SER 36, 139-40, 149-50.)

The evidence also supports the Board's finding that the picket line caused other adverse effects on operations that valets and bell employees would have been able to observe. (ER 6, 13; SER 36, 139-40, 149-50.) Thus, on several occasions numerous guests, and at least one valet, drove vehicles out the entrance because of the delays caused by the picket line at its exit. (ER 8-9, 13; SER 25-27, 83-84, 89, 99, 119, 136-37, 153-54, 178-79, 183-84.) By delaying vehicles from entering the *porte cochere*, the picket line also caused traffic to back up on Paoakalani Avenue. (ER 7; SER 19.)

Based on the foregoing evidence, the Board found (ER 13; *see also id.* at 10) that the Union had "deliberately, repeatedly, and persistently blocked numerous vehicles" driven by employees for several minutes at a time, and "engaged in

similar conduct" by "temporarily blocking numerous vehicles in the presence or view of the hotel valet and bell employees." Accordingly, the Board found (ER 10; *see also id.* at 13) that under "the totality of the circumstances . . . the Union's picketing activities would reasonably tend to coerce or intimidate employees in the exercise . . . of their Section 7 rights," in violation of Section 8(b)(1)(A).

That finding is, as the Board reasoned (ER 1 n.2, 10, 13), consistent with the aforementioned principles and relevant precedent as well as additional cases involving repeated blocking ranging from less than a minute to more than a half hour. Thus, for instance, the Board, with court approval, found that a union violated Section 8(b)(1)(A) where on five days it blocked numerous employee-driven vehicles, some with multiple employees inside, from entering one jobsite, blocked two employee-driven vehicles from entering a second jobsite, and blocked one employee-driven vehicle from entering a third jobsite. *Local 19*, 316 NLRB at 426-27, 430-33, 435-36, *enforced in relevant part*, 154 F.3d 137 (3d Cir. 1998).[3] Because of the union's conduct, employees waited at the picket line from approximately thirty seconds to three to five minutes. *Id.* Similarly, the Board found a violation where, during a months-long picket, on "numerous occasions"

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[3] Although the Third Circuit granted the union's petition for review based on its rejection of the Board's application of a joint venture theory of liability, the court expressly "affirm[ed] the Board's conclusion that the [u]nion itself committed unfair labor practices at the [three] job sites." *NLRB v. Sheet Metal Workers' Int'l Ass'n, Local Union No. 19*, 154 F.3d 137, 139 n.3 (3d Cir. 1998).

the union blocked the ingress or egress of vehicles driven by employees, employer officials, and third parties, for periods ranging from 5 to 7 minutes up to 30 to 45 minutes. *Local Union No. 17*, 335 NLRB at 582-84.

In finding that the Union violated Section 8(b)(1)(A), the Board reasonably rejected (ER 10, 13) the Union's assertion (Br. 29, 38, 42-43, 51, 54, 56, 59, 67) that its conduct did not amount to unlawful restraint or coercion because any blocking was "brief and merely inconvenienced vehicles" (ER 10) and was "minor or de minimis" (ER 13). Factually, the credited—and uncontroverted—evidence establishes that over the course of several months the Union, through its picket line, "repeatedly" (ER 10) blocked or otherwise impeded vehicles for between one and four minutes. As just shown, the Board has found that similar widespread and repeated blocking constitutes a violation of Section 8(b)(1)(A) by coercing employees into union activity, in contravention of their Section 7 right to refrain from it. In any event, as the Board further observed (ER 1 n.2, 10, 13), under established Board law a union need not engage in recurring or especially lengthy blocking conduct in order to violate Section 8(b)(1)(A). *See, e.g.*, *Local Union No. 98*, 350 NLRB at 1104 (single instance where employee blocked at picket line for 30 minutes); *Local 98*, 342 NLRB at 740-41, 751-52 (single instance where employee blocked for 15-30 minutes); *Local 19*, 316 NLRB at 436 (at "Stong" jobsite, single instance where employee and apprentice blocked at picket for four

minutes); *Int'l Local 67*, 200 NLRB at 336, 399-400 (two employees blocked two to three minutes, one employee blocked three to five minutes).

In rejecting the Union's de minimis argument, the Board reasonably found (ER 1 n.2, 10 & n.64, 13) cases relied on by the Union (*see* Br. 38-41, 50, 59) distinguishable. As the Board explained, "the relatively few 'haphazard' and/or isolated attempts to temporarily block ingress or egress" in those cases "did not rise to the level of" unlawful restraint or coercion under Section 8(b)(1)(A). (ER 13.) Thus, there was no unlawful restraint or coercion where picketers on a sidewalk briefly stopped a total of three employees walking to work, two chairs were placed alongside one of two driveways into the employer's facility but the driveways remained open, and a total of three third-party trucks temporarily were prevented from entering or leaving the facility. *Serv. Emps. Int'l Union Local 50 (Evergreen Nursing Home & Rehab. Ctr., Inc.)*, 198 NLRB 10, 10-13 (1972). As the Board reasoned in that case, the union's "haphazard efforts" at the driveways and "obstructive capers" on the sidewalk did not amount to "effective" blocking under the totality of the circumstances. *Id.* at 12. Similarly, the "evidence [fell] short" of restraint or coercion where, despite months of picketing, there were only two dates on which vehicles were "delayed briefly," affecting a total of three employees and one foreman. *Hendricks-Miller Typographic Co.*, 240 NLRB 1082, 1082, 1098-99 (1979). Those facts, the Board explained, bore "a closer

resemblance" to its decision in *Local 50* finding no violation than to cases finding a violation. *Id*. at 1099. Accordingly, notwithstanding the Union's (Br. 38, 42) assertion that it, too, merely engaged in "run-of-the-mill" picketing, the Board reasonably found those cases factually distinguishable from the present case, where the Union engaged in widespread and repeated blocking of numerous employee-driven vehicles and others while employees were present.

Moreover, the Board also reasonably rejected (ER 10) the Union's assertion that "no employee's rights were restrained since its pickets were not directed at non-striking employees."[4] That assertion is misplaced because the relevant inquiry is whether the Union's conduct adversely affected employees' Section 7 rights; that it was "directed at" someone else is beside the point. As foregoing evidence thoroughly establishes, "the valet employees were directly affected by and prevented from entering/exiting the Hotel due to [the Union's] pickets." (ER 10.) Under accepted Board law, these facts—employees prevented from freely crossing a picket line—establish the violation because the valets were coerced into union

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[4] Although, as the Union points out (Br. 52-53), one of the administrative law judges mistakenly referred to "non-striking" employees (ER 10), it is limited to a single page of the decision, which otherwise makes clear that there was no strike. (*See, e.g.*, ER 1 n.2.) In any event, that errant description does not affect the Board's analysis because employees' Section 7 rights encompass refraining from "any or all" union activities, such as picketing, notwithstanding the Union's fixation on picketing during strikes (*see, e.g.*, Br. 28, 32-34, 41-42, 48, 52-53) and its attempt to narrow Section 7 to protect only employees' "right to refrain from striking" (Br. 33).

activity, in contravention of their Section 7 right to refrain from it. *See supra* 15-16. Although, as the Union argues (Br. 44-46), some valets responded positively to the picket by smiling or giving the "shaka" sign,[5] the Board found (ER 10) that "does not negate the fact that those employees were blocked from entering/exiting" the *porte cochere* where they worked. That finding is consistent with the Board's governing standard for Section 8(b)(1)(A) violations generally—specific employees' reactions or feelings are not relevant where, as here, the legal standard for evaluating the Union's conduct is objective, not subjective.[6] *See supra* 17.

In addition, the Board found (ER 10) that the other undisputed evidence in the case further undermined the Union's blanket claim that employees remained unrestrained and uncoerced by its picketing. Specifically, as discussed, the pickets were loud, included bullhorns, shouting, and chanting, and featured picket signs, and the police were called to control the crowd and noise as well as to protect working employees. *See supra* 5-9. Thus, "it is certainly reasonable to conclude that non-striking employees would have seen/heard the commotion of the Union's protests and redirected themselves away from the front of the [h]otel." (ER 10.) While the Union argues (Br. 51-53) that this was speculation, under the Board's

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[5] "Shaka" is a hand gesture that is used in Hawaii as a friendly greeting. (ER 9; ER 88-89, SER 54, 148.)

[6] The Union acknowledges as much, though it claims that the Board "should" consider such evidence. *See* Br. 44 ("evidence of the subjective reactions of . . . employees is not dispositive or even necessary").

objective test, whether employees actually redirected themselves is not germane. Moreover, the Board's reasonable inference is supported by evidence showing that the recurring pickets caused commotions often necessitating a police presence, employees watched the scenes from inside the hotel (SER 73), and a valet exited the *porte cochere* via its entrance to avoid the picket line at the exit (ER 9; SER 32, 83-84). *See Carson Cable TV*, 795 F.2d at 881 (Board permitted to draw "reasonable derivative inferences").

There is also no merit to the Union's repeated assertion (Br. 54-68) that the Board created or applied a "*per se* rule" that any blocking or impeding is coercive. As the Board expressly stated in rejecting that claim (ER 1 n.2), it "do[es] not conclude that any picket line blockage is a per se violation regardless of duration." (*Id.* (internal quotation marks omitted).) Instead, based on its review of the record evidence and the relevant law, the Board found that "under the particular circumstances of this case, the [Union's] conduct was reasonably calculated to coerce" employees' right to refrain from union activity. (*Id.*) Thus, unlike cases where there was insufficient evidence to find unlawful coercion, "[h]ere, conversely, the [Union] picketed at least 10 different times over many months, and

any valet employee who attempted to cross the picket line was delayed for several minutes."[7] (*Id.*)

C. There Is No Merit to the Union's Remaining Legal Claims that a Nexus and Specific Factual Circumstances Are Required to Establish a Violation of 8(b)(1)(A)

Established, court-approved, principles governing the Board's analysis of Section 8(b)(1)(A) violations, and the cases applying them, dispose of the Union's remaining claims. As demonstrated, the test for determining whether a union violated Section 8(b)(1)(A) is objective, asking whether the conduct would reasonably tend to restrain or coerce employees in violation of their Section 7 right to refrain from "any or all" union activities.[8] *See supra* 17. As applied here, the

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[7] To the extent the Union suggests (Br. 56) that the Board erred in finding further unlawful conduct where employees would have witnessed *non*-employees being blocked or impeded by the picket line, on-point precedent plainly provides that union misconduct directed at non-employees, but observed by employees, reasonably tends to coerce employees. *See supra* 16-17.

[8] The Union claims (Br. 63-65) that the Board treats union activity differently than employer activity when analyzing alleged violations of Section 8(b)(1)(A) as opposed to Section 8(a)(1), which restricts employer activity. Because the Union failed to raise that claim in its exceptions to the Board (*see* SER 192-94), the Court lacks jurisdiction to consider it. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court"); *NLRB v. Legacy Health Sys.*, 662 F.3d 1124, 1126 (9th Cir. 2011) (citing § 160(e)). In any event, the question under both provisions is whether the conduct reasonably tends to restrain or coerce employees in the exercise of their Section 7 rights. *See, e.g.*, *Winkle Bus Co.*, 347 NLRB 1203, 1219 (2006) (a question constitutes unlawful interrogation in violation of Section 8(a)(1) if it "reasonably tends to interfere with, restrain, or coerce employees in the exercise of

right to refrain from union activity encompasses freely crossing a picket line and continuing to work.

Accordingly, the Union's many arguments fail because it claims—incorrectly—that certain requirements for establishing a violation of Section 8(b)(1)(A) are unmet. Specifically, extant Board law does not, as the Union repeatedly posits (Br. 31-32, 44, 50, 56-58, 65, 67), require "proof" of "an unmistakable nexus" (Br. 57) between a union's picketing and its "antagonism" toward employees' Section 7 right to refrain from union activity and freely cross a picket line. In support of that proposition, the Union solely relies (Br. 31-32, 57) on the legally distinguishable *Laborers Local 806*, 295 NLRB 941 (1989). In that case, the Board required a "nexus" in order to find the respondent union itself responsible for the misconduct of a non-agent member, who had physically assaulted another member involved in dissident activity. *Id.* at 962.

Those agency-type principles are plainly not at issue here. Instead, Section 8(b)(1)(A) broadly—and by its express terms—prohibits union conduct that "restrain[s] or coerce[s]" employees in the exercise of their Section 7 rights.[9] Consistent with the statute's proscription, and as discussed above (p. 17), the

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their Section 7 rights"). The Union does not appear to dispute (Br. 63-65) that relevant standard, only its application (and the adverse outcome) here.

[9] There is, therefore, no basis for its claim (Br. 32) that the "need to find a nexus is inherent in the statutory language of Section 8(b)(1)(A) . . . ."

Board examines whether, objectively, a union's challenged conduct would reasonably tend to restrain or coerce. Moreover, notwithstanding the Union's contentions (Br. 31, 57) regarding the necessity of proving its "antagonism" towards employees exercising their Section 7 rights, Board case law—including the decision the Union cites (Br. 31)[10]—makes plain that a union's intent to coerce is "not essential to finding an 8(b)(1)(A) violation." *Local Joint Exec. Bd.*, 323 NLRB at 148.

Relying on its mistaken legal premise that a "nexus" is required (Br. 32), the Union incorrectly argues that "[p]icketing-related delays violate Section 8(b)(1)(A) only" when certain factual circumstances exist. The Union first claims (Br. 32-36, 42-43) that because its picketing occurred outside of a strike and without other misconduct, such as threats or violence, the Board's unfair-labor-practice finding cannot stand. Board precedent, however, plainly does not require either a strike or additional misconduct in order to find that a union violated Section 8(b)(1)(A) by blocking or impeding of employees from freely crossing a picket line, *see supra* 18-19, which the Union itself acknowledges (*see* Br. 32, 35 ("most" and "many" cases involve those facts)).

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[10] The Union cites (Br. 31) a footnote in the administrative law judge's portion of *Local Joint Executive Board*, where the judge relied on *Laborers Local 806*.

The Union next claims (Br. 36-38, 42-43) that its picketing was not violative of Section 8(b)(1)(A) because picketing runs afoul of that section where it either (Br. 36) "singled out" employees based on their views or (Br. 38) "entirely prevented" employees from working. Once again, Board precedent demonstrates that a union may unlawfully block or impede employees regardless of whether it targeted specific employees or completely prevented employees from performing their duties. *See, e.g.*, *Local Union No. 17*, 335 NLRB at 583 (during months-long picket, union unlawfully blocked or impeded numerous employees at worksite, none of whom were singled-out); *Int'l Local 67*, 200 NLRB at 336 (finding unfair labor practice where employees blocked between 1 and 5 minutes).

Moreover, although the Union claims (Br. 50-51) that the "calculated and recurring" nature of its picketing is immaterial, the Board has found that such a pattern and practice supports a violation. *See Local 19*, 316 NLRB at 436, 439 (discussing "pattern" of unlawful picketing). In addition, despite its contention (Br. 43), a violation of Section 8(b)(1)(A) for blocking or impeding employees is not limited to situations where employees were reporting to, or leaving from, work. *See, e.g.*, *Local Union No. 98*, 350 NLRB at 1104, 1107 (on-duty employee blocked while performing task); *Local 98*, 342 NLRB at 740-41, 751-52 (same).

More broadly, in making its arguments the Union cites (Br. 32-38) some cases where unions arguably committed "worse" acts than it did, but they do not

compel a finding that its conduct here was non-coercive or non-restraining. Simply stated, those cases do not purport to create a categorical floor under which lesser union conduct is not coercive or restraining, and Board counsel are unaware of such a case. Given the established Board law in this area and the uncontested evidence, the Union's blanket assertion (Br. 44) that "[n]othing about the actions of the . . . picketers bore any connection to the Section 7 rights of the valet employees" falls far short. Accordingly, the absence of those facts emphasized by the Union does not undermine the Board's present finding.[11]

Furthermore, the Union makes a plethora of misplaced claims (Br. 60-63, 65-67)—including that the Board exceeded its jurisdiction (Br. 60, 62-63) and otherwise interfered with the parties' "economic weapons" (Br. 60, 62, 66). As the Union acknowledges, however, the Board properly finds a violation of 8(b)(1)(A) where "a union's conduct would have a reasonable tendency to restrain or coerce employees in the exercise of statutory rights." (Br. 65-66 (internal quotation marks omitted).) Thus, the Union's arguments ultimately circle back to the same

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[11] Focusing on those facts, the Union claims (Br. 41) that there is "not a single" prior Board decision with identical facts to those here. However, the relevant conduct the Union engaged in—repeatedly picketing so as to block and impede employees—is precisely the type of conduct the Board has found violates 8(b)(1)(A) because it reasonably tends to restrain or coerce employees. *See Local 19*, 316 NLRB at 426-27, 430-33, 435-36 (finding violation where union repeatedly blocked numerous employee-driven vehicles at several jobsites from approximately thirty seconds to three to five minutes); *see also Local Union No. 17*, 335 NLRB at 583; *Int'l Local 67*, 200 NLRB at 336.

question of whether it coerced or restrained employees' rights. As demonstrated, the Board found that it did after reviewing the totality of the circumstances and determining that the Union had "deliberately, repeatedly, and persistently" blocked and impeded employees (and others) from freely crossing its picket line while attempting to enter or exit the Aston's *porte cochere*. That finding is based on substantial, credited evidence—which the Union does not dispute—and consistent with Board law.

Finally, even if the Union's picketing is characterized as "peaceful" (Br. 1), it was unlawful. As discussed, the Act is not limited to prohibiting only violent or threatening conduct.[12] In accordance with that proscription, and exercising its role as the agency charged with setting national labor policy, the Board has determined that blocking or impeding employees (or others, if employees are present) violates Section 8(b)(1)(A) where it would reasonably tend to restrain or coerce employees' Section 7 right to refrain from union activity. The Court should defer to the Board's interpretation of the Act and that established policy choice. *See supra* 12.

---

[12] In passing, the Union asserts (Br. 53) that the judge "penalize[d] constitutionally-protected speech." To the extent that argument is not waived, *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1229 (9th Cir. 2008) (arguments made in passing are waived), the Board rejected (ER 10 n.66) the Union's First Amendment affirmative defense because its *conduct*, not its speech, was the basis of the unfair labor practice.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Board counsel are unaware of any related cases pending in this Court.

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National Labor Relations Board

June 2018

STATUTORY ADDENDUM
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29 U.S.C. § 160(e) ..... Addendum 3

29 U.S.C. §160(f) ..... Addendum 4

Relevant provisions of the National Labor Relations Act,
29 U.S.C. §§ 151-69:

Sec. 7 [Sec. 157] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

***

Sec. 8(a) [Sec. 158(a)] [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

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

***

Sec. 8(b) [Sec. 158(b)] [Unfair labor practices by labor organization] It shall be an unfair labor practice for a labor organization or its agents --

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [section 157 of this title] . . . .

***

Sec. 10 [Sec. 160]

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

local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

***

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

the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITE HERE! LOCAL 5	)	
	)	
Petitioner/ Cross-Respondent	)	Nos. 18-70029
	)	18-70324
v.	)	
	)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	)	20-CB-163657
	)	20-CB-166055
Respondent/Cross-Petitioner	)	20-CB-171212

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 7,875 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

s/ Linda Dreeben
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Dated at Washington, DC
this 25th day of June, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITE HERE! LOCAL 5	)	
	)	
Petitioner/ Cross-Respondent	)	Nos. 18-70029
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v.	)	
	)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	)	20-CB-163657
	)	20-CB-166055
Respondent/Cross-Petitioner	)	20-CB-171212

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they a registered user or, if they are not, by serving a true and correct copy at the address listed below:

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Dated at Washington, DC
this 25th day of June, 2018

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To: Ring, John
Subject: Daily Labor Report Highlights
Date: Wednesday, April 17, 2019 4:33:48 PM

Bloomberg Law

DAILY LABOR REPORT®

Highlights

Print/Download These Articles

TOP STORIES

California's ABC Worker Classification Test Goes to 9th Cir. (1)

By Erin Mulvaney and Porter Wells

A federal appeals court will consider whether California truckers should be classified as contractors, rather than employees, despite the state's rigid worker classification test.

Teacher Fired Over Online Nude Photo Gets Case Revived

By Patrick Dorrian

A Mississippi county may have jumped the gun when it fired a high school teacher-football coach after a nude photo of him was posted on the Ashley Madison website, the Fifth Circuit ruled April 17.

DOD Taking HIV+ Discharge Policy Fight to 4th Circuit

By Porter Wells

The Defense Department has given notice that it will appeal the recent order barring the Air Force from discharging HIV-positive service members.

Iraqi Muslim Denied Citigroup Job Can't See Full FBI Report

By Patrick Dorrian

The FBI doesn't have to turn over to an Iraqi Muslim woman the full version of a background check report Citigroup relied on in denying her employment, a federal court ruled.

DISCRIMINATION

Lockheed Martin Workers Seek Class Discovery in Race Bias Case

By Patrick Dorrian

A group of black workers suing Lockheed Martin Corp. for alleged racial discrimination in the company's performance appraisal system told a federal court they need "ample discovery" on their potential class claims.

Government Owes Postal Worker for Taxes on Job Bias Settlement

By Patrick Dorrian

A former U.S. Postal Service employee is entitled to $33,691 to cover the adverse tax consequences of a 2003 discrimination settlement she reached with the government, the Federal Circuit ruled April 17.

AI Creeps Into Hiring, and Some Ask if It's Injecting New Biases

By Jaclyn Diaz

With each click of the mouse, the orange balloon on the screen expands, adding five more cents to a pile of cash. The sum, recorded at the left corner of the computer screen, reads $3.05. Click. Click. Fifteen cents goes up to 20 cents. Twenty goes up to 25.

Tesla Met With Judges' Silence on Arbitrating Race Bias Claims

By Robert Iafolla

Tesla Inc.'s attorney didn't face a single question from a federal appeals court as she argued that a race discrimination case against the carmaker should be

forced into arbitration.

WAGE & HOUR

Truckers at LA Port Ruled Employees, Awarded $1.2 Million

By Joyce E. Cutler

Ten truck drivers at the Port of Los Angeles/Long Beach were awarded $1.2 million as the state labor commissioner found their employer mistakenly considered them independent contractors instead of employees.

California Car Wash Company Fined $2.4M in Wage Case

By David McAfee

A Southern California car wash company was fined more than $2.36 million for alleged wage violations that affected 64 workers.

HARASSMENT & RETALIATION

Fanatics Retail to Pay EEOC $322K Under Race Harassment Pact

By Patrick Dorrian

Sports apparel giant Fanatics Retail Group Fulfillment LLC has agreed to pay the EEOC $322,050 to resolve allegations it subjected a black employee to racial slurs and comments.

LABOR RELATIONS

Fate of Volkswagen Union Campaign in Limbo After Initial Hearing

By Andrew Wallender

The fate of a proposed union representation vote at Volkswagen's Chattanooga, Tenn., facility will remain undecided for at least another week as both sides face an extended deadline to file information.

Union Turf War Erupts at Brooklyn Academy of Music

By Andrew Wallender

The AFL-CIO, the nation's largest federation of labor unions, is intervening after a dispute broke out between two unions over who should represent workers at a New York multi-arts center.

Hollywood Writers Sue Talent Agencies Over Packaging Fees

By Lucas Shaw

A Hollywood screenwriters' union and eight of its members sued the four largest talent agencies, escalating a dispute over what are known as packaging fees.

Strike Hurting Stop & Shop's Bottom Line, Analysts Say

By Aaron Nicodemus

A strike by 31,000 retail Stop & Shop supermarket workers is clearly hurting the chain's short-term financial health, and how the strike is resolved will be critical to the chain's long-term success.

IMMIGRATION

Inability to Work Doesn't Justify Expedited H-1B Order (1)

By Laura D. Francis

A worker who was denied an H-1B visa when she changed employers didn't prove to a federal judge that she's facing the kind of economic harm that justifies the court's immediate intervention.

H-1B Program 'Alive and Well,' Latest Visa Lottery Results Show

By Laura D. Francis

The Trump administration's efforts to change the H-1B program and encourage hiring more U.S. workers don't appear to be having much effect on demand for the skilled guestworker visas.

SAFETY & HEALTH

California Proposes Expanding Nighttime Labor Safety Regulation

By Fatima Hussein

An increasing number of farm workers are joining the ranks of nearly 15 million full-time workers on night shifts, rotating shifts, or irregular schedules.

ALSO IN THE NEWS

EEOC May 31 Pay Data Deadline Impossible: Agency Official

By Jaclyn Diaz

It would be impossible for the Equal Employment Opportunity Commission to collect worker pay data from more than 60,000 employers by May 31, the agency's chief data officer told a federal judge April 16.

New Work Suits: Amazon, Urban Outfitters Accused of Age Bias

By Cynthia Harasty

Amazon laid off an account specialist because of her age, and Urban Outfitters tolerated ageist attacks against an apparel sourcing expert of Chinese descent, according to two separate lawsuits the workers filed in federal courts.

LATEST CASES

Case: Discrimination/Promotion (E.D. Ark.)

A black preventative maintenance foreman for the Little Rock School District in Arkansas isn't entitled to a trial on his claim that a less qualified white applicant was selected instead of him for the maintenance-and-operations supervisor position because of racial discrimination, even thought the black foreman had a college degree and the white candidate did not. The selected white applicant scored higher on his interview than the black foreman, a college degree was neither required not preferred for the position, there was no evidence that a college degree would make a person better able to perform the duties of the

job, they both had supervisory experience over about 20 employees, the white applicant had served as interim maintenance-and-operations supervisor for several years, and the black foreman failed to present evidence that he and the white applicant provided the same answers to a particular interview question yet received different scores or that the black foreman had an objectively better answer yet received a lower score on that question, the court stated. The case is .

Case: FMLA/Retaliation (6th Cir.)

A Grosse Pointe, Michigan, public school assistant principal's retaliation claim under the Family and Medical Leave Act was properly dismissed, because the alleged retaliatory acts--a "minimally effective" performance review, a request for her resignation, and her transfer to a middle school--all occurred after her FMLA leave, and she wasn't subjected to an adverse employment action after she returned from protected leave given that she then received a full performance evaluation, wasn't on a performance improvement plan for the next school year, and was placed back on a favorable two-year contract after she received an "effective" performance rating. The case is Redlin v. Grosse Pointe Pub. Sch. Sys., 2019 BL 135127, 6th Cir., No. 18-1641, 4/16/19.

Case: Wage & Hour/Attorneys' Fees (E.D.N.Y.)

An employee of a New York nail salon must lower the amount of attorneys' fees provided for in the settlement of her unpaid wage claim before a court will approve the agreement, because the fact that her attorneys have a one-third contingency fee doesn't mean that they aren't required to support the requested amount, and one attorney's one month of experience in employment law doesn't support her requested hourly rate of $300. The case is Chunhua Cui v. Monroe Nail II Corp., 2019 BL 134963, E.D.N.Y., No. 18-CV-4256 (RLM), 4/16/19.

Case: Discrimination/Exhaustion of Remedies (D. Mont.)

Old Dominion Freight Line Inc. is entitled to summary judgment on a claim by a former sales manager that he was discharged for going over his human resources manager’s head and reporting an employee's alleged sexual harassment to a company vice president after the HR manager had told him to

drop the investigation, because the sales manager failed to first exhaust his administrative remedies under the Montana Human Rights Act before filing suit, the court said. The case is .

Discrimination/Racial Harassment (W.D. Wash.)

A fired Asian Regional Sales Manager for Royal Canin USA, Inc. may proceed to trial on his claim that his white supervisor subjected him to a racially hostile work environment. He asserts that she said that his "people" eat dog and repeatedly made other biased stereotypical remarks about Asians, and her alleged actions can be imputed to Royal Canin as she was able to affect the terms and conditions of his employment given that she admittedly participated in the decision to discharge him, the court said. The case is .

Case: Disability Discrimination/Equal Protection (N.D. Ill.)

A truck driver can go ahead with his 42 U.S.C. §1983 claims alleging that the Metropolitan Water Reclamation District of Greater Chicago violated his equal protection rights by discriminating against him based on his disabilities, because the Americans with Disabilities Act doesn't preclude independent constitutional claims. However, he will have to show that the MWRDGC's discriminatory intent wasn't rationally related to a legitimate state interest, because people with disabilities aren't a suspect class entitled to heightened constitutional protection, the court ruled. The case is Grillo v. Metro. Water Reclamation Dist. of Greater Chi., 2019 BL 135292, N.D. Ill., No. 18 CV 5607, 4/16/19.

Case: Disability Discrimination/Reasonable Accommodation (2d Cir.)

A former payroll department employee's claim that the Manhattan and Bronx Transit Authority failed to accommodate her arthritis, fibromyalgia, and carpal tunnel syndrome was properly dismissed, because she didn't show that a scheduling position with less typing was available when she asked for a transfer, and her requests for a promotion and assignment of some of her essential job functions to her co-workers weren't reasonable. Her disparate treatment, hostile work environment, and retaliation claims also failed, because she wasn't qualified for promotion given that she didn't have the required bachelor's degree, and the two instances in which her supervisors were rude to

her weren't adverse employment actions or enough to constitute actionable harassment. The case is Harvin v. Manhattan & Bronx Surface Transit Operating Auth., 2019 BL 134635, 2d Cir., 18-1308, unpublished 4/16/19.

Case: Discrimination/Retaliation (6th Cir.)

A female assistant principal may proceed with her claim that Grosse Pointe Public School System in Michigan gave her a "minimally effective" evaluation and transferred her from a high school to a middle school in retaliation for complaining about discrimination on the basis of sex. Her assertions, including that the superintendent said that he decided to transfer her because of her complaint and that she was treated differently than another assistant principal who didn't make any discrimination complaints, could show that the school system acted in a retaliatory manner. The case is Redlin v. Grosse Pointe Pub. Sch. Sys., 2019 BL 135127, 6th Cir., No. 18-1641, 4/16/19.

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From: Employment Law360
To: Ring, John
Subject: Courts Wrestle With LGBT Cases While Waiting On Justices
Date: Thursday, April 18, 2019 3:38:39 AM

EMPLOYMENT

Thursday, April 18, 2019

TOP NEWS

Courts Wrestle With LGBT Cases While W aiting On Justices

While the U.S. Supreme Court has kept employment law watchers waiting on whether it will take up the question of if bias against LGBT workers and job seekers is covered under Title VII, trial courts have been left to tackle tricky questions involving the viability of sexual orientation and gender identity discrimination claims. Here, Law360 looks at two recent developments in Title VII cases that you may have missed.

Read full article »

5th Circ. Revives Ex-Teacher's Nud e Photo Due Process Claim

A former Mississippi teacher and football coach can pursue a claim that he wasn't afforded a public hearing to clear his name after he was fired when his nude picture popped up on the online adultery hub Ashley Madison, the Fifth Circuit ruled Wednesday.

Read full article »

TV Writers Ask Calif. Court To Can cel Agents' Lucrative Fees

The TV writers' union took its growing fight with the big four talent agencies to Los Angeles state court Wednesday, saying the payments the agents extract for pairing scribes with studios enrich agencies at their clients' expense.

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'Dancer' In FLSA Suit Just A Drunk Customer, Strip Club Says

A Florida strip club has asked a Florida federal court to throw out a proposed wage-and-hour collective action, arguing that the woman who brought the suit wasn't a dancer at the club, just an "admittedly drunk and repeatedly-violent customer."

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Calif. Labor Commish Tells Car Wash To Cough Up $2.4M

The California Labor Commissioner's Office ordered a Los Angeles-area car wash to shell out nearly $2.4 million Wednesday after an investigation showed it stiffed dozens of workers out of pay through a variety of illegal practices.

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IN-DEPTH

News Analysis

Escape Hatch Remains For Judges Accused O f Misconduct

Recent changes empowering judicial authorities to conduct institutional reviews of alleged misconduct after a judge retires are a step in the right direction, advocates say, but do they go far

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New Cases

Discrimination (41)
Labor (38)

LAW FIRMS

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Fisher Phillips
FisherBroyles
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Fried Frank
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Goodwin
Greenberg Traurig
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Hagens Berman
Heninger Garrison

enough? (This article is part of a series examining sexual harassment in state courts.)
Read full article »

Op-Ed

Federal Courts' #MeToo Response Is A G uide For State Courts

Recent workplace assessments from two groups in the federal judiciary are instructive for state courts that choose to similarly review their misconduct policies and address the significant power imbalances that can silence victims, says Lauren Stiller Rikleen, president of the Rikleen Institute for Strategic Leadership.
Read full article »

DISCRIMINATION

4th Circ. Sinks Logistics Worker's Same-Sex Harassment Suit

The Fourth Circuit won't revive a former Capstone Logistics worker's suit alleging he was fired for complaining that a male supervisor sexually harassed him, agreeing with a lower court that the case was too flimsy to be decided by a jury.
Read full article »

WAGE & HOUR

Trucking Group Asks 9th Circ. To Block Dynamex Standard

A trucking group has turned to the Ninth Circuit to revive its bid to block California's standard for distinguishing between independent contractors and employees, challenging a recent district court decision saying the standard wasn't preempted by federal law.
Read full article »

9th Circ. Affirms $42M Fee Award In NCAA Damag es Deal

The Ninth Circuit on Wednesday cleared the way for a nearly $209 million settlement between athletes and the NCAA over claims it unlawfully capped compensation, affirming a $42 million fee award despite objections from a former Division I football player.
Read full article »

TRADE SECRETS

Motorola Can't Get Intel On 2nd Radio In Trade Secrets Fight

Motorola can't get source code and sales data for one of Chinese radio manufacturer Hytera's products, an Illinois federal judge ruled, finding that the discovery bid would have expanded an ongoing trade secrets dispute significantly.
Read full article »

WHISTLEBLOWER

Analysis

DOJ Dismissal Power Looking Wobbly In FCA Cases

The U.S. Department of Justice's newly launched campaign to shrink its False Claims Act docket has hit surprising turbulence as federal judges scrutinize the DOJ's willingness to look the other way on alleged fraud and its disparagement of a company that specializes in bringing FCA cases.
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Feds Slam Order To Cough Up Info In Kickbacks Suit

The government fired back at a Minnesota federal court's order granting an eye product supplier's bid to force the U.S. to hand over information on all of

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Alliant Insurance Services
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Bio-Rad Laboratories Inc.
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United Talent Agency Inc.

the alleged false claims in a whistleblower suit and interviews it conducted during its investigation.

Read full article »

NEGLIGENT RETENTION

Fla. Judge Didn't Review Discovery In Airlines Suit: Court

A Florida appeals court on Wednesday threw out an order requiring American Airlines to hand over documents and testimony to the estate of a former employee who killed himself, finding a lower court should have reviewed the materials before rejecting the company's arguments that they contain privileged information.

Read full article »

PEOPLE

Jackson Lewis Adds Veteran In-Hous e Litigator From Macy's

Jackson Lewis has boosted its ranks in St. Louis by hiring a seasoned employment litigator who spent more than 20 years as an in-house lawyer for retail giant Macy's.

Read full article »

FisherBroyles Nabs Employment Partner From FordHarrison

FisherBroyles LLP has expanded its presence in Atlanta by luring a partner from FordHarrison LLP to its labor and employment team.

Read full article »

EXPERT ANALYSIS

Few Avenues To Protection For Foreign FCPA Whistleblowers

The Ninth Circuit's recent decision in Wadler v. Bio-Rad falls within a larger pattern of federal courts interpreting whistleblower protection statutes narrowly — especially when employees raise allegations about international business and potential Foreign Corrupt Practices Act violations abroad, say Daniel Wendt and Amelia Hairston-Porter of Miller & Chevalier.

Read full article »

LEGAL INDUSTRY

What Firms Are Getting Wrong On Partner Com pensation

As law firms jostle to succeed in today's challenging legal market, too many fall behind because their compensation plans fail to encourage partners to engage in behaviors that further the firm's overall goals, according to a Wednesday presentation at the Association of Legal Administrators' annual conference.

Read full article »

Greenberg Traurig's Atty Immu nity Dooms Ponzi Investor Suit

Greenberg Traurig LLP can't be sued by a group of investors alleging the law firm aided Robert Allen Stanford's $7 billion Ponzi scheme, the Fifth Circuit held Wednesday, rejecting arguments that the actions of the firm's attorneys fell outside the scope of immunity.

Read full article »

Fake Atty Copped Cravath Bios And B ilked Clients, DOJ Says

A Tennessee man was arrested Tuesday for posing online as a team of attorneys while mimicking the website profiles of what appear to be several Cravath Swaine & Moore LLP partners and then defrauding clients seeking legitimate legal advice, according to New York federal prosecutors.

Read full article »

Key House Member Backs DOJ On Upped FARA Enforc ement

Utah Transit Authority

GOVERNMENT AGENCIES

California Supreme Court

Equal Employment Opportunity Commission

Federal Aviation Administration

Federal Bureau of Investigation

Judicial Conference of the United States

Miami International Airport

Securities and Exchange Commission

Texas Legislature

Texas Supreme Court

U.S. Attorney's Office

U.S. Department of Justice

U.S. Department of Labor

U.S. Supreme Court

United States District Court for the Eastern Dist rict of Pennsylvania

The ranking member of the House Judiciary Committee sent a letter to Attorney General William Barr on Wednesday offering support for enforcing and reforming the Foreign Agent Registration Act, a law meant to track lobbying by foreign entities in the United States.

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Perkins Coie Taps Lead DC Atty As Next Managing Partner

Perkins Coie has chosen an environment, energy and resources partner who currently leads its Washington, D.C., office to become the firm's next managing partner.

Read full article »

Goodwin Elevates Managing Partner To Firm Chairma n

Goodwin Procter on Wednesday named a founding partner of its New York office and its current managing partner as its next firmwide chairman.

Read full article »

Law Firm Slams $500M Fee Divvy In GMO Corn Settlement

Heninger Garrison has railed against a report recommending that a group of other firms receive most of the Illinois portion of a $500 million attorney fee award in multidistrict litigation over Syngenta's genetically modified corn, saying it did most of the work and deserves the larger portion.

Read full article »

Boies Schiller Partners On $30M Vietnam D ispute Funding

Boies Schiller Flexner LLP is teaming up with global litigation funder IMF Bentham to provide $30 million in financing targeted at arbitration and litigation related to Vietnam, with the firm's Vietnamese-speaking partners giving it an edge in a growing market.

Read full article »

Law Firm Leaders: Cadwalader's Patrick Quinn

Patrick Quinn has served as managing partner of Cadwalader Wickersham & Taft LLP since 2015 and has served on the law firm's management committee for more than a decade. Quinn offered up his thoughts on the evolving legal sector, Cadwalader's strategy, and the importance of diversity to the firm's success.

Read full article »

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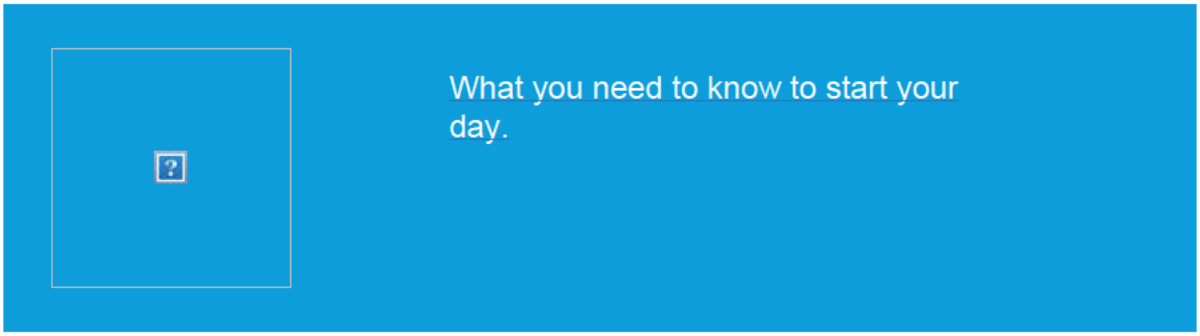
From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: First Move: EEOC Files Fewer Lawsuits but Collects More Money
Date: Thursday, April 18, 2019 7:09:59 AM



EEOC Files Fewer Lawsuits but Collects More Money

By Patricio Chile

The Equal Employment Opportunity Commission filed almost 10 fewer lawsuits halfway through 2019 than in the first half of last year. At the same time, money from settlements obtained is 50 percent higher than at the same point last year.

- **No Slowdown:** The agency filed 24 new lawsuits and collected more than $21 million in settlements from Oct. 1, 2018, through March 31. The numbers aren't bad for an agency that had to scale back during the longest federal government shutdown in U.S. history.

- **Top Claims:** Disability discrimination, retaliation, and sexual harassment were the three most common allegations in the agency's lawsuits this year, Patrick Dorrian reports.

RETRAINING OVERLOOKED IN BARGAINING

Companies and unions love to brag about "retraining." But the talk isn't always backed up with action, according to a new Bloomberg Law survey.

- **Record Lows:** Only 3 percent of employers said that their collective bargaining agreements included provisions on retraining. That's near an all-time low of 2 percent in 2017, Jaclyn Diaz and Andrew Wallender report.

- **Trouble Ahead:** The lack of resources being devoted to retraining could lead to long-term worker displacement, observers say. As needed skills change, unions may find themselves on the defensive if they're not proactive about retraining.

At a time when automation is changing many workplaces and making workers' skill sets obsolete, labor contracts are failing to address retraining.
By Daniel Acker/Bloomberg

WHAT ELSE WE'RE WATCHING

- **Pay History:** Maine bars employers from asking job applicants about their pay history, while some legislators in Texas want to publish the names of companies found to have violated wage laws. Read more in this week's "States of Work."

- **Worker Classification:** The Ninth Circuit will consider whether California truckers should be classified as contractors, rather than employees, despite the state's rigid worker classification test. Erin Mulvaney and Porter Wells report.

- **Volkswagen Union:** The fate of a proposed union representation vote at Volkswagen's Chattanooga, Tenn., facility will remain undecided for at least another week as both sides face an extended deadline to file information. Andrew Wallender has the story.

- **Dues Checkoff:** A Wisconsin lawn equipment company didn't violate federal labor law when it stopped deducting union dues from employee paychecks, the NLRB ruled yesterday. The company reasonably believed its employees' union dues checkoff authorizations no longer conformed to state law after Wisconsin enacted right-to-work legislation in 2015, the board said.

- **Personnel Files:** Disputes between agencies and employees over alleged misconduct or poor performance are harder to resolve because of a May 2018 policy that said agencies can't alter personnel files to settle the disputes. Louis LaBrecque has the story.

- **Jobless Claims:** The Employment and Training Administration issues its weekly jobless claims report at 8:30 a.m.

- **Mueller Report:** Robert Mueller's nearly 400-page report coming out today is expected to answer why he declined to make a decision on whether to charge President Trump with obstruction, according to a person familiar with the matter. Chris Strohm and Shannon Pettypiece have the story.

DAILY RUNDOWN

Top Stories

Teacher Fired Over Online Nude Photo Gets Case Revived
A Mississippi county may have jumped the gun when it fired a high school teacher-football coach after a nude photo of him was posted on the Ashley

Madison website, the Fifth Circuit ruled.

DOD Taking HIV+ Discharge Policy Fight to 4th Circuit
The Defense Department has given notice that it will appeal the recent order barring the Air Force from discharging HIV-positive service members.

Iraqi Muslim Denied Citigroup Job Can't See Full FBI Report
The FBI doesn't have to turn over to an Iraqi Muslim woman the full version of a background check report Citigroup relied on in denying her employment, a federal court ruled.

Discrimination

Lockheed Martin Workers Seek Class Discovery in Race Bias Case
A group of black workers suing Lockheed Martin Corp. for alleged racial discrimination in the company's performance appraisal system told a federal court they need "ample discovery" on their potential class claims.

Government Owes Postal Worker for Taxes on Job Bias Settlement
A former U.S. Postal Service employee is entitled to $33,691 to cover the adverse tax consequences of a 2003 discrimination settlement she reached with the government, the Federal Circuit ruled April 17.

Wage & Hour

California Car Wash Company Fined $2.4M in Wage Case
A Southern California car wash company was fined more than $2.36 million for alleged wage violations that affected 64 workers.

Harassment

Fanatics Retail to Pay EEOC $322K Under Race Harassment Pact
Sports apparel giant Fanatics Retail Group Fulfillment LLC has agreed to pay the EEOC $322,050 to resolve allegations it subjected a black employee to racial slurs and comments.

Labor Relations

Union Turf War Erupts at Brooklyn Academy of Music
The AFL-CIO, the nation's largest federation of labor unions, is intervening after a dispute broke out between two unions over who should represent workers at

a New York multi-arts center.

Immigration

Inability to Work Doesn't Justify Expedited H-1B Order
A worker who was denied an H-1B visa when she changed employers didn't prove to a federal judge that she's facing the kind of economic harm that justifies the court's immediate intervention.

WORKFLOWS

Hogan Lovells hired Christopher Cox as a partner to the litigation practice in Silicon Valley from Weil, Gotshal & Manges | **Eversheds Sutherland** hired Rhys McWhirter from PricewaterhouseCoopers' affiliate law firm in Hong Kong | **McDermott Will & Emery** opened a new office in Wilmington, Del., staffed by newly hired corporate and securities litigator Ashley Altschuler, who arrives as a partner from DLA Piper | **Dykema** added corporate finance attorney Denise M. Drake as a senior counsel in San Antonio | **Locke Lord** rehired former Texas appeals court justice Elizabeth Lang-Miers as a partner in the appellate practice group and director of attorney development in Dallas | **BakerHostetler** has hired Ann M. Caresani as a partner in its employee benefits practice in Cleveland.

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From: Martin, Andrew
To: Barney Horowitz (horowitz28@verizon.net); Barry Kearney; Dan Hubbel (dhubb1972@gmail.com); DG-Legal News FYI; Diana Embree (diana.embree@gmail.com); jackieyoungdc (jackieyoungdc@yahoo.com); jandd114@att.net; Joe Frankl (joefrankl53@gmail.com); John Higgins (higgins@cua.edu); Jolynne Miller (millerjolynne@gmail.com); Jose Masini (jmasini@iuoe.org); Kyle deCant; Linda Dreeben; Marni von Wilpert (mwilpert@gmail.com); Martha Kinard; Rebecca Leaf (raleaf@gmail.com); Robert Chester (Robertwchester.arbitrator@gmail.com); Susanne Leverone (Shinnerones5@gmail.com)
Subject: Legal News FYI 04-18-19
Date: Thursday, April 18, 2019 8:10:55 AM
Attachments: image001.png

Thursday, April 18, 2019

EEOC Files Fewer Lawsuits but Collects More Money

BloombergLaw - Daily Labor Report 18 Apr 2019 07 06

By Patricio Chile The Equal Employment Opportunity Commission filed almost 10 fewer lawsuits halfway through 2019 than in the first half of last year. At the same time, money from set lements obtained is 50 percent higher than at the same point last...

Spilling the beans: Local coffee chain announces closure after baristas unionize

Michigan Daily (Ann Arbor, MI) 18 Apr 2019 00:14

When the baristas at Mighty Good Coffee formed a union last fall, hey intended to stop their employers from discriminating against workers. Now the members of the Washtenaw Area Coffee Workers' Association are negotiating severance pay as the owners of...

Union Turf War Erupts at Brooklyn Academy of Music

BloombergLaw - Daily Labor Report 17 Apr 2019 19:37

• UAW, IATSE both claim jurisdiction • AFL-CIO seeking to mediate dispute By Andrew Wallender The AFL-CIO, the nation's largest federation of labor unions, is intervening after a dispute broke out between two unions over who should represent workers at a...

Labor board eyes possible dates for new Volkswagen Chattanooga union election

Chattanooga Times/Free Press (Chattanooga, TN) 17 Apr 2019 18:02

Updated at 5:56 p.m. on Wednesday, April 17, 2019, with more information. Volkswagen and the United Auto Workers will have to wait a little longer to see if and when a new union election might take place at the automaker's Chattanooga plant. A National...

Pennsylvania hospital, nurses trade unfair labor complaints: 6 things to know

Becker's Hospital Review 17 Apr 2019 17:26

Indiana (Pa.) Regional Medical Center and the union representing 380 registered nurses and nurse anesthetists are accusing each other of unfair labor practices as a contract dispute between he parties continues, according to the Indiana Gazette . Six...

The Past and Future of the NLRB's "Quickie Election" Rules

JD Supra: Labor & Employment Law 17 Apr 2019 16:47

The National Labor Relations Board is charged with holding union elections whenever petitioners demonstrate that a sufficient number of employees in a particular workplace wish to become unionized. The NLRB's "quickie election" rules have changed how.....

Fate of Volkswagen Union Vote in Limbo After Initial Hearing (1)

BloombergLaw - Labor Relations News 17 Apr 2019 14:36

• Additional filings due by April 24 • May 2-3 or May 16-17 floated as vote dates By Andrew Wallender The fate of a proposed union representation vote at Volkswagen 's Chattanooga, Tenn., facility will remain undecided for at least another week as both...

Anti-union campaign blasts UAW 'corruption' in full-page ad

Detroit Free Press (Detroit, MI) 17 Apr 2019 13:40

April 17-- Apr. 17 --A new anti-union campaign launched Wednesday in full-page Detroit newspaper ads portrays the UAW as having a "culture of corruption" that's willing to "sell out union members." The ads, purchased by a Washington -based group with a...

Instagram Memers Are Unionizing

Atlantic Monthly, The 17 Apr 2019 12:01

@UnionizedMemes / Instagram Instagram memers have had enough. They generate the engagement that helps keep Instagram growing—but, hey argue, the multibillion-dollar platform doesn't pay them for their work, or give hem any control. So they're fighting...

NLRB Judge Rules Tecnocap's 2018 West Virginia Lockout Illegal, Orders Back Pay for USW Members

Morningstar 17 Apr 2019 11:15

/PRNewswire/ -- The United Steelworkers (USW) today said that in an April 5, 2019 , decision, Administrative Law Judge Michael A. Rosas of he National Labor Relations Board (NLRB) blistered the management of Tecnocap, LLC, for a series of unfair labor...

Bathroom conversations aren't private conversations

Kohrman Jackson & Krantz : Ohio Employer's Law Blog 17 Apr 2019 08:06

Michael Woods, a mortgage banker at Quicken Loans, was having a bad day at work. A customer Woods had helped four years ago had been trying to get in touch with a Client Specialist; the company routed the call to Woods because of their prior...

LGBT Bias Protections Land at Eighth Circuit

BloombergLaw - Daily Labor Report 17 Apr 2019 07 06

By Patricio Chile Does it violate federal civil rights law to rescind a job offer based on the applicant's orientation? The Eighth Circuit today will become the latest appeals court to grapple over whether or not federal law on sex discrimination also...

UAW Steps Away From Volkswagen Union Ahead of New Vote (1)

Bloomberg Law 15 Apr 2019 18:31

The United Auto Workers said it is disclaiming a unit of maintenance workers hat it organized at Volkswagen's Chattanooga, Tenn., plant in 2015. The move comes as the union prepares for a potential factorywide representation vote at the facility. The...

Legal News FYI monitors news, cases, and legislative developments of interest to the NLRB. To be added to or removed from the distribution list contact Andrew Martin. Please note that these are external links and the Agency takes no responsibility for their content.

From: Morning Shift
To: Ring, John
Subject: POLITICO"s Morning Shift: Why big business is quitting the minimum wage fight — Hedge fund eyeing Gannett purchase faces pension scrutiny — Miller to the Hill?
Date: Thursday, April 18, 2019 10:03:33 AM

View online version

2018 Newsletter Logo: Morning Shift

04/18/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click here.

QUICK FIX

— Who's left to fight raising the minimum wage? Small businesses.

— Did the hedge fund bidding to purchase Gannett invest employee pensions in its own accounts?

— Will Stephen Miller testify before the House Oversight Committee?

GOOD MORNING! It's Thursday, April 18, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

WHY BIG BUSINESS IS QUITTING THE MINIMUM WAGE FIGHT: With large corporations like Amazon and Bank of America raising minimum pay and McDonalds no longer lobbying against minimum-wage hikes, "life in the opposition is getting lonelier ," Lydia DePillis reports for CNN Business. "We're playing defense on this one, to state the obvious," Jon Kurrle, vice president of federal government relations at the National Federation of Independent Business, told CNN. "A larger company can absorb costs in a way that a smaller business can't, and also make technology investments in a way that not all small businesses can."

DePillis reports that "for large companies, opposing a hike comes along with bad publicity, which lately just doesn't seem to be worth it for corporate America." Roger King, senior labor and employment counsel with the HR Policy Association, said that their members are "very concerned about marketability of their product, and they don't want to be a poster child for poor working conditions." The Federal Reserve's Beige book, which provides an outlook of economic conditions, has noted in recent editions that increases in wages at national retailers have put pressures on small businesses to remain competitive in the tight labor market. More here.

PENSIONS

HEDGE FUND EYEING GANNETT FACES PENSION SCRUTINY: Alden Global

Capital, the hedge fund weighing a purchase of the media company Gannett, "moved nearly $250 million of employee pension savings into its own accounts in recent years" prompting a DOL investigation, Jonathan O'Connell reports for the Washington Post. "The hedge fund, which is the controlling owner of such newspapers as the Denver Post and Boston Herald under the brand MediaNews Group, in some cases moved 90 percent of retirees' savings into two funds it controlled." That caught the attention of federal regulators, because the law "generally requires that pension managers avoid conflicts of interest and avoid taking excessive risks with the assets they manage," O'Connell explains.

The probe could cause some friction in MediaNews Group's bid to purchase Gannett, the country's largest daily newspaper chain. Gannett's board said in a letter to shareholders last month that it had "grave concerns that under MNG's control, the board would be repurposed for siphoning value — including potentially from Gannett's pensions — to deliver generous management fees and profits to Alden." Minority Leader Chuck Schumer wrote to Alden in February inquiring how the hedge fund would handle Gannett's pensions. More from the Post here.

ON THE HILL

MCALEENAN'S BID TO CONGRESS ON THE BORDER: In his first public appearance as the acting head of DHS, Kevin McAleenan urged Congress on Wednesday to address what he called "both a humanitarian and security crisis" at the U.S.-Mexico border, arguing that lax asylum and immigration laws encourage migrants to make the trek to the U.S., POLITICO's Ted Hesson reports. More here.

MILLER TO THE HILL?: A top House Democrat on Wednesday invited White House senior advise Stephen Miller to testify on May 1 about the administration's hard-line immigration policies and the recent leadership shakeup at DHS. In the request from House Oversight Committee Chairman Elijah Cummings (D-Md.), he wrote Miller, "because it appears that you are one of the primary moving forces behind some of the most significant — and in my view, troubling — immigration policies coming out of the Trump White House." Read the letter here.< /p>

Related read: "Republicans Get Lion's Share of Blame for Current Immigration Policy," from Morning Consult

UNIONS

BIDEN TO JOIN STOP & SHOP PICKET: Former vice president Joe Biden will speak to striking Stop & Shop workers today in Boston, according to the Boston Globe. Some 31,000 workers in New England have been on strike since last Thursday over proposed cuts to pay and benefits, prompting Stop & Shop store closings and reduced hours. Biden will be the second 2020 Democratic contender to visit the picket line; Sen. Elizabeth Warren (D-Mass.) spoke to Stop & Shop workers Friday.

Related read: "He's Worked For Stop & Shop For 48 Years. Here's Why He's On Strike." from The Huffington Post

RUTGERS FACULTY REACHES TENTATIVE AGREEMENT: "The faculty union at Rutgers University announced late Tuesday that it has reached a tentative agreement on a new contract, staving off what would have been the first strike by faculty and graduate student workers at the state's largest university," POLITICO's Linh Tat reports. "The tentative four-year deal, which still needs to be ratified by the bargaining unit's roughly 4,800 full-time faculty and graduate student workers, would result in equal pay for equal work for women and faculty across the three campuses." However, the bargaining unit for the nearly 3,000 part-time lecturers and adjunct faculty has yet to settle a contract with the administration. Members of the full-time unit have pledged to stand with them. More from POLITICO here.

PAYDAY

D.C. UBER DRIVERS DON'T KNOW HOW MUCH THEY'RE PAID: A new study out today from Georgetown University's DC Public Policy Initiative and Kalmanovitz Initiative for Labor and the Working Poor found that Uber drivers in D.C. struggle to understand their actual pay and that 30 percent of surveyed drivers said they experience physical safety concerns. All 40 of the DC area drivers interviewed for the study said they "experienced difficulties with, or barriers to" calculating their compensation. Additionally, about one-third of the drivers said they took on debt to cover car maintenance costs. "The conditions in the Uber workplace do not best resemble those of low-wage jobs in the retail and restaurant industries, temporary staffing agencies, or even digital workplaces for crowd-work," the report states. "Instead the debt trap and slippery wage mean that the Uber workplace resembles a casino where drivers must pay-to-play the game of work." Read the report here.

CLASS ACTIONS MOST OFTEN CONCERN LABOR ISSUES: Labor and

employment lawsuits were the most common type of class action brought in 2018, according to a recent survey of 415 lawyers representing large businesses in 25 industries conducted by the law firm Carlton Fields. Most companies (nearly 70 percent) reported that they feared the prospect of labor-related class action suits, with wage and hour disputes at the top of the respondents' worries. The report also found that the use of arbitration clauses increased in 2018, and that nearly 48.9 percent of companies now require employees to waive their right to participation in class actions, up from 37.2 percent in 2017. That uptick follows the Supreme Court's 2018 ruling in *Epic Systems Corp. v. Lewis*, which upheld employers' use of mandatory arbitration clauses to block the filing of class-action lawsuits over workplace issues such as unpaid overtime. Read the survey here.

COFFEE BREAK

— "Senate homeland security chairman to propose tighter asylum standards amid border surge," from The Washington Post

— "Writers Guild Sues Talent Agencies as Dispute Goes Nuclear," from The Hollywood Reporter

— "Sexual Orientation Bias at Work Goes Before Eighth Circuit," from Bloomberg Law

— "Only 18 out of 890 major US companies are fully transparent on worker issues — and that openness is helping them grow their bottom line," from Business Insider

— "Anti-union campaign blasts UAW 'corruption' in full-page ad," from The Detroit Free Press

— "Colorado Could Be The Next State To Let Its Employees Collectively Bargain," from Colorado Public Radio

— "Wall Street's looming 'earnings recession' is a good thing," from The Week

— "The world's largest hedge fund breaks down how the US workforce got screwed over the past 20 years," from Business Insider

— "Beverly Hills Auto Dealership Mogul Ordered to Pay $2.4M in State's Largest Wage-Theft Case Against Car Wash," from the Los Angeles Times

— "In a twist, Canada asks U.S. for help cracking down at its southern border," from The Washington Post

THAT'S ALL FOR MORNING SHIFT!

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From:	Bashford, Jo Ann
To:	Ring, John; Lucy, Christine B.
Subject:	FW: Littler Executive Employer - Phoenix
Date:	Thursday, April 18, 2019 12:12:17 PM
Attachments:	image001.png image002.png

Please see the below note from Tanja re: the Litter Conference, particularly the 3rd paragraph.

Jo Ann Bashford
Confidential Assistant,
Legal Administrative Specialist
Office of the Chairman
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-0837
joann.bashford@nlrb.gov

From: Thompson, Tanja L. <TThompson@littler.com>
Sent: Thursday, April 18, 2019 11:54 AM
To: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Subject: RE: Littler Executive Employer - Phoenix

Hi JoAnn:

Do you happen to know John's travel schedule for the Littler meeting in May? I was trying to figure out whether we could pin John down for a meal sometime while he's out there and, if so, what might work best for him?

Our presentation is titled "A Conversation with John Ring" and I'll moderate and ask him questions and he can answer. We are scheduled to present at approx. 3pm on Weds May 8.

If there are certain topics he'd like me to ask him about (things he's generally talking about in presentations these days), I'm happy to get any questions/or brief list of topics in advance from him. Similarly, if there are any topics he'd rather me not ask about, happy to avoid particular topics (i.e. pending cases), I'm happy to learn what those are as well. I'll also work on putting together a list of possible questions in advance so he can weigh in on what works/doesn't work. Thought I'd start by sending this to you, but if John would rather email me back or schedule a call with me, happy to discuss directly with him as well.

Thanks so much for your assistance.

Tanja

Tanja Thompson
Office Managing Shareholder
901.322.1223 direct, 901.210.8404 mobile, 901.531.8179 fax
TThompson@littler.com

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From: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Sent: Thursday, February 28, 2019 11:52 AM
To: Thompson, Tanja L. <TThompson@littler.com>
Cc: Woodhouse, Susan A.P. <SWoodhouse@littler.com>; Schneider, Mark <MSchneider@littler.com>; Kalis, Sara B. <SKalis@littler.com>
Subject: RE: Littler Executive Employer - Phoenix

Tanja: For planning purposes, this is great, thank you. I will await the hotel information.

Best,

Jo Ann Bashford
Confidential Assistant,
Legal Administrative Specialist
Office of the Chairman
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-0837
joann.bashford@nlrb.gov

From: Thompson, Tanja L. <TThompson@littler.com>
Sent: Thursday, February 28, 2019 12:03 PM
To: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Cc: Woodhouse, Susan A.P. <SWoodhouse@littler.com>; Schneider, Mark <MSchneider@littler.com>; Kalis, Sara B. <SKalis@littler.com>
Subject: RE: Littler Executive Employer - Phoenix

Hi JoAnn.

Good timing! I had a brief conversation with John last night and thought about sending this information today. Below is the information regarding the labor programs on May 8th. I believe (and hope Susan, copied above can confirm the times – is my order right?) that the order will be Joint Employer with Christine at 2 pm, my "conversation" with John at 3 pm, and then the third labor program (that they are not panelists in) at 4 pm.

I do not have the hotel reservation information for them but the hotel is the JW Marriott Desert Ridge, 5350 E. Marriott Drive, Phoenix, AZ.

Susan: Can you or someone on your team let JoAnn know John and Christine's hotel information?

Please let me know if you have additional questions.

Thanks.

Tanja

Please Join Us for a Special Labor Relations Symposium at the 2019 Littler Executive Employer Conference!

If you are attending the 2019 Littler Executive Employer Conference, we welcome you to attend the labor relations symposium designed just for you! A future Executive Employer communication will alert you when session sign-up is available.

Date: Wednesday, May 8, 2019 | **Time**: 2:00 p.m. – 5:00 p.m. | **www.executiveemployer.com**

Traditional Labor Symposium: What Union and Nonunion Employers Need to Know About Today's Unions and Employer Obligations Under the NLRA

In this interactive symposium, Littler's traditional labor law attorneys will review the current status of unions in the private sector and highlight the issues facing both union and nonunion employers. The symposium will feature a conversation with current National Labor Relations Board Chairman John Ring as he discusses the latest issues confronting the NLRB. The symposium will also include the following sessions:

• *Casing the Joint – Labor Implications and Beyond for Joint Employers*: The Trump NLRB has been busy trying to effectuate

rulemaking regarding joint employers. But will the Board succeed in developing standards that address the myriad of concerns employers across the country face in trying to structure their operations to comply with current case law?

• *Reality Check – If Unions Can't Succeed Through Traditional Organizing Tactics, What Else Will They Try*? As unions struggle to increase their membership ranks and the Trump Board considers changing the current NLRB election rules, unions pursue nontraditional means of organizing. Join us for a discussion of labor's use of social media, corporate campaign tactics, picketing, boycotts, demonstrations and other tactics to organize today's workers.

Tanja Thompson
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From: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Sent: Thursday, February 28, 2019 7:02 AM
To: Thompson, Tanja L. <TThompson@littler.com>
Subject: Littler Executive Employer - Phoenix

Good morning Tanja.

I am in the process of arranging travel for the Chairman and Christine Lucy to attend the referenced program in Phoenix. Has an agenda been circulated yet (or a draft) that will show when the Chairman and/or Christine are speaking?

Also, have hotel accommodations been made? I don't have any information on that either.

Anything information you can pass along would be a great help.

Thanks, and I look forward to hearing from you.

With best regards,

Jo Ann

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From:	Haley, Vickie
To:	Perez, Leonard J.; Carlton, Peter J.; Emanuel, William; Free, Douglas; Giannasi, Robert (ALJ); Jacob, Fred; Kaplan, Marvin E.; Krafts, Andrew J.; Kyle, John; Lennie, Rachel G.; Lucy, Christine B.; McFerran, Lauren; Murphy, James R.; Ring, John; Robb, Peter; Rothschild, Roxanne L.; Stock, Alice B.; Zick, Lara S.
Subject:	(Brief) Board Case No. 14-CA-223328; Docket Nos. 18-3695; 19-1157; DOLENGCORP, LLC v. NATIONAL LABOR RELATIONS BOARD
Date:	Thursday, April 18, 2019 2:30:17 PM
Attachments:	Dolgencorp v NLRB (18-3695) Respondent"s Brief.pdf

Attached please find an electronic copy of the Board's brief in the following case Dolgencorp, LLC v. National Labor Relations Board.

Thanks,

Vickie Haley
Administrative Assistant
Appellate and Supreme Court Litigation Branch
1015 Half Street, SE, Suite 4131C
Washington, DC 20570
202-273-3732

Nos. 18-3695, 19-1157

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DOLGENCORP, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Dolgencorp, LLC ("the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Decision and Order issued against the

Company on December 11, 2018, and reported at 367 NLRB No. 48. (A. 1-3.)[1] The Board found that the Company unlawfully refused to bargain with the United Food and Commercial Workers, Local 655 ("the Union"), which the Board has certified as the bargaining representative of a unit of sales associates at the Company's Auxvasse, Missouri retail store.

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(a), which empowers the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), and venue is proper because the Company transacts business in Missouri. The Board's Order is final, and the Company's petition and the Board's cross-application were timely because the Act places no time limitation on the initiation of review or enforcement proceedings.

Because the Board's Order is based, in part, on findings made in an underlying representation (election) proceeding (Board Case No. 14-RC-209845), the record in that proceeding is part of the record before this Court, pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d). *See Boire v. Greyhound Corp.*, 376

[1] Record references in this brief are to the Joint Appendix ("A."). References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Company's opening brief.

U.S. 473, 477, 479 (1964). Section 9(d) does not give the Court general authority over the representation proceeding, but authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to "enforc[e], modify[], or set[] aside in whole or in part the [unfair-labor-practice] order of the Board . . . ." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

STATEMENT OF THE ISSUE

The ultimate issue is whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1), by refusing to recognize and bargain with the Union. The dispositive underlying issue is whether the Board reasonably overruled the Company's election objections and certified the Union as the bargaining representative of a unit of company employees.

Millard Processing Servs., Inc. v. NLRB, 2 F.3d 258 (8th Cir. 1993)
Beaird-Poulan Div., Emerson Elec. Co. v. NLRB, 649 F.2d 589 (8th Cir. 1981)
Corner Furniture Discount Ctr., 339 NLRB 1122 (2003)
Ideal Elec. & Mfg. Co., 134 NLRB 1275 (1961)

STATEMENT OF THE CASE

The Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the exclusive bargaining representative of the sales associates at its retail store in Auxvasse, Missouri. The Company admits its refusal but claims that the Board erred in overruling its election objections and certifying the Union as bargaining representative. (Br. 14.) In the objections before the Court, the Company alleged that an employee unlawfully threatened to slash the tires of coworkers who did not vote in favor of the Union and offered a coworker $100 as an inducement to vote in favor of the Union. The Board's findings, the procedural history of the representation and unfair-labor-practice cases, and the Board's conclusions and Order, are set forth below.

I. PROCEDURAL HISTORY

A. The Representation (Election) Proceeding

The Company is engaged in the retail sale of food, snacks, health and beauty aids, cleaning supplies, family apparel, housewares, and seasonal items. (A. 1; 9, 405.) Its Auxvasse, Missouri store employs 6 sales associates. (A. 121; 58, 135.)

In early November 2017, Adam Price, a part-time lead sales associate at the Auxvasse store, became dissatisfied when the Company decreased his, and three coworkers, work hours. (A. 326-27). Because of his dissatisfaction, he contacted

the Union's organizing director, Billy Myers, who advised Price to gauge interest in unionization among his coworkers. (A. 235-36, 306-07, 325-27.) Over the next few days, Price spoke with the three coworkers whose hours had been reduced about the possibility of unionization. (A. 325-27.)

On November 14, 2017, after Myers met briefly with employees to solicit signatures on union-authorization cards, the Union filed an election petition, seeking to represent a unit of sales associates employed at the Company's Auxvasse store. (A. 2, 118-19; 157.) The parties reached a Stipulated Election Agreement, which was approved by the Board's Region 14 on November 24. (A. 118; 405-07.) An election was conducted on December 8, and the Union prevailed by a 4-2 vote. (A. 118; 404-07.)

Based on complaints of coercion from two unit employees, the Company filed objections to the election alleging that, prior to the election, Price and/or Myers had threatened employees, made false and deceptive statements to employees, engaged in impermissible electioneering, and improperly interfered with the election by creating an atmosphere of fear and coercion. (A. 119; 191-93, 399-402.) The Acting Regional Director ordered that a hearing be conducted regarding the Company's objections, and a hearing was held on January 3, 2018. The Acting Regional Director subsequently reopened the record in response to an

allegation by the Company of witness tampering at the January 3 hearing, and a second hearing was held on February 1 to explore that allegation. (A. 119.)

The Hearing Officer issued his report on February 8, in which he recommended rejecting all the Company's objections. (A. 118-34.) On March 23, the Acting Regional Director adopted the Hearing Officer's recommendations and issued a Decision and Certification of Representation, designating the Union as the exclusive bargaining representative of the Company's Auxvasse sales associates. (A. 75-83.) The Company filed a request for review of that Decision and Certification, which the Board denied on June 21. (A. 13, 15-76.)

B. The Unfair-Labor-Practice (Failure-to-Bargain) Proceeding

Following the Union's certification, the Company refused the Union's requests to bargain. (A. 5, 10-11.) Based on a charge filed by the Union, the General Counsel issued a complaint alleging that the Company had unlawfully refused to recognize and bargain with the Union. (A. 9-12.) Thereafter, the General Counsel filed a motion for summary judgment, and the Board issued a Notice to Show Cause why the Board should not grant that motion. (A. 1.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On December 11, 2018, the Board (Members McFerran, Kaplan, and Emanuel) issued its Decision and Order, granting the General Counsel's motion for summary judgment and finding that the Company's refusal to recognize and

bargain with the Union violated Section 8(a)(5) and (1) of the Act. (A. 1-3.) The Board concluded that all representation issues raised by the Company in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that the Company neither offered to adduce at a hearing any newly discovered or previously unavailable evidence, nor alleged the existence of any special circumstances that would require the Board to reexamine its decision in the representation proceeding. (A. 1.)

To remedy the unfair labor practice found, the Board's Order requires the Company to cease and desist from refusing to recognize and bargain with the Union or, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (A. 2.) Affirmatively, the Board directed the Company to bargain with the Union upon request and, if an understanding is reached, to embody that understanding in a signed agreement. It further ordered the Company to post a remedial notice. (A. 2.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize or bargain with its employees' duly certified Union. The Company admittedly refused to recognize and bargain to challenge the Board's certification of the Union. That challenge,

however, fails because in the underlying representation proceeding, the Board reasonably concluded that the Company failed to meet the heavy burden necessary to overturn the employees' vote for union representation. It pursues only two of its objections before the Court and each is without merit.

First, the Company failed to demonstrate that a threat allegedly made by employee Adam Price, even assuming it occurred, happened within the "critical period" between the representation petition and the election. The Board thus overruled the Company's objection based on its long-standing, court-approved rule, pursuant to which pre-petition conduct is generally insufficient to warrant setting aside an election. The Company's challenges to the factual finding that any threat, if made, was outside the critical period fail because that finding was based on well-founded credibility determinations, and the Company cannot meet the high bar for rejecting such determinations by the factfinder. In addition, the Court does not have jurisdiction to consider the Company's challenges to the Board's critical-period rule and application of that rule in this case, which were never presented to the Board. The rule is, in any event, a reasonable exercise of the Board's expertise and role in managing representation elections, and the rare cases finding exceptions to the rule are materially distinguishable.

Second, the Company also failed to prove that an offer of cash made by Price to coworker Joanna Durlin constituted objectionable conduct. To start, the

Board reasonably found that the more stringent standard applicable to assessing alleged pre-election misconduct by third parties applied to this objection because the Company fell far short of demonstrating that Price was an agent of the Union. Establishing agency requires a showing that the Union engaged in conduct that would have reasonably led others to believe Price was its agent. The Company erroneously focuses on the conduct of Price himself, which cannot establish agency and, in any event, shows at most that he was an ardent union supporter who invited the Union to organize the Auxvasse sales associates—not a union agent. The Board further reasonably rejected the Company's allegation that Price offered Durlin money in exchange for her vote. The credited testimony amply demonstrates that Price's offer was unconditional, not linked to Durlin's union support or vote, and thus unobjectionable. Once again, the Company's challenge to that finding relies on successfully disputing the factfinder's credibility determinations and it fails to do so. And, finally, the Company's reliance on cases where unions or union agents offered benefits before elections, or where benefits were explicitly offered in exchange for union support, are all materially distinguishable from the unconditional, third-party offer at issue here.

STANDARD OF REVIEW

To the extent the Board's decision turns on its factual findings, those findings are to be treated as conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951); *NLRB v. MDI Commercial Servs.*, 175 F.3d 621, 625 (8th Cir. 1999). As a result, this Court will not "displace the Board's choice between two fairly conflicting views" in a particular case, "even though the court would justifiably have made a different choice had the matters been before it de novo." *NLRB v. Metal Container Corp.*, 660 F.2d 1309, 1313 (8th Cir. 1981). Rather, the Board's decision "may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view." *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 771 (D.C. Cir. 2012) (quotation marks and citation omitted).

Of particular relevance in this case, determinations of witness credibility are "within the sound discretion of the trier of facts and should be reversed only in extraordinary circumstances." *Porta-King Bldg. Sys. v. NLRB*, 14 F.3d 1258, 1262 (8th Cir. 1994) (citation and internal quotation marks omitted). Accordingly, the Court will not overturn the Board's credibility determinations "unless they shock the conscience." *NLRB v. RELCO Locomotives*, 734 F.3d 764, 787 (8th Cir. 2013).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION

Section 7 of the Act grants employees the right to choose a representative and to have that representative bargain with their employer on their behalf. 29 U.S.C. §157. Employers have a corresponding duty to recognize and bargain with their employees' chosen representative and refusal to do so violates Section 8(a)(5) of the Act. 29 U.S.C. § 158(a)(5). Moreover, an employer who violates Section 8(a)(5) also violates Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights . . . ." 29 U.S.C. § 158(a)(1); *St. John's Mercy Health Sys. v. NLRB*, 436 F.3d 843, 846 (8th Cir. 2006).

Here, the Company has admittedly refused to recognize or bargain with the Union. In its defense, the Company challenges the validity of the Union's certification as bargaining representative, arguing that the Board erred by overruling two of the Company's election objections, one based on an alleged threat and the other on an alleged bribe.[2] As we now show, the Board reasonably

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[2] In its brief, the Company does not challenge the Board's decision to overrule its other six election objections. Issues "not meaningfully argued in an opening brief are waived." *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 634 (8th Cir. 2007); *see also Cintas Corp. v. NLRB*, 589 F.3d 905, 916 (8th Cir. 2009); *accord* Fed. R.

overruled those objections. Because the Company provided no basis for setting aside the election, it violated Section 8(a)(5) and (1) by refusing to recognize or bargain with the Union, and the Board is entitled to enforcement of its Order.

A. An Employer Challenging Its Employees' Election of a Union as Their Representative Bears the Heavy Burden of Proving that Alleged Misconduct Interfered with the Employees' Free Choice

In evaluating alleged pre-election misconduct, this Court applies "a strong presumption that [the election] reflects the employees' true desires regarding representation." *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997). As a result, Board-supervised representation elections "are not to be set aside lightly," and the party seeking to set aside such an election "carries a heavy burden." *Millard Processing Servs.*, 2 F.3d at 261. To meet that burden, the objecting party must "'show by specific evidence not only that improprieties occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the election results.'" *Id*. (quoting *Beaird-Poulan Div., Emerson Elec. Co. v. NLRB*, 649 F.2d 589, 592 (8th Cir. 1981)).

Overturning a representation election requires an especially compelling showing where the alleged improprieties involve employee (third-party) conduct,

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App. P. 28(a)(8) (opening brief must contain the appellant's contentions and the reasons for them).

rather than the conduct of the union or the employer. As this Court has explained, "unions and employers cannot prevent misdeeds by persons over whom they have no control," *Millard*, 2 F.3d at 261, and conduct that is not attributed to the union or employer is less likely to affect the outcome of an election. *Deffenbaugh Indus.*, 122 F.3d at 586. Thus, an election will be set aside for such third-party misconduct only if that misconduct was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); *accord Millard Processing Servs.*, 2 F.3d at 261. The effect of alleged misconduct is evaluated objectively, from the perspective of a reasonable employee. *NLRB v. Downtown Bid Servs. Corp.*, 682 F.3d 109,116 (D.C. Cir. 2012). And "while the size of the unit and the closeness of the vote may be relevant considerations in determining whether free choice was interfered with, neither fact is sufficient to raise a presumption that the conduct had an impact on the election results." *NLRB v. Browning-Ferris Indus. of Louisville, Inc.*, 803 F.2d 345, 349 (7th Cir. 1986) (citation omitted); *accord Deffenbaugh Indus.*, 122 F.3d at 586 ("closeness of the election may also be considered, but it is not the determining factor") (citation omitted).

The Board, moreover, generally will not consider alleged improprieties occurring outside the "critical period" prior to an election—that is, the period beginning with the union's filing of an election petition and ending with the

election. *Ideal Elec. & Mfg. Co.*, 134 NLRB 1275, 1278 (1961). Courts have endorsed the Board's critical-period rule as a "convenient device to limit the inquiry to the period near the election when improper acts are most likely to affect the employees' freedom of choice." *Amalgamated Clothing & Textile Wkrs. v. NLRB*, 736 F.2d 1559, 1567 (D.C. Cir. 1984); *see also, e.g.*, *Uniroyal Tech. Corp. v. NLRB*, 98 F.3d 993, 996-97 (7th Cir. 1996) (applying Board's critical-period rule); *Randall, Burkart/Randall Div., Textron, Inc. v. NLRB*, 638 F.2d 957, 960 (6th Cir. 1981) (same); *NLRB v. Claxton Poultry Co., Inc.*, 581 F.2d 1133, 1135 (5th Cir. 1978) (same); *cf. NLRB v. Earle Indus.*, 999 F.2d 1268, 1272 (8th Cir. 1993) (rejecting allegation of "critical period misconduct"). Accordingly, absent "extremely unusual circumstances," conduct occurring before the critical period—i.e., before the election petition was filed—cannot serve as the basis for setting aside an election. *Amalgamated Clothing & Textile Wkrs.*, 736 F.2d at 1567; *see also Pac. Coast M.S. Indus. Co.*, 355 NLRB 1422, 1443 (2010) (distinguishing as exceptions to rule cases involving financial incentives for union support or particularly egregious conduct and applying rule to bar consideration of "isolated solicitation of an authorization card"); *Randall, Burkart/Randall Div. of Textron*, 638 F.2d at 960 (Board will consider pre-petition conduct "when there is significant post-petition conduct related to or continuing from pre-petition events").

B. The Board Reasonably Overruled the Company's Objection Based on an Alleged Threat by Employee Price

1. The credited evidence supports the Board's finding that even assuming employee Price made the alleged threat, he did so outside the critical period

In its first objection, the Company alleged that Price unlawfully threatened to slash the tires of anyone who did not vote in favor of the Union. Specifically, both before and after the election, the Company had received reports from employee Jennifer Miles that Price had made such a threat while attending a party at her house.[3] Consistent with its critical-period rule, the Board reasonably overruled the Company's objection. As demonstrated below, substantial evidence supports the Board's finding that the Company failed to demonstrate that if Price made such a threat, he did so during the critical period.

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[3] Human Resources Vice-President Kathleen Reardon credibly testified that Miles approached her on December 4 to ask how to pull a union-authorization card. Miles then backtracked, asserting that Price would slash her tires if he learned that she no longer supported the Union, and stated that she would simply vote against the Union in the upcoming election. (A. 121; 190.) Immediately following the December 8 election, employee Joanna Durlin, who was visibly upset and crying, complained to Reardon that she and Miles had "felt pressured" to vote for the Union and wanted to change their votes. (A. 122; 191.) When Reardon spoke to the two employees, Durlin stated that she had been promised $100 to vote for the Union (discussed below, pp. 42-46), and Miles cited pressure from Price and Myers, reiterating Price's alleged threat to slash her tires. (A. 122; 193.) At Reardon's request, each employee subsequently wrote a statement memorializing her allegations. (A. 121-22; 194-98, 419, 421.)

As the Board found (A. 79-80, 122-23), Miles claimed that Price made the alleged threat at a "coming together party of people that signed cards" at her house (A. 219). It is undisputed in the record, and the Company does not contest, that if Price made the threat, he did so at Miles' party. And the credited evidence further demonstrates that employee Price only ever attended one gathering at employee Miles' house. (A. 341-42.) That party was on November 11, three days before the Union's November 14 representation petition started the critical period. (A. 331, 157.) Based on those facts, the Board reasonably declined to overturn the election based on the alleged threat. *See Ideal Elec.*, 134 NLRB at 1277-78.

In finding that the gathering at issue occurred on November 11, the Hearing Officer explicitly credited Price, the only witness to provide any testimony as to the exact date of the party, over Miles, who thought it had occurred weeks later.[4] In support of that credibility determination, the Hearing Officer noted that Price was able to pinpoint the date as November 11 by examining his text messages during the hearing. Price found a text message from Miles inviting him to a bonfire at her home that day. Price also credibly testified that the November 11 gathering was the only time he had been in Miles' home. (A. 80; 331.) Finally,

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[4] The Hearing Officer's report correctly identifies the date as November 11 when discussing and crediting Price's testimony (A. 122-23) but later erroneously states that the gathering occurred on November 8 (A.124). The Acting Regional Director correctly clarified that the gathering occurred November 11. (A. 80; 331.)

the Hearing Officer noted (A. 123) that November 11 was a more plausible date for a party of card-signers than the times suggested by Miles because it was "much closer" to when the employees signed cards.[5]

By contrast, the Hearing Officer found Miles' testimony vague and unconvincing overall, and specifically with respect to the party date, which he found would naturally stand out more than a "non-descript work day that would easily blend with many others." (A. 122.) As the Hearing Officer noted, Miles could not recall the date of her party—she gave only a "general timeline," and a shifting one at that. (A. 122; 219-20, 227-28, 234.) For example, while Miles initially testified that the gathering was "maybe two weeks" prior to the election, she admitted when pressed that she was "not sure of the timeline" because "[e]verything happened so quickly." (A. 219.) Nor could she place the party either before or after the Thanksgiving holiday (November 23), a memorable day in that time period. She later narrowed the time frame down to one week before

[5] Moreover, although the Hearing Officer did not cite this principle, the Board and courts consider particularly reliable the testimony of current employees testifying against their employer's interests, as Price was here, because "these witnesses are testifying adversely to their pecuniary interest." *Flexsteel Indus.*, 316 NLRB 745, 745 (1995), *enforced mem.*, 83 F.3d 419 (5th Cir. 1996); *see also Shop-Rite Supermarket*, 231 NLRB 500, 505 n.22 (1977) (testimony of current employees that is adverse to their employer is "given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false").

the December 8 election, or after she volunteered to serve as the Union's election observer on November 27. (A. 219-20.)

In crediting Price over Miles, the Hearing Officer also relied (A. 123) on his observations of the demeanor of both witnesses, a factor which is afforded "particular weight." *Beaird-Poulan Div., Emerson Elec.*, 649 F.2d at 592-93. While Price was calm, self-assured, and answered questions from both counsel in a "deliberate and non-evasive manner," the Hearing Officer found Miles "much more evasive, vague, and on occasion argumentative with opposing counsel." (A. 123.) He cited, for example, Miles' responses when union counsel asked about her failure to block text messages that she later described as harassing and probed whether Miles knew how to block texts. Instead of answering the latter question, Miles challenged the attorney, "Is that sarcasm?" (A. 233.) In addition, the Hearing Officer highlighted that, contrary to record evidence, "Miles refused to admit she frequently participated" in the purportedly harassing text exchanges among a group of unit employees and union representative Meyers during the campaign. (A. 232.) In fact, Miles was the most active participant in the group, sending more than double the number of text messages Price sent and, at times, initiating the group's exchanges. (A. 425-61).

2. The Company's Argument that Price's Alleged Threat Occurred During the Critical Period Depends on Rejecting the Factfinder's Well-Founded Credibility Determinations

To challenge the Board's finding that any threat by Price occurred outside the critical period, the Company must persuade this Court to reject the factfinder's credibility determinations. The Company does not come close to showing that those determinations "shock the conscience," however, as it must for the Court to disregard them. *RELCO Locomotives*, 734 F.3d at 787 (8th Cir. 2013).

With respect to the decision to credit Price, the Company spills much ink (Br. 18-24) debating the date the employees signed union-authorization cards, which does not affect the Board's finding. The Company emphasizes that the Hearing Officer relied, in part, on the rationale that it would be more likely for Miles to have a party for card signers *after* signing, whereas there is evidence that the party happened two days *before* signing. But, as the Hearing Officer explained, his focus was the proximity of the party date to the card signing—he found it more likely for employees to gather to celebrate "much closer" to when they signed the cards, "not a month or so after." (A. 123.) While he later described the party as "a few days after" the card signing, the general-proximity point is still valid even if he mistook the precise order of events. If the cards were signed two days after the party, it is, as the Acting Regional Director subsequently reasoned, "just as likely that the party was intended to be coming together of those

employees who intended to sign cards." (A. 79.) The Company fixates on the Hearing Officer's purported factual error regarding the order of events but offers no explanation for why employees would have united specifically to celebrate card signing weeks after the signing (and petition), shortly before the election.

The crux of this aspect of the Hearing Officer's analysis—that it is more likely for Miles to have thrown a party for card signers on a date that was close to the signing of the cards, rather than weeks later as Miles stated—holds true regardless of whether the cards were signed on November 8 or November 13. Thus, the Company's assertion that "the Regional Director disposed of [the Company's] objection by contriving a different rationale" is spun from whole cloth. To the contrary, the Acting Regional Director simply rejected the Company's argument that adjusting the signing date of the cards by 5 days would undermine the Hearing Officer's credibility determination that the party was held November 11. In any event, as described above, the proximity of November 11 to the card signing was only one reason the Hearing Officer provided for his credibility determination, and the Company's arguments regarding the other reasons are also unpersuasive.

As the Hearing Officer noted, Price's account was also believable because he had a text message pinpointing the date of the party he attended at Miles' house as November 11. (A. 123.) The Company is grasping at straws by asking this

Court to reject that evidence because the text message Miles sent Price inviting him to the gathering "said nothing about a meeting to discuss union issues," which is how Price later described the gathering in his testimony. (Br. 21.) The Company goes so far as to assert that the invitation "cannot plausibly be read" as describing the party at which the alleged threat occurred. (Br. 21.) But of course it can: Price testified that he had never attended any other gatherings or otherwise been in Miles' home. And Miles, who wrote the text, did not testify that Price threatened her at a union meeting; she described a "party" for union supporters—it is certainly plausible that she planned a celebration and Price took the opportunity to discuss the Union while there, which could explain his later characterization of the evening.

As a curious and last-ditch effort to undermine the Hearing Officer's decision to credit Price, the Company argues that Price's testimony should not be believed because he allegedly intimidated employee Joanna Durlin on the day of the objections hearing, purportedly "confirm[ing] the pattern of Price's threatening behavior during the campaign." (Br. 45.) In response to that allegation, the Board reopened the record and gave the Company the opportunity to present supporting evidence. It failed to do so. Rather, Durlin testified that, while she was sitting outside the hearing room during the first hearing, she overheard Price tell another employee that the witness-sequestration order was futile because Price would later

get access to the hearing transcript through the Union. At the time of his statements, he and the person he was talking to were seated on the opposite side of the waiting area from Durlin. (A. 82, 131-32.)

As the Hearing Officer and Acting Regional Director found, Price's remarks are best "characterized as a misunderstanding of the purposes of sequestration," which is intended to prevent witnesses from adjusting their testimony based on the accounts of other witnesses. (A. 132.) *See Marcus Mgmt.*, 292 NLRB 251, 264 n.8 (1989) (purpose of witness sequestration is to present "individual and unprompted versions of the events in question"); *accord United States v. Vallie*, 284 F.3d 917, 921 (8th Cir. 2002) ("purpose of sequestration is to prevent witnesses from tailoring their testimony to that of prior witnesses"). Specifically, the Hearing Officer found that "two employees were essentially complaining that [the Hearing Officer] had not allowed them to be present in the hearing room" and commented that the order "made no sense in their eyes [because] they [would] eventually be able to see a transcript of the testimony." (A. 132.) In other words, Price's comment was based on a misunderstanding rather than a deliberate attempt to violate the sequestration order, much less threaten other witnesses, and it was part of an amicable conversation with another employee, not directed at Durlin at all. As such, the Hearing Officer reasonably concluded that the innocuous comment did not impact Price's credibility. (A. 132.)

The Company's challenges to the Hearing Officer's reasons for discrediting Miles' account of Price's alleged threat are equally unavailing. To start, its argument (Br. 23) that the transcript does not support the Hearing Officer's observation that Miles' was argumentative when she challenged union counsel's question about blocking texts merely illustrates why a reviewing court cannot, based on the dry transcript of a hearing, easily assess the factfinder's observations, which are based not only witnesses' words but also on tone, body language, and facial expressions. *See Shen Lincoln-Mercury-Mitsubishi, Inc.*, 321 NLRB 586, 589 (1996) (deference is owed to demeanor-based credibility determinations because fact finder "'sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records'") (quoting *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962)); *accord Stanley v. Henderson*, 597 F.2d 651, 653 (8th Cir. 1979) (deference to factfinder especially appropriate in cases "primarily based upon oral testimony and where the [factfinder] had an opportunity to view the demeanor and credibility").

The Company's further argument (Br. 24-25), that the Hearing Officer's rationale for discrediting Miles' testimony about Price's threat is contrary to *International Longshoremen's Assn.*, 366 NLRB No. 20 (Feb. 20, 2018), is also misguided. There, a judge discredited a female witness who had allegedly suffered physical and sexual harassment in the workplace because, in his view, the witness

would not have "meekly allowed" the harassment. He based his credibility determination on his impression that the witness was a "tough woman" who performed manual labor "on the docks" and had previously been employed as a truck driver in Iraq. 366 NLRB No. 20, slip op. at 3. Setting aside the plain factual distinctions between her situation and that of Miles, the Hearing Officer's assessment of Miles's credibility is not analogous to the judge's rejected rationale. The Hearing Officer did not find Miles' testimony about the alleged threat less believable because she did not stop engaging in, or affirmatively block, the group texts. Instead, he cited as examples of her evasive and argumentative demeanor that she "refused to admit she frequently participated in these group texts in spite of the record showing otherwise" (A. 123) and was argumentative when questioned about whether she knew how to block texts. *See Budrovich Contracting Co.*, 331 NLRB 1333, 1339 (2000) (upholding credibility determination based on judge's observation that witness was "evasive in his responses, self-serving, and/or unduly protective of the Respondent and, consequently, his testimony was lacking in candor and forthrightness"), *enforced*, 20 F. App'x 596 (8th Cir. Oct. 15, 2001).

Nor, contrary to the Company's suggestion, did the Hearing Officer or Acting Regional Director implicitly credit Miles's testimony that Price actually made the threat because they were "unwilling to reject" her testimony. (Br. 22.)

The Hearing Officer explicitly stated that Price "credibly denied" making the threat and he generally credited "the testimony of Price over that of Miles." (A. 122.) But he ultimately found it unnecessary to make a credibility determination regarding the threat itself—whether it was made and, if so, what it entailed—given that the party where it allegedly occurred was outside of the critical period. The Company's contrary assertion amounts to nothing more than conjecture.

The Company further speculates (Br. 22) that Miles "had absolutely no motive to invent such a story," so the only conceivable reason Miles might have disavowed her vote immediately after the election was "pressure and threats" from the Union. That assumption ignores that employers and unions are both capable of interfering with employee free choice. While there is no allegation that the Company unlawfully interfered with the election, the Company's Vice-President of Human Resources, Reardon, who was based out of an office 400 miles away and responsible for all of the Company's 14,000-plus stores, arrived at the Auxasse store "a day or two after the petition was filed." (A. 174-76.) She remained at the store until the election, "cleaning windows" and "stocking product[s]." (A. 181, 190.) Her presence did not go unnoticed. Indeed, in the group text exchange, Price remarked that the store was "crawling with management executive vice president HR people," (A. 438), and Miles herself characterized the increased management presence as "odd" and "really weird." (A. 425-26.) While Reardon

testified that she was at the Auxvasse store every day "to be available for the employees should they have questions" (A. 202), it defies common sense for the Company to argue that the only plausible explanation for Miles' change of heart is *union* interference.

In essence, the Company implores the Court to discard the factfinder's credibility determinations in favor of an alternative interpretation of the testimony. That, of course, is not the role of the Court, as it is "for the [B]oard to make credibility determinations." *York Prods., Inc. v. NLRB*, 881 F.2d 542, 544 (8th Cir. 1989). More fundamentally, cases like this one, in which there is conflicting testimony, are those where "essential credibility determinations [must] be[] made," *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 965 (4th Cir. 1985), and where deference to the Board and judge is most appropriate. *See Porta-King Bldg. Sys. v. NLRB*, 14 F.3d 1258, 1262 (8th Cir. 1994).

3. The Company's challenge to the Board's application of *Ideal Electric* is jurisdictionally barred and is, in any event, without merit

There is no merit to the Company's contention (Br. 25-28) that the Board erred in its "mechanical" application of *Ideal Electric*, which establishes that misconduct before a representation petition is filed is insufficient to set aside the ensuing election except in rare cases. 134 NLRB 1275, 1278 (1961). As a threshold matter, the Company did not argue before the Board that the decisions

below had misapplied *Ideal Electric* or that the narrow exceptions to the critical-period rule should apply. In fact, the Company did not even cite *Ideal Electric* in its request for review of the Acting Regional Director's Decision and Certification, or in its brief in support of its exceptions to the Hearing Officer's report. Rather, the Company limited its arguments to challenging the Hearing Officer's factual determination that the gathering where Price allegedly issued a threat took place prior to the filing of the petition. Thus, the Court is jurisdictionally barred from considering the Company's challenge to the Board's application of *Ideal Electric*. S*ee* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. Cornerstone Builders, Inc.*, 963 F.2d 1075, 1077 (8th Cir. 1992). Moreover, because "points not meaningfully argued in an opening brief are waived," *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 634 (8th Cir. 2007), the Company has forfeited any potential argument that extraordinary circumstances warrant a departure from this jurisdictional bar.

In any event, the Board's application of *Ideal Electric* in this case conforms to precedent. While the Board and courts have recognized departures from the critical-period rule, they are limited to "extremely unusual circumstances."

Amalgamated Clothing & Textile Wkrs., 736 F.2d at 1567. Thus, in *Amalgamated Clothing*, the court reasoned that multiple anonymous pre-petition threats to anti-union employees, including one that there were "5 sticks of dynamite for [the recipient's] house" and another that "something bad is liable to happen to your truck," were insufficiently egregious to warrant an exception to *Ideal Electric*. *Id.* Conduct that the Board or courts have found warranted an exception to the critical-period rule, including in the cases cited by the Company, tends to fall into a few narrow categories, which would not apply here even if Price made the threat as alleged.

One exception to *Ideal Electric*, developed in response to *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973), involves union agents' solicitation of the union-authorization cards supporting an election petition using threats of job loss or unlawful promises of benefits. *See e.g.*, *Lyons Rests.*, 234 NLRB 178, 179 (1978) (union warned employees they would not work for employer if they did not sign authorization cards); *Gibson's Discount Ctr.*, 214 NLRB 221, 221-22 (1974) (union solicited authorization cards with unlawful promise to waive union-initiation fees). Thus, while the Company is correct that in *NLRB v. R. Dakin & Co.*, 477 F.2d 492, 494 (9th Cir. 1973), the Ninth Circuit disapproved of the *Ideal Electric* rule, that decision pre-dated both the Supreme Court's *Savair* decision and the Board's subsequent recognition that the critical-period rule could be suspended

in exceptional circumstances. The *R. Dakin* Court's concern—that the rule, as then applied by the Board, "flatly bar[red] the consideration of all pre-petition misconduct," without exception—has been resolved. *NLRB v. Lawrence Typographical Union*, 376 F.2d 643, 652 (10th Cir. 1967), which the Company also cites (Br. 26), also preceded *Savair*, but the court's rationale—that the effects of an employer's pre-decertification-petition bribe could linger into the critical period—is consistent with the Supreme Court's and the Board's later rationale respecting similar pre-petition misconduct by unions. 376 F.2d at 652 (rejecting application of *Ideal Electric* to bar consideration of employer's offer of super-seniority to strike replacements).

The Company's reliance (Br. 26-27) on *Catholic Medical Center of Brooklyn & Queens v. NLRB*, 589 F.2d 1166, 1172 (2d Cir. 1978), is similarly misplaced. There, the court assumed the validity of the *Ideal Electric* rule but highlighted that it "was faced with the narrower question" of *Ideal Electric*'s application to alleged misconduct that occurred "during the pendency of a petition for election subsequently withdrawn and shortly replaced. *Id.* Specifically, the court considered the effect on the election of alleged authorization-card solicitation by pro-union supervisors. The Board has since recognized that alleged *supervisory* misconduct, particularly involving card solicitation, may also warrant an exception to the critical-period rule. *See Harborside Healthcare, Inc.*, 343 NLRB 906, 912

(2004) (supervisor's pre-petition coercion may carry through post-petition campaign because his inherent authority over employees is ongoing).

Other exceptions to the critical-period rule have involved pre-petition conduct particularly likely to have effects lingering into the critical period due to the egregious or repeated nature of the conduct, sometimes even into the critical period. *See, e.g.*, *NLRB v. L&J Equip.*, 745 F.2d 224, 237 (3d Cir. 1984) (court found pre-petition arson that destroyed the truck of an employee who opposed union "inextricably linked" to arson during critical period); *Willis Shaw Frozen Food Express, Inc.*, 209 NLRB 267, 268 (1974) ("series of abhorrent acts" including shootings, stabbings, and assaults was extreme enough for effects to persist). Even assuming that Price made the threat the Company claims that he made, which has not been established, his conduct plainly falls far short of the types of "abhorrent acts," repeated or renewed threats, supervisory misconduct, and coercive card solicitation that the Board and courts have recognized as exceptions to *Ideal Electric*.

The Company also argues, for the first time, that the critical-period rule leads to "absurd results." (Br. 26.) But because the Company never raised that challenge before the Board, the Court lacks jurisdiction to consider the argument. 29 U.S.C. § 160(e); *see also supra*, pp. 26-27. In any event, the Company's argument conveniently ignores that it is for the Board, which has overseen

representation elections for decades, to establish appropriate procedures. As the Supreme Court recognized, Congress gave the Board a "wide degree of discretion" to establish the "safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *accord Warren Unilube, Inc. v. NLRB*, 690 F.3d 969, 974 (8th Cir. 2012). Based on considerations of equity and orderly administration of the Act, the Board has consistently held for 58 years that misconduct occurring before the filing of a representation petition will generally not be considered as a basis upon which to set aside an election. The Company describes the election-petition cut-off as arbitrary (Br. 25-26) and cites examples of critical-period conduct more remote from the election than the pre-petition conduct here, *see, e.g.*, *Wilkinson Mfg. Co. v. NLRB*, 456 F.2d 298 (8th Cir. 1972); *NLRB v. Van Gorp Corp.*, 615 F.2d 759, 764 (8th Cir. 1980). But it fails to acknowledge the benefits of a clear presumptive definition of the critical period during which the Board will scrutinize an election campaign. There is an unmistakable logical link between the filing of a representation petition and the start of intense campaigning. Conversely, the foreseeable downsides (in terms of efficiency and finality) of requiring the Board to stringently evaluate any alleged misconduct no matter how distant from an election, or to engage in a fact-intensive analysis to set the cut-off in each case are also apparent.

Finally, even if the Court disagrees with the Board's application of *Ideal Electric*, the Company's argument that this Court should make the factual finding that the threat occurred and, therefore, "can and should render judgment" for the Company, borders on absurd. (Br. 44-45.) As described above, because the Board dismissed the objection as based on conduct outside the critical period, it did not make a factual finding as to whether the threat was made or, if it was, exactly what was said or under which circumstances. It is impossible without further factfinding to know, for instance, whether the statement Price allegedly made while drinking at a social gathering was "made in a serious manner," as the Company asserts. (Br. 39.) The Company's extended discussion (Br. 40-44) of how the legal standard for non-party conduct might apply to the alleged threat as the Company describes it is entirely irrelevant in the absence of such baseline facts. Its further argument (Br. 38-40) purporting to apply the party-misconduct standard to nonexistent "facts" is even more off-point, given the Board's finding that Price was not a union agent. There is, in sum, nothing for the Court to assess at this juncture. The Court does not make factual determinations so, in the event the Court concludes the Board incorrectly applied the law, remand would be appropriate. *Beverly Enters.-Minn. v. NLRB*, 266 F.3d 785, 789 (8th Cir. 2001).

C. The Board Reasonably Overruled the Company's Objection Based on Price's Unconditional Offer of Money to a Coworker

In its second objection, the Company alleged that, Price, acting as an agent of the Union, unlawfully offered to pay $100 to any employee who voted for the union; before the Court, the Company argues only that Price made such an offer to employee Joanna Durlin. Substantial evidence, however, supports the Board's finding that employee Price was not a union agent. Accordingly, the third-party standard applies to the Company's objection regarding his offer of money to employee Joanna Durlin, which cannot be attributed to the Union. Ample evidence also supports the Board's finding that because the offer was unconditional, it was not objectionable.

1. Price was not a union agent

As an initial matter, the Board reasonably found that the Company failed to prove Price was a union agent. The Company does not argue that Price had actual authority to act on behalf of the Union. Rather, it claims that he had apparent authority, which is "created through a manifestation by the principal to a third party that supplies a reasonable basis for the third party to believe that the principal has authorized the alleged agent to do the acts in question." *Serv. Emps. Local 87 (West Bay Maint.)*, 291 NLRB 82, 82-83 (1988) (citing *NLRB v. Donkin's Inn, Inc.*, 532 F.2d 138, 141 (9th Cir. 1976), and *Alliance Rubber Co.*, 286 NLRB 645, 646 n.4 (1987)). In other words, the principal must either intend to cause another

person to believe that the agent is authorized to act for him or undertake conduct the principal should realize is likely to create such belief. Restatement (Second) of Agency § 227 cmt. a (1958); *Carbon Fuel Co. v. United Mine Workers of Am.*, 444 U.S. 212, 213-14 (1979) (Board applies common-law agency principles). A necessary condition for apparent authority, therefore, is that there be a manifestation by the principal to a third party. *Id.* at § 8.

As the party asserting the existence of an agency relationship, the Company has the burden of proof. *Corner Furniture Discount Ctr.*, 339 NLRB 1122, 1122 (2003). Furthermore, it must prove agency in connection with each instance of allegedly unlawful conduct. Restatement (Second) of Agency § 227 cmt. a (1958); *see also Cornell Forge Co.*, 339 NLRB 733, 733 (2003) ("agency must be established "with regard to the specific conduct that is alleged to be unlawful"); *Daylan Eng'g*, 283 NLRB 803, 804 (1987) (employee agency status to solicit authorization cards "is limited to conduct connected with the solicitation"). Finally, "[w]hether an individual was a union agent is a question of fact." *Millard Processing Servs., Inc. v. NLRB*, 2 F.3d 258, 263 (8th Cir. 1993) (citation and internal quotation marks omitted); *see also NLRB v. Int'l Bhd. Of Boilermakers*, 321 F.2d 807, 810 (8th Cir. 1963) (finding Board's agency determination was supported by substantial evidence).

Substantial evidence supports the Board's finding (A. 120) that the Company failed to meet its burden: the record contained no evidence whatsoever indicating that the Union manifested any intent to vest Price with authority to act on its behalf, or that any employee would reasonably have believed that it had. The Company adduced no evidence that any union official engaged in any conduct that would have led employees reasonably to believe that Price had a special status beyond committed union supporter, much less that he was a union agent or running the Union's organizational campaign. To the contrary, after Price contacted the Union, its organizer, Myers, directed the campaign and interacted personally with the unit employees, including Durlin. As the Board detailed (A. 76-78), Myers was actively engaged with employees during the period leading up to the election, communicating with them and visiting regularly. And he made clear to employees that he had initiated the one task Price performed specifically on behalf of the Union—distributing a survey—with the intent of exploring employee preferences to develop the Union's bargaining position. (A. 447.)

The Company's challenge to the Board's finding, and argument that Price was a union agent, is flawed from the outset because it relies primarily on actions undertaken by Price himself—not on any manifestation by the Union. That turns well-established agency law on its head, as the relevant inquiry is into the principal's conduct. *See supra*, pp.32-34; *see, e.g.*, *Downtown BID Servs. Corp.*,

682 F.3d at 114 (even though many employees and the employee in question thought the employee was a union agent, the record evidence supported the finding that the union "never engaged in any conduct that would reasonably create that impression"). Accordingly, the Company's insistence (Br. 38) that "Myers never told the other employees Price was not a union agent or that Price was not authorized to speak on the Union's behalf," misses the mark: the Union was under no obligation to confirm Price's non-agent status having done nothing to suggest he was acting on its behalf.

The Company's argument (Br. 32, 35-36) that Price's level of involvement was in any way extraordinary—much less sufficient to make him a union agent for all purposes unless the Union affirmatively disclaimed agency—is refuted by even the most cursory glance at the record. As the Board explained, the "only actions on the part of Price which separated him from any other employee union supporters were that he was the employee who initially contacted the Union, and he handed out a survey to other employees designed to indicate which issues were important to them in the event of collective bargaining." (A. 120.) Even if Myers had not had an active role in introducing that survey to the employees, the distribution of literature and talking to fellow employees do not transform a union supporter into a union agent. *See Foxwoods Resort Casino*, 352 NLRB 771, 771 (2008).

Indeed, in *United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988), the Board reasoned that although an employee was one of the most prominent union supporters, solicited and collected authorization cards, set up some union meetings with other employees, and was selected by the union to serve as its election observer, there was no manifestation to employees broad enough to render the employee a general agent of the union. Even employee members of organizing committees are not, per se, agents of the union. *See Cornell Forge Co.*, 339 NLRB 733 (2003); *Advance Products Corp.*, 304 NLRB 436 (1991). Here, moreover, Price was not even the Union's only employee "contact." Myers also relied on Miles as a conduit between the Union and employees. (A. 315, 321.) For example, Miles informed Myers about management changes in the store, updated Myers on a meeting he was unable to attend, and volunteered to serve as the Union's election observer. (A. 315, 321, 426-429, 432, 437, 439, 443-44.)

The Board and courts have occasionally found unions' failure to clarify employees' non-agent status significant in assessing agency, but those cases involved situations where acknowledged union representatives were present for, or aware of, the alleged agents' misrepresentations of their own authority. For example, in *Bio-Medical of Puerto Rico*, 269 NLRB 827 (1984), two employees were found to be union agents in the absence of affirmative representations by the union where they introduced themselves as union representatives in front of the

union's organizing secretary and president, accompanied union representatives to Board proceedings, and spoke on behalf of the union at employee meetings held by the employer. *Id.* at 827-28. *See also NLRB v. Urban Tel. Corp.*, 499 F.2d 239, 243 (7th Cir. 1974) (court found where union knew of alleged threats made in its name, it was required to disclaim them to avoid responsibility for the threats). In contrast, there is no evidence that Price explicitly held himself out as a union agent or purported to speak on the Union's behalf, much less that the Union was aware of any of his alleged misconduct. It follows, of course, that the Union was under no obligation to affirmatively disclaim Price.

The Company does not advance its argument by relying on cases (Br. 31, 33-36) in which unions were largely absent from unionization campaigns, which were in turn largely run by (agent) employees. For example, in *NLRB v. Georgetown Dress*, the Fourth Circuit found that volunteer employee-members of the in-plant committee were "the union's only in-plant contact with workers." 537 F.2d 1239, 1242-43 (4th Cir. 1976). And in *NLRB v. Kentucky Tennessee Clay*, it found that employees were apparent agents of the union because they "carried out all of the organizing efforts within the facility" and were "instrumental in every step of the campaign process." 295 F.3d 436, 443 (4th Cir. 2002). But as the Fourth Circuit later stated when distinguishing that case, there was "hardly 'any participation whatsoever' by the union official responsible for overseeing the

organizing campaign." *Ashland Facility Operations v. NLRB*, 701 F.3d 983, 990 (4th Cir. 2012); *see also PPG Indus., Inc. v. NLRB*, 671 F.2d 817, 819 (4th Cir. 1982) (court found in-plant organizing committee was union's apparent agent because it operated as union's "alter ego" and handled all contact with rank-and-file employees, who had no direct dealings with union's professional staff).

Local 340, International Brotherhood of Operative Potters (Macomb Pottery), 175 NLRB 756 (1969), is similarly distinguishable. There, the Board found that a union unlawfully sought to cause the discharge of an employee for nonpayment of union dues after she had effectively revoked her union membership by informing another employee, who was a well-known union supporter, that she did not want to be a union member. *Macomb Pottery*, 175 NLRB 756, 757. In finding that the pro-union employee was a "de facto" agent of the union for purposes of accepting the revocation notice, the Board reasoned that, as the Company notes (Br. 34), the employee-agent had initiated contact with the union, helped secure authorization cards, and served as an information link between the union and employees. *Id.* But crucially, unlike here, the union in *Macomb Pottery* had not had any contact with the employee who revoked her membership. In fact, the Board highlighted that the union had deliberately "stayed away from her." *Id.* There was no evidence, moreover, that she knew of the activities of other employees who were active union supporters—her only contact with the union had

been through the employee-agent. Here, by contrast, Price was not Durlin's only—or primary—link to the Union. Durlin had extensive direct contact with the Union through Myers. For example, she actively engaged in the group's text exchange, during which she not only asked Myers questions about the election (A. 426), described her frustrations with the Company's scheduling (A. 430-31, 434), and responded to Myers' questions about other employees (A. 432, 438), but also proactively offered to help Myers with the campaign (A. 446).

In contrast to the Company's cases, here the Union actively engaged with employees in every aspect of the campaign. As the Acting Regional Director aptly noted (A. 76-77), Myers visited Auxvasse three times during the short, three-week unionization campaign. (A. 78; 319, 423.) Myers also maintained regular contact throughout the campaign with three of the four union supporters through a group text exchange, answered their questions about the election, solicited a volunteer to serve as the Union's election observer, and organized meetings with employees. (A. 77; 307-20, 426, 431, 433, 436-38, 445.) He also met separately to update an employee who had missed an informational meeting he had held with her coworkers and sent another union representative to meet with the employees in his stead when he was unavailable. (A. 78; 310-13, 319, 423.) Moreover, Myers did attempt to separately contact the one card signer who was not in the text group and

did not—contrary to the Company's assertion (Br. 37)—rely solely on Price to relay information to that employee. (A. 308, 440-41.)

While the Company faults Myers for not visiting enough and not seeking out the two unit employees who had not signed cards, it fails to acknowledge the material difference between the campaign Myers managed and the campaigns in the cases it cites. The Union, through Myers, reasonably chose to focus its efforts on maintaining the (majority) support of the four card signers and on learning what those unit employees wanted to see in a potential contract, rather than trying to convince the two non-card-signers to support the Union. Moreover, unlike in the Company's cases, there is no evidence that Myers used Price to organize the two non-card-signers on his behalf. The nature of the campaign thus also distinguishes this case from many of those the Company cites.

In sum, for the reasons discussed above, even if Price had, as the Company insists (Br. 35 page), a "leadership role" (Br. 52) among his fellow employees in the unionization campaign, that would not prove agency status with respect to his alleged misconduct, much less general agency status for all conduct. *See United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988) (Board acknowledged that employee "was a leading, if not the leading, union supporter," but stated that it had "never held . . . that such status alone is sufficient to establish" agency).

2. Price's offer to Durlin was not objectionable

Because Price was not a union agent, the Company faced, but fell far short of carrying, the heavy burden of showing that Price's offer of money to Durlin created a "general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB at 803 (1984); *accord Millard Processing Servs.*, 2 F.3d at 261. Substantial evidence supports the Board's finding that Price's offer was not, contrary to the Company's allegation, conditioned in any way on Durlin supporting or voting for the Union. In light of that finding, the Board reasonably overruled the Company's objection.

Specifically, the credited evidence shows that, around the time the petition was filed, Price offered Durlin $100 because Durlin was in a financial bind after the Company cut her hours. At the time, Durlin was a single mother going though a divorce and used her pay from the Company, which was one of her three jobs, to finance legal fees stemming from her divorce. (A. 124; 275-76, 434.) She expressed her worries to Price, crying and demonstrating significant agitation; in response, Price offered her $100. (A. 124-25; 334-35.) Durlin never accepted the offer, and Price never gave her any money. (A. 281.)

Those findings rest, in part, on the Hearing Officer's determination to credit Price's account that the offer of money was unconditional, over Durlin's that it was contingent on her voting for the Union. In assessing their conflicting testimony,

the Hearing Officer first determined (A. 124) that Price's story was more plausible because Durlin's dire financial circumstances were the only thing that set her apart from other employees (Miles and Bloom) to whom Price did not offer money. Price knew that Durlin was financially strained, especially after the Company reduced her hours. Indeed, Durlin herself explained in the group text that the Company's sudden reduction of her hours put her between "a damn rock and a hard spot." (A. 434.) Offering her money in response to her distress made sense. By contrast, there is no evidence Durlin, who participated actively in the text exchange throughout the critical period, had wavered in her union support. Accordingly, Price had no reason to offer her money to secure her vote, just as he did not offer money to Miles or Bloom.

As the Hearing Officer also noted, Price's assertion that his offer of money was not conditioned on Durlin's vote was corroborated by Miles. Notably, Miles did not testify that Price told Durlin that the $100 offer was in exchange for her vote, as Durlin claimed. Rather, Miles testified that after making the offer, Price separately told her that he had offered Durlin $100 because he did not want her financial situation to cause her to quit. He further explained that he did not want Durlin to quit because he assumed that she was planning to vote for the Union. (A. 227.) Neither Price nor Miles stated that he told *Durlin* that her union support motivated him in any way, much less made the offer contingent on Durlin's union

support or vote. The Company's argument (Br. 50-51) that Miles' testimony did not corroborate Price's because she described Price's offer as a gift rather than a loan (as he described it) is irrelevant: the key, corroborated factual finding is that, whichever it was, it was unconditional.[6]

The Hearing Officer also based his credibility determination on his assessment of Durlin's account of Price's offer as internally inconsistent, and on his observation of Durlin's demeanor, which he described as nervous, anxious, and evasive. While the Company offers (Br. 48-49) an interpretation of Durlin's testimony to address the perceived inconsistencies, the Hearing Officer's confusion is understandable. And while the Company fixates on the Hearing Officer's remark that Durlin brought tissues to the witness stand and looked as though she were prepared to cry, nothing about that observation is "bizarre." *See, e.g.*, *Northwest Pipe & Casting Co.*, 300 NLRB 726, 731 (1990) ("expression of crocodile tears" a relevant and "transparent attempt to shift blame"); *see also Shen Lincoln-Mercury-Mitsubishi*, 321 NLRB at 589 (emphasizing importance of factfinder's demeanor observations and difficulties inherent in reviewing them on cold record). The Company does not even address the example the Hearing Officer provided of Durlin's evasiveness: when asked a straightforward question

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[6] For this reason, the Company's cases (Br. 51-53) for the proposition that a loan can be a thing of value are beside the point.

about another allegedly objectionable incident, she looked at her prior written statement before answering.

The Company wastes additional ink (Br. 46-47, 50-53) relying on a litany of distinguishable cases. Thus, while the Company correctly notes (Br. 51) that "benefits substantially less than $100" have been found objectionable, its case citations involve situations in which a party (union or employer) was shown to have offered financial benefits, *see, e.g.*, *Crestwood Manor*, 234 NLRB 1097 (1978), and those benefits were either explicitly contingent upon, or could reasonably be interpreted as having been offered in exchange for, union support, *e.g.*, *Tio Pepe*, 263 NLRB 1165, 1165 n.4 (1982) (restaurant employees who controlled tip distribution promise to give greater share to others in order to induce them to vote for union objectionable); *Revco D.S., Inc. v. NLRB*, 830 F.2d 70, 72-73 (6th Cir. 1987) (Court found objectionable union agent's offer of money in exchange for employee's vote in favor of representation). This case is distinguishable on both counts: Price was not a union agent and the credited evidence firmly establishes that his offer to Durlin was unconditional. The offer was, moreover, made it in response to Durlin's breakdown over her well-known financial troubles, not in the context of soliciting an authorization card or discussing the union. (A.124, 334-35.)

Finally, the Company's argument (Br. 52) that Durlin would have felt "a sense of obligation to vote for the Union" because "Price explicitly connected his offer to Durlin's vote" is based on discredited evidence and speculation. The credited testimony establishes Price told *Durlin* no such thing. As noted above, to the extent the Company relies on Miles' testimony to support its theory of how Durlin "would have" (Br. 52) felt, Miles recounted not what Price said to Durlin but what Price said to Miles. Relatedly, the Company's contention that Durlin would believe that the offer was contingent because of Price's "leadership role in the organizing campaign" (Br. 52) is simply a repackaging of its effort to portray him as a general union agent for all purposes, which fails for the reasons discussed above (pp. 32-41).

D. Substantial Evidence Supports the Board's Finding that the Totality of Circumstances Do Not Warrant Setting Aside the Election Results

There is no merit to the Company's contention (Br. 53-54) that the totality of the circumstances alleged in the two objections before the Court warrant setting aside the election. An employer may not use a cumulative-effects argument "to turn a number of insubstantial objections to an election into a serious challenge." *Amalgamated Clothing & Textile Workers*, 736 F.2d at 1569 (quoting *NLRB v. Van Gorp Corp.*, 615 F.2d 759, 765 (8th Cir. 1980)).

Although the Company correctly notes (Br. 54) that the size of a unit and the closeness of the election—here a one-vote margin—are relevant factors in assessing the effects of misconduct on an election, "neither fact is sufficient to raise a presumption that the conduct has an impact on the election results." *NLRB v. Browning-Ferris Indus. of Louisville, Inc.*, 803 F.2d 345, 349 (7th Cir. 1986). Moreover, factual considerations such as closeness of an election "do [] not alter the objecting party's burden to prove that there has been misconduct to warrant setting aside the election in the first instance." *Consumers Energy Co.*, 337 NLRB 752, 752 n.2 (2002). Accordingly, courts have upheld elections with similarly close results. For example, in *Rosewood Care Ctr. v. NLRB*, 83 F.3d 1028, 1032 (8th Cir. 1996), this Court upheld a 26-24 vote in favor of representation after determining that threats made to one eligible voter and one noneligible voter did not create a general atmosphere of fear and coercion. *See also Eskimo Radiator*, 688 F.2d 1315, 1317, 1319-20 (9th Cir. 1982) (closeness of election is one factor in scrutinizing pre-election conduct but "not the controlling factor"; upholding 73-70 vote in favor of representation after finding threats did not create atmosphere of fear and coercion).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board

April 2019

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DOLGENCORP, LLC	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 18-3695
	*	19-1157
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	14-CA-223328
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,127 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection and is virus-free according to that program.

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Dated at Washington, DC
this 18th day of April, 2019

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DOLGENCORP, LLC	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 18-3695
	*	19-1157
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	14-CA-223328
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2019 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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this 18th day of April, 2019

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TOP STORIES

Facebook Takes Overtime Arbitration Fight to Seventh Circuit

By Porter Wells

A key issue in Facebook Inc.'s push to keep some workers out of a collective lawsuit over unpaid overtime is heading to a federal appeals court.

Disabled Worker Must Show 'But-For' Cause to Prove Bias (1)

By Patrick Dorrian and Jay-Anne B. Casuga

A former director with the New York City Department of Investigation failed to show he was demoted or otherwise discriminated against because of his hearing disability, a divided Second Circuit ruled April 18 in a case of first impression.

EEOC Is Suing Less but Collecting More at Mid-Way Point of 2019

By Patrick Dorrian

The Equal Employment Opportunity Commission is mid-way through its 2019 fiscal year, and it has sued less often but has collected more money through settlements.

DISCRIMINATION

Paraplegic Cablevision Worker's Disability Bias Claims Fail

By Patrick Dorrian

Cablevision Systems Corp. doesn't have to face trial over a paraplegic senior operator's claims that a manager targeted him for discharge because he was a "hardship," a federal judge ruled.

AIG, Other Insurers Not on Hook for $46M Job Bias Judgment

By Patrick Dorrian

An Ohio man whose $46 million job bias judgment against Republic Services Inc. and related companies was overturned on appeal can't collect from the companies' insurers, the Ohio Court of Appeals ruled April 18.

Facebook's Anti-Bias Vows May Not Kill Suit Against Advertisers

By Josh Eidelson

Facebook’s vow to block ads on its platform from being programmed to discriminate based on demographics ended a string of lawsuits against the social network, but companies that allegedly used the site to weed out older applicants for jobs aren’t off the hook yet.

WAGE & HOUR

Delivery Drivers' $4.75 Million Wage Settlement Gets Nod

By Julie Steinberg

A delivery drivers' $4.75 million collective action wage settlement, including $2.9 million in attorneys' fees and costs, got the approval of a federal judge April 17.

Kone Must Pay Elevator Apprentice's Travel Expenses

By Porter Wells

Elevator company Kone Inc. will have to reimburse an elevator constructor apprentice for travel expenses he incurred when assigned to a job site 615 miles from home, the Eighth Circuit said April 18.

HARASSMENT & RETALIATION

Houston Housing General Counsel Gets $1.9M for Retaliation Win

By Patrick Dorrian

The former general counsel for the Houston Housing Authority, who was fired for blowing the whistle on her boss, is entitled to $1.9 million, a federal judge ruled.

Weinstein's Former Companies Dismissed From Racketeer Suit (1)

By Chris Dolmetsch

Harvey Weinstein's former companies and their officers and directors were dismissed from a federal racketeering lawsuit filed by 10 women, who claim the firms and executives helped facilitate and conceal the alleged widespread sexual misconduct that led to the movie mogul's ouster.

WHISTLEBLOWERS

Workers Win Jury Verdict in Crushed-Hand Whistleblower Case

By Fatima Hussein

A manufacturing company and its owner unlawfully terminated two workers because they cooperated with a federal safety investigation after a worker's hand was crushed in a machine, a federal jury in Pennsylvania found.

STATES OF WORK

States of Work: Texas Bill Calls for Online Wage Violator List

By Chris Marr

This week's "States of Work" looks at a Texas proposal to publish a list of

employers who fail to pay workers and a new Maine law blocking employers from asking applicants about salary history.

LABOR RELATIONS

Stop & Shop Worker Says Union Harassed, Misled Him During Strike

By Andrew Wallender

A Massachusetts Stop & Shop employee said that a union official misled him during an ongoing strike by threatening he'd be fired if he ended his union membership and returned to work, according to an April 17 National Labor Relations Board filing.

Striking Stop & Shop Workers Rally Before Biden Appearance

By Adrianne Appel

Hundreds of union supporters and those eager to hear former Vice President Joe Biden rallied for striking Stop & Shop workers in a Boston parking lot April 18.

Metal Maker Excused for Stopping Union Dues Deductions: NLRB

By Robert Iafolla

A Wisconsin metal manufacturer acted reasonably when it temporarily stopped deducting and transferring union dues in light of a provision of the state's "right-to-work" law that has since been struck down by a federal appeals court, a divided National Labor Relations Board ruled.

Employers and Unions Talk Retraining, Just Not in Contracts

By Jaclyn Diaz and Andrew Wallender

Businesses and unions often talk about skills development but are increasingly failing to address retraining in collective bargaining agreements.

HEALTH CARE & BENEFITS

Argent Trust Sued Over $198M Employee Stock Plan Transaction

By Jacklyn Wille

Argent Trust Co. faces a class suit over its role in a $198 million stock transaction between Choate Construction Co. and its employee stock ownership plan.

Safeway Workers Denied Pre-Trial Win in 401(k) Lawsuit

By Jacklyn Wille

Current and former Safeway Inc. employees who challenged the JPMorgan target-date funds in the company's $1.9 billion 401(k) plan can't win their case without a trial.

SAFETY & HEALTH

Safety Hazards Tied to Farmworker's Death Result in $100K Fines

By David McAfee

A walnut company and a farm labor contractor face a combined $100,000 in fines following the death of a worker who was crushed by machinery.

ALSO IN THE NEWS

Trump Order Banning Personnel File Changes Hindering Settlements

By Louis C. LaBrecque

Disputes between federal agencies and their employees over alleged misconduct or poor performance are harder to resolve because of a policy, in place since last May, that agencies can't alter personnel files to settle the disputes.

Best Retail Sales Gain Since 2017 Brightens U.S. Growth Outlook (1)

By Reade Pickert

Retail sales in the U.S. jumped by the most since September 2017 and first-

time filings for unemployment benefits dropped to a fresh 49-year low, as a strong labor market gives American consumers the wherewithal to keep the economy chugging along.

For Job Security at the Factory, Learn How to Repair a Robot

By Nick Leiber

While jobs are being eliminated, many positions that are safer, more interesting, and pay better than the typical assembly-line assignment are being created. An advanced degree in engineering or artificial intelligence isn't required, but some training is.

In a Hot Jobs Market, Bosses Have to Train Their Low-Paid Staff

By Shelly Hagan and Carlyann Edwards

You'd need a cast of thousands to re-enact Black Friday at a Walmart store, so virtual reality comes in handy at the company's training centers. Employees get to experience a shopper stampede on their headsets, part of a widening national effort that encompasses some 7,000 workers a week.

Coastal Tech Hubs Reign, But Smaller U.S. Cities Offer an Edge

By Shelly Hagan

The San Francisco Bay Area and Boston are likely at the top of the list of U.S. regions to work for tech job seekers. But for techies interested in building the next generation of autonomous cars or supersonic jets, smaller cities may offer better opportunities.

LATEST CASES

Case: Individual Employment Rights/Contracts (Ind. Ct. App.)

Two former employees failed to show that Oakland City University and its president committed fraud in the inducement to convince them to execute their employment contracts or fired them in retaliation for reporting the misuse of public funds. They failed to plead the misrepresentation of a past or present fact. The employees' fraud claims were premised on statements of current

intentions made by OCU officers during the hiring process regarding the duration of their employment offers, and integration clauses in the parties' employment contracts precluded fraud. Further, they didn't report the alleged misuse of funds in writing as required by law, a court said. The case is Jones v. Oakland City Univ., 2019 BL 138193, Ind. Ct. App., 18A-PL-2994, 4/18/19.

Case: Labor Relations/Refusal to Bargain (N.L.R.B.)

A manufacturer of lawn maintenance equipment lawfully failed to deduct and send dues to a union after Wisconsin enacted a right-to-work law that curtailed dues checkoff. Although a federal appeals court later struck down the Wisconsin law as preempted by federal labor law, the manufacturer reasonably believed that its employees' dues-checkoff authorizations didn't conform to the new law when it stopped honoring them, the NLRB finds in a 2-1 decision. The case is Metalcraft of Mayville, Inc., 2019 BL 137005, N.L.R.B., 18-CA-178322, 4/17/19.

Case: Discrimination/Disparate Treatment (2d Cir.)

A black principal may not proceed with her claim that the Rochester City School District in New York miscalculated her "Annual Professional Performance Review" score because of her race and age. She didn't show that the negative performance evaluation, alone, adversely affected her employment conditions because her conditions were suboptimal before the evaluation and there wasn't a significant negative change in those conditions after it. The case is Atkins v. Rochester City Sch. Dist., 2019 BL 138164, 2d Cir., 18-1275-cv, unpublished 4/18/19.

Case: Individual Employment Rights/False Claims Act (S.D. Tex.)

The Houston Housing Authority owes its former general counsel a "back pay" award of $741,502, properly calculated by doubling the back pay awarded by the jury in her False Claims Act retaliation lawsuit, which arose out of a dispute with its president and CEO over the handling of a fraud investigation. Congress intended to allow FCA plaintiffs to recover double the sum required to make them whole, i.e. twice their net loss, a court said. The case is Miniex v. Hous. Hous. Auth., 2019 BL 137154, S.D. Tex., No. 4:17-00624, 4/17/19.

Case: Discrimination/Retaliation (Tex. App. 1st Dist.)

A juvenile probation officer may not proceed with his claim that Harris County, Texas didn't promote him to an intake screening supervisor position in retaliation for filing charges of race and sex discrimination with the EEOC. He didn't show that the selected candidate was significantly less qualified than he was and his claim that members of the selection committee were aware of his prior EEOC charges wasn't enough to show that the County acted in a retaliatory manner. The case is Smith v. Harris County, 2019 BL 138180, Tex. App., 1st Dist., 01-18-00247-CV, 4/18/19.

Case: Discrimination/Exhaustion of Remedies (D. Kan.)

A female former employee of a restaurant in Kansas City, Kansas, adequately exhausted her administrative remedies for her claim that she was discharged in retaliation for reporting that she was sexually harassed by a male shift manager, even though her EEOC charge didn't include the identity of the alleged harasser, the dates and times of any alleged harassment, and she didn't specify the nature of her protected activity. However, she had marked the “retaliation” box on the charge form, alleged that she “openly opposed” acts of discrimination during a limited time frame that included the period during which she purportedly made an internal harassment complaint, and the restaurant's EEOC position statement indicated that it had explored whether the plaintiff had made such a complaint and acknowledged the identity of the alleged harasser, the court said. The case is .

Case: Wage & Hour/Settlement Agreements (N.D. Cal.)

TFI International and a group of its delivery drivers showed that their nearly $5 million settlement of the drivers' claim that they are owed overtime pay due to their misclassification as independent contractors is fair and reasonable, because, among other factors, drivers will receive all of their claimed unpaid overtime pay, and the claims-release provision doesn't include claims for which the drivers never sought collective certification. The case is Flores v. TFI Int'l Inc., 2019 BL 137597, N.D. Cal., No. 12-cv-05790-JST, 4/17/19.

Case: Wage & Hour/Tip Credit (D.N.J.)

A busser and server for a New Jersey diner established that the diner failed to

give them the requisite notice under federal law for using the reduced minimum wage rate for tipped employees, because its notice only stated that it assumed unless otherwise notified that tipped employees earned the base minimum wage rate, and didn't explain that it couldn't claim a tip credit in excess of the amount they actually earned in tips. The employees must go to trial on their New Jersey claim, however, because it's unclear if the state law on tipped wages mandates the same type of notice. The case is Casco v. Ponzios RD, Inc., 2019 BL 136731, D.N.J., No. 16-2084 (RBK/JS), unpublished 4/17/19.

Case: Discrimination/Employer Status (M.D. Tenn.)

A fired female licensed physical therapist assistant may not proceed with her Title VII retaliation claim against a Tennessee nursing home because the home wasn't her "employer" for purposes of Title VII. She was actually employed by an independent contractor that provided services to the home and she didn't show that the two entities were "joint employers" given that, among other things, the contractor had the sole ability to hire, fire, and dictate her wages and benefits. The case is Nethery v. Quality Care Investors, LP, 2019 BL 137605, M.D. Tenn., 3:17-CV-00537, 4/17/19.

Case: Disability Discrimination/Discharge (E.D.N.Y)

A paraplegic network-support employee in the greater New York City area didn't show that Cablevision violated disability bias laws when it fired him for performance errors after he returned from protected medical leave, given that a manager's email questioning whether extending the employee's leave as an accommodation posed an "undue hardship" merely indicated concern about understaffing. Nor did the delay in issuing a final warning until he returned from leave show discriminatory or retaliatory intent, given that the employee knew that he would receive the warning due to his part in contributing to a network outage affecting 80,000 customers before the company knew that he would be lodging a disability bias complaint with human resources, the court found. The case is Patacca v. CSC Holdings, LLC, 2019 BL 137170, E.D.N.Y., No. 16-cv-0679 (SFJ)(ARL), 4/17/19.

Case: Discrimination/Discharge (E.D.N.C.)

The Housing Authority of the City of Wilmington, North Carolina, is entitled to

dismissal of a claim under 42 U.S.C. § 1983 by a black lead maintenance mechanic alleging that he was discharged because of his race. The mechanic's assertions that 17 of the 28 employees terminated or forced out by the Housing Authority were black, whereas the proportion of blacks in the general population of the relevant county is only 10 percent, is insufficient to give rise to an inference of discriminatory purpose, and his allegations that several black former employees of the Housing Authority protested discrimination and retaliation aren't enough to allow the conclusion that the Housing Authority plausibly acted with discriminatory intent when it fired him, the court said. The case is .

Case: Discrimination/Retaliation (E.D. La.)

A male dispatcher may proceed with his claim that St. Tammany Parish Sheriff's Department in Louisiana fired him in retaliation for complaining about a sexually hostile work environment, rather than for failing to demonstrate that he could perform essential job duties. He was fired three weeks after he complained and questions remain, including who actually made the firing decision and whether or not he had adequately performed his essential job duties. The case is Richard v. St. Tammany Par. Sheriff'S Dep't, 2019 BL 137227, E.D. La., 17-9703, 4/17/19.

Case: Disability Discrimination/Discharge (D. Kan.)

A Kansas City, Kansas, restaurant worker's disability bias claims must go before a jury, because it's unclear as to whether she quit or was fired after on-the-job injuries that she sustained in an on-the-job physical altercation with a co-worker, with whom she was romantically involved, delayed her recovery from her earlier hysterectomy. The restaurant refused to accept a note from her gynecologist indicating that the worker needed an additional week of leave to recover from urinary incontinence, advising her instead to submit a note from the workers' compensation physician or report to work, and there is evidence on both sides as to whether her termination when she did neither was voluntary, the court found. The case is Stovall v. Brykan Legends, LLC, 2019 BL 137347, D. Kan., 17-CV-2412-JWL, 4/17/19.

Case: Labor Relations/Union Dues (E.D. Wash.)

An individual who provides in-home health care services to her disabled son doesn't have a claim that a state payroll contractor deprived her of her constitutional rights when it withdrew union dues from her pay based on an electronic union authorization card that she says a union representative forged. Although the contractor was the instrument in directing payments, the state determined from whom the contractor would receive the necessary information, and the state ultimately withheld the funds by directing the contractor to process information as provided by the union. The case is Ochoa v. Serv. Emps. Local 775, 2019 BL 133784, E.D. Wash., No. 2:18-CV-0297-TOR, 4/15/19.

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From: Employment Law360
To: Ring, John
Subject: Judge Won"t Sanction MoFo Atty Fired At 8 Months Pregnant
Date: Friday, April 19, 2019 3:50:00 AM

EMPLOYMENT

Friday, April 19, 2019

TOP NEWS

Judge Won't Sanction MoFo Atty Fired At 8 Months Pregnant

A California judge won't sanction a former Morrison & Foerster LLP associate suing the firm for pregnancy discrimination despite accepting a severance package purportedly barring legal action, saying her claims aren't frivolous and it's "common sense" she didn't have job alternatives when she was fired at eight months pregnant.

Read full article »

Lowe's Shakes Ex-Employee's FLMA Retaliation Suit

A West Virginia federal judge awarded Lowe's a win Thursday over a former employee's suit claiming the retailer illegally fired her for taking leave under the Family and Medical Leave Act following a lung cancer diagnosis, saying there was no evidence the worker faced mistreatment.

Read full article »

FedEx Can't Dodge Ex-Worker's Sexual Haras sment Claims

An Illinois federal judge on Thursday refused to toss allegations of sexual harassment brought by a FedEx logistics unit ex-employee who said she had to endure inappropriate comments and unwanted touching by a supervisor, but did throw out "duplicative" gender bias claims.

Read full article »

LA Glass Co., Workers Polish $1.3M Wage Settlement

A Los Angeles judge on Thursday signed off on a $1.3 million settlement resolving class claims that architectural glass maker Glasswerks L.A. Inc. didn't pay its employees for all hours worked, including overtime, and didn't provide proper breaks.

Read full article »

Lesbian Teacher Scores $850K Settlement In Bia s Suit

A Southern California school district has agreed to pay $850,000 to resolve a suit alleging it discriminated against a lesbian teacher by not renewing her contract, Lambda Legal announced Thursday, saying the deal was the largest employment discrimination settlement Lambda has ever obtained.

Read full article »

Weinstein, But Not His Film Cos. , To Face Sex Trafficking Case

Hollywood producer Harvey Weinstein will face a trafficking charge brought by women who say he coerced them into having sex with him, a Manhattan federal judge said Thursday in a ruling that dismissed his former film companies from the suit.

Read full article »

DISCRIMINATION

Cox Louisiana Can't Escape Worker's Race, Sex Bias Suit

A Louisiana federal judge has refused to let the Louisiana branch of Cox

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New Cases

Discrimination (47)
ERISA (31)
Labor (42)

LAW FIRMS

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Hoguet Newman
Jackson Lewis
Jones Day
Kupferstein Manuel LLP
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Latham & Watkins
Lavi & Ebrahimian

Communications escape a black female worker's suit claiming she was paid less than her white male counterparts and retaliated against for complaining about it.

Read full article »

USPS Must Cover Ex-Worker's Tax Li ability, Fed. Circ. Says

The Federal Circuit has ordered the U.S. Postal Service to reimburse an ex-employee some $34,000 for the tax consequences of receiving a lump-sum payment from a 2003 agreement on a discrimination complaint.

Read full article »

WAGE & HOUR

Workers Defend Cert. In 3rd Circ. Am erican Airlines Wage Row

American Airlines workers told the Third Circuit on Thursday that the airline uniformly failed to pay employees at Newark Liberty International Airport for all the hours they worked and cannot try to dismantle three certified subclasses of employees suing over wage and hour violations.

Read full article »

Buffalo Wild Wings Branch to Pay $650K T o End Wage Suit

A Buffalo Wild Wings franchisee agreed to pay $650,000 to settle workers' class claims that it paid them below minimum wage for long periods of untipped work, according to an order preliminarily approving the deal in Missouri federal court.

Read full article »

LABOR

Metal Co.'s Dues Collection Cutoff Leg al, Split NLRB Says

A metals company didn't break federal labor law when it stopped collecting union dues because of a 2015 Wisconsin law, a divided National Labor Relations Board panel said Wednesday, the same day Wisconsin dropped its push for the U.S. Supreme Court to review a ruling that nixed a key part of that state law.

Read full article »

Grocery Union Hit With NLRB Charge In Stop & Shop Strike

An official for a Massachusetts chapter of the United Food and Commercial Workers union incorrectly told a Stop & Shop employee he would be fired if he resigned from the union and returned to work during an ongoing strike, according to charges filed Wednesday with the National Labor Relations Board.

Read full article »

TRADE SECRETS

Hospice Aide Charged With Nursin g Home Trade Secrets Theft

A former nurse's aide has been criminally charged in Pennsylvania state court with stealing trade secrets and patient records the day she was fired from a Pittsburgh-area nursing home, a theft discovered when she produced the documents for an unpaid overtime lawsuit against her ex-employer, court records show.

Read full article »

WORKER SAFETY

Ex-NFLers' Painkiller Claims Aga inst League Fall Short Again

NFL players accusing the NFL of giving them painkillers to get them back into the game without regard for their long-term health had their suit shot down a

Lewis Brisbois
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Mallery & Zimmerman, S.C.
Morrison & Foerster
Nourse & Bowles
O'Melveny & Myers
Pachulski Stang
Patterson Belknap
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FedEx Corp.
Freddie Mac
Home Depot Inc.
International Association of Machinists and Aerospace Workers
Johnson & Johnson
Lambda Legal Defense & Educational Fund
Lehman Brothers Holdings Inc.
LinkedIn Corp.
Lowe's Companies Inc.
Miramax Film Corp.

second time by a California federal judge Thursday, who ruled they couldn't show how the relevant drug laws applied to the league.

Read full article »

BANKRUPTCY

Ditech Employee Bonus Program Gets Ch. 1 1 Court Approval

"Key employees" at Ditech Holding Corp. received extra incentive Thursday to hit enhanced performance goals and procure increasing bids from interested parties to buy the company out of Chapter 11, as a New York bankruptcy judge approved a bonus program that could pay the recipient pool more than $30 million.

Read full article »

PEOPLE

Hogan Lovells Picks Up Another Weil Partner In Silicon Valley

Hogan Lovells has picked up Weil Gotshal & Manges LLP's California complex corporate litigation head, a longtime Weil employee with particular experience in patents and trade secrets, the firm said Tuesday.

Read full article »

EXPERT ANALYSIS

What To Expect 1 Year After DOL's Up dated Internship Test

As companies begin to usher in summer interns, it's not extremely clear how courts will apply the U.S. Department of Labor's seven-part test for classifying internships as paid or unpaid, which was introduced just over one year ago and has not yet been addressed in a major lawsuit, says Elizabeth Vulaj of Segal McCambridge.

Read full article »

Reverse FCA Cases Rise With 'America First' Trade Policies

Though the number of reverse False Claims Act suits alleging importers made false customs declarations will likely keep increasing given the Trump administration's protectionist policies, importers can take steps to mitigate their risks, say attorneys at Crowell & Moring.

Read full article »

Opinion

Jury Trials Are In Decline For Good Reason

A recent Law360 article reported on federal judges bemoaning jury trials' nationwide decline, but these laments are unfounded as jury trials have been replaced by better alternatives, says J.B. Heaton of J.B. Heaton Research.

Read full article »

LEGAL INDUSTRY

Jones Day's McGahn Felt 'Trapped' In Pa nicked White House

A White House lawyer badgered by a panicked boss to do "crazy shit" and engage in a Watergate-style attack on a Justice Department investigation appears to have made the best, ethically speaking, of an extremely bad situation.

Read full article »

Supreme Court To Lawyers: Can You Keep It Short?

Beginning in July, Supreme Court practitioners will be permitted fewer words to make their cases and less time to file reply briefs as a result of rule changes adopted by the justices Thursday.

Read full article »

Postpone Opioid MDL Trial? Get Real, Judge Says

NFL Enterprises LLC

National Consumer Law Center

National Right to Work Legal Defense Foundation

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Panasonic Corporation

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GOVERNMENT AGENCIES

Equal Employment Opportunity Commission

National Labor Relations Board

U.S. Customs and Border Protection

U.S. Department of Justice

U.S. Department of Labor

U.S. General Services Administration

U.S. Postal Service

U.S. Supreme Court

United States Bankruptcy Court for the So uthern District of New York

United States Court of Appeals for the Third Circuit

Wage and Hour Division

Wisconsin Department of Justice

An Ohio federal judge on Thursday said that drug companies in the multidistrict opioid litigation are apparently maneuvering to indefinitely delay a bellwether trial and that the idea isn't even worthy of consideration.

Read full article »

PACER Fee Use Isn't Reviewable In $200M Case, Gov't Says

The federal government urged the Federal Circuit on Thursday to vacate a district court judge's ruling in a certified class action that the judiciary has improperly spent more than $200 million in PACER system fees to fund other projects, in breach of federal law.

Read full article »

Law360's Weekly Verdict: Legal Lions & Lambs

Legal lions this week include the team that helped secure a favorable jury verdict for a Johnson & Johnson unit in pelvic mesh litigation, while the lambs include a Tennessee man charged with fraud after he was caught allegedly pretending to be a team of lawyers from Cravath.

Read full article »

JOBS

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From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: First Move: Paid Leave Costs Complicate National Plan
Date: Friday, April 19, 2019 7:09:39 AM

What you need to know to start your day.

Paid Leave Costs Complicate National Plan

By Patricio Chile

Determining the true price tag of different paid leave proposals from lawmakers isn't a simple calculation. Costs are largely determined by how many people use the leave benefits and what kind of leave benefits are covered. But those estimates are important as cost is a major impasse between Republicans and Democrats in the push for a national paid leave plan.

- **Leave Differences:** Paid leave for a personal medical illness is the most costly type of leave to cover, while parenting leave and caregiving leave come in second and third place, respectively, Genevieve Douglas reports.

- **Benefits and Costs:** Plans will have to be put into practice to truly understand the benefits and costs of national paid leave, observers say.

A mother gives a bottle to her baby.
FRED DUFOUR/AFP/Getty Images

OSHA SET TO RELEASE RULE UPDATES

Are feral cats that hang out around shipyards “vermin”? Will companies have to overhaul their “lockout/tagout” procedures when performing equipment maintenance? Employers hope to get answers to these questions when the Occupational Safety and Health Administration releases its long-awaited update to a grab bag of rules.

- **Years in Making:** OSHA started the rulemaking process in 2011 to revise what the agency called “outdated, duplicative, unnecessary, and inconsistent requirements.”

- **Rule Change:** Many employers hope the agency drops an earlier proposal to revise a series of equipment safety procedures, known as lockout/tagout, by deleting the phrase “unexpected energization.” Equipment manufacturers and industry groups say a new rulemaking process would be required to make the change.

WHAT ELSE WE’RE WATCHING

- **LGBT Bias Settlement:** A school district in Southern California agreed to pay $850,000 to settle claims by a former English teacher who taught as an open lesbian and accused the school of firing her for LGBT bias. Erin Mulvaney has the story.

- **Maine Plans:** Lawmakers in Maine hold public hearings today on several paid family and medical leave plans. Legislators have introduced bills that would establish an opt-in paid family leave insurance program, mandate paid maternity and paternity leave, or create a paid family and medical leave benefit program.

- **Law Firm Updates:** Sidley Austin has named new office managing partners in Boston and Chicago, both high-powered female finance lawyers. Theresa Wilton Harmon will take over the top leadership spot in Chicago, while Elizabeth Shea Fries takes the reins in Boston.

- **Stop & Shop Strike:** Hundreds of union supporters and those eager to hear former Vice President Joe Biden rallied for striking Stop & Shop workers in Boston, Adrianne Appel reports.

DAILY RUNDOWN

Top Stories

Facebook Takes Overtime Arbitration Fight to Seventh Circuit
A key issue in Facebook Inc.‘s push to keep some workers out of a collective lawsuit over unpaid overtime is heading to a federal appeals court.

Disabled Worker Must Show ‘But-For’ Cause to Prove Bias
A former director with the New York City Department of Investigation failed to

show he was demoted or otherwise discriminated against because of his hearing disability, a divided Second Circuit ruled April 18 in a case of first impression.

EEOC Is Suing Less but Collecting More at Mid-Way Point of 2019
The Equal Employment Opportunity Commission is mid-way through its 2019 fiscal year, and it has sued less often but has collected more money through settlements.

Discrimination

Paraplegic Cablevision Worker's Disability Bias Claims Fail
Cablevision Systems Corp. doesn't have to face trial over a paraplegic senior operator's claims that a manager targeted him for discharge because he was a "hardship," a federal judge ruled.

AIG, Other Insurers Not on Hook for $46M Job Bias Judgment
An Ohio man whose $46 million job bias judgment against Republic Services Inc. and related companies was overturned on appeal can't collect from the companies' insurers, the Ohio Court of Appeals ruled.

Wage & Hour

Delivery Drivers' $4.75 Million Wage Settlement Gets Nod
A delivery drivers' $4.75 million collective action wage settlement, including $2.9 million in attorneys' fees and costs, got the approval of a federal judge April 17.

Kone Must Pay Elevator Apprentice's Travel Expenses
Elevator company Kone Inc. will have to reimburse an elevator constructor apprentice for travel expenses he incurred when assigned to a job site 615 miles from home, the Eighth Circuit said April 18.

Harassment & Retaliation

Houston Housing General Counsel Gets $1.9M for Retaliation Win
The former general counsel for the Houston Housing Authority, who was fired for blowing the whistle on her boss, is entitled to $1.9 million, a federal judge ruled.

Whistleblowers

Workers Win Jury Verdict in Crushed-Hand Whistleblower Case
A manufacturing company and its owner unlawfully terminated two workers because they cooperated with a federal safety investigation after a worker's hand was crushed in a machine, a federal jury in Pennsylvania found.

Labor Relations

Stop & Shop Worker Says Union Harassed, Misled Him During Strike
A Massachusetts Stop & Shop employee said that a union official misled him during an ongoing strike by threatening he'd be fired if he ended his union membership and returned to work, according to an April 17 National Labor Relations Board filing.

WORKFLOWS

Blank Rome said that James ("Jim") Stapleton has joined the Washington, DC office as Chief Business Development and Marketing Officer; he comes from Dickinson Wright | **Dickinson Wright** hired Brenda Roubidoux Taylor as of counsel specializing in aviation and tax in Las Vegas | **McDermott Will & Emery** added former federal prosecutor Ben Curtis as a partner in the white collar and healthcare litigation practices in Miami from Nelson Mullins | **Barnes & Thornburg** said ex-Squire Patton Boggs corporate lawyer Pat Cornelius joined its corporate and healthcare departments in Columbus, OH | **Cozen O'Connor** hired real estate and finance attorney Alex DuFour in Washington from Linowes and Blocher | **DLA Piper** added K. Randolph Peak to the corporate practice and healthcare sector in Dallas from Perkins Coie | **Morris, Manning & Martin** added intellectual property and technology litigation lawyer Daniel Huynh to Atlanta office from Alston & Bird | **Hogan Lovells** said former Drinker Biddle M&A and capital markets lawyer Robert C. Juelke joined its Philadelphia office as a partner | **Goodwin Procter** announced that longtime managing partner Robert Insolia will replace David Hashmall as chairman in October; Mark Bettencourt will replace Insolia as managing partner | **Perkins Coie** said that William Malley will take over as firm-wide managing partner for a four-year term beginning in July

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From: Martin, Andrew
Subject: Legal News FYI 04-19-19
Date: Friday, April 19, 2019 7:26 03 AM
Attachments: image001.png

Friday, April 19, 2019

Paid Leave Costs Complicate National Plan

BloombergLaw - Daily Labor Report 19 Apr 2019 07 06

By Patricio Chile Determining the true price tag of different paid leave proposals from lawmakers isn't a simple calculation. Costs are largely determined by how many people use the leave benefits and what kind of leave benefits are covered. But those...

Nine newly released NLRB advice memos span 8 years, address work rules, dues revocation, among other topics

CCH Business & Corporate Compliance 19 Apr 2019 05:15

The memos, dated between 2011 and 2019, address topics such as union discipline and checkoff revocation, and employer social media and media communication rules, among others. On April 15, the Nationa

Grocery Union Hit With NLRB Charge In Stop & Shop Strike

Retail & E-Commerce Law360 19 Apr 2019 00:23

Already a subscriber? Check out Law360's new podcast, Pro Say, which offers a weekly recap of both he biggest stories and hidden gems from he world of law.

Blackburn says union effort at Volkswagen Chattanooga harms workers; UAW says employees just want seat at bargaining table

Chattanooga Times/Free Press (Chattanooga, TN) 18 Apr 2019 21:00

April 18-- Apr. 18 --" Tennessee has prospered because it is a right-to-work state with no income tax. " U.S. Sen. Marsha Blackburn U.S. Sen. Marsha Blackburn on Thursday weighed into a possible new union vote at Volkswagen's Chattanooga plant, saying...

Employee Must Arbitrate Employment Dispute Once Employer Declares...

National Law Review 18 Apr 2019 20:29

Late last week, the California Court of Appeals ruled in Diaz v. Sohnen Enterprises hat an employee must arbitrate her discrimination suit against her employer because she consented to an arbitration agreement by continuing to work. The split,...

At Stop & Shop rally, Biden blasts 'morally wrong' treatment of workers

Boston Business Journal (Boston, MA) 18 Apr 2019 20:20

Former Vice President Joe Biden cri icized Stop & Shop's parent company for its stock buybacks and the use of its tax cut, as he spoke to a crowd of hundreds of union workers and supporters in Dorchester on Thursday. The Democrat was he headline speaker...

NLRB Overturns Rule and Clarifies a Successor Employer's Right To Set Initial Terms of Employment [Alert]

Cozen O'Connor News 18 Apr 2019 19:11

In Ridgewood Health Care Center, Inc. , a 3-1 majority of he National Labor Relations Board overruled a Clinton-era Board decision (Galloway School Lines) that held that if a successor employer discriminates in the hiring of any of he predecessor's...

Case: Labor Relations/Refusal to Bargain (N.L.R.B.)

BloombergLaw - Daily Labor Report 18 Apr 2019 16 06

A manufacturer of lawn maintenance equipment lawfully failed to deduct and send dues to a union after Wisconsin enacted a right-to-work law hat curtailed dues checkoff. Although a federal appeals court later struck down the Wisconsin law as preempted by...

Stop & Shop Worker Says Union Harassed, Misled Him During Strike

BloombergLaw - Daily Labor Report 18 Apr 2019 15:17

• Charge comes during weeklong strike of 31,000 workers • Employee sought to return to work during strike By Andrew Wallender A Massachusetts Stop & Shop employee said that a union official misled him during an ongoing strike by threatening he'd be fired...

Metal Maker Excused for Stopping Union Dues Deductions: NLRB

BloombergLaw - Daily Labor Report 18 Apr 2019 13 57

• Wisconsin 'right-to-work' law limited automatic payroll deductions • Employer had 'sound arguable basis' for halting dues transfers By Robert Iafolla A Wisconsin metal manufacturer acted reasonably when it temporarily stopped deducting and transferring...

Blog Post: Metal Co.'s Dues Collection Cutoff Legal, Split NLRB Says

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 18 Apr 2019 13:31

A metals company didn't break federal labor law when it stopped collecting union dues because of a 2015 Wisconsin law, a divided National Labor Relations Board panel said Wednesday, the same day Wisconsin dropped its push for the U.S. Supreme Court...

Ann Arbor Coffee Chain Baristas Say They're Being Laid Off After Unionizing

Eater 18 Apr 2019 11:29

An Ann Arbor coffee chain is reportedly closing down its cafes after its baristas organized a union. Employees at Mighty Good Coffee tell WXYZ that they were in he midst of their first union contract negotiation when they received notice on Monday,...

Legal News FYI monitors news, cases, and legislative developments of interest to the NLRB. To be added to or removed from the distribution list contact Andrew Martin. Please note that these are external links and the Agency takes no responsibility for their content.

From: Martin, Andrew
Subject: Trump administration moves to invalidate Longshoremen's union election
Date: Friday, April 19, 2019 7:45:48 AM

Trump administration moves to invalidate Longshoremen's union election

By Ian Kullgren

04/18/2019 07:05 PM EDT

The Trump administration today asked a federal judge to invalidate key results of the International Longshore and Warehouse Union's 2018 election, arguing that the union did not count nearly 2,000 ballots from members in Panama.

In a complaint filed in U.S. District Court in Northern California, the Labor Department asked the judge to require a new election for ILWU president, vice president, secretary-treasurer and the international executive board officer for Panama. The margin s of victory for those positions were less than the 1,970 Panamanian votes that were not counted, DOL said.

Willie Adams, the first black president of ILWU, won by 393 votes. The union board voted 15-6 in October 2018 to certify the results despite the uncounted ballots from Panama, according to news reports. A union spokesperson did not respond to reques ts for comment Thursday.

A postage mix-up prevented 1,970 dock workers and ship pilots in Panama from mailing their ballots to the U.S. More than 1,000 of those ballots were shipped in a box and arrived in time to be counted, but the union board "decided to disqualify the ballots because they were not voted in accordance with" its bylaws, according to the complaint. In addition, the instructions were not "fully or accurately" translated to Spanish, DOL said.

DOL argues that ILWU violated the Labor-Management Reporting and Disclosure Act, which requires unions to provide every member the opportunity to vote.

ILWU represents port workers in the U.S. and Canada, and in 2011 joined with dock workers and ship drivers along the Panama Canal. The union reportedly sought to increase its bargaining power, worried that a planned widening of the canal could siphon business from West Coast ports.

From: Morning Shift
To: Ring, John
Subject: POLITICO"s Morning Shift: Counting NAFTA 2.0"s trade gains — Evers takes on Foxconn — DOL seeks to invalidate Longshore and Warehouse Union election
Date: Friday, April 19, 2019 10:02:21 AM

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2018 Newsletter Logo: Morning Shift

04/19/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

With help from Ian Kullgren

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click

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QUICK FIX

— The trade deal with Mexico and Canada may not create as many auto jobs as the Trump administration thinks.

— Wisconsin's recently elected Democratic governor wants to renegotiate the state's $4 billion tax-break pledge to Foxconn.

— DOL is suing to invalidate the results of a leadership election of the International Longshore and Warehouse Union.

GOOD MORNING! It's Friday, April 19, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

COUNTING TRADE PACT'S JOB GAINS: The Trump administration and an independent government agency have reached conflicting conclusions about how many auto jobs the new U.S.-Mexico-Canada Agreement would create, POLITICO's Doug Palmer reports. The Office of the U.S. Trade Representative predicted Thursday that the trade agreement will create about 76,000 jobs in the U.S. automotive sector over the next five years. But the U.S International Trade Commission, also Thursday, predicted a much smaller five-year gain of 28,000. The ITC also said it expected "U.S. consumers to buy 140,219 fewer cars each year because of higher prices resulting from the USMCA's more stringent automotive trade rules."

The agreement contains a number of changes to NAFTA's automotive rules of origin, such as requiring that "at least 40 percent of the value of passenger cars and 45 percent of the value of light trucks be produced in North American facilities where workers earn an average of $16 per hour." More from Palmer here. Read the USTR estimate here and the ITC estimate here.

Related read: "Trump's Mexico-Canada deal would bring minimal economic gains, trade agency says," from POLITICO

JOBS, JOBS, JOBS

EVERS TAKES ON FOXCONN: Democratic Wisconsin Governor Tony Evers plans to revisit the state's contract with Taiwan-based technology company Foxconn and "figure out how a new set of parameters should be negotiated" now that the company has walked back its promise to create 13,000 blue-collar manufacturing jobs in Wisconsin, Tiffany Hsu reported for The New York Times. "They're downsizing the footprint of what they're doing," Evers told reporters on Wednesday, according to the Times.

The Trump-touted deal, brokered by then-Wisconsin Gov. Scott Walker in 2017, pledged $4 billion in tax breaks to Foxconn if it met certain hiring goals. But in January a Foxconn official told Reuters that there would be no Wisconsin factory to produce LCD screens, as originally promised; instead, Foxconn would focus on design, research and packaging. That prompted a phone call with President Donald Trump, which in turn led Foxconn to clarify that the site will still function as an "advanced manufacturing facility, as well as a hub of high technology innovation."

"The present contract deals with a situation that no longer exists," Evers said, "so it's our goal to make sure that the taxpayers are protected and environmental standards are protected.... We believe we need to take a look at that contract and see if it needs to be downsized as a result." More from the Times here.

UNIONS

DOL SEEKS TO INVALIDATE UNION ELECTION: The Trump administration on Thursday asked a federal judge to invalidate key results of a leadership election last year of the International Longshore and Warehouse Union, arguing that the union didn't count nearly 2,000 ballots from members in Panama.

In a complaint filed in U.S. District Court in Northern California, DOL asked the judge to require a new election for ILWU president, vice president, secretary-treasurer and the international executive board officer for Panama. The margins of victory for those positions were narrower than the 1,970 Panamanian votes that were not counted — including president Willie Adams, who won by less than 400 votes, DOL said.

Ship pilots and dock workers along the Panama Canal sent more than 1,000

ballots to the U.S. in a box after a postage mix-up prevented them from mailing their votes individually. But the union's board refused to count them, and never received ballots from more than 900 other workers affected by the mailing issue. More from POLITICO's Ian Kullgren here.

BATTLE AT THE NEWSGUILD: A data reporter who last year helped start the L.A. Times newsroom's successful organizing drive is now running for president of the NewsGuild. "It was clear to me to me that the international NewsGuild didn't have experience organizing and didn't have experiencing organizing journalists," Jon Schleuss told Morning Shift. The L.A. Times, BuzzFeed, The New Yorker, and Pitchfork, are among the newsrooms that organized recently with the Guild.

The NewsGuild, which represents more than 20,000 members in the U.S., Canada and Puerto Rico, lacks a cohesive bargaining and communications program, Schleuss told Morning Shift. Writing in Labor Notes, Alexandra Bradbury noted that a Guild unit at the Chicago Tribune hasn't had a single negotiating session since it won a union election in May 2018. "For smaller shops, they don't have a ton of resources right now, and they rely on the international, which hasn't been very strategic in deploying those resources," Schleuss said. If elected, Schleuss says he plans to reverse a nearly 40 percent drop in membership since the union's last competitive election. In 2008, the NewsGuild had 28,000 members eligible to vote, but today it has only 16,626 (of whom 11,465 are in the U.S.).

The Guild al so has vacancies for its communications director and organizing director. Incumbent president Bernie Lunzer, who's helmed the Guild for the past decade, told Labor Notes' Bradbury that the vacancies resulted from "a 25 percent budget cut imposed by the NewsGuild's parent union, the Communications Workers (CWA), because of the Supreme Court's decision in *Janus v. AFSCME*.... Jon has said he would demand those positions be filled. It just doesn't work like that." More from Labor Notes here.

AT THE BORDER

JOHNSON EYES ASYLUM RESTRICTIONS: Sen. Ron Johnson (R-Wis.) will introduce legislation in the coming weeks that will make it more difficult for asylum seekers to prove "credible fear" of persecution, in an effort he says will discourage migrants who don't actually deserve the benefit, POLITICO's Ted Hesson reports. "It was amazing to me — when I talked to people, not one of them

claimed credible fear or that they were fleeing persecution," said Johnson. (Credible fear is the first step in certain asylum petitions.) "In addition to the credible fear standard, the bill would provide funding to speed up the processing of asylum seekers, allow children to be detained beyond a current 20-day limit, and permit unaccompanied minors from Central America to be deported more rapidly," Hesson reports. More here.

WORKER SAFETY

NEW HAMPSHIRE PASSES BILL TO INVESTIGATE PUBLIC WORKERS' ACCIDENTS: New Hampshire state lawmakers passed a bill Thursday that would allow the state Department of Labor to investigate workplace accidents that seriously injure or kill public employees who are not protected by federal OSHA, the Associated Press reports. Public-sector workers are not covered by worker safety laws enforced by the federal Occupational Safety and Health Administration. States can choose to maintain their own occupational safety and health programs and receive partial funding from the federal government, an option that allows states to write laws to include public sector workers. But in New Hampshire, the state is under federal OSHA jurisdiction, and the law passed Thursday would refer workplace accidents involving public employees to the state's labor department.

Rudy Ogden, the state's deputy labor commissioner, warned lawmakers last week that the bill "won't lead to the same level of investigation as federal officials would undertake," according to the AP. "I would note that we are not OSHA. We do not have the funding or the training," he said. More here.

COFFEE BREAK

— "HUD moves to crack down on illegal immigrants in public housing," from POLITICO

— "How Much Slower Would the U.S. Grow Without Imm igration? In Many Places, a Lot," from The New York Times

— "Sprint Tells Regulators Its Business Is Worse Than Earlier Portrayed," from The Wall Street Journal

— "Harvard Grad Students Union Ad: Ivy League University Has 'World-Class #MeToo Problem'" from Newsweek

— "Sears Sues Ex-CEO Eddie Lampert, Claiming He Stripped Assets and Left It Broke," from The Wall Street Journal

THAT'S ALL FOR MORNING SHIFT!

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From:	Kennedy, Margaret
To:	Robb, Peter; Lesesne, Katherine; McFerran, Lauren; Colwell, John F.; Krafts, Andrew J.; Waters-Burnett, Yolanda C.; Giannasi, Robert (ALJ); Meyers, Mary; Zick, Lara S.; Merberg, Elinor; Vazquez, Laura T.; Sophir, Jayme; Carlton, Peter J.; Murphy, James R.; Lennie, Rachel G.; Kaplan, Marvin E.; Emanuel, William; Free, Douglas; Kraus, Grant; Ring, John; Stock, Alice B.; Kyle, John; Platt, Nancy; Jacob, Fred; Coleman, Jocelyn; Lambert, Malissa
Cc:	Burdick, Ruth E.
Subject:	Opinion - UPS Ground Freight Inc v. NLRB - 18-1161 DC Circuit
Date:	Friday, April 19, 2019 10:26:37 AM
Attachments:	UPS 18-1161 Decision DC Circ.pdf

The DC Circuit issued the attached decision today.

Margaret Yale Kennedy
Paralegal Specialist
Appellate & Supreme Court Litigation Branch
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
202-273-0027
202-273-0191 (fax)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 21, 2019 Decided April 19, 2019

No. 18-1161

UPS GROUND FREIGHT, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION
NO. 773,
INTERVENOR

Consolidated with 18-1182

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Kurt G. Larkin argued the cause and filed the briefs for petitioner. *James P. Naughton* entered an appearance.

David R. Broderdorf and *Jonathan C. Fritts* were on the brief for *amici curiae* UPS Ground, et al. in support of petitioner.

Mark W. Mosier, *Kevin King*, *Steven P. Lehotsky*, and *Michael B. Schon* were on the brief for *amicus curiae* The Chamber of Commerce of the United States of America in support of petitioner and cross-respondent.

Eric Weitz, Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were *Peter B. Robb*, General Counsel, *John W. Kyle*, Deputy General Counsel, *David Habenstreit*, Associate General Counsel, and *Kira Dellinger Vol*, Supervisory Attorney.

Before: GARLAND, *Chief Judge*, SRINIVASAN, *Circuit Judge*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* SRINIVASAN.

SRINIVASAN, *Circuit Judge*: UPS Ground Freight, Inc. challenges the certification of a union at its Kutztown, Pennsylvania distribution facility. The National Labor Relations Board rejected UPS Ground's challenges to the union's certification and then determined that the company committed unfair labor practices by declining to bargain with the union. UPS Ground now seeks review in this court. We deny UPS Ground's petition for review and grant the Board's cross-application for enforcement.

I.

UPS Ground Freight, Inc., a subsidiary of United Parcel Service, Inc., provides transportation and delivery services throughout the United States. On December 10, 2015, International Brotherhood of Teamsters, Local 773, filed a petition with the Board seeking a representation election among all drivers at UPS Ground's distribution center in Kutztown, Pennsylvania. The Acting Regional Director

scheduled a pre-election hearing for December 21, at which the parties presented evidence on the supervisory status of Frank Cappetta, one of the drivers employed at the Kutztown center. On January 5, 2016, the Acting Regional Director directed a mail-ballot election at the Kutztown distribution center. The Acting Regional Director did not rule on the supervisory status of Cappetta.

The election occurred between January 11 and January 29. By a vote of twenty-seven to one, the employees voted in favor of representation by the union. UPS Ground sought review with the National Labor Relations Board.

On July 27, 2017, the Board issued a Decision on Review and Order. The Board found that Cappetta was not a statutory supervisor and that, in the alternative, he did not engage in objectionable conduct if he were a supervisor. On all other grounds, the Board denied review.

Subsequently, the Union made a formal request to bargain, and UPS Ground refused. The Board's General Counsel issued an unfair-labor-practice complaint, and the Board found that UPS Ground had committed unfair labor practices by refusing to bargain. UPS Ground petitions this Court for review, and the Board cross-petitions this Court for enforcement.

II.

Because UPS Ground has not identified a defect in the Board's decision to certify the Union, we deny UPS Ground's petition for review and grant the Board's cross-application for enforcement.

First, the Board certified an appropriate bargaining unit. Under the Act, a bargaining representative must be selected "by

the majority of the employees in a unit *appropriate* for [collective bargaining] purposes." 29 U.S.C. § 159(a) (emphasis added). "The Board need only select *an* appropriate unit, not *the* most appropriate unit." *Cleveland Constr., Inc. v. NLRB*, 44 F.3d 1010, 1013 (D.C. Cir. 1995) (emphases added). Under controlling Board precedent, a single-facility bargaining unit is "presumptively appropriate." *Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1084 (D.C. Cir. 2003). To assess that presumption in a given case, the Board considers "geographic proximity, employee interchange and transfer, functional integration, administrative centralization, common supervision, and bargaining history." *Id.* at 1085 (quoting *W. Jersey Health Sys.*, 293 NLRB 749, 751 (1989)).

Here, the Acting Regional Director reasonably found (and the Board ratified) that those factors favored a single-facility bargaining unit, rather than a unit encompassing all of UPS Ground's facilities. In particular, the Acting Regional Director reasonably relied on "the significant evidence of local autonomy over labor relations matters at the Kutztown facility" and "the considerable distance between the Kutztown facility and the other facilities." J.A. 677. We see no basis to set aside the Board's choice of bargaining unit.

Second, the Board reasonably determined that Cappetta was an "employee" under the Act and not a statutory "supervisor" who would be excluded from the Act's protections. Generally, if a supervisor's conduct "reasonably tends to have such a coercive effect on . . . employees that it is likely to impair their freedoms of choice in the election," that conduct can taint an election and require its results to be set aside. *Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 63 (D.C. Cir. 2015) (alterations omitted). Here, however, the Board properly concluded that Cappetta was not a supervisor, which renders irrelevant the question of taint.

UPS Ground argues that Cappetta performed four supervisory functions—namely, that he assigned work, made hiring recommendations, directed employees, and adjusted grievances. The Board reasonably rejected each of those claims. The authority to assign work requires that the employee "ha[ve] the ability to *require* that a certain action be taken." *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 729 (2006). And the evidence supports the conclusion that Cappetta lacked the authority to require a driver to accept a particular route; rather, if a driver objected, Cappetta was obligated to refer the matter to management. As for the ability to make hiring recommendations, the Board explains that Cappetta had input only insofar as he administered road tests to new hires and reported the results to management. The Board has consistently found that such involvement in the hiring process does not establish supervision. *See, e.g.*, *Pac. Beach Corp.*, 344 NLRB 1160, 1161–62 (2005). The last two alleged supervisory functions—the direction of employees, and the adjustment of grievances—find even less support in the record. For someone to direct employees, that person must be "accountable for the performance of the task by the [employees]." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692 (2006). UPS Ground points to no record evidence that Cappetta was so accountable. As for the authority to adjust grievances, it does not appear that Cappetta had the authority to resolve *any* disputes. At most, Cappetta had the authority to "bring any minor grievances to the attention of upper management for resolution," which does not suffice. *Ken-Crest Servs.*, 335 NLRB 777, 779 (2001).

UPS Ground would have us look to additional evidence of supervisory status, detailed in an offer of proof filed in support of its objections to the election results. But neither the Acting Regional Director nor the Board had an obligation to consider belatedly-presented evidence. "[T]he Board need not afford a

party objecting to a representation hearing more than one opportunity to litigate any particular issue," *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1182 (D.C. Cir. 2000), and UPS Ground received that opportunity at the pre-election hearing.

UPS Ground's remaining objections to the application of the Board's rules and regulations all lack merit. (UPS Ground has disclaimed a facial challenge to the Board's rules.) Various of UPS Ground's objections challenge the Acting Regional Director's failure to permit an all-embracing investigation of Cappetta's actions leading up to the election. Those objections all fail for the simple reason that the Board reasonably concluded that Cappetta was not a statutory supervisor. Thus, UPS Ground cannot demonstrate the requisite "prejudice" from any of those alleged errors. *Salem Hosp.*, 808 F.3d at 70.

Nor do any of UPS Ground's other objections carry the day. For example, UPS Ground argues that the pre-election hearing timeline was abusive because it allotted only eleven days to prepare for the hearing. The Acting Regional Director, though, was required by regulation to schedule the pre-election hearing on the eighth day after the Union petition. *See* 29 C.F.R. § 102.63(a)(1). Further, the Acting Regional Director partially granted UPS Ground's motion for a two-business-day postponement of the pre-election hearing. The Acting Regional Director did not abuse his discretion by complying with the regulation. And the decision to postpone the hearing by one business day, but not two, is in the heartland of his discretion. That timeline also comported with due process. Even assuming that due process requires any pre-election hearing whatsoever, *but see Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 710 (1945), an eight-day notice accords with both the Due Process Clause and UPS Ground's statutory right to an "appropriate" hearing, 29 U.S.C. § 159(c)(1).

Next, UPS Ground argues that it was prejudiced by the timeline because it was required to file a Statement of Position on the business day before the hearing. UPS Ground, though, cannot show any prejudice from that requirement, as the Statement of Position is not binding. The Regional Director "may permit the employer to amend its Statement of Position in a timely manner for good cause." 29 C.F.R. § 102.63(b)(1). Nor does the Statement of Position preclude the Regional Director from "direct[ing] the receipt of evidence concerning any issue . . . as to which the regional director determines that record evidence is necessary." *Id.* § 102.66(b). And despite UPS Ground's contention that its Statement of Position limited it to calling only certain witnesses at the pre-election hearing, at no point during this litigation has UPS Ground ever identified any additional witnesses it would have called at the hearing.

UPS Ground also challenges various rulings made by the hearing officer during the pre-election hearing—specifically, that the hearing officer asked UPS Ground for certain documents that UPS Ground did not possess, denied UPS Ground's request to grant a one-day adjournment for preparation for closing arguments, and refused the filing of posthearing briefs. None of those rulings was an abuse of discretion. A demand for documents is not an adverse ruling, in any sense. The denial of an adjournment was entirely proper, especially given that the regulations do not require even a *recess* prior to closing arguments. *See* 29 C.F.R. § 102.66(h). And UPS Ground had no entitlement to posthearing briefs, which "shall be filed only upon special permission of the regional director." *Id.*

The Acting Regional Director also properly directed a mail-ballot election. A mail-ballot election is proper when voters are "scattered" over a wide area or across different work

schedules. *San Diego Gas & Elec.*, 325 NLRB 1143, 1145 (1998). In this case, the Acting Regional Director reasonably determined that the employees travel long distances and that traffic and weather conditions, particularly in winter, might hinder employees from returning to the facility in time to permit them to vote. The Acting Regional Director reasonably rejected UPS Ground's alternative proposal—to arrange drivers' work schedules so they could vote before leaving on their assigned routes—which, by UPS Ground's own characterization, would have ensured the ability to vote only of "*most* of [the drivers] before they go." J.A. 320 (emphasis added). And the mail-ballot election did not impermissibly restrict UPS Ground's right to campaign. The Act proscribes only mass captive-audience assemblies (for employer and union alike) during a mail-ballot election. *See San Diego Gas*, 325 NLRB at 1146. UPS Ground was still free to campaign via other means. More generally, it is difficult to imagine any prejudice arising from the choice of a mail-ballot election when 94% of eligible voters cast ballots and those ballots overwhelmingly favored unionization. *Cf. Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1127 (D.C. Cir. 1996).

Finally, the Acting Regional Director did not abuse his discretion by declining to decide, before the election, whether two employees in disputed job classifications (safety instructors and dispatchers) were part of the bargaining unit. It is common practice to permit such employees to vote under challenge. *See Kirkhill Rubber Co.*, 306 NLRB 559, 559 (1992). Nor does that practice imperil the bargaining unit's right to make an informed choice, so long as the notice of election—as happened here—"alert[s] employees to the possibility of change" to the definition of the bargaining unit. *Sears, Roebuck & Co. v. NLRB*, 957 F.2d 52, 55 (2d Cir. 1992).

* * * * *

For the foregoing reasons, we deny the petition for review and grant the Board's cross-application for enforcement.

So ordered.

From:	Lucy, Christine B.
To:	Bashford, Jo Ann; Ring, John
Subject:	Re: Littler Executive Employer - Phoenix
Date:	Friday, April 19, 2019 10:34:59 AM
Attachments:	image001.png image002.png

Thanks - I can work with him on these topics next week. If you didn't already, please write her back, let her know the travel plans and that we'll get back with her on topics.

Christine

Christine Lucy
Special Counsel and Chief of Staff
to the Chairman of the NLRB

Sent from my iPhone

From: Bashford, Jo Ann
Sent: Thursday, April 18, 2019 12:12:14 PM
To: Ring, John; Lucy, Christine B.
Subject: FW: Littler Executive Employer - Phoenix

Please see the below note from Tanja re: the Litter Conference, particularly the 3rd paragraph.

Jo Ann Bashford
Confidential Assistant,
Legal Administrative Specialist
Office of the Chairman
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-0837
joann.bashford@nlrb.gov

From: Thompson, Tanja L. <TThompson@littler.com>
Sent: Thursday, April 18, 2019 11:54 AM
To: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Subject: RE: Littler Executive Employer - Phoenix

Hi JoAnn:

Do you happen to know John's travel schedule for the Littler meeting in May? I was trying to figure out whether we could pin John down for a meal sometime while he's out there and, if so, what might work best for him?

Our presentation is titled "A Conversation with John Ring" and I'll moderate and ask him questions and he can answer. We are scheduled to present at approx. 3pm on Weds May 8.

If there are certain topics he'd like me to ask him about (things he's generally talking about in presentations these days), I'm happy to get any questions/or brief list of topics in advance from him. Similarly, if there are any topics he'd rather me not ask about, happy to avoid particular topics (i.e. pending cases), I'm happy to learn what those are as well. I'll also work on putting together a list of possible questions in advance so he can weigh in on what works/doesn't work. Thought I'd start by sending this to you, but if John would rather email me back or schedule a call with me, happy to discuss directly with him as well.

Thanks so much for your assistance.

Tanja

Tanja Thompson
Office Managing Shareholder
901.322.1223 direct, 901.210.8404 mobile, 901.531.8179 fax
TThompson@littler.com

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From: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Sent: Thursday, February 28, 2019 11:52 AM
To: Thompson, Tanja L. <TThompson@littler.com>
Cc: Woodhouse, Susan A.P. <SWoodhouse@littler.com>; Schneider, Mark <MSchneider@littler.com>; Kalis, Sara B. <SKalis@littler.com>
Subject: RE: Littler Executive Employer - Phoenix

Tanja: For planning purposes, this is great, thank you. I will await the hotel information.

Best,

Jo Ann Bashford
Confidential Assistant,
Legal Administrative Specialist
Office of the Chairman
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-0837
joann.bashford@nlrb.gov

From: Thompson, Tanja L. <TThompson@littler.com>
Sent: Thursday, February 28, 2019 12:03 PM
To: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Cc: Woodhouse, Susan A.P. <SWoodhouse@littler.com>; Schneider, Mark <MSchneider@littler.com>; Kalis, Sara B. <SKalis@littler.com>
Subject: RE: Littler Executive Employer - Phoenix

Hi JoAnn.

Good timing! I had a brief conversation with John last night and thought about sending this information today. Below is the information regarding the labor programs on May 8th. I believe (and hope Susan, copied above can confirm the times – is my order right?) that the order will be Joint Employer with Christine at 2 pm, my "conversation" with John at 3 pm, and then the third labor program (that they are not panelists in) at 4 pm.

I do not have the hotel reservation information for them but the hotel is the JW Marriott Desert Ridge, 5350 E. Marriott Drive, Phoenix, AZ.

Susan: Can you or someone on your team let JoAnn know John and Christine's hotel information?

Please let me know if you have additional questions.

Thanks.

Tanja

Please Join Us for a Special Labor Relations Symposium at the 2019 Littler Executive Employer Conference!

If you are attending the 2019 Littler Executive Employer Conference, we welcome you to attend the labor relations symposium designed just for you! A future Executive Employer communication will alert you when session sign-up is available.

Date: Wednesday, May 8, 2019 | **Time**: 2:00 p.m. – 5:00 p.m. | **www.executiveemployer.com**

Traditional Labor Symposium: What Union and Nonunion Employers Need to Know About Today's Unions and Employer Obligations Under the NLRA

In this interactive symposium, Littler's traditional labor law attorneys will review the current status of unions in the private sector and highlight the issues facing both union and nonunion employers. The symposium will feature a conversation with current National Labor Relations Board Chairman John Ring as he discusses the latest issues confronting the NLRB. The symposium will also include the following sessions:

• *Casing the Joint – Labor Implications and Beyond for Joint Employers*: The Trump NLRB has been busy trying to effectuate rulemaking regarding joint employers. But will the Board succeed in developing standards that address the myriad of concerns employers across the country face in trying to structure their operations to comply with current case law?

• *Reality Check – If Unions Can't Succeed Through Traditional Organizing Tactics, What Else Will They Try*? As unions struggle to increase their membership ranks and the Trump Board considers changing the current NLRB election rules, unions pursue nontraditional means of organizing. Join us for a discussion of labor's use of social media, corporate campaign tactics, picketing, boycotts, demonstrations and other tactics to organize today's workers.

Tanja Thompson
Office Managing Shareholder
901.322.1223 direct, 901.210.8404 mobile, 901.531.8179 fax
TThompson@littler.com

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From: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Sent: Thursday, February 28, 2019 7:02 AM
To: Thompson, Tanja L. <TThompson@littler.com>
Subject: Littler Executive Employer - Phoenix

Good morning Tanja.

I am in the process of arranging travel for the Chairman and Christine Lucy to attend the referenced program in Phoenix. Has an agenda been circulated yet (or a draft) that will show when the Chairman and/or Christine are speaking?

Also, have hotel accommodations been made? I don't have any information on that either.

Anything information you can pass along would be a great help.

Thanks, and I look forward to hearing from you.

With best regards,

Jo Ann

Jo Ann Bashford
Confidential Assistant,
Legal Administrative Specialist

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Washington, DC 20570
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From: Kanu, Hassan
To: Ring, John; McFerran, Lauren
Subject: FW: re: D.C. Circuit ruling on election rule application
Date: Friday, April 19, 2019 12:51:58 PM

Hi Chairman Ring and Member McFerran,

Hope you're doing well. I wanted to forward along this inquiry, given the away messages from Tracey and Cynthia, to be sure you both, and the agency, actually have/has a chance to make a decision on commenting. Please do feel free to give me a call or forward to any of the other members, if you feel that's necessary or appropriate.

Thanks!

From: Kanu, Hassan
Sent: Friday, April 19, 2019 12:49 PM
To: Tracey Roberts (tracey.roberts@nlrb.gov) <tracey.roberts@nlrb.gov>
Subject: FW: re: D.C. Circuit ruling on election rule application

Hey hey Tracey—long time no talk, hope you've been good. Just forwarding this along—thanks!

From: Kanu, Hassan
Sent: Friday, April 19, 2019 12:47 PM
To: Witkin, Cynthia <Cynthia.Witkin@nlrb.gov>; SM-Publicinfo <Publicinfo@nlrb.gov>
Subject: re: D.C. Circuit ruling on election rule application

Hi Cynthia,

Hope you've been well. The D.C. Circuit ratified the Obama NLRB's election rule changes this morning: https://www.cadc.uscourts.gov/internet/opinions.nsf/2B20692727C8717D852583E1004D3730/$file/18-1161.pdf and I'm currently working on an article.

I believe that makes the second court of appeals to have OK'd the rules (5th and D.C.). The ruling—which is short and dismissed all of UPS' claims—and the fact that the board's data shows unions aren't winning elections at any significantly larger rate would seem to support some of the arguments the unions and Dems have been making against the board's request for comment on changing the rules/plan to do so.

In addition, the board's RFI noted that circuit court rulings at the time "did not preclude the possibility that the Election Rule might be invalid as applied in particular cases." The court has now ratified the application of the rules to UPS' particular circumstances, which indicates that sort of application, at least, is valid.

Please let me know if the Chairman or any of the other concurring members on the request for information has any general comment, or comment on the couple points I've raised. And if Member McFerran also has any comment on the matter, given her dissent.

Thanks!

: : : : : : : : : : : : : : : : : :

Hassan Kanu
Legal Editor/Reporter
Bloomberg Law
Desk 703.341.3953

Cell 240.643.7506
Twitter: @hassankanu

From: Kanu, Hassan
To: McFerran, Lauren; Ring, John
Subject: RE: re: D.C. Circuit ruling on election rule application
Date: Friday, April 19, 2019 1:48:40 PM

Appreciated—thank you, Member McFerran. Enjoy your weekend!

From: McFerran, Lauren [mailto:Lauren.McFerran@nlrb.gov]
Sent: Friday, April 19, 2019 1:47 PM
To: Kanu, Hassan <hkanu@bloomberglaw.com>; Ring, John <John.Ring@nlrb.gov>
Subject: Re: re: D.C. Circuit ruling on election rule application

Hassan,

I'm going to decline to comment but thanks for checking in.

Lauren

Get Outlook for iOS

From: Kanu, Hassan <hkanu@bloomberglaw.com>
Sent: Friday, April 19, 2019 12:51:46 PM
To: Ring, John; McFerran, Lauren
Subject: FW: re: D.C. Circuit ruling on election rule application

Hi Chairman Ring and Member McFerran,

Hope you're doing well. I wanted to forward along this inquiry, given the away messages from Tracey and Cynthia, to be sure you both, and the agency, actually have/has a chance to make a decision on commenting. Please do feel free to give me a call or forward to any of the other members, if you feel that's necessary or appropriate.

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To: Tracey Roberts (tracey.roberts@nlrb.gov) <tracey.roberts@nlrb.gov>
Subject: FW: re: D.C. Circuit ruling on election rule application

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To: Witkin, Cynthia <Cynthia.Witkin@nlrb.gov>; SM-Publicinfo <Publicinfo@nlrb.gov>
Subject: re: D.C. Circuit ruling on election rule application

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Hope you've been well. The D.C. Circuit ratified the Obama NLRB's election rule changes this morning: https://www.cadc.uscourts.gov/internet/opinions.nsf/2B20692727C8717D852583E1004D3730/$file/18-1161.pdf and I'm currently working on an article.

I believe that makes the second court of appeals to have OK'd the rules (5th and D.C.). The ruling—which is short and dismissed all of UPS' claims—and the fact that the board's data shows unions aren't winning elections at any significantly larger rate would seem to support some of the arguments the unions and Dems have been making against the board's request for comment on changing the rules/plan to do so.

In addition, the board's RFI noted that circuit court rulings at the time "did not preclude the possibility that the Election Rule might be invalid as applied in particular cases." The court has now ratified the

application of the rules to UPS' particular circumstances, which indicates that sort of application, at least, is valid.

Please let me know if the Chairman or any of the other concurring members on the request for information has any general comment, or comment on the couple points I've raised. And if Member McFerran also has any comment on the matter, given her dissent.

Thanks!

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From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: Daily Labor Report Highlights
Date: Friday, April 19, 2019 4:34:38 PM

Bloomberg Law

DAILY LABOR REPORT®

Highlights

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TOP STORIES

Lockheed Martin Retaliation Suit Properly Barred, Fifth Circuit Says

By Daniel Seiden

Lockheed Martin Corp. convinced a federal appeals court to affirm the rejection of claims it retaliated against two former employees for their disclosures about potential fraud under a NASA contract.

Employers' Association Can't Provide Legal Advice, 4th Cir. Says

By Martina Barash

A North Carolina trade association's multi-year quest to provide legal services to its members ran into another wall April 19 when the Fourth Circuit ruled against it.

Heterosexual Worker Stung by 5th Cir. Stance on LGBT Bias (1)

By Patrick Dorrian and Genevieve Douglas

A heterosexual human resources employee fired over an anti-transgender Facebook post has no claim for sexual orientation-based job retaliation under federal law, the Fifth Circuit ruled April 19.

Chicago Officer Gets Trial Against Sergeant Over Accent-Mocking

By Patrick Dorrian

A Chicago police sergeant must face trial for allegedly mocking a Poland-born officer's accent and otherwise harassing him, a federal judge ruled April 19.

DISCRIMINATION

No Bias in Abbott's Passing Over Laid Off Worker for Rehire

By Patrick Dorrian

Abbott Labs's refusal to rehire a California woman based on medical leave she took while previously employed by the health-care giant didn't show bias, a state appeals court ruled.

Bed Bath & Beyond Manager Fails to Show Age Drove Layoff

By Patrick Dorrian

A Bed Bath & Beyond Inc. manager in California lacks evidence she was included in a corporate downsizing because she was 59, a federal court ruled.

California School District to Pay $850K to End LGBT Bias Suit

By Erin Mulvaney

A California school district agreed to pay an $850,000 settlement with a former English teacher who taught as an open lesbian and accused the school of firing her for LGBT bias.

WAGE & HOUR

Los Angeles Glass Company to Pay $1.3M to Settle Wage Claims

By David McAfee

A Los Angeles commercial and architectural glass manufacturer will pay $1.3 million to resolve a class action alleging it failed to properly pay overtime and provide required meal and rest breaks.

McKesson to Pay $1.65M for Failing to Pay Contractor Rate (1)

By Chris Marr

A failure to pay prevailing wage rates as required under a federal contract means that a division of McKesson Corp. must pay $1.65 million in back wages and benefits to 515 workers.

Judge Approves PetSmart's $1.3M Seating, Meal Break Settlement

By Porter Wells

A $1,350,000 settlement deal between PetSmart Inc. and workers over claims the company didn't provide adequate rest and meal breaks got initial approval from a federal judge in California April 18.

LABOR RELATIONS

Pitt Skewed Faculty Numbers to Defeat Organizing Bid, Union Says

By Louis C. LaBrecque

The University of Pittsburgh inflated the number of instructors in a potential bargaining unit to avoid a union election, the union that seeks to represent the faculty members alleges.

Volkswagen to Workers: We Will 'Remain Neutral' in Union Vote

By Andrew Wallender

Volkswagen told employees at its Chattanooga, Tenn., plant that it would "remain neutral" in the midst of an ongoing campaign from the United Auto Workers to unionize the facility, but the company also indicated that it's made improvements for workers without a union.

Maryland Teachers With Moot Suit Can't Get Refund of Union Fees

By Mike Leonard

Two Maryland teachers who sued over their union fees have nothing left to

challenge after the U.S. Supreme Court held in 2018 that public sector unions can't collect fees from nonmembers who object to them.

HARASSMENT & RETALIATION

USC's $215M Sex Abuse Settlement Offer a No-Go (1)

By Porter Wells

A proposed $215 million class action settlement that would have resolved sexual abuse accusations against an on-campus gynecologist and the University of Southern California was rejected by a federal judge April 18.

STATE & LOCAL LAWS

New Hampshire Aims to Boost Public-Worker Safety Oversight (1)

By Aaron Nicodemus

New Hampshire lawmakers want the state's Department of Labor to more aggressively investigate fatal and serious accidents involving public-sector employees.

IMMIGRATION

Growers Appeal Ruling Upholding Guest Worker Wage Hike

By Brian Flood

A group of growers will appeal a federal court ruling upholding 2019 wage rate increases for guest workers, it told the court April 18.

HEALTH CARE & BENEFITS

Your Plan Costs More Than Mine: The Price Tag for Paid Leave

By Genevieve Douglas

Children may be priceless, but taking leave to care for them, or for an illness

for that matter, certainly isn't. The collective cost of paying for a variety of leave benefits could top many billions of dollars each year, according to several estimates.

Perks of Work: Truth May Set You Free But Lying Pays Better

By Warren Rojas

Time for Perks of Work, our weekly recap of intriguing data, surveys, and trends about the 21st century workplace.

ALSO IN THE NEWS

Ex-NFL Players' Drug Claims Against League Tossed

By Steven M. Sellers

Former NFL players alleging they were given painkillers to get them back on the field at the expense of their long-term health have no case against the National Football League, a federal court in California ruled.

GM Pays Barra $21.9 Million as Trump, Biden Attack Closings (1)

By David Welch

General Motors Co. Chief Executive Officer Mary Barra took a 0.4 percent pay cut last year, as the largest U.S. automaker pulled off the rare feat of uniting Washington in opposition to its plan to close four factories in America.

Lyft, Uber, Others Say Trump Census Question Bad for Business

By Kimberly Strawbridge Robinson

Companies and business associations—from Lyft to Univision to Levi Strauss—oppose the Trump administration's plan to add a citizenship question to the 2020 census, the issue at the heart of a U.S. Supreme Court case to be argued Tuesday.

LEGAL PROFESSION

McGahn Was Right, Real Lawyers Take Notes (1)

By Stephanie Russell-Kraft

The Mueller report is full of lawyers doing lawyerly things (and some very unlawyerly things). But no anecdote stands out as a more basic illustration of the role of an attorney as Don McGahn's exchange with President Donald Trump over—note-taking.

LATEST CASES

Case: Disability Discrimination/'Qualified Individual' (D. Ariz.)

An adult probation officer for Maricopa County, Arizona, who was discharged after she ran out of leave following partial knee replacement surgery and wasn't able to return to work, wasn't a qualified individual within the meaning of the Americans with Disabilities Act. She couldn't perform nearly half of the functions listed as essential on the form completed by her doctor and the field work component of her job duties that she couldn't do can still be considered an essential function, even if it accounts for less half of her duties, the court said. The case is Hummel v. Maricopa Cty. Adult Prob. Dep't, 2019 BL 139539, D. Ariz., CV-16-04381-PHX-JJT, 4/18/19.

Case: Disability Discrimination/Jurisdiction (11th Cir.)

Federal district court lacks subject matter jurisdiction over disability discrimination claims under the Rehabilitation Act of 1973 by a former Department of Army employee, because her claims implicated the Army's decision to suspend and revoke her security clearance, and the U.S. Supreme Court has held that no reviewing court has authority to review the substance of an underlying security clearance determination when reviewing an adverse employment action. The case is .

Case: Labor Relations/Arbitration (8th Cir.)

A federal district court erred in vacating an arbitration award in favor of the International Union of Elevator Constructors because the award, which required a major elevator company to pay for the travel expenses of an apprentice reporting to a job site, drew its essence from a labor contract. The

contract stated in part that "elevator constructors" sent a certain distance must be paid for their travel time and expenses pursuant to a local expense agreement, and the arbitrator correctly relied on language in the recognition clause of the contract, that included the term "apprentice," even though it didn't quote the clause in its entirety, to determine that the term "elevator constructor" included the apprentice in this dispute. The case is Nat'l Elevator Bargaining Ass'n v. Elevator Constructors Local 33, 2019 BL 138399, 8th Cir., No. 18-1584, 4/18/19.

Case: FMLA/Retaliation (Cal. App. 4th Dist.)

A former specialist in diabetic supplies may not proceed with her claim that Abbott Laboratories didn't rehire her to the same position in retaliation for taking medical leave under California law. The selected candidate was more qualified for the position and her allegation that the hiring decisionmaker was aware of her past leave, without more, didn't show that her leaves of absence were factors in the hiring decision. The case is Villacreses v. Abbott Labs., 2019 BL 138783, Cal. Ct. App., 4th Dist., G054983, unpublished 4/18/19.

Case: Discrimination/Reduction-In-Force (S.D. Cal.)

A protected-age employee for Bed Bath & Beyond of California, LLC, who was discharged in a reduction-in-force after her department manager position was eliminated as a cost-saving measure and her performance scores prepared in connection with the RIF didn't meet the cutoff for transfer to another position, isn't entitled to a trial on her age discrimination claim. Her RIF performance scores were consistent with her recent annual reviews, the fact that that her termination documents don't mention her performance doesn't conflict with the evidence that her performance was the basis for the termination decision, the company wasn't required to place her on a performance improvement plan prior to the RIF, and her evidence that the company was hiring for department supervisors after the RIF doesn't demonstrate that her department manager position wasn't eliminated, as they are distinct positions, the court said. The case is .

Case: Disability Discrimination/Causation Standard (2d Cir.)

In a case of first impression, the U.S. Court of Appeals for the Second Circuit

rules that an employee pursuing a disability discrimination claim under the Rehabilitation Act of 1973 must show that the disability was the "but-for" cause of the adverse employment action, which means that the action wouldn't have been taken but for his disability. Applying this standard to a claim by a former director with the New York City Department of Investigation who alleged that his demotion was due to his hearing disability, the court concludes that the contemporaneous evidence of the director's poor performance demonstrates that his disability wasn't the "but-for" cause of his demotion. The case is .

Case: Discrimination/Retaliation (11th Cir.)

A black supervisor for the Alabama Power Company was properly denied a trial on her claims that she was subjected to a retaliatory transfer to an all-white office after she complained that a fellow employee had violated the company's policy prohibiting the possession of explicit sexual materials and that a job promotion offer was rescinded two days after she called the employee concerns line to report discrimination and harassment. The transfer resulted in a promotion to a higher position, she declined her superiors' help after she was harassed by a white subordinate in the new office, and the concerns program and her managers didn't learn of her call until after the rescindment of the job offer, the court said. The case is .

Case: FMLA/Retaliation (S.D. W. Va.)

A department manager may not proceed with her claim that Lowe's Home Centers in West Virginia fired her in retaliation for taking leave under the Family and Medical Leave Act. The manager was terminated when she was unable to secure a new position after her position was eliminated during a nationwide restructuring, two former department managers who also took FMLA leave but found other positions weren't terminated, and she didn't show that anyone at Lowe's commented on her FMLA leave or discouraged her from taking it. The case is Flatt v. Lowe'S Home Ctrs., LLC, 2019 BL 138609, S.D. W.Va., 2:18-cv-00570, 4/18/19.

Case: Discrimination/Hostile Work Environment (S.D. Ill.)

A female former employee may proceed with her claim that that FedEx Supply Chain in Illinois subjected her to a hostile work environment because of her

sex. Her allegations, including that her male supervisor continuously made lewd comments about her body and pressed his body against her's, could show that she was subjected to a sexually hostile work environment. The case is Brooks v. Fedex Supply Chain, Inc., 2019 BL 139395, S.D. Ill., No. 3:19-CV-00014-NJR-MAB, 4/18/19.

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From: Employment Law360
To: Ring, John
Subject: Week In Review: Walmart Hit With $6M Meal Break Verdict & NLRB Releases Advice Memos
Date: Saturday, April 20, 2019 7:09:00 AM

Employment Week In Review

Saturday, April 20, 2019

TOP NEWS

Walmart Owes $6M In Meal Break Suit, Jury Says

Walmart must pay $6.1 million to a class of employees for not providing meal breaks when it required workers to go through anti-theft metal detectors every time they wanted to leave the building, a California federal jury decided April 12.

New NLRB Advice Memos Tackle Worker Vs. Union Issues

The NLRB's Division of Advice has released a new batch of guidance memos that blessed several challenges from workers taking aim at their unions, backed a New Jersey hospital's change to how it handled worker complaints and punted "unit packing" claims against Domino's Pizza.

High Court Skeptical Calif. Law Applies To Oil Rig Labor Row

An offshore drilling worker tried to convince skeptical U.S. Supreme Court justices Tuesday that applying California state labor law to an offshore oil rig would not make language in the Outer Continental Shelf Lands Act pointless.

EEOC Scolded Over Missing Pay Data Compliance Info

A D.C. federal judge gave the U.S. Equal Employment Opportunity

LAW FIRMS

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COMPANIES

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General Motors
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Institute for Policy Int egrity
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International Franchise Association
National Employment La w Project
National Restauran t Association
National Women's Law Cen ter
New York University
Parker Drilling Company
The Boeing Co.
The Walt Disney Co.
United Parcel Service Inc.
Utah Transit Authority
Wal-Mart Stores Inc.
Walt D isney Parks & Resorts Worldwide Inc.
Washington Post Co.

GOVERNMENT AGENCIES

Equa l Employment Opportunity Commission
Executive Offi ce of the President
National Labor Relations Board
U.S. Department of Justice
U.S. Department of Labor

Commission a slap on the wrist Tuesday for removing information from its website to help employers comply with pay data collection, but held off on setting a deadline for when the data needs to be collected.

Courts Wrestle With LGBT Cases While Waiting On Justices

While the U.S. Supreme Court has kept employment law watchers waiting on whether it will take up the question of if bias against LGBT workers and job seekers is covered under Title VII, trial courts have been left to tackle tricky questions involving the viability of sexual orientation and gender identity discrimination claims. Here, Law360 looks at two recent developments in Title VII cases that you may have missed.

Employers Seek To Fortify Trump Regs Against Court Attacks

Business advocates are gleaning lessons from a series of court rulings that struck down Obama-era and early Trump administration employment regulations as they look to insulate more recent, employer-friendly rules against anticipated court challenges.

EXPERT ANALYSIS

What To Expect 1 Year After DOL's Updated Internship Test

As companies begin to usher in summer interns, it's not extremely clear how courts will apply the U.S. Department of Labor's seven-part test for classifying internships as paid or unpaid, which was introduced just over one year ago and has not yet been addressed in a major lawsuit, says Elizabeth Vulaj of Segal McCambridge.

U.S. Supreme Court

United States District Court for the Eastern District of Pennsylvania

Wage and Hour Division

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From: Employment Law360
To: Ring, John
Subject: Supreme Court To Mull Title VII"s Presuit Hurdles
Date: Monday, April 22, 2019 3:58:48 AM

EMPLOYMENT

Monday, April 22, 2019

TOP NEWS

Analysis

Supreme Court To Mull Title VII's Presuit Hurdles

The U.S. Supreme Court on Monday will hear a Texas county's challenge to a Fifth Circuit decision letting a worker pursue a religious discrimination claim she didn't make to the U.S. Equal Employment Opportunity Commission first, a case that could resolve a circuit split over what workers have to do before bringing federal discrimination suits.

Read full article »

Analysis

High Court FOIA Case May Alter Labor Agency's Disclosures

The U.S. Supreme Court will hear arguments Monday about the standard for invoking a key exception to the Freedom of Information Act in a case that could make it harder for employers with federal contracts to keep the reams of data they send to the Office of Federal Contract Compliance Programs under wraps, experts say.

Read full article »

Analysis

BigLaw Forced Arbitration Expected To Survive Amid #MeToo

Even though social media pressure spurred on by Harvard law students has led several BigLaw firms to change course on mandatory arbitration, experts say arbitration has gotten a bad rap and so-called coercive contracts, in some form, will ultimately survive the #MeToo movement.

Read full article »

Anti-Straight Bias Not Forbidden By Title VII: 5th Circ.

A Fifth Circuit panel said Friday that federal workplace discrimination law does not block employers from firing straight workers because of their sexuality, refusing to budge from its stance that Title VII of the Civil Rights Act does not cover sexual orientation.

Read full article »

UPS Can't Reverse Pa. Facility's Unionization, DC Circ. Says

The D.C. Circuit on Friday rejected UPS Ground Freight Inc.'s effort to overturn the unionization of employees at a Pennsylvania distribution facility, ruling that the International Brotherhood of Teamsters and the National Labor Relations Board had followed all the rules for certifying the union.

Read full article »

DISCRIMINATION

2nd Circ. Won't Revive Ex-Mt. Sinai Worker's Race Bias Suit

The Second Circuit on Friday refused to revive a fired worker's race bias suit against Mount Sinai Health System, saying she'd made a "glaringly disproportionate" number of errors while on the job.

Read full article »

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New Cases

Discrimination (45)
ERISA (30)
Labor (29)

LAW FIRMS

Ahmad Zavitsanos
Akerman
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Arnold & Porter
Baker Botts
Baker Donelson
Baker McKenzie
Ballard Spahr
Beveridge & Diamond
Blank Rome
Burns & Levinson
Cohen Milstein
Constangy Brooks
Cooley
DLA Piper
Davis Malm
Dechert
Duane Morris
Edelson PC
Epstein Becker Green
Fenwick & West
Fisher Phillips
Freeborn & Peters
Fried Frank

WAGE & HOUR

McKesson To Pay $1.6M In Back Wages, Benefits, DOL Says

A McKesson Corp. subsidiary will pay more than $1.6 million in back wages and fringe benefits to hundreds of its federally contracted workers after it discovered it wasn't paying them correctly, the U.S. Department of Labor announced Friday.

Read full article »

Law Firm Exits Wage Suit After Bagel Shop Worker's Perjury

A New York federal judge has allowed counsel for a worker found last year to have committed perjury to exit a wage case involving a lower Manhattan bagel shop.

Read full article »

Wells Fargo Battles Cert. In Reimbursement Fight At 9th Circ.

Wells Fargo urged the Ninth Circuit on Friday to reverse a lower court's decision to certify a class of 2,000 home mortgage consultants and bankers who claim the bank didn't reimburse their expenses or pay commissions on time, arguing that the expenses were optional and commissions can't be determined classwide.

Read full article »

Amazon Fights Nationwide Cert. Bid In Drivers' Wage Action

Amazon pushed back Thursday against a judge's suggestion that a Florida federal court could oversee a nationwide collective action accusing the e-commerce titan of shorting delivery drivers on pay, saying claims from out-of-state residents must be excluded.

Read full article »

5th Circ. Says Interstate Travel Axes Oil Workers' OT Suit

The Fifth Circuit has affirmed a federal judge's decision absolving Welltec Inc. from oil field workers' wage and hour claims, saying federal overtime pay requirements don't apply because the workers regularly drove across state lines.

Read full article »

LABOR

4th Circ. Trims Sanctions In Fired CarMax Worker's Arbitration

A former CarMax employee who claims he was unfairly fired deserved some sanctions from a district court for arguing aspects of his arbitration award appeal that were already rejected, but he also raised a fresh argument that didn't warrant a penalty, the Fourth Circuit ruled.

Read full article »

RESTRICTIVE COVENANTS

Ky. Court Upholds Atty Firing For Refusing Non-Solicit Deal

Kentucky's highest court has unanimously affirmed a lower court's ruling that a law firm did not wrongfully terminate an attorney after she refused to sign a non-solicitation agreement involving clients, as the deal did not violate state legal ethics rules.

Read full article »

Jimmy John's Workers Say No-Poach Suit Must Be Heard

Jimmy John's employees who are fighting the company's no-poach agreements for franchisees have urged an Illinois federal court not to throw out the case after the U.S. Department of Justice said such agreements aren't automatically illegal.

Read full article »

Gibson Dunn
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Greensfelder Hemker
Hart McLaughlin
Hirschfeld Kraemer
Hogan Lovells
Hunton Andrews Kurth
Jones Day
Kirkland & Ellis
Latham & Watkins
Leonard Carder
Lewis Brisbois
Lieff Cabraser
Littler Mendelson
Markowitz & Richman
Mayer Brown
McCune Wright
Michael Faillace & Associates
Mintz Levin
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Morgan Lewis
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Orrick Herrington
Paul Hastings
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Wright Close
Wyatt Tarrant

COMPANIES

Amazon.com Inc.
American Bar Association
American Civil Liberties Union
Apple Inc.
Association of Corporate Counsel
BB&T Corp.

TRADE SECRETS

Halliburton Says Ex-Engineer Stole IP, Tried To Sell It Back

Halliburton Energy Services is suing a former engineer, alleging he stole its proprietary information for a new technology, quit the company, patented that stolen intellectual property and then tried to sell it back to the company.

Read full article »

X-Ray Engineer Gave Trade Secrets To Rival, Philips Says

A former Philips Medical Systems employee stole trade secrets that have given a competitor “a decadeslong head start” in designing and selling its own knock off version of Philips X-ray tubes, the technology company told an Illinois federal judge Friday.

Read full article »

WORKER PRIVACY

Uphold Arbitration Order In Biometric Case, Southwest Urges

Southwest Airlines employees who are accusing the company of unlawfully collecting their biometric data are trying and failing to sidestep the federal arbitration requirements preempting their suit, the airline told the Seventh Circuit on Thursday.

Read full article »

PEOPLE

Hunton Andrews Kurth Nabs Constangy Employment Litigator

A year after a merger between Andrews Kurth and Hunton & Williams brought Hunton Andrews Kurth, the firm has added a litigator from Constangy Brooks to spearhead the expansion of its labor and employment practice in the Northeast.

Read full article »

EXPERT ANALYSIS

Kickstarter's Unionizing Efforts May Signal New Trend In Tech

Historically, employee organizing efforts at tech companies have been limited to lower-paying positions, but Kickstarter employees' recently announced plans to unionize could signal a shift toward increased unionizing efforts by tech workers in higher-paid positions, says Candice Zee of Vedder Price.

Read full article »

Downsides To Accelerating Contractor Debarment Decisions

A new pilot program from the U.S. Department of Labor aims to reduce processing times for suspensions and debarments of indicted or convicted government contractors, but there are a few reasons the agency might reconsider the plan, says Dominique Casimir of Arnold & Porter.

Read full article »

New Chancery Guidance On Books And Records Law

The Delaware Court of Chancery’s recent decisions in Schnatter, Tempur-Sealy and CHC Investments further delineate the metes and bounds of a stockholder's right to obtain a company's books and records, say attorneys with Winston & Strawn.

Read full article »

LEGAL INDUSTRY

Analysis

Looking To Go Green? Here's How It Can Work For Your Firm

As another Earth Day arrives, environmental consciousness is on the minds of many in the legal industry, and despite a number of challenges, going

Bristol-Myers Squibb Co.
CVC Capital Partners
CarMax Business Services LLC
Edgeworth Economics LLC
Essendant Inc.
Facebook
Food Marketing Institute
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Google Inc.
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Intel Corp.
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Lowe's Companies Inc.
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McKesson Corp.
MetLife Inc.
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New York University
Outback Steakhouse
Papa John's International Inc.
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QUALCOMM Inc.
Southwest Airlines Co.
Staples Inc.
State Farm
Taylor Bean & Whitaker Mortgage Corp.
Tempur Sealy International Inc.
The Walt Disney Co.
Twitter Inc.
Uber Technologies Inc.
United Parcel Service Inc.
United Technologies Corp.
Wal-Mart Stores Inc.
Wells Fargo & Co.

GOVERNMENT AGENCIES

Centers for Disease Control and Prevention
Chicago Department of Aviation
Delaware Court of Chancery
Department of Commerce
Equal Employment Opportunity Commission
European Commission

green is not only a possibility but an opportunity as well.

Read full article »

In Civil Rights Arena, Practice Groups A Rare But Potent Force

Although a rarity among firms, dedicated practice groups focused on civil rights cases can have a big impact, proponents say, taking cases solo attorneys and government regulators can't.

Read full article »

Analysis

5 Times Lawyers Settled During The Big Show

Apple and Qualcomm grabbed headlines when they decided to settle their differences before a San Diego federal jury could decide their multibillion-dollar antitrust dispute. But they aren't the first high-profile litigants to think twice about having a jury decide their fate once they got to court.

Read full article »

Analysis

Gibson Dunn Ups The Ante On Gambling After High Court Win

Gibson Dunn, the law firm that led the fight to overturn a federal ban on sports betting, has launched a revamped practice group focused on sports betting and gambling, positioning itself to take advantage of the rapidly expanding, newly legal market.

Read full article »

Baker Donelson's Growth Recognized Its Roots, Ex-Chief Says

During Ben Adams' 16 years at the helm of Baker Donelson, the firm doubled its offices and attorneys, carrying out a growth strategy that the departing chairman told Law360 bet on the firm's roots to prepare for its future.

Read full article »

Q&A

Q&A With 'Queen Of Torts' Sheila Birnbaum

Dechert LLP's Sheila Birnbaum, known as the "Queen of Torts," recently discussed with Law360 the changes in product liability laws she has seen over her long career, her proudest achievement as a lawyer and the challenges of representing Purdue Pharma in the multidistrict litigation over the opioid crisis.

Read full article »

More Women Taking Reins Among Tech Giants' Legal Chiefs

Women are increasingly heading up the legal departments of the largest companies in California's Silicon Valley as well as the corporations on the S&P 100, though men continue to hold the bulk of those positions, a biannual report by Fenwick & West LLP reveals.

Read full article »

Most 2016 Law Grads Who Took The Bar Passed, ABA Says

About 88.6% of 2016 law school graduates who took the bar exam within two years of completing school passed the test, the American Bar Association said Friday, noting that the class of 2016's two-year success rate is about the same as that of 2015 graduates.

Read full article »

Up Next At High Court: Census Brawl Dominates Busy Week

The Trump administration's attempt to put a citizenship question on the census is the most high-profile case at the Supreme Court this week, but the justices will also tackle issues affecting government contractors and Title VII plaintiffs as it closes out the final argument session of the 2018 term.

Read full article »

GC Cheat Sheet: The Hottest Corporate News Of The Week

Google has been accused in a derivative suit of hiding workplace

European Union

Federal Acquisition Regulatory Council

Federal Bureau of Investigation

Federal Trade Commission

National Labor Relations Board

Office of Federal Contract Compliance Programs

Securities and Exchange Commission

Texas Workforce Commission

U.S. Department of Agriculture

U.S. Department of Justice

U.S. Department of Labor

U.S. Department of Transportation

U.S. House of Representatives

U.S. Supreme Court

Wage and Hour Division

Wisconsin Supreme Court

harassment, a Duane Morris partner said law firms are dropping the ball in addressing misconduct and employers are seeking to fortify Trump administration regulations against court attacks. These are some of the stories in legal news you may have missed in the past week.

Read full article »

In Case You Missed It: Hottest Firms And Stories On Law360

For those who missed out, here's a look back at the law firms, stories and expert analyses that generated the most buzz on Law360 last week.

Read full article »

Podcast

Law360's Pro Say: Mueller Madness

After more than two years of speculation, Special Counsel Robert Mueller's report about Russian interference with the 2016 election has been released and there are plenty of legal revelations to unpack. So we'll do just that on this week's Pro Say podcast.

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From: GovExec Today
To: Ring, John
Subject: Trump"s OPM nominee; battle lines between EPA, watchdog; surge in leaks
Date: Monday, April 22, 2019 5:36:16 AM

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GovExec Today

April 22, 2019

EPA Clashes With IG Over Destroyed Documents // Eric Katz

Auditors say officials at the agency are impeding its work.

Trump's Pick to Lead OPM Has an Unusual Management Record for the Job // Erich Wagner

"We thought she was there to destroy the agency," said a former senior official at the Federal Labor Relations Authority during Dale Cabaniss' tenure there.

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Guide to Transforming Digital Communications in the DoD

With ever-changing mission requirements, the DoD must have secure and reliable mobile communications to make informed decisions impacting the effective command and control of operations forces, whether sharing real-time intelligence with military leaders on the battlefield, managing the logistics of feeding thousands of troops, or discharging a patient from a military hospital. Modernizing unified communications (UC) is essential to ensuring the U.S. military meets its mission and remains the world's preeminent fighting force. Privacy Policy.

Read More…

Criminal Referrals for Leaks of Sensitive Government Information Have Surged // Lindy Kyzer

The number of criminal prosecutions for leakers only scratches the surface of those who disclose government secrets, however.

Scholar Predicts Government Reform Could Motivate 2020 Voters // Charles S. Clark

New survey data suggest the presidential race outcome could turn on candidate plans for "rebuilding broken bureaucracy," says New York University's Paul Light.

Why Engagement Matters and How to Improve It // John Kamensky

The results of past employee viewpoint surveys haven't been very useful to most frontline managers trying to address challenges specific to their organizations.

The Real Illegal Immigration Crisis Isn't on the Southern Border // Krishnadev Calamur

Focusing on asylum seekers who cross land borders ignores the real problem: people who overstay their visas.

All Those Mueller Report Redactions Mean the U.S. is Still Investigating Moscow's Online Meddling in 2016 // Patrick Tucker

There's still a lot the public doesn't know about Russian interference operations.

Union Fee Refunds to Local Government Workers Unwarranted, Federal Judge Rules // Bill Lucia

The lawsuits against a California union local are just two of many being filed against public sector unions across the country.

The Pentagon is Investing in Space Robots to Repair Satellites // Jack Corrigan

The robots would service military, government and commercial spacecraft more than 22,000 miles above the Earth.

NSF Kicks Off Final Phase of Workforce Reskilling App Competition // Jack Corrigan

The Career Compass Challenge aims to build an app that matches feds to the tech jobs based on their current skills and interests.

Scooters Did Take Over Last Year // Laura Maggi

A new report shows use of electric scooters surged past docked bike share.

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Guide to Transforming Digital Communications in the DoD

With ever-changing mission requirements, the DoD must have secure and reliable mobile communications to make informed decisions impacting the effective command and control of operations forces, whether sharing real-time intelligence with military leaders on the battlefield, managing the logistics of feeding thousands of troops, or discharging a patient from a military hospital. Modernizing unified communications (UC) is essential to ensuring the U.S. military meets its mission and remains the world's preeminent fighting force. Privacy Policy.

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Government Executive Media Group, 600 New Hampshire Avenue NW, Washington, DC 20037

From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: First Move: Supreme Court Tackles Pre-Lawsuit Rule for Bias Cases
Date: Monday, April 22, 2019 7:08:25 AM

What you need to know to start your day.

Supreme Court Tackles Pre-Lawsuit Rule for Bias Cases

By Patricio Chile

An employer's ability to get discrimination claims tossed out of court at any stage of litigation—if a worker didn't list those allegations in filings to civil rights agencies before suing—will be weighed by the U.S. Supreme Court today. A former employee of Fort Bend County, Texas, says the county waited too long to argue that her religious bias claims should be dismissed because they didn't appear in charges she submitted to an agency.

- **Requirement Challenged:** At issue in the case is what's known as "administrative exhaustion," and employers have found success in arguing that workers haven't met that requirement.

- **Potential Impact:** A win for workers could have implications for how employers defend discrimination cases, and may even drive up litigation costs.

The U.S. Supreme Court is seen on April 15 in Washington.
Photographer: Eric Baradat /AFP/ Getty Images

EMPTY EEOC SEATS HIGHLIGHT NOMINEE DROUGHT

The Equal Employment Opportunity Commission's lack of a quorum has created some uncertainty about how the agency will handle a judge's recent decision to revive Obama-era pay data reporting requirements. It also highlights concerns from business advocates who say the slow confirmation process is stalling policy activity.

- **Still Waiting:** The Senate has yet to vote on a handful of labor and employment nominees, while the White House still hasn't picked anyone to fill other spots at the Labor Department and EEOC, Tyrone Richardson reports.

- **Pay Data:** A judge recently ordered the EEOC to start collecting certain pay data from many companies, but the agency says it doesn't have the bandwidth to do that anytime soon. The EEOC can't revoke an Obama administration move to start collecting the data without a quorum.

LEGAL FUTURISTS

Job titles like Project Manager, Risk Manager, and Data Scientist are showing up everywhere, but now they get a new prefix that hadn't been there before —"Legal."

- **Tech & Legal Ops:** New technology and the rise of legal operations—helping legal departments work more efficiently—are disrupting the traditional eight-year up-or-out track for associates and other law school grads.

- **Winds of Change:** "The forces that have changed every industry, the forces of technology and the internet and globalization, got to the law late," the director of the National Association for Law Placement said. Read more about these new roles in the Bloomberg Law Analysis piece by analyst Meg McEvoy.

WHAT ELSE WE'RE WATCHING

- **High Court Orders:** The Supreme Court also will issue orders at 9:30 a.m., including possible grants and denials of review in pending appeals. Still on the radar are three cases involving anti-discrimination protections for LGBT workers.

- **EEO-1 Suit:** The EEOC and worker advocates have until 5 p.m. today to file proposed orders with a federal judge on a deadline for when the agency must collect pay data from employers.

- **Volkswagen Union:** The gloves appear to be off in the latest effort to unionize a Volkswagen plant in Tennessee. Punch In with Chris Opfer and

Jaclyn Diaz for the an update on the union drive.

- **Stop & Shop Deal:** The United Food and Commercial Workers announced late April 21 that it reached a tentative agreement for a new contract for the 31,000 Stop & Shop workers who walked off their jobs on April 11 to protest changes in health care, take-home pay, and other benefits, Andrew Wallender reports.

- **Judicial Discipline:** A former military commission judge who presided over the USS Cole bombing case may not face additional consequences for failing to appear impartial after a federal appeals court penalized him for his actions. Melissa Heelan Stanzione has the story.

DAILY RUNDOWN

Top Stories

Lockheed Martin Retaliation Suit Properly Barred, Fifth Circuit Says
Lockheed Martin Corp. convinced a federal appeals court to affirm the rejection of claims it retaliated against two former employees for their disclosures about potential fraud under a NASA contract.

Employers' Association Can't Provide Legal Advice, 4th Cir. Says
A North Carolina trade association's multi-year quest to provide legal services to its members ran into another wall April 19 when the Fourth Circuit ruled against it.

Heterosexual Worker Stung by 5th Cir. Stance on LGBT Bias
A heterosexual human resources employee fired over an anti-transgender Facebook post has no claim for sexual orientation-based job retaliation under federal law, the Fifth Circuit ruled.

Chicago Officer Gets Trial Against Sergeant Over Accent-Mocking
A Chicago police sergeant must face trial for allegedly mocking a Poland-born officer's accent and otherwise harassing him, a federal judge ruled.

Discrimination

No Bias in Abbott's Passing Over Laid Off Worker for Rehire
Abbott Labs's refusal to rehire a California woman based on medical leave she

took while previously employed by the health-care giant didn't show bias, a state appeals court ruled.

Bed Bath & Beyond Manager Fails to Show Age Drove Layoff
A Bed Bath & Beyond Inc. manager in California lacks evidence she was included in a corporate downsizing because she was 59, a federal court ruled.

Wage & Hour

Los Angeles Glass Company to Pay $1.3M to Settle Wage Claims
A Los Angeles commercial and architectural glass manufacturer will pay $1.3 million to resolve a class action alleging it failed to properly pay overtime and provide required meal and rest breaks.

McKesson to Pay $1.65M for Failing to Pay Contractor Rate
A failure to pay prevailing wage rates as required under a federal contract means that a division of McKesson Corp. must pay $1.65 million in back wages and benefits to 515 workers.

Labor Relations

Pitt Skewed Faculty Numbers to Defeat Organizing Bid, Union Says
The University of Pittsburgh inflated the number of instructors in a potential bargaining unit to avoid a union election, the union that seeks to represent the faculty members alleges.

Maryland Teachers With Moot Suit Can't Get Refund of Union Fees
Two Maryland teachers who sued over their union fees have nothing left to challenge after the U.S. Supreme Court held in 2018 that public sector unions can't collect fees from nonmembers who object to them.

State & Local Laws

New Hampshire Aims to Boost Public-Worker Safety Oversight
New Hampshire lawmakers want the state's Department of Labor to more aggressively investigate fatal and serious accidents involving public-sector employees.

Immigration

Growers Appeal Ruling Upholding Guest Worker Wage Hike

A group of growers will appeal a federal court ruling upholding 2019 wage rate increases for guest workers.

WORKFLOWS

Baker McKenzie announced the passing of global chair Paul Rawlinson on April 12 2019 | **Gordon Rees Scully Mansukhani** says it is the first law firm with offices in all 50 states | Windels Marx Lane & Mittendorf's Madison, WI office acquired a team of 15 intellectual property lawyers from Budd Larner | **Cole Schotz** added a four-lawyer litigation and IP team in Dallas | Texas trial firm **Hartline Dacus Barger Dreyer** has shortened its name to Hartline Barger, due to the retirement of two name partners | **BakerHostetler** added Robert A. Julian, Cecily A. Dumas and Kimberly Morris as partners in Northern CA | **Hunton Andrews Kurth** added Chris Pardo and Anna L. Rothschild to its labor and employment team in Boston from Constangy, Brooks, Smith & Profete | **DLA Piper** announced that 77 lawyers have been promoted to its partnership; the promotions were made across many of the firm's practice areas in 43 different offices throughout 20 countries

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From: Access to Justice Law360
To: Ring, John
Subject: In Civil Rights Arena, Practice Groups A Rare But Potent Force
Date: Monday, April 22, 2019 7:20:33 AM

Access to Justice

10911.jpg

In Civil Rights Arena, Practice Groups A Rare But Potent Force

Although a rarity among firms, dedicated practice groups focused on civil rights cases can have a big impact, proponents say, taking cases solo attorneys and government regulators can't.
Read full article

When Algorithms Control Justice, Who Can Check The Math?

In New York City, more than 30 different automated decision systems help government agencies analyze DNA, assess inmates' risk of recidivism and more. As algorithms become increasingly prevalent across the country, groups have raised concerns that the supposedly objective calculations might share some of the same biases as the subjective humans who created them.
Read full article

Justices Wary Of Stonewalling The Victims Of Faked Evidence

With plenty of head-shaking and sharp questioning, much of the U.S. Supreme

Monday, April 22, 2019

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Court appeared dubious that the clock for people to file civil suits over bogus evidence used against them in a criminal action should start before that case comes to a close.
Read full article

NY's ICE Rule Offers Model For Other Courts

The New York state court system's recent bar on U.S. Immigration and Customs Enforcement administrative arrests on its property offers inspiration and a tentative blueprint for other jurisdictions looking to sideline agency tactics that many advocates worry have a chilling effect on the justice system.
Read full article

Iowa Is Latest State To Extend Right To Counsel Protections

The Constitution guarantees people the right to an attorney if they are charged with a crime, but more than 50 years after that right was established, courts are still hashing out just how far those protections go and whether they cover every stage of a criminal case.
Read full article

Oregon Foster System Accused Of Failing Vulnerable Kids

Kylie, age 7, was placed into foster care in Oregon in January after her mother was accused of neglect and substance abuse, but rather than being placed in a safe, stable home, Kylie was placed in four homes in two months.
Read full article

McGuireWoods Taps Full-Time Pro Bono Director

McGuireWoods LLP is looking to cement the importance of its pro bono program by appointing a senior counsel with a history of such work as the firm's first full-time pro bono director.
Read full article

All Access

Legal Aid Vet Bergmark Dishes On Rising Up For Civil Justice

Former Legal Services Corporation president Martha Bergmark discusses challenges to federal legal aid funding and her most recent efforts as the founder of Voices for Civil Justice to raise the profile of America's justice gap.
Read full article

Perspectives

How To Improve Jurors' Perceptions Of Legal Outcomes

When practitioners use methods to emphasize procedural fairness during jury selection, they can engender more faith in the justice system among potential jurors — which can extend beyond trial, says Natalie Gordon of trial consulting firm DOAR.
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Equal Employment Opportunity Commission

European Commission

European Union

Federal Bureau of Investigation

Federal Trade Commission

Legal Services Corp.

Securities and Exchange Commission

U.S. Department of Agriculture

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From: Martin, Andrew
Subject: Legal News FYI 04-22-19
Date: Monday, April 22, 2019 8:31:34 AM
Attachments: image001.png

Monday, April 22, 2019

Leftist memes are everywhere on Instagram. Now their creators are unionizing.

VOX 22 Apr 2019 08:03

It started with a Shrek meme, but of course he origins go back much further. The IG Meme Union Local 69-420 — what other number could it possibly have used? — went public on April 10 as the project of just a single memer under the name @possumkratom69,...

Punching In: Volkswagen Looks to Pump Brakes on Union Vote

BloombergLaw - Daily Labor Report 22 Apr 2019 06 07

By Chris Opfer and Jaclyn Diaz Monday morning musings for workplace watchers Third Time's he Charm? | Fear of an EEOC Pay Data Hack | Bill Emanuel's Lost Winter Chris Opfer: Lawyers for Volkswagen and the United Auto Workers have until Wednesday to file...

NLRB Says Griping About Clients Is Not Protected Concerted Activity

Parker Poe Adams & Bernstein LLC 22 Apr 2019 02:26

Section 7 of the National Labor Relations Act protects employee "concerted activity." Concerted activity means two or more employees engaging in discussions or ac ions intended to address terms and conditions of employment. In general, employees are...

Safety Concerns Plague Boeing Dreamliner Plant

New York Times, The (New York, NY) 21 Apr 2019 00:00

NORTH CHARLESTON, S.C. -- When Boeing broke ground on its new factory near Charleston in 2009, the plant was trumpeted as a state-of- he-art manufacturing hub, building one of the most advanced aircraft in the world. But in the decade since, the factory,...

Graduate student workers unionize for better working conditions

American University : The Eagle (Washington, DC) 20 Apr 2019 16:47

The graduate student union at American University formed to create better working conditions for graduate student workers, with he goals of improving pay, access to student heal h services and reducing fees, among o her things. Unionization efforts...

NLRB Weighs in on Confidentiality, Personal Use of Company Email, and Other Workplace Policies

Lexology 19 Apr 2019 22:06

Employers should be careful about designating Employee Handbooks confiden ial as, according to the National Labor Relations Board's advice division, that would be unlawful. That advice was contained in one of five memoranda issued by the advice division...

Should Graduate Students Be Paid Like Employees? Students Across Campuses Push for Living Wage

Newsweek.com 19 Apr 2019 16:05

Graduate students across America are forming unions, holding protests and, in some cases, being arrested to draw attention to their cause. What is it they're after? In many cases, it's a livable wage. The relationship between universities and graduate...

Blog Post: UPS Can't Reverse Pa. Facility's Unionization, DC Circ. Says

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 19 Apr 2019 15:01

The D.C. Circuit on Friday rejected UPS Ground Freight Inc.'s effort to overturn the unionization of employees at a Pennsylvania distribution facility, ruling that he International Brotherhood of Teamsters and the National Labor Relations Board had...

UPS Loses Court Challenge to Obama-Era Union Election Rules (1)

BloombergLaw - Labor Relations News 19 Apr 2019 12:07

• Drivers voted 27-1 to unionize; UPS refused to bargain • Appeals court upholds unfair labor practices finding By Hassan A. Kanu and Porter Wells UPS Ground Freight Inc. lost its bid April 19 to get the D.C. Circuit to overturn a union election by...

DuPont's Pasadena workers vote to unionize, contract talks...

Houston Chronicle, The (Houston, TX) 19 Apr 2019 11:48

Workers at DuPont's Bayport chemical plant in Pasadena have voted in favor of joining an engineers' union and will likely start contract talks soon, the International Union of Operating Engineers confirmed Friday. The vote comes as workers are nervous...

Volkswagen to Workers: We Will 'Remain Neutral' in Union Vote

BloombergLaw - Labor Relations News 19 Apr 2019 10:37

• Company said it has no prearrangements with union • CEO: Too early to judge possible union effect on profit By Andrew Wallender Volkswagen told employees at its Chattanooga, Tenn., plant hat it would "remain neutral" in the midst of an ongoing...

The labor-rights activist who helped win 2 million US caregivers higher wages warns that robots aren't the real threat to workers

Business Insider UK 19 Apr 2019 10:06

Sarita Gupta's mission is to ensure that we don't forget "the future of workers" in our ongoing discussion on "the future of work." As he co-execu ive director of the union rights group Jobs with Justice, Gupta has spent her career as a leading voice...

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From: Leah Spinelli
To: Ring, John
Subject: John F., have you seen your invite to join USAF, DHA, + NGA?
Date: Monday, April 22, 2019 9:10:25 AM

Hello John F.,

The **2019 Data Security Summit** hosted by Thales is taking place next week, so I wanted to personally answer some frequently asked questions about the event!

- **Date:**Wednesday, May 1, 2019
- **Time:** 8:30 AM - 12:00 PM
- **Location:** Spire, 750 First St NE, Washington, DC 20002
- **Metro Stop:** Union Station - Red Line
- **Speakers:** We'll host speakers from U.S. Air Force, National Geospatial Agency, Defense Health Agency, and more!
- **Cost:** This event is completely free to attendees, however, spaces are limited so **reserve your seat now**
- **Meal:** A complimentary breakfast will be served from 8:30 - 9:00 AM
- **Bringing Colleagues:** We welcome you to invite your colleagues to attend this event with you! Please have them register ahead of time to ensure their spot. We will also be able to take on-site registrations.

Don't miss out on the opportunity to hear from these cybersecurity experts! **Register now** to ensure your place. More information can be found on our **event site**

I hope to see you at the **Data Security Summit** on May 1! If you have any questions in the meantime, please contact me directly at lspinelli@gemgstudio2g.com

All the best,

Leah Spinelli
Studio 2G

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WASHINGTON, DC | MAY 1 | 8:30 AM - 12:00 PM | REGISTER

In modernization efforts across government, agencies are doing more than replacing or updating legacy systems. They are leveraging the cloud and related technologies to make the IT enterprise more efficient, adaptable, and scalable.

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View the speaker lineup, agenda, and more on our **event site**.

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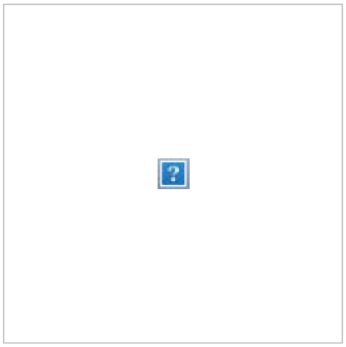

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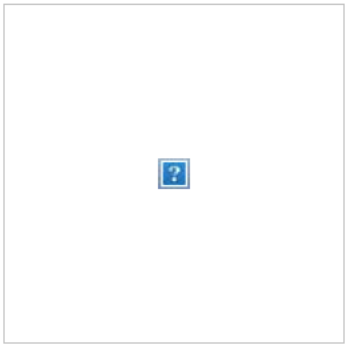

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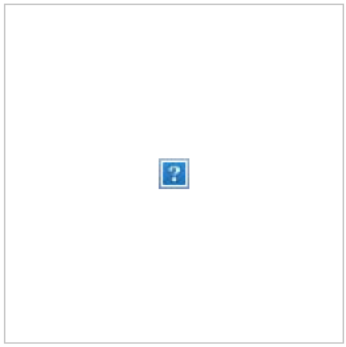

Dr. Monica Farah-Stapleton
Chief Engineer, PM DHMSM, PEO Defense Healthcare Management Systems,
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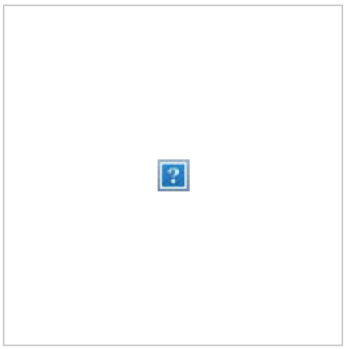

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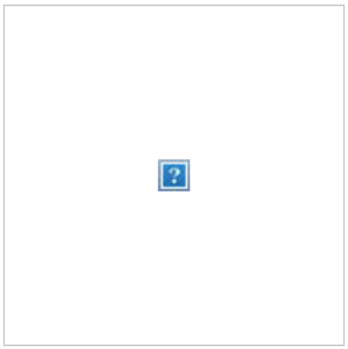

Adrian Monza
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Questions about the event? Contact Leah at lspinelli@gemgstudio2g.com.

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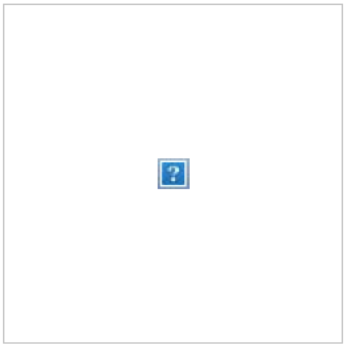

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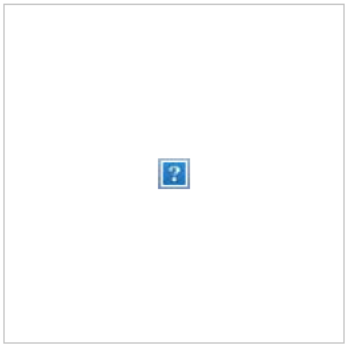

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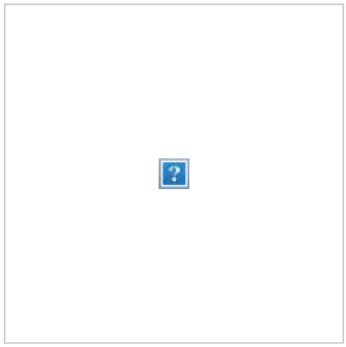

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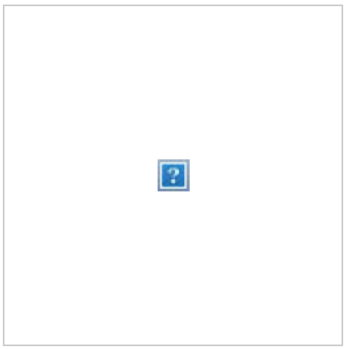

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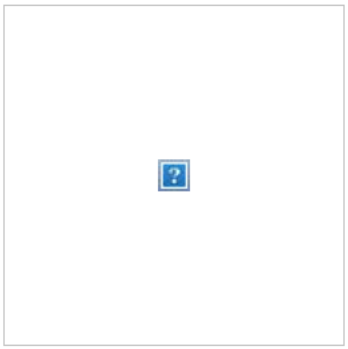

Adrian Monza
Chief, Cyber Defense Branch, U.S. Citizenship and Immigration Services

Questions about the event? Contact Leah at lspinelli@gemgstudio2g.com.

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From: Morning Shift
To: Ring, John
Subject: POLITICO"s Morning Shift: FBI arrests militia leader at the border — Stop & Shop reaches tentative agreement with union — UPS loses union challenge
Date: Monday, April 22, 2019 10:04:27 AM

View online version

2018 Newsletter Logo: Morning Shift

04/22/2019 10:00 AM EDT

By IAN KULLGREN (ikullgren@politico.com; @iankullgren)

With help from Ted Hesson

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click

here.

QUICK FIX

— The FBI arrested a militia leader in New Mexico.

— Stop & Shop reached a tentative accord with strikers.

— UPS lost a court challenge to the Obama-era quickie election rule.

GOOD MORNING! It's Monday, April 22, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

FBI ARRESTS MILITIA LEADER AT BORDER: "The FBI arrested the head of an armed right-wing 'patriot' group that had detained hundreds of migrants at the New Mexico border on Saturday for being a felon in possession of a weapon," Buzzfeed News' Adolfo Flores reports. "Larry Mitchell Hopkins, 69, was arrested on a federal complaint charging him with being a felon in possession of firearms and ammunition, the FBI said. He was arrested near the New Mexico border with the assistance of the Sunland Park Police Department."

Hopkins is the leader of the United Constitutional Patriots, a vigilante militia group that in recent days stopped migrants at the border at gunpoint before handing them off to border patrol. CBP distanced itself from the group, tweeting on Friday that it "does not endorse or condone private groups or organizations that take enforcement matters into their own hands." The militia last week held up 200 migrants seeking asylum in New Mexico, posting video of the incident on social media. More here.

UNIONS

STOP & SHOP REACHES AGREEMENT WITH UNION: UFCW and the Stop & Shop grocery chain reached a tentative contract agreement Sunday, ending a 10-day strike that closed stores across New England.

"The tentative, three-year deal between Stop & Shop and the five United Food and Commercial Workers locals representing the workers offers increased pay for all associates, as well as continued health coverage and retirement benefits," the Boston Globe's John Hilliard writes.

In a statement, UFCW said the agreement also maintains time-and-half pay on Sundays for current union members. "Today is a powerful victory for the 31,000 hardworking men and women of Stop & Shop who courageously stood up to fight for what all New Englanders want — good jobs, affordable health care, a better wage, and to be treated right by the company they made a success," the union said. More here.

UPS LOSES UNION CHALLENGE: A federal court on Friday declined to overturn a union election of a group of UPS employees under the Obama administration's quickie election rule. The rule, finalized in 2014, sought to speed up union organizing by postponing litigation on eligibility issues until after an election takes place. It also scrapped a mandatory 25-day waiting period between when an election is ordered and when it takes place, and required employers to release employees' contact information to organizers.

UPS challenged the unionization vote at its Kutztown, Pennsylvania distribution facility, arguing that one of the workers was a manager and shouldn't have been involved in the union drive. But the court agreed with a 2017 NLRB ruling that the employee was not a manager, and instructed UPS to bargain with the union.

The NLRB has indicated it will seek to repeal the Obama rule sometime this spring, Bloomberg Law reported, citing a memo sent to the American Bar Association.

IMMIGRATION

U.S. OFFICIAL HEADS TO CENTRAL AMERICA: A senior U.S. diplomat is meeting with officials in Honduras and El Salvador to discuss the migrant crisis. Kimberly Breier, the assistant secretary for Western Hemisphere affairs, will hold a series of talks through Tuesday to "urge the governments of those countries to do more to prevent illegal immigration to the United States and to promote regional prosperity, security, and governance," according to a notice from the State Department.

The visit comes after the Trump administration last month said it would stop

sending aid to Guatemala, El Salvador and Honduras, threatening to exacerbate the flow of migrants to the U.S. More here.

USCIS, CBP TO TALK 'CREDIBLE FEAR': USCIS asylum staffers will meet with CBP officials this week to discuss logistics around border personnel conducting "credible fear" interviews, according to a person familiar with the meeting. The interviews, which seek to determine whether a person fears persecution in their home country, are the first step in some asylum claims.

Brandon Judd, president of a union for Border Patrol agents, said earlier this month that DHS would launch a pilot program that would require border personnel to perform the interviews to speed up the asylum process. Judd said he wasn't aware of a meeting this week to discuss the issue, but said a previous training scheduled to begin April 15 had been pushed back.

USCIS: POT AIN'T MORAL: "U.S. Citizenship and Immigration Services [on Friday] issued a policy update clarifying that candidates for naturalization may not be able to meet the 'good moral character' benchmark for citizenship if they have been found to have violated federal drug laws, including for cannabis, even in states where the drug is legal," POLITICO's Lauren Gardner reports.

"The guidance clarifies that such a violation, 'established by a conviction or admission, is generally a bar to establishing [good moral character] for naturalization even where the conduct would not be a violation of state law,'" Gardner writes. More here.

STATES

WISCONSIN HIGH COURT TO TAKE UP UNION CHALLENGE: The Wisconsin Supreme Court on Friday agreed to take up SEIU's challenge of GOP lame-duck bills that curtail the power of Democratic Gov. Tony Evers and Democratic Attorney General Josh Kaul, the Milwaukee Journal Sentinel's Molly Beck reports.

"Without being asked, the state's highest court assumed jurisdiction over the appeal of the lawsuit brought by labor unions arguing the legislators' actions in December violated the state constitution's separation-of-powers doctrine," Beck writes.

One of the most controversial provisions passed by the Republican legislature prevents Evers from withdrawing from a multi-state challenge to the Affordable

Care Act. A lower court moved to block the laws last month. More here.

AGRICULTURE

USDA EMPLOYEES TO VOTE ON UNION: "The Agriculture Department's Economic Research Service will vote on May 9 on whether to unionize," POLITICO's Liz Crampton reports.

"Morale has been destroyed at this agency," Peter Winch, an organizer for the American Federation of Government Employees, told Crampton. "Highly-educated employees who wanted to come to Washington and do something good for agriculture, their morale is terrible. Forming a union and being able to stand up for themselves and advocate is already improving morale for the positive." More here.

WAGES

UC BUSINESS SCHOOL STUDY: Minimum wage increases in California haven't reduced employment in the restaurant industry but could prove to be a problem when the next recession hits, according to a study from the University of California-Riverside School of Business.

The study, prepared at the request of the California Restaurant Association, argues that restaurant employment has grown more slowly than it would have without the minimum wage increase. California's minimum wage rose to $12 an hour for businesses with more than 25 employees at the start of 2019, and will reach $15 for all businesses by 2023.

"When the next recession arrives, the higher real minimum wage could increase overall job losses within the economy and lead to a higher unemployment rate than would have been the case without the minimum wage increases," the report says. Read it here.

HUD LIMITS DOWN PAYMENT ASSISTANCE: "The Department of Housing and Urban Development is moving to rein in government entities that provide homebuyers with down payment assistance for Federal Housing Administration-backed mortgages, citing the rising risk of defaults," POLITICO's Victoria Guida and Katy O'Donnell write.

In a letter to lenders , "HUD said it would require new documentation to verify that any entity offering such assistance is acting in its 'governmental capacity,' a move that effectively limits the scope of assistance they can offer," Guida and

O'Donnell write. The move comes days after HUD said it would bar undocumented immigrants from receiving housing aid. More here.

WORKER SAFETY

BOEING EMPLOYEES RAISE SAFETY CONCERNS: Employees at a Boeing plant in Charleston, South Carolina said they were pressured not to report safety concerns with the manufacturing of the 787 Dreamliner, the New York Times' Natalie Kitroeff and David Gelles report.

"Workers have filed nearly a dozen whistle-blower claims and safety complaints with federal regulators, describing issues like defective manufacturing, debris left on planes and pressure to not report violations," Kitroeff and Gelles write. "Others have sued Boeing, saying they were retaliated against for flagging manufacturing mistakes."

Workers' concerns at the Charleston plant echo those raised in the aftermath of two crashes of Boeing's 737 Max, which killed nearly 350 people. The U.S. government grounded the aircraft last month.

Two workers also told the Times that they were pressured not to hire unionized employees from a Boeing plant in Everett, Washington, despite a shortage of qualified workers locally. More here.

COFFEE BREAK

— "Mounting debt, few opportunities keep Guatemalans coming," from the Arizona Daily Star

— "Fed Officials Contemplate Thresholds f or Rate Cuts," from the Wall Street Journal

— "'When Deported, You Become Nothing,'" from POLITICO Magazine

— "Mexican Town Once Welcomed Migrants. Now It Blames Mexico's President for Them," from the New York Times

— "Armed Mexican troops question Ameri can soldiers on US side of border," from CNN

THAT'S ALL FOR MORNING SHIFT!

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Bloomberg Law

DAILY LABOR REPORT®

Highlights

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TOP STORIES

Supreme Court to Consider Whether LGBT Bias Is 'Sex' Bias (2)

By Erin Mulvaney and Patrick Dorrian

The U.S. Supreme Court will settle whether federal civil rights protections should extend to LGBT workers, a divisive question that created clashes among government agencies, appeals courts, and advocacy groups in recent years. The outcome could have far-reaching effects on civil rights and workplace discrimination law.

Virginia School Board Can't Shake Older IT Workers' Group Suit

By Porter Wells

A federal judge declined to break up a set of information technology workers who say they were bumped out of consideration for jobs with Virginia Beach City Public Schools because of their ages.

Pressure Mounts on Senate, Trump to Move Labor Nominees

By Tyrone Richardson

Republicans were able to speed up the confirmation process for agency nominees, boosting the pressure on the party and the White House to put its

stamp on labor and employment policy, observers told Bloomberg Law.

WAGE & HOUR

Dallas Equinox Trainers Certified to Proceed in Overtime Suit

By Porter Wells

Equinox personal trainers in Dallas, Texas, have won conditional certification of their collective action seeking unpaid overtime wages.

LABOR RELATIONS

American Airlines Cagey About Bargaining, Pilots' Union Says

By Louis C. LaBrecque

American Airlines is dragging its feet in labor negotiations with the union that represents its 15,000 pilots, according to the Allied Pilots Association.

Stop & Shop, Union Reach Tentative Pact, Ending Strike

By Andrew Wallender

The union representing 31,000 Stop and Shop employees said it reached an agreement with the company April 21, putting an end to a strike that started April 11.

SUPREME COURT

Supreme Court Can Settle Split on LGBT Bias in the Workplace

By Robert Iafolla

The Supreme Court now has the chance to settle whether federal law safeguards LGBT people from workplace discrimination, which has split courts around the country and left a patchwork of legal protections in the wake of those divisions.

High Court to Review Removal of Lawful Permanent Residents

By Kimberly Strawbridge Robinson

The U.S. Supreme Court could make it easier for lawful permanent residents to remain in the country after committing a crime.

Supreme Court Asks Feds for ERISA Guidance for Third Time

By Jacklyn Wille

The U.S. Supreme Court expressed interest April 22 in a case involving Putnam Investments LLC's 401(k) plan by asking the federal government to file a brief expressing its opinion on the dispute.

Amazon, Walmart, Others May Win FOIA Disclosure Exemption (1)

By Kimberly Strawbridge Robinson

The U.S. Supreme Court, hearing arguments in a case potentially impacting Amazon, Walmart and other leading retailers, seemed primed to change Freedom of Information Act disclosures in a way that would please business.

LEGAL PROFESSION

Few Avenues to Discipline Ex-Cole Judge Over Impartiality Doubts

By Melissa Heelan Stanzione

A federal appeals court decision vacating orders issued by a former military tribunal judge presiding over the USS Cole bombing case because he failed to appear impartial may be where the consequences end for him.

IMMIGRATION

Israelis Can Seek Treaty Investor Visas Starting May 1

By Laura D. Francis

Israeli nationals will have a new visa option available to them beginning May 1: the E-2 treaty investor visa.

Investor Properly Denied Visa Because Not All Money 'At Risk'

By Martina Barash

The U.S. Customs and Immigration Services didn't act arbitrarily when it denied a Chinese investor's petition for an investment-related visa, a federal court in Washington said April 19.

HEALTH CARE & BENEFITS

Yale President Can't Escape Deposition in Retirement Plan Suit

By Jacklyn Wille

Yale University president Peter Salovey must sit for a deposition in a proposed class action challenging how the school manages its $3.8 billion retirement plan.

National Production Workers 401(k) Accused of Blocking Transfers

By Jacklyn Wille

The trustees of the National Production Workers Union were hit with a proposed class action by workers who say their retirement accounts weren't transferred to their new plan after they voted to switch unions.

Frontier Communications Fights Suit Over Verizon Stock in 401(k)

By Jacklyn Wille

Frontier Communications Corp. wants a federal judge to toss a proposed class action challenging the Verizon Communications Inc. stock in its $2.5 billion 401(k) plan.

ALSO IN THE NEWS

Tesla Takes Short Seller to Court, Saying He Menaced Its Workers

By Peter Blumberg

Elon Musk's war with Tesla Inc. short sellers just got weirder.

America's Elderly Are Twice as Likely to Work Now Than in 1985

By Suzanne Woolley

Just as single-income families began to vanish in the last century, many of America's elderly are now forgoing retirement for the same reason: They don't have enough money.

Punching In: Volkswagen Looks to Pump Brakes on Union Vote

By Chris Opfer and Jaclyn Diaz

Monday morning musings for workplace watchers.

LATEST CASES

Case: Discrimination/Retaliation (5th Cir.)

A heterosexual female human resources manager may not proceed with her claim that an employment agency in Louisiana fired her in retaliation for complaining about being subjected to a hostile work environment because of her sexual orientation, rather than for unsatisfactory work performance. She never engaged in protected activity under Title VII because the Act doesn't outlaw employment discrimination on the basis of sexual orientation, the court said. The case is O'Daniel v. Indus. Serv. Sols., 2019 BL 140412, 5th Cir., No. 18-30136, 4/19/19.

Case: Wage & Hour/Settlement Agreement (E.D. Cal.)

A federal district court approved a settlement agreement between a class of municipal employees and the county of Tuolumne, California for their Fair Labor Standards Act claim. The settlement was fair and reasonable because, among other things, the parties alleviated the possibility of fraud and collusion by revising the "attorney's fees" portion of the agreement to allot only 28% of the award to go towards attorney's fees. The case is Kerzich v. County of Tuolumne, 2019 BL 140938, E.D. Cal., No. 1:16-cv-01116-DAD-SAB, 4/18/19.

Case: FMLA/Retaliation (S.D. Fla.)

A librarian may proceed with her claim that Martin County, Florida fired her in retaliation for expressing interest in taking leave under the Family and Medical Leave Act, rather than for job abandonment and insubordination. Her allegations, including that she was fired the day after she was given an FMLA application and that her failure to appear for work for one day wouldn't qualify as a resignation under the County's policies, could show that the County acted in a retaliatory manner. The case is Isaias v. Martin County, 2019 BL 140658, S.D. Fla., No. 2:18-CV-14171-ROSENBERG/MAYNARD, 4/19/19.

Case: Wage & Hour/FLSA Coverage (S.D. Tex.)

A former tow truck driver may proceed with his unpaid wages and overtime wages claim against a tow truck business in Texas under the Fair Labor Standards Act. The business didn't show that the Motor Carrier Act exemption applies because, among other things, it failed to provide any dispatch information for interstate towing assignments during the period that the driver was employed with the business to prove that it engaged in interstate activity for the purpose of the exemption. The case is Constantine v. Adas, 2019 BL 140618, S.D. Tex., No. H-18-1273, 4/19/19.

Case: Discrimination/Hostile Work Environment (N.D. Ill.)

A police officer of Polish descent may not proceed with his claim that the City of Chicago subjected him to a hostile work environment because of his national origin through his sergeant's alleged discriminatory treatment. He didn't show that the City is liable for the sergeant's alleged harassment because he waited a significant time before informing anyone with authority about the conduct and was reassigned away from the sergeant's team the same day that he reported it. The case is Wazny v. City of Chicago, 2019 BL 140077, N.D. Ill., No. 17 C 6871, 4/19/19.

Case: Disability Discrimination/Equitable Tolling (D.S.C.)

A self-represented plaintiff in South Carolina who says that Boeing discriminated against him because of a disability that restricted him to office work may continue with his disability discrimination lawsuit, even though he filed his complaint the day after the statue of limitations expired. He diligently

tried to contact the courthouse several times before his time to file expired, leaving voicemails that went unanswered due to mandatory evacuations for Hurricane Florence, and even though he finally learned the courthouse was open and that he could file his complaint on the last day of the limitations period, his disability prevented him from being able to do so until the next day. The case is Baker v. The Boeing Co., 2019 BL 139900, D.S.C., No. 9:18-2574-RMG, 4/18/19.

Case: Discrimination/Retaliation (E.D.N.Y.)

A discharged black probationary per diem phlebotomy laboratory assistant for John T. Mather Hospital of Port Jefferson, New York, Inc. is denied a trial on her claim that her hours were reduced and she was later discharged because she complained about a co-worker's racially insensitive comments, rather than for performance reasons. The co-worker was disciplined for her comments, the assistant's probation was extended when she violated the hospital's blood sample labeling policy, she committed a second violation of the same policy during her extended probation, she wasn't guaranteed a set number of hours, and the reduction in her hours was because she requested time off for jury duty and vacation, the court stated. The case is .

Case: Labor Relations/Arbitration (Mich. Ct. App.)

Hurley Medical Center must arbitrate two former employees' claims that it fired them for striking in violation of a labor contract. Although the contract provides that the employer shall have the right to discharge any employee participating in a strike, and the employer may present undisputed evidence that the two were involved in a strike, the employees allege that they were sick, and whether they were striking is a question of fact for the arbitrator. The case is Registered Nurses, Registered Pharmacisys Union v. Hurley Med. Ctr., 2019 BL 141214, Mich. Ct. App., 343473, unpublished 4/18/19.

Case: Disability Discrimination/Retaliation (10th Cir.)

A former Campbell County, Wyoming, school district employee with multiple sclerosis loses her disability-based retaliation claim after arguing that she was "locked out" of computer access then fired because she filed for disability benefits. She didn't specify any protected activity either in her initial complaint

or in the lower court, and even if the appellate court could consider her filing for disability benefits as properly alleged protected activity, there is no evidence that she was locked out of any computers, and her application for disability benefits admits to her total inability to work. The case is Sorenson v. Campbell Cty. Sch. Dist., 2019 BL 140052, 10th Cir., No. 18-8012, unpublished 4/19/19.

Case: Discrimination/Reduction-In-Force (S.D. Tex.)

A protected-age customer service manager for a Chinese-Polish Joint Stock Shipping company may proceed to trial on her claim that she was terminated in a reduction-in-force due to her age. She presented evidence that one of the co-presidents of the company made ageist remarks, that the duties of her position were substantially similar to a position for which a much younger co-worker with significantly less experience was retained to fill, and that an initial proposed reorganization plan selected her for the position that the younger co-worker eventually received, the court said. The case is .

Case: Individual Employment Rights/Contracts (Ala.)

Shoals Extrusion LLC may not have to pay a plant manager a severance and benefits award of a year's salary for discharging him before the completion of his five-year written employment contract. The employee contended that Shoals had no right under the terms of the agreement to fire him for cause. Shoals plausibly argued that he had breached both the express terms of his contract and the implied duty of good faith and fair dealing, when he refused to arrive for work an hour earlier as directed, stated that he wouldn't work the extra hours his employer requested him to take on unless he was given an ownership interest, and told others in the industry that Shoals was having financial difficulties. The case is Shoals Extrusion, LLC v. Beal, 2019 BL 141380, Ala., 1170673, 4/19/19.

Case: Labor Relations/Arbitration (4th Cir.)

CarMax Auto Superstores Inc. wasn't entitled to sanctions against a pro se plaintiff it alleged brought frivolous claims that a class-action waiver in his arbitration agreement with the employer violated federal labor law. Although the U.S. Supreme Court recently held that class-action waivers in arbitration agreements don't violate the National Labor Relations Act, the Fourth Circuit

hadn't previously decided the question. The case is CarMax Auto Superstores, Inc. v. Sibley, 2019 BL 138716, 4th Cir., 18-2256, unpublished 4/18/19.

Case: Labor Relations/Refusal to Bargain (D.C. Cir.)

The NLRB properly found that UPS Ground Freight Inc. unlawfully refused to bargain with a union that the board certified as the exclusive representative of a unit of drivers at a Kutztown, Pennsylvania distribution facility. UPS argued that one of the drivers was a supervisor and engaged in objectionable conduct that tainted the election, but all evidence supports the conclusion that he lacked authority to require other drivers to accept a particular route, and that he had input in hiring new drivers only insofar as he administered road tests and reported the results. The case is UPS Ground Freight, Inc. v. NLRB, 2019 BL 140056, D.C. Cir., No. 18-1161 Consolidated with 18-1182, 4/19/19.

Case; Discrimination/Class Action (E.D. Va.)

The Virginia Beach City Public Schools system isn't entitled to decertification of a class action by a group of protected-age employees who allege that they were discriminated against on the basis of age when their Computer Resource Specialist position was eliminated and they were not hired when they applied for the newly-created Instructional Technology Specialist position. While each rejected applicant may need to present different evidence to make out their specific cases, they are all arguing that age was the reason that they weren't hired, and there are common questions of law, factual issues, and relief sought among them, the court stated. The case is .

Case: Discrimination/Religious Harassment (W.D. Wis.)

The Kalahari Resort & Convention Center in Wisconsin is entitled to summary judgment on a religious harassment claim by a Seventh Day Adventist maintenance supervisor who alleged that a colleague drilled a hole through his Bible, stuck a bolt in it, and chained it to his work cart. The resort thoroughly investigated the matter by reviewing hours of surveillance tape, interviewing witnesses, and reminding its employees of its anti-harassment policy, and while the perpetrator wasn't identified, no further acts of harassment occurred, the court said. The case is .

Case: Wage & Hour/Overtime Exemptions (5th Cir.)

Field engineers for an oil and gas company headquartered in Katy, Texas, were properly classified as overtime-exempt motor carrier employees, because the company is registered as a motor carrier with the U.S. Department of Transportation, their job involved the safe operation of tractors, they generally traveled across state lines on a regular basis, and the tractors they operated weighed over 10,000 pounds. The case is Rychorcewicz v. Welltec, Inc., 2019 BL 138477, 5th Cir., 18-20603, unpublished 4/18/19.

Case: Wage & Hour/Unreimbursed Expenses (S.D. Cal.)

A sales representative for ADT Security established that the company violated California wage law by failing to reimburse him for mileage expenses, because he used his car exclusively to perform job-related tasks such as driving to meet with prospective customers, the number of miles reflected by his odometer is sufficient basis to calculate his compensable miles in light of the fact that the company didn't require him to keep a physical record of his miles, and his request for a 56 cent per mile reimbursement rate is reasonable. The case is Clayton Del Thibodeau v. ADT LLC, 2019 BL 139354, S.D. Cal., No. 3:16-cv-02680-GPC-AGS, 4/18/19.

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From: Lucy, Christine B.
To: Ring, John
Subject: FW: Draft Semiannual Rpt
Date: Monday, April 22, 2019 5:26:59 PM
Attachments: Exemption 5

FYI – draft semi-annual OIG report from Dave. I'm reviewing. Note any comments we have are due Thursday.

Christine B. Lucy
Chief of Staff and Special Counsel to the Chairman
National Labor Relations Board
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christine.lucy@nlrb.gov | 202-273-3914
(m) 202.701.4804

From: Berry, David P.
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To: Lucy, Christine B. <Christine.Lucy@nlrb.gov>; Stock, Alice B. <Alice.Stock@nlrb.gov>; Witkin, Cynthia <Cynthia.Witkin@nlrb.gov>; Roberts, Tracey <Tracey.Roberts@nlrb.gov>
Subject: (b) (5)

(b) (5)

Thanks,
Dave

From: Employment Law360
To: Ring, John
Subject: Politics Looms As High Court Agrees To Weigh LGBT Rights
Date: Tuesday, April 23, 2019 3:41:36 AM

EMPLOYMENT

Tuesday, April 23, 2019

TOP NEWS

Analysis

Politics Looms As High Court Agrees To Weigh LGBT Rights

The U.S. Supreme Court's decision Monday to wade into litigation over whether Title VII protects LGBT workers makes it a virtual certainty that the high court's ruling will drop in the heat of the 2020 presidential race, turning the blockbuster result into a potentially decisive political issue, experts say. Here are three factors to keep an eye on as the case moves forward.

Read full article »

High Court To Consider Whether Title VII Covers LGBT Bias

The U.S. Supreme Court on Monday agreed to hear a trio of closely watched cases that hinge on whether gay and transgender workers are protected from discrimination under Title VII of the Civil Rights Act.

Read full article »

High Court Skeptical Of Limiting Courts' Title VII Purview

The U.S. Supreme Court appeared to be leaning Monday toward ruling that courts can hear job bias claims even if workers don't bring them to government enforcers first, as justices quizzed a Texas county seeking to use a discrimination accuser's clerical flub to escape a seven-year-old lawsuit.

Read full article »

Quinn Gets Dispute With Ex-Partners Bumped To Arbitration

The litigators who left Quinn Emanuel last year to launch Selendy & Gay PLLC must go to arbitration to fight a contentious and potentially unenforceable clause in their old partnership agreement, a Manhattan state judge ruled Monday in a victory for the lawyers' former firm.

Read full article »

Olive Garden Gets $35M Skin Color Bias Suit Thrown Out

A Kentucky federal judge handed Olive Garden a win Monday in an African American woman's $35 million lawsuit alleging she was fired because her skin was "too dark," though he said the conduct of the restaurant chain's counsel "leaves something to be desired."

Read full article »

Law Firm Called 'Jilted Lover' By Ex-Partner Defends Suit

An Illinois insurance defense law firm labeled a “jilted lover” by a former partner has urged a state court not to toss its case alleging the attorney stole $2.4 million in business by poaching clients before officially walking out the door, arguing that it has properly asserted its claims.

Read full article »

DISCRIMINATION

1st Statewide Hairstyle Discrimination Ban Clears Calif. Senate

California inched closer Monday to becoming the first state to ban

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New Cases

Discrimination (41)
ERISA (23)
Labor (47)

LAW FIRMS

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Ballard Spahr
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Cooley Iuliano
DLA Piper
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Haynes and Boone
Hogan Lovells
Jackson Lewis
Jones Day
Judge James Hoban & Fisher
Kirkland & Ellis
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Orrick Herrington

discrimination in the workplace and in schools based on hair texture or hairstyle when the state Senate unanimously passed bipartisan legislation.
Read full article »

11th Circ. Won't Revive Ex-Mill Worker's Disability Bias Suit

The Eleventh Circuit on Monday refused to revive a fired worker's disability discrimination suit against a Florida sawmill operator, saying he fell short on showing he was still disabled when he got back from leave after an ankle injury.
Read full article »

9th Circ. Won't Revive Ex-Tribal Atty's Age Bias Case

A former attorney for Arizona's Gila River Indian Community waited too long to argue that a tribal court violated his due process rights when it tossed his age discrimination suit against the community and its general counsel, the Ninth Circuit has held.
Read full article »

WAGE & HOUR

Equinox Trainer Denied Nationwide Cert. In FLSA Suit

A Texas federal judge has refused to certify a former Equinox personal trainer’s bid for a national class action against the fitness company, deciding that alleged pressure to work off the clock was likely specific to a gym in the high-end Highland Park area of Dallas.
Read full article »

NCAA Demands Billing Records In $45M Atty Fees Fight

The NCAA is fighting a push for almost $45 million in attorney fees by the legal team that scored a March antitrust victory against the organization in California federal court on behalf of student athletes, saying the players’ lawyers won’t disclose their billing records.
Read full article »

TRADE SECRETS

Chinese Co. Says Motorola Stonewalling In Trade Secret Fight

Motorola Solutions Inc. needs to do a better job preparing its witnesses to discuss precisely which trade secrets have been at the center of its two-year-old lawsuit, the Chinese radio manufacturer Hytera told an Illinois federal judge Friday.
Read full article »

WORKER SAFETY

Tesla Accuses Short Seller Of Harassing Factory Workers

Tesla has secured a temporary restraining order against a short seller accused of stalking the electric car company’s facilities in Fremont, Calif., threatening its employees, following company cars on the highway and even hitting a security guard with his car, according to California state court filings.
Read full article »

5th Circ. Upholds $2.9M Injury Award For Rig Worker

The Fifth Circuit on Monday affirmed a $2.9 million award to an offshore drilling technician who was injured in a fall, saying ENI US Operating Co. should not be granted a retrial after a lower court said the worker’s prescription drug use could be kept from a jury.
Read full article »

5th Circ. Won't Rethink Insurer's Loss In H-2A Worker Row

The Fifth Circuit refused Monday to revisit its decision that a Louisiana insurance company must pay $2.5 million to two foreign laborers who were

Osborn Maledon
Pearson Simon
Plauché Maselli
Pritzker Levine
Quinn Emanuel
Rhorer Law Firm
Schain Banks
Schiff Hardin
Selendy & Gay
Shulman Hodges
Sideman & Bancroft
Skadden
Steptoe & Johnson LLP
Tobin & Munoz
Ulmer & Berne
Vladeck Raskin
Walsworth
Wilkinson Walsh
Winston & Strawn
Wright Close

COMPANIES

AbbVie Inc.
Abbott Laboratories
American Civil Liberties Union
American Federation of State, County and Municipal Employees
Anheuser-Busch Inbev SA/NV
AstraZeneca
Burger King Holdings Inc.
Coldwell Banker Real Estate Corp.
Comcast Corp.
Dynamex, Inc.
ENI S.p.A.
Equinox Holdings Inc.
Facebook
Farm Bureau Financial Services
Food Marketing Institute
HSBC Holdings PLC
International Business Machines Corp.
McDonald's Corp.
Motorola Solutions Inc.
National Collegiate Athletic Association
New York State Bar Association
Nike Inc.
Pfizer Inc.
PricewaterhouseCoopers
State Bar Association of North Dakota
State Bar of California
Tesla Inc.
Twitter Inc.

hurt while working at a sugar cane farm.

Read full article »

EXPERT ANALYSIS

Trade Secret Takeaways From 9th Circ. Beer Recipe Ruling

The Ninth Circuit's recent opinion in Anheuser-Busch v. Clark — concerning AB's beer recipe and brewing process — underscores the importance of providing the court with ample evidence of an employer's efforts to keep its trade secrets confidential in the face of an anti-SLAPP motion, says Dan Forman of Carothers DiSante.

Read full article »

Are Calif. Real Estate Agents Still Independent Contractors?

The California Supreme Court's Dynamex decision makes it very difficult for real estate brokerage firms to continue treating their agents as independent contractors, but there are some glimmers of hope for firms, say Mary Watson Fisher and Anna Greenstin Kudla of Walsworth.

Read full article »

LEGAL INDUSTRY

Facebook Taps Trump State Dept. Lawyer As General Counsel

Facebook has hired the U.S. Department of State legal adviser as its next general counsel, the social media giant announced Monday, as it faces unprecedented government scrutiny over a string of privacy breaches and misinformation being spread on the platform.

Read full article »

House Panel Subpoenas Former WH Counsel In Trump Probe

The House Judiciary Committee subpoenaed former White House Counsel Don McGahn on Monday, calling him to testify and provide documents on events surrounding President Donald Trump's alleged interference in special counsel Robert Mueller's investigation.

Read full article »

Sounding Like Gorsuch, Kagan Focuses On Text

Justice Elena Kagan showed just how mainstream it has become to interpret statutes based solely on their text when she pressed a newspaper's attorney Monday to explain why the Freedom of Information Act doesn't exempt all confidential business information from public disclosure.

Read full article »

NY Bar Beefs Up Civility Message To Members

In the first update in more than two decades, the New York State Bar Association on Monday published expanded "civility" standards meant to inspire lawyer professionalism in deal-making as well as in court and to promote good behavior in areas like electronic communication.

Read full article »

Forced ND Bar Membership Illegal Under Janus, 8th Circ. Told

A North Dakota attorney has told the Eighth Circuit that the state's bar association failed to prove that its mandatory membership policy and dues collection structure are constitutional, arguing the current setup runs afoul of the First Amendment.

Read full article »

Avenatti's Former Law Partner Wins Atty Fees In Contract Row

A Los Angeles judge on Monday ordered Michael Avenatti to pay his former legal partner $60,000 in attorney fees after the lawyer won an order requiring Avenatti to pay him $4.85 million for work he did at their former firm Eagan Avenatti LLP.

Unilever Plc

GOVERNMENT AGENCIES

California Supreme Court

Equal Employment Opportunity Commission

Executive Office of the President

Gila River Indian Community

Internal Revenue Service

International Trade Commission

Texas Workforce Commission

U.S. Department of Justice

U.S. Department of State

U.S. Merit Systems Protection Board

U.S. Supreme Court

United Nations

Read full article »

Pfizer VP Returns To DLA Piper As Litigation Partner In DC

Former Pfizer Senior Vice President Carlton Wessel has returned to DLA Piper as a partner in the firm's litigation practice in Washington, D.C., the firm announced Monday.

Read full article »

Interview

15 Minutes With AbbVie's Chief Legal Officer

AbbVie Chief Legal Officer Laura Schumacher shared with Law360 how the biopharmaceutical company navigates a highly regulated industry, how lawyers at the highest level can remove obstacles for the advancement of female and minority attorneys, and why picking blueberries was her most challenging job to date.

Read full article »

JOBS

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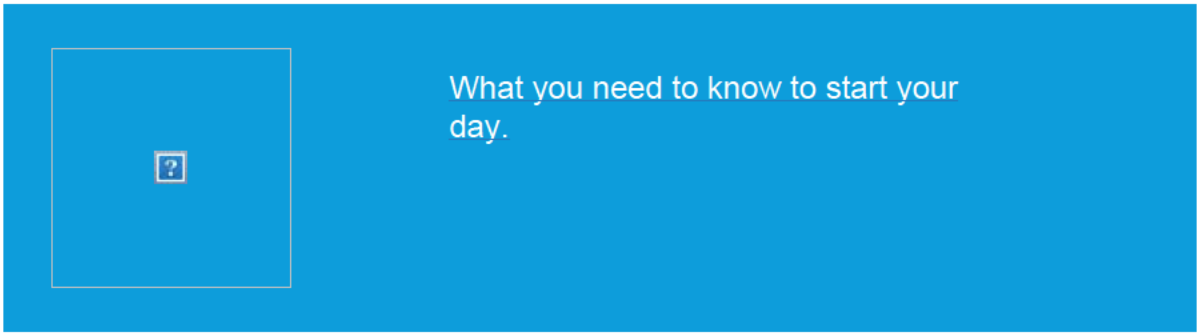
From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: First Move: Supreme Court to Weigh LGBT Bias in the Workplace
Date: Tuesday, April 23, 2019 7:08:06 AM



Supreme Court to Weigh LGBT Bias in the Workplace

By Patricio Chile

The U.S. Supreme Court will decide whether federal law protects lesbian, gay, bisexual, and transgender workers from discrimination—a question that has divided government agencies, courts, and advocacy groups in recent years.

- **Circuit Split:** Federal courts have reached different conclusions on whether sex discrimination prohibitions under Title VII of the 1964 Civil Rights Act extend to sexual orientation and gender identity.

- **Agency Conflict:** The Equal Employment Opportunity Commission backs Title VII protections for LGBT workers, but the Trump administration's Justice Department doesn't.

- **OPINION:** Justices will likely debate the text versus purpose of the word "sex" in Title VII of the 1964 Civil Rights Act. Both theories are "malleable" and the decision probably will end up a political one, Harvard Professor Noah Feldman says in this Bloomberg opinion piece.

TOP NEWS

- **Discrimination Claims**: The Supreme Court signaled that it could deal employers a blow by ruling that a worker's duty to file a discrimination claim with an administrative agency before court is a claims-processing requirement that can be waived. Robert Iafolla has the story.

- **Labor Relations:** Negotiators for Rutgers University and a union that

represents 5,000 full-time faculty members and graduate workers have reached a tentative deal on a four-year contract. Read more on this and other stories in this week's "Unions at Work."

- **Safety Fines:** The way administrative law judges assess fines for willful safety citations against mine operators is the topic of a case headed to oral arguments today at the U.S. Court of Appeals for the District of Columbia Circuit, Fatima Hussein reports.

- **Trumka Talk:** AFL-CIO President Richard L. Trumka takes part in a conversation-style interview today at the Economic Club in Washington. Topics will include the USMCA trade agreement, the outlook on U.S. labor shaped by future laws and policies, immigration policy, and the state of the U.S. and global economies.

- **FOIA Disclosure:** The Supreme Court, hearing arguments in a case potentially impacting Amazon, Walmart and other leading retailers, could make it harder to use Freedom of Information Act requests to access business commercial and financial information when it intersects with government programs. Kimberly Robinson has the story.

- **Permanent Residents:** The Supreme Court could make it easier for lawful permanent residents to remain in the country after committing a crime, Kimberly Robinson reports.

- **Game of Firms:** WilmerHale partner and former deputy CIA director David S. Cohen made a surprise cameo in hit HBO series "Game of Thrones" this week as a soldier waiting on line for food in the northern kingdom of Winterfell, Rebekah Mintzer reports.

PRACTITIONER INSIGHTS

Attorneys Need to Regain Their Clients' Trust
Warshaw Burstein LLP partner Murray D. Schwartz offers five tips on how lawyers can regain their role as trusted adviser to their clients, including changes to billing methods and putting clients' interests above the firms.

DAILY RUNDOWN

Virginia School Board Can't Shake Older IT Workers' Group Suit
A federal judge declined to break up a set of information technology workers who say they were bumped out of consideration for jobs with Virginia Beach City Public Schools because of their ages.

Dallas Equinox Trainers Certified to Proceed in Overtime Suit
Equinox personal trainers in Dallas, Texas, have won conditional certification of their collective action seeking unpaid overtime wages.

Pressure Mounts on Senate, Trump to Move Labor Nominees
Republicans were able to speed up the confirmation process for agency nominees, boosting the pressure on the party and the White House to put its stamp on labor and employment policy, observers told Bloomberg Law.

Labor Relations

American Airlines Cagey About Bargaining, Pilots' Union Says
American Airlines is dragging its feet in labor negotiations with the union that represents its 15,000 pilots, according to the Allied Pilots Association.

Stop & Shop, Union Reach Tentative Pact, Ending Strike
The union representing 31,000 Stop and Shop employees said it reached an agreement with the company April 21, putting an end to a strike that started April 11.

Immigration

Israelis Can Seek Treaty Investor Visas Starting May 1
Israeli nationals will have a new visa option available to them beginning May 1: the E-2 treaty investor visa.

Investor Properly Denied Visa Because Not All Money 'At Risk'
The U.S. Customs and Immigration Services didn't act arbitrarily when it denied a Chinese investor's petition for an investment-related visa, a federal court in Washington said April 19.

WORKFLOWS

Venable hired Andrew Kay to the Commercial Litigation Practice in Washington from Cozen O'Connor | **Ballard Spahr** said that Kim Phan has rejoined the firm in the Privacy and Data Security Group from WilmerHale | **Nelson Mullins**

added Juan Carlos Iturregui to the Corporate Team from Dentons | **Covington** hired Jessica Cox Hill as Special Counsel from Winston & Strawn | **K&L Gates** added Stephen M. Humenik to the Investment Management Practice Group from Covington | **Crowell & Moring** said that Rachel Raphael rejoined as Counsel in the Mass Tort, Product and Consumer Litigation Group from Squire Patton Boggs | **Davis Wright Tremaine** hired former Akerman partner M. Darren Traub to the Media, Entertainment, and Intellectual Property practice group in New York and Los Angeles | **FisherBroyles** says Edward Zughaib has joined the Real Estate and Financial Services & Lending practice groups from Locke Lord LLP | **Carlton Fields** added attorney David A. Karp to the Appellate Practice and Trial Support practice group in the Miami and Tampa offices

For all of today's Bloomberg Law headlines, visit Daily Labor Report

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From: Martin, Andrew
Subject: Legal News FYI 04-23-19
Date: Tuesday, April 23, 2019 8:15:24 AM
Attachments: image001.png

Tuesday, April 23, 2019

Unions at Work: A Raise at Rutgers, Bid for Leverage at Loyola

BloombergLaw - Labor Relations News 23 Apr 2019 06:46

By Louis C. LaBrecque Keep up to date with a roundup every Tuesday of union initiatives, bargaining developments, leadership changes, and other labor news. Rutgers Strike Averted Negotiators for Rutgers University and the union representing nearly 5,000...

Organizers of the Google Walkout Say They've Been Threatened with Demotion

Slate Magazine 22 Apr 2019 20:36

On the first day of November last year, some 20,000 Google employees at more than 40 offices across the world staged a walkout, protesting how the company had dealt with serious accusa ions of sexual assault and harassment and what many employees...

Dow locks out more than 200 workers in Deer Park

Houston Chronicle, The (Houston, TX) 22 Apr 2019 19:48

April 22-- Apr. 22 --A Dow Chemical subsidiary has locked out more than 200 workers at a chemical plant in Deer Park east of Houston , the union and company said Monday. Workers at a plant owned by Rohm and Haas Texas Inc , a subsidiary of Dow Chemical...

NPM is Not Particularly Magnanimous? Staff fired after trying to unionize – complaints

Register, The (Blog) 22 Apr 2019 16:38

Special report Three of the five people fired from JavaScript package management biz NPM Inc last month claim that bosses got rid of them for trying to form a union. NPM Inc, for the uninitiated, oversees npm, the default package manager for he widely...

Case: Labor Relations/Arbitration (4th Cir.)

BloombergLaw - Daily Labor Report 22 Apr 2019 13 06

CarMax Auto Superstores Inc. wasn't en itled to sanctions against a pro se plaintiff it alleged brought frivolous claims that a class-action waiver in his arbitration agreement with the employer violated federal labor law. Al hough the U.S. Supreme Court...

Case: Labor Relations/Refusal to Bargain (D.C. Cir.)

BloombergLaw - Daily Labor Report 22 Apr 2019 12:36

The NLRB properly found that UPS Ground Freight Inc. unlawfully refused to bargain wi h a union that the board cer ified as the exclusive representative of a unit of drivers at a Kutztown, Pennsylvania distribution facility. UPS argued that one of the...

Legal News FYI monitors news, cases, and legislative developments of interest to the NLRB. To be added to or removed from the distribution list contact Andrew Martin. Please note that these are external links and the Agency takes no responsibility for their content.

From:	Vines, Tomika
To:	Ring, John
Cc:	Bashford, Jo Ann; Kachadoorian, Karen; Gavigan, Teresa
Subject:	USLERN SPRING SESSION GUEST SPEAKER
Date:	Tuesday, April 23, 2019 9:25:11 AM
Attachments:	US LERN 2019 Spring Session Agenda.docx John Ring Bio.docx

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Hello Chairman Ring,

We look forward to your presentation at the US LERN Spring Session. The session will take place at the Renaissance Chicago Downtown Hotel, 1 West Wacker Drive in Chicago. In preparation for the session, enclosed are the following:

1. Agenda
2. Meeting participants list to date

Please approve the attached bio or send me your bio to include with the meeting materials at your earliest convenience. If you will have a presentation to display at the session send it to me by end of day **Monday, May 6**. At that time, let me know if you have any special requirements (i.e., internet access to display videos, etc.). If you will be presenting a video it is recommended that you also bring the video on a USB in the event the firewall does not allow access to the website.

Note: If there are materials you would like to have produced for the session please send those to me by end of day **Thursday, May 2.**

We typically share presentations after the session. If your presentation can be shared (in PDF) with members, please provide your approval when you send your document or indicate that you will provide a version for distribution.

If you have any questions do not hesitate to contact me.

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AGENDA

US Labor and Employee Relations Network
Renaissance Chicago Downtown Hotel, 1 West Wacker Drive, Chicago
May 9-10, 2019 Spring Session

Thursday, May 9

12:00 pm **Lunch and Networking**

12:45 **Welcome and Introductions**
Teresa Gavigan, Leader, US LERN and Karen Kachadoorian, Global Leader, Mercer Networks

12:55 **Insights from Jerry Dias: Responding to Trade Challenges and the Evolving Workplace**
Jerry Dias, President, Unifor
Mr. Dias, President of Canada's largest private sector union with 315,000+ members, will offer insights on the US-Mexico-Canada Trade Agreement, and explain ways in which Unifor is responding to the evolving workplace and drive for innovation.

1:45 **Union Organizing Campaigns under the Expedited Election Rules**
Mark Stubley, Shareholder, Ogletree Deakins, John Mitchell, VP, Labor Relations, Sysco and Michael Murphy, VP and Counsel, Labor Practice Group, Airgas
Mark will offer guidance and share experiences regarding union organizing campaigns since the Expedited Election rules were enacted in 2015. John and Mike will comment on recent campaigns in their respective companies.

2:45 **Break**

3:00 **NLRB Update – Developments, Current Initiatives and the Path Forward**
John Ring, Chairman, National Labor Relations Board
Chairman Ring will share insights regarding recent changes at the NLRB and the impact of these developments, as well as the Board's current labor initiatives and what to expect going forward.

4:00 **Negotiating Changes to Defined Benefit Plans – Lessons Learned at Mondelez and Johnson Controls**
Pamela DiStefano, Director, Labor Relations, Mondelez, Christopher Thom, Director, Labor Relations, Johnson Controls and Matt McDaniel, Partner, Mercer
Pam and Chris will discuss changes made to their respective defined benefit plans for unionized employees and explain their negotiating strategies, outcomes and lessons learned. Matt will moderate the discussion and highlight key considerations for employers considering changes to their plans.

5:00 **Adjourn**

6:00 **Dinner** – Haray Caray's Italian Steakhouse, 33 W Kinzie St, Chicago

Friday, May 10

7:30 am **Breakfast**

8:30 **Break-out Roundtable Discussions**
Members will share views on current Labor and Employee Relations challenges, recent LR initiatives and top issues raised by the unions at the bargaining table.

9:45 **Break**

10:00 **How Best to Deal with Absenteeism, ADA and FMLA Challenges**
Ivan Smith, Shareholder, Buchanan Ingersoll & Rooney
Ivan will discuss best practices for employers addressing the multiplicity of paid sick and family leave issues, as well as the interplay between the ADA and related federal and state policies.

10:45 **ArcelorMittal-USW Negotiations**
Patrick Parker, VP, Labor Relations, ArcelorMittal
Patrick will discuss ArcelorMittal's recent negotiations with the United Steelworkers Union and their four-year agreement. He will explain the industry backdrop and the challenges associated with tariffs, as well as the steel industry bargaining model and negotiated contract terms.

11:30 **General Motors' Corporate Responsibility Agenda – Doing Right for Employees**
Scott Sandefur, VP GMNA Labor Relations, General Motors
GM was recently recognized in the top 15 Companies 'Doing Right by America' by JUST Capital. Scott will discuss GM's global corporate responsibility philosophy and the impact on the employee experience for the unionized and non-unionized workforce. He will discuss the role the LR/ER team plays in setting and delivering the corporate responsibility agenda which supports human rights in the workplace, fair wage practices and overall "doing the right thing" across the globe.

12:00 pm **Adjourn/Lunch**

GUEST SPEAKER

JOHN F. RING

Chairman, National Labor Relations Board

April 12, 2018, President Donald J. Trump named John Ring Chairman of the National Labor Relations Board after being confirmed by the Senate on April 11, 2018. Mr. Ring was subsequently sworn in for a term ending on December 16, 2022.

Prior to his appointment to the NLRB, Mr. Ring served as a partner with the law firm Morgan Lewis. He has represented client interests in collective bargaining, employee benefits, litigation, counseling, and litigation avoidance strategies. He has an extensive background negotiating and administering collective bargaining agreements, most notably in the context of workforce restructuring and multiemployer bargaining. Mr. Ring received his J.D. and B.A. from Catholic University of America.

From: Martin, Andrew
Subject: Northeastern Faculty Drop Unionization Bid to Avoid NLRB Ruling
Date: Tuesday, April 23, 2019 4:31:53 PM

Northeastern Faculty Drop Unionization Bid to Avoid NLRB Ruling

- Northeastern argued for employer-friendly change to labor laws
- Faculty, union drop petition to avoid adverse ruling

By Hassan A. Kanu and Andrew Wallender | April 23, 2019 04:05PM ET | Bloomberg Law

A group of full-time, non-tenured professors at Northeastern University have dropped their petition to form a union in an effort to avoid a pro-employer ruling on faculty organizing from the Republican-controlled National Labor Relations Board.

The move by the group and organizers at the Service Employees International Union suggests that colleges and universities across the country that prefer to keep a union out of their workplace will have an easier time doing so under President Donald Trump's NLRB.

The organizing professors withdrew a previous petition to form a unit of the SEIU after the college argued that most of the professors are essentially managers—a job classification that's exempt from the protections of federal labor laws. The group and union refiled the petition April 9 but dropped the unionization effort two weeks later on April 23.

"We won't jeopardize the rights of our colleagues across the country by entering a legal battle presided over by an outspokenly anti-union board," the group said on its Facebook page a week before dropping its petition to the NLRB.

Representatives of Northeastern and SEIU Local 509, which filed the petition on behalf of the professors, didn't immediately respond to requests for comment.

"We're obviously not happy to have had to withdraw the petition again, but nothing has changed fundamentally except for the fact that people on campus now know the university is playing hardball with our rights to organize—and going further to strike a blow to faculty organizing across the country," Sebastian Stockman, an organizing committee member and associate teaching professor in the English Department, told Bloomberg Law April 23.

Partisan Agency, Partisan Policy

The NLRB's Republican members and general counsel are responsible for interpreting the National Labor Relations Act, which grants workers certain rights to organize, form unions, and take action to change their workplace terms and conditions, as well as outlining restrictions on those rights.

The members and general counsel are appointed by the president, and the agency's policies therefore tend to swing in favor of either business or labor,

depending on whether a Republican or Democrat is in the White House.
The board under President Barack Obama in 2014 enacted a new test for deciding the “management” status for faculty members that was seen as largely favorable to labor.
The current GOP members and general counsel, though, have a taken a fast-moving, deregulatory approach to businesses and employers that suggests they would reverse the 2014 standard in a way that would make it harder for faculty to organize.
A March 12 federal court decision generally upheld the 2014 test as a permissible interpretation of the NLRA but left room for the current board to decide the proper way to apply the test to any particular case. The board also has discretion, if a new faculty organizing case comes along, to establish a different test.
The possibility for a new, more employer-friendly rule was a major factor in the decision to withdraw the petition, Stockman said.

University: Faculty Are Managers

Northeastern argued in the case that the board should go back to the sort of employer-friendly standards in place before the 2014 test, which came via a decision called *Pacific Lutheran*.
The university said its non-tenure faculty members are “managers” under any of the tests but argued also “that the *Pacific Lutheran University* case was wrongly decided.” It said it would challenge that ruling and “present evidence under any new standard announced by the board in a decision overruling *Pacific Lutheran.”*
“Northeastern’s pushback has been more extreme than any of us felt was called for or had expected,” Stockman said.
To contact the reporters on this story: Hassan A. Kanu in Washington at hkanu@bloomberglaw.com; Andrew Wallender in Washington at awallender@bloomberglaw.com
To contact the editors responsible for this story: Simon Nadel at snadel@bloomberglaw.com; Terence Hyland at thyland@bloomberglaw.com

From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: Daily Labor Report Highlights
Date: Tuesday, April 23, 2019 4:36:21 PM

Bloomberg Law

DAILY LABOR REPORT®

Highlights

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TOP STORIES

Amazon Drivers Escape Arbitration in Nationwide Wage Dispute

By Porter Wells

Amazon.com Inc. drivers will get to fight out their claims the internet giant misclassified them as independent contractors in court, a federal judge ruled April 23.

High Court LGBT Decision: Much at Stake in Clarifying Gray Area

By Erin Mulvaney

A Supreme Court ruling on whether LGBT workers have federal civil rights protections could provide long-awaited clarity to the business community and have wider ripple effects on discrimination cases beyond the workplace, including health care and education.

Shifting Rationales Revive Trash Collector's Race Bias Suit (1)

By Porter Wells and Jay-Anne B. Casuga

A black trash collector's race discrimination lawsuit against his employer shouldn't have been kicked out of court, the Fourth Circuit ruled April 23.

DISCRIMINATION

Older Lawyer Asks High Court to Consider Age Bias in Hiring Case

By Erin Mulvaney

An Illinois lawyer wants the U.S. Supreme Court to decide whether as an unsuccessful job candidate he could sue for hiring discrimination, in a case that could test the federal law that protects against age bias.

Former AT&T Sales Director Appeals Decision Rejecting Bias Claim

By Julie Steinberg

A white man who lost his job with AT&T Mobility Services in a 2016 downsizing is appealing a ruling that he failed to prove his discrimination claim.

Olive Garden Wins Racial Discrimination Lawsuit

By Brian Flood

GMRI Inc., doing business as the restaurant chain Olive Garden, isn't liable for allegedly discriminating against an African-American server, in part because it never actually hired her, a federal court ruled April 22.

WAGE & HOUR

Boeing Hit With Class Action Alleging Failure to Pay Overtime

By Peter Hayes

The Boeing Company faces a class action by current and former employees who allege the company failed to pay overtime.

STATE & LOCAL LAWS

Tennessee Workplace Bullying Immunity Law Signed by Governor

By Chris Marr

Tennessee is offering employers immunity from workplace-bullying lawsuits if

they adopt the state's model anti-bullying policy. The legislation was signed into law April 23 by Gov. Bill Lee (R).

California Bill Would Make Contractors Liable for Harassment

By Laura Mahoney

Employers would share legal liability with contractors for workers who engage in sexual harassment, assault, or discrimination under a bill approved in the California Assembly.

California Employers Couldn't Bar Afros, Other Hairstyles: Bill

By Laura Mahoney

Employer policies barring hairstyles such as afros, locks, twists, or braids that are historically associated with race would be illegal under a California bill approved in the Senate.

Michigan to Probe Worker Misclassification, Wage Issues, AG Vows

By Alex Ebert

The Michigan attorney general will begin investigating companies allegedly bilking the state and workers by misclassifying employees as independent contractors or violating state wage laws.

LABOR RELATIONS

Northeastern Faculty Drop Unionization Bid to Avoid NLRB Ruling

By Hassan A. Kanu and Andrew Wallender

A group of full-time, non-tenured professors at Northeastern University have dropped their petition to form a union in an effort to avoid a pro-employer ruling on faculty organizing from the Republican-controlled National Labor Relations Board.

Unions at Work: A Raise at Rutgers, Bid for Leverage at Loyola

By Louis C. LaBrecque

Keep up to date with a roundup every Tuesday of union initiatives, bargaining developments, leadership changes, and other labor news.

NLRB

NLRB Weekly Summary of Cases, Dated April 8-12, 2019

Summary of NLRB decisions for week of April 8 - 12, 2019.

LEGAL PROFESSION

Mueller Rips 'Disappearing Data' Prized by Corporations

By Sam Skolnik

Add to the fallout from the Mueller report: questions among lawyers about whether clients should use disappearing or encrypted data, or make it accessible, maybe forever.

From WilmerHale to Westeros, a 'Game of Thrones' Cameo

By Rebekah Mintzer

There's a new face in Westeros, WilmerHale partner and former CIA official David S. Cohen, who made a surprise appearance in the April 21 episode of "Game of Thrones."

IMMIGRATION

DOJ Immigration Judges Look to Break Away From Agency

By Louis C. LaBrecque

A union that represents about 420 federal immigration judges is lobbying Congress to pass legislation making the judges independent from the Department of Justice.

HEALTH CARE & BENEFITS

Vanderbilt Inks $14.5M Settlement in Retirement Plan Class Suit

By Jacklyn Wille

Vanderbilt University will pay $14.5 million to resolve a class action challenging the fees and investment options in its $3.4 billion retirement plan.

Republic Services Faces Class Action Over $112M Rainbow Purchase

By Jacklyn Wille

Former employees of Rainbow Disposal Co. won class status in their lawsuit challenging waste management giant Republic Services Inc.'s 2014 purchase of Rainbow for $112 million.

SAFETY & HEALTH

3M's Allegedly Defective Earplugs at Issue in New Worker Claims

By Bruce Rolfsen

Civilian workers are joining thousands of military service members claiming in lawsuits that defective 3M Co. earplugs led to hearing loss and ringing in their ears.

Ohio Metal Plant Guilty of Hiding Fatal Injury Probe Obstruction

By Alex Ebert

The Ohio subsidiary of a Canadian metal company concealed from authorities that some of its employees had allegedly obstructed justice in a safety inspection probe.

ALSO IN THE NEWS

Prudential Commits $180 Million for Job Training and Education

By Lananh Nguyen

Prudential Financial Inc. will commit more than $180 million in the next six years for programs that help unskilled young people gain education and employment training.

BofA Reaches Into Low, Moderate-Income Areas for 4,700 Employees

By Lananh Nguyen

Bank of America Corp. hired 4,700 people from low- and moderate-income areas in the last 18 months, putting it on track to meet a goal of 10,000 by 2023.

PRACTITIONER INSIGHTS

INSIGHT: Attorneys Need to Regain Their Clients' Trust

Warshaw Burstein LLP partner Murray D. Schwartz offers five tips on how lawyers can regain their role as trusted adviser to their clients, including changing billing methods and putting client loyalties first.

LATEST CASES

Case: Discrimination/Disparate Treatment (10th Cir.)

Two black assembly workers may not proceed with their claim that a heating, ventilation, and air conditioning manufacturer in Oklahoma treated them less favorably than their non-black co-workers because of their race. The placement of a metal barrier between their work stations to increase productivity was an inconvenience at most, and the feeling of humiliation they allegedly experienced when they were escorted out of the office during a disciplinary matter, without more, didn't negatively alter the terms or conditions of their employment. The case is Braxton v. Nortek Air Sols., LLC, 2019 BL 143203, 10th Cir., 18-6076, 4/23/19.

Case: Discrimination/Promotion (7th Cir.)

A federal district court in Illinois improperly dismissed a claim by a case manager for the Illinois Department of Human Services, who identifies as being of African ancestry and Antigua African ethnicity, alleging that his managerial duties were replaced, he was rejected for promotions, and he was transferred to an inferior location because of his national origin and ethnicity. The district court applied the wrong standard, relying on decisions resolved at summary judgment, and his allegations plausibly state a claim at the motion to dismiss stage. The case is Phillips v. Baxter, 2019 BL 143162, 7th Cir., 18-1381, unpublished 4/23/19 .

Case: Wage & Hour/Employer Status (D. Md.)

The part-owner of a Maryland nightclub and restaurant may attempt to establish that he isn't an 'employer' liable for unpaid overtime, improper tipping practices, and other wage violations, even though he initially withdrew his defense against the claims. His statement that the restaurant manager actually held all the 'employer' duties is sufficient to show that he may have a viable defense, and the employees' interests won't be harmed because the U.S. Secretary of Labor already secured a judgment in their favor against the manager and restaurant. The case is Acosta v. Vera's White Sands Beach Club, LLC, 2019 BL 141938, D. Md., 816-cv-00782-PX, 4/22/19.

Case: Discrimination/Retaliation (11th Cir.)

A black employee may not proceed with his claim that the Alabama Department of Transportation subjected him to a suspicious drug screening and gave him a low performance rating in retaliation for filing a complaint of racial discrimination with the EEOC. He didn't show that his supervisor who issued the rating was aware of his complaint and the drug test wasn't an adverse employment action because he passed and as a result suffered no harm. The case is McQueen v. Ala. Dep't of Transp., 2019 BL 143080, 11th Cir., 17-13405 Non-Argument Calendar, unpublished 4/23/19.

Case: Disability Discrimination/Default Judgment (Minn. Ct. App.)

A fired employee of a property management company in Minnesota gets the $915,331awarded in damages on her state-law disability bias claim, because a default judgment against the company shouldn't have been vacated. To set

aside the damages award and try the case on its merits, the company had to show, among other factors, that it acted with due diligence, which it couldn't do given that it knew about the employee's complaint for six months before it retained an attorney who then sought to vacate the judgment. The case is Brown v. MSP Servs. LLC, 2019 BL 141569, Minn. Ct. App., A18-0892, unpublished 4/22/19.

Case: Discrimination/Discharge (Cal. Ct. App.)

A retreat in Yucaipa, California should've been granted summary adjudication on a claim by its protected-age guest services manager alleging that she was discharged because of her age, rather than for job abandonment after a lengthy serious illness. During her leave, she failed to contact her supervisor for a month, she didn't report to work within three work days of the date of her doctor's release, two younger part-time employees did some of the manager's duties, but her supervisor performed many of the manager's responsibilities until a permanent replacement was hired, the replacement was a year older than the manager, and the same individuals were involved in the hiring and firing decisions. The case is .

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From: Rice, Tresa
To: Robb, Peter; Stock, Alice B.; Ring, John; Lucy, Christine B.; McConnell, Isabel
Cc: Schreckengost, Lindsey A.; Smith, Barry F.
Subject: FW: NLRBU Request for FY 2019 Spend Plan--Operating Plan
Date: Tuesday, April 23, 2019 4:57:06 PM
Attachments: Spend Plan Grievance.pdf

Good afternoon,

Yesterday the request below was sent by the NLRBU requesting that the Agency reconsider the union's request and produce a copy of this year's spend plan. Today, the attached grievance was filed over the Agency's failure to provide a copy of the spend plan. (b) (5)
(b) (5)

Thank you.

From: Burt Pearlstone <president@nlrbu.net>
Sent: Monday, April 22, 2019 12:02 AM
To: Rice, Tresa <Tresa.Rice@nlrb.gov>
Cc: *Exec List <exec@nlrbu.net>
Subject: NLRBU Request for FY 2019 Spend Plan--Operating Plan

Tresa: I am writing this in the hope that the Agency will reconsider and provide the full Spend Plan/Operating Plan to the union, which was requested by the Union In its Consultations RFI for the consultations which occurred on March 20 and 21, 2019. My recollection is that you informed me, that week, that the Agency would not be providing anything other than the chart you provided us on Tuesday, March 19. That chart, with about a dozen broad categories of spending, is clearly not the Spend Plan/Operating Plan. We know, from our Consultations week meeting with Board Chairman Ring, that the Agency in fact still utilizes a Spend Plan. At that time, you did not articulate, with specificity, any countervailing anti-disclosure interest for refusing to provide the full Spend Plan/Operating Plan for FY 2019.

We have a particularized need for the Spend Plan/Operating Plan for the same reasons we articulated in 2018 for needing the FY 2018 Spend Plan/Operating Plan.

- At least 15 provisions in our CBA are subject to budgetary considerations, as per Article 3, Section 9 of the CBA.

- The parties have negotiated language in Article 3 of the agreements prescribing the standards and procedures required when the Agency seeks to "defer" or "curtail" any of those benefits. So the information in the Spend Plan/Operating Plan is necessary and has always been necessary for the union to evaluate the costs of these benefits as compared with other agency expenditures. In addition, there are typically grievances pending which relate to the Agency's spending. Thus we need the full Spend Plan/Operating Plan in order to evaluate the merits of some grievances and prepare for arbitration for others. One current example is the grievance regarding the cessation of Health Units based on budgetary considerations. The Agency, in its Step 3 Answer, asserts economic necessity as the principal reason for ceasing to afford to unit employees the services provided by these Health Units. It is insufficient to know just what the particular item (health units) costs. To rebut an argument that this particular cost savings measure was necessary for the functioning of the Agency, we need to be able to see the other cost items in the budget as well.

- The union additionally needs the Operating Plan, for mid-term negotiations on various matters, to properly evaluate costs of other terms and conditions which depend on the budget, even if they are not the subject of specific contractual "budget out" provisions. One key example of this is space and move negotiations, which are currently occurring at the local level in a few

locations, and at headquarters in Washington.

- Finally, in addition to needing this data for potential grievances and/or negotiations, we need this information , and in fact it has been provided consistently for over 20 years, to be able to intelligently discuss the various issues we address at our semiannual Consultations. These consultations are contractually required to occur twice per year (CBA at Article 28, Section 4(a)), and by contract are to include "all matters affecting conditions of employment of employees…" (CBA at Article 5, Section 7).

For union related matters, please communicate with me at president@nlrbu.net, or exec@nlrbu.net
The second email address comprises all six members of our Executive Committee

Burt Pearlstone
NLRBU President
26 Federal Plaza, Room 3614
New York, NY 10278
(212) 776-8635
president@nlrbu.net

National Labor Relations Board Union
1301 Clay Street, Suite 300 N
Oakland CA 94612

Tel: (510) 671 3045 Fax: (510) 637 3315

23 April 2019

Beth Tursell, Associate to the General Counsel
National Labor Relations Board
Division of Operations Management
1015 Half Street SE
Washington, DC 20003-3654

transmitted by e-mail

Re: Step 3 Grievance – Failure to provide requested information

Dear Ms. Tursell:

This step 3 grievance protests the Agency's failure to provide its FY 2019 Spend Plan in response to the Union's February 28, 2019 information request. .

Background – Release of Spend Plan in Prior Years – Change in Practice in 2018

For at least 20 years, the Agency had provided a copy of its operating (spend) plan to the Union in response to information requests. The Spend Plan is a multipage document detailing the Agency's expenditures for various items, broken down by category and budget line. For example in the fiscal year 2016 report under Personnel, there were 33 budget lines, including one for pay and benefits and another for Performance Awards. Under Facilities, there were a total of 63 budget line items, including building rent, parking at various facilities, and expenses for medical equipment. The entire 2016 report was 7 pages and several hundred budget lines.

In 2018, the Union requested a copy of the spend plan in preparation for its semiannual consultations meeting with the Agency. In response, the Agency provided a ½ page document that contained only 13 items such as Budget, current payroll, facilities etc. None of the broad categories was broken down into individual expenditures as they had been in the prior spend plans. In response the Union requested that a more detailed spend plan be provided. The Agency did not do so. The Union then filed an unfair labor practice charge with FLRA alleging a violation of the Statute. The case is still under investigation.

Current Dispute – Agency refuses to provide Spend Plan in Response to Information Request

On February 28, 2019, in preparation for consultations, Union President Pearlstone sent the Agency an information request which included the following request:

> 18. The FY 2019 Spend Plan (previously referred to as the Operating Plan), or in lieu of that document, the totality of whatever Budget Branch document(s) are currently in use to guide spending during FY 2019.

In a March 19, 2019 response, Labor Relations Counsel Tresa Rice provided a document entitled Final Spend Plan, which was dated 1/18/19. The document contained 11 categories of expenditure, but no detail for any of them. For example, Operations management was shown as $1,814,102, but no detail was given as to how that money would be spent. The other categories were similar. The entire document was less than ½ page.

Contentions:

Article 3, Section 1 of the Collective Bargaining Agreement provides that the Agency is governed by existing and future law and existing and future government-wide rule and regulation. The Federal Service Labor-Management Relations Statute (5 U.S.C. 7101 et seq.) is a law which is applicable to the Agency and enforceable through the grievance procedure of the collective bargaining agreement.

The Statute makes it an unfair labor practice for an Agency to, "refuse to consult or negotiate in good faith with a labor organization. . ." 5 U.S.C. 7116(a)(5) or, "to otherwise fail or refuse to comply with any provision of this chapter" 5 U.S.C. 7116(a)(8). With respect to information, the Statute at 5 U.S.C. 7116(b) provides that the duty to negotiate in good faith includes the obligation

> **(4)** in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—
>
> **(A)** which is normally maintained by the agency in the regular course of business;
>
> **(B)** which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> **(C)** which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining;

In this case, the information sought was normally maintained in the course of business. The spend plan or some version of it similar to the 2016 plan would have to exist in order for the Agency to function. It is inconceivable that the Agency does not maintain a document that would break down expenditures in the categories which is identical or similar to the spend plans previously provided to the Union[1].

The information sought was, or should have been, reasonably available and was necessary for full and proper discussion, understanding, and negotiation of subjects with the scope of collective bargaining. This is so because various provisions of the Collective Bargaining Agreement provide for benefits subject to budget considerations. The contract also permits the Agency to defer or curtail benefits in some circumstances. A detailed knowledge of the Agency's various expenditures is necessary for a proper understanding of whether the

[1] Indeed, Federal Financial Management System Requirements issued by the Bureau of the Fiscal Service, a division of the Treasury department, require the maintenance of records similar or identical to the spend plan.

Agency may or may not curtail or defer benefits. The Union also requires the information to evaluate costs of other items such as facility relocations. By way of example, detailed data are required so that the Union can understand how much money is available for furniture or other items in a new facility. This is just one example among many demonstrating the Union's need for, and right to have, the information at issue.

Finally, the data sought did not constitute "guidance, advice, counsel, or training provided for management . . . relating to collective bargaining."

The information sought was required to be furnished by 5 U.S.C 7116(b)(4). The failure to furnish it was an unfair labor practice under 5 U.S.C. 7116(a)(5) and (8). In addition to being unfair labor practices, the Agency's violation of these provisions of law are violations of the CBA as well.

Remedy:

Provide the information sought by Pearlstone in his February 28, 2019 email without further delay.

Cease and desist refusing to provide requested, relevant information.

Post a notice at all NLRB facilities where bargaining unit members are employed that

(a) Recognizes the Union as the exclusive representative of bargaining unit employees;
(b) Describes the violation at issue and promises to cease and desist from similar violations in the future; and
(c) Promises to furnish the requested information immediately.

Any other remedy that may be appropriate given the facts and circumstances of this case.

Respectfully submitted,

Stephen Sloper,
Grievance Committee Chairperson

cc: Burt Pearlstone, President
Keith Ebenholtz, Executive Vice President
Dallas Manuel II, Secretary
Jessica Gibson, Treasurer
Nydia Arroyo, Administrative Professional Representative
Tresa Rice, Labor Relations Counsel
Barry Smith, Senior Special Counsel

From: Employment Law360
To: Ring, John
Subject: 4th Circ. Reverses Waste Co."s Victory In Race Bias Suit
Date: Wednesday, April 24, 2019 3:41:51 AM

EMPLOYMENT

Wednesday, April 24, 2019

TOP NEWS

4th Circ. Reverses Waste Co.'s Victory In Race Bias Suit

The Fourth Circuit on Tuesday reversed a sanitation company's quick win on a black worker's unfair termination claim, saying a jury should decide whether the company keeping on a white worker with an arguably worse employment history suggested racism.

Read full article »

EEOC Announces Flurry Of Discrimination Settlements

The U.S. Equal Employment Opportunity Commission has announced five settlements in disability, religion and age bias cases since Thursday, garnering a total of $415,000 in payouts and wrapping up lawsuits against companies including retailer Party City and grocery store chain Safeway.

Read full article »

LVMH Legal Affairs VP Alleges Sex Harassment At Luxury Co.

The vice president of legal affairs and litigation counsel at LVMH Moet Hennessy Louis Vuitton Inc. says she’s been sexually harassed for years on the job, and when she reported it, the company chastised her, intimidated her and suggested promoting the man who harassed her.

Read full article »

NLRB Right To Reject Evidence Add-On, 11th Circ. Says

The National Labor Relations Board was right to not let an IRS security contractor introduce new evidence in a case alleging it violated federal labor law by veering from its disciplinary policy to fire three guards and not bargaining with a union over their reinstatement, the Eleventh Circuit ruled Tuesday.

Read full article »

10th Circ. Won't Give Nortek Workers' Race Bias Suit New Life

The Tenth Circuit on Tuesday affirmed a win for Nortek Air Solutions in a suit brought by two African American workers who said they were mistreated because of their race, finding the alleged mistreatment wasn't harmful enough to keep their case in court.

Read full article »

DISCRIMINATION

Justices Asked To Hear If Job Seekers Can Sue For Age Bias

A jilted CareFusion Corp. in-house counsel applicant has asked the U.S. Supreme Court to review whether the Seventh Circuit interpreted the Age Discrimination in Employment Act too rigidly when it ruled that the statute protects only older employees but not job seekers.

Read full article »

Southwest Airlines Beats Ex-Flight Attendant's FMLA Claims

A Texas federal judge on Tuesday allowed Southwest Airlines Co. to escape a former flight attendant's Family and Medical Leave Act suit claiming he was

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New Cases

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LAW FIRMS

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wrongly fired, finding that those claims weren't timely filed.
Read full article »

Health Care Workers Lose Bias Appeal At 3rd Circ.

The Third Circuit affirmed the dismissal of employment discrimination claims from two former employees of a residential health care center in Pennsylvania on Monday, ruling that neither showed evidence that they lost their jobs due to workplace injuries.
Read full article »

Tech Co. VMware Denied Job To DACA Recipient, Suit Says

A 28-year-old Mexican immigrant said she was unlawfully denied a job at a Silicon Valley company because of her citizenship status, despite being authorized to work in the U.S. under the Deferred Action for Childhood Arrivals program, according to a class action filed Tuesday.
Read full article »

WAGE & HOUR

Amazon Delivery Drivers Win Transpo Worker Exempt Status

Amazon must face a proposed collective action alleging the e-commerce giant misclassified drivers as independent contractors after a Washington federal judge said Tuesday that the drivers fit the definition of transportation workers who are exempt from the Federal Arbitration Act.
Read full article »

Ex-Waiter Gets Partial Class Cert. Over Stiffed Steakhouse Pay

A New York federal court has conditionally certified a class of tipped workers at one location of a ritzy steakhouse chain's Manhattan restaurants in litigation claiming the business stiffed them on minimum wages, overtime and tips, but denied certification to workers at four others.
Read full article »

NONCOMPETES

Fla. Oncologists Try To Save Antitrust Suit Over Noncompetes

A group of oncologists who claim a cancer treatment company forced them to sign illegal noncompete agreements and created a monopoly for oncology services in Southwest Florida asked a federal court Monday not to dismiss their suit, saying the claims are still timely because of ongoing conduct.
Read full article »

TRADE SECRETS

Energy Market Data Co. Unlikely To Escape Trade Secrets Row

A bitter fight between energy market data company Genscape and one of its competitors over trade secrets allegedly stolen by a former Genscape employee is likely to drag on after a Colorado federal judge said Tuesday the claims were solid.
Read full article »

Panera Wants To Block Ex-IT Execs From Working For Rival

Fast-casual restaurant chain Panera Bread Co. told a Delaware Chancery Court judge Tuesday that three former IT employees should be barred from taking jobs with a competitor because they were integral to the development of Panera's proprietary software programs and had absconded with confidential company information.
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EXPERT ANALYSIS

The Potential Impact Of Reversing Chevron Deference

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Foley Hoag
Fox Rothschild
Frank Freed
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Liskow & Lewis
Littler Mendelson
Locke Lord
Manatt Phelps
Mayer Brown
McAfee & Taft
McDowell Hetherington
MehaffyWeber
Meltzer Lippe
Mintz Levin
Monty & Ramirez
Morgan Lewis
Munsch Hardt
Nelson Mullins
Nistico Crouch
Norton Rose Fulbright
Ogletree Deakins
Orrick Herrington

Some questions during U.S. Supreme oral arguments in Kisor v. Wilkie suggested a willingness to overturn Auer deference. If this leads to the scuttling of Chevron deference, rapidly evolving areas of law like labor and employment could benefit from a return to courts addressing ambiguities in federal statutes, says Michael Abcarian of Fisher Phillips.

Read full article »

A Broader View Of The US Supreme Court Bar

During the past 15 years, three widely read articles bolstered by starstruck media have promulgated the incorrect perception — sorely in need of revision — that the U.S. Supreme Court bar is limited to a handful of elite lawyers, says Lawrence Ebner of Capital Appellate Advocacy.

Read full article »

Rebuttal

Jury Trials, Though In Decline, Are Well Worth Preserving

In a recent Law360 guest article, the author applauded the disappearance of jury trials as an inefficient, costly mechanism, but in doing so he overlooked the greater value of jury trials for our justice system, says Stephen Susman, executive director of the Civil Jury Project at NYU School of Law.

Read full article »

LEGAL INDUSTRY

BigLaw's Biggest Revenue Gainers And Losers In 2018

Five law firms bested the rest of BigLaw in 2018 in terms of year-over-year revenue increases, while five others failed to keep up with the pack. Here, find out which firms logged the biggest revenue gains and which experienced the biggest losses.

Read full article »

BigLaw Lobbyists See Strong Q1 Demand Under Divided Gov't

For BigLaw federal lobbyists, the first quarter of 2019 got off to a slow start with a weekslong shutdown, but soon rebounded as clients sought out expertise to navigate the tangle of regulatory and oversight agendas under a newly divided government.

Read full article »

Analysis

4 Things To Know About Facebook's New General Counsel

The former Davis Polk partner tapped Monday as Facebook's next general counsel is joining the social media giant amid unprecedented government scrutiny, but a packed resume shows she is no stranger to dealing with international policy and probing questions from lawmakers.

Read full article »

Term Limits For Supreme Court Justices? 'Fine,' Says Breyer

Amid the left's plans to reform a U.S. Supreme Court seen as dominated by conservatives, Justice Stephen Breyer said he would be OK with creating term limits for justices. In fact, "It would make life easier," he said.

Read full article »

Cosby Sues Quinn Emanuel To Duck $1M Monthly Legal Bill

Bill Cosby wants a California court to undo an arbitration award in favor of Quinn Emanuel, saying the firm charged the comedian almost $1 million a month for work related to the sexual assault allegations against him and that he didn't understand the scope of the firm's representation.

Read full article »

LGBT Bar Urges Schools To Up Discrimination Protections

The National LGBT Bar Association urged all law schools Tuesday to include protections against discrimination based on sexual orientation and gender

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COMPANIES

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International Association of Privacy Professionals
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LinkedIn Corp.
Mexican American Legal Defense and Education Fund
National LGBT Bar Association
Natural Resources Defense Council
Panera Bread Company
Party City Corp.

identity, as it released the results of its first campus climate survey.

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More Than 60 Firms Sign Houston Bar Gender Fairness Pledge

More than 60 law firms have signed on to the Houston Bar Association's Gender Fairness Commitment, making a pledge to increase the number of female partners and firm leaders by next year.

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Goodyear Stays In-House As It Names New General Counsel

Goodyear on Tuesday unveiled a series of moves within its in-house legal department, including the promotion of a new general counsel.

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From:	Lassiter, Marjorie
To:	Robb, Peter; Lesesne, Katherine; McFerran, Lauren; Colwell, John F.; Krafts, Andrew J.; Waters-Burnett, Yolanda C.; Giannasi, Robert (ALJ); Meyers, Mary; Zick, Lara S.; Merberg, Elinor; Vazquez, Laura T.; Sophir, Jayme; Carlton, Peter J.; Murphy, James R.; Lennie, Rachel G.; Kaplan, Marvin E.; Emanuel, William; Free, Douglas; Kraus, Grant; Ring, John; Stock, Alice B.; Kyle, John; Platt, Nancy; Lucy, Christine B.; Rothschild, Roxanne L.; Barham, Jeffrey; Rappaport, Steve; Jacob, Fred; Coleman, Jocelyn; Lambert, Malissa
Cc:	Habenstreit, David
Subject:	FW: 17-13154 Security Walls, Opinion fld.pdf
Date:	Wednesday, April 24, 2019 5:58:33 AM
Attachments:	17-13154 Security Walls, Opinion fld.pdf

The Eleventh Circuit issued the attached decision 4/23/19. The Court was reviewing the Board's decision and order in Security Walls, 365 NLRB 99 (2017). (Miscimarra, Pearce, McFerran).

Marjorie Lassiter
Legal Assistant
Enforcement Litigation
(202)273-3855

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13154

Agency No. 16-CA-152423

SECURITY WALLS, INC.,

Petitioner - Cross Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent - Cross Petitioner.

Petitions for Review of a Decision of the
National Labor Relations Board

(April 23, 2019)

Before TJOFLAT and WILLIAM PRYOR, Circuit Judges, and MURPHY,[*] District Judge.

TJOFLAT, Circuit Judge:

---

[*] Honorable Stephen J. Murphy, III, United States District Judge for the Eastern District of Michigan, sitting by designation.

A private security contractor signed an agreement with the Internal Revenue Service (the "IRS") to provide protective services at one of its facilities. The agreement required the contractor to ensure that the guards it employed conformed to specifically enumerated standards of conduct. The contractor designed a discipline system to monitor guard compliance with those standards. But the IRS provided itself with another layer of protection: power to short-circuit that system and require the immediate removal of a non-conforming guard.

Three guards misbehaved. The contractor, without prompting from the IRS, suspended (and then terminated) them, a consequence much harsher than what the contractor's own discipline system called for. It turns out that by circumventing its own system, the contractor violated the National Labor Relations Act of 1935 (the "NLRA"), 29 U.S.C. §§ 151–69.

The contractor has an explanation for its wrongdoing: Its contract with the IRS *required* it to fire the guards. The question on appeal is whether the National Labor Relations Board (the "Board") abused its discretion by not reopening the administrative record to allow the contractor to establish that point. Because the contractor's proffer does not prove the point, we hold that the Board did not abuse its discretion in letting the record stand as it was.

I.

A.

Security Walls is a governmental security contractor. On March 1, 2014, it entered into a contract with the IRS to provide guard services at the agency's facility in Austin, Texas (the "Facility"). The contractor that it replaced was a party to a collective-bargaining agreement with the International Union, Security, Police and Fire Professionals of America (the "Union"), for a unit of guards that worked at the Facility. Declining to adopt that agreement, however, Security Walls commenced new collective-bargaining negotiations in August 2014.[1] When it first began providing services under the contract, Security Walls posted at the Facility a document called the "Performance Work Statement" (the "PWS"), which was part of its contract with the IRS.

The PWS requires Security Walls to ensure that its employees conform to "acceptable standards of conduct." It sets out thirty-five "actions, behaviors, or conditions" by employees that constitute "cause for immediate removal from performing on the contract." Security Walls must "maintain[] satisfactory standards of employee . . . conduct" and "tak[e] such disciplinary action with respect to [its] employees as may be necessary." At the same time, however, the

[1] The parties eventually negotiated an agreement that became effective on September 1, 2015, but that agreement is not in play here.

IRS "may request [Security Walls] to immediately remove any employee . . . should it be determined that the employee has been disqualified for either employment suitability, performance suitability, or security reasons, or who is found to be unfit for performing security duties during his/her tour of duty."[2] The IRS's power to demand an employee's removal is vested in the Contracting Officer (the "CO") and the Contracting Officer's Representative (the "COR"), who may require the "retraining . . ., suspension, or removal of any Contract employee from the contract who does not meet and adhere to the Standards of Conduct as required in th[e] contract." Security Walls "must comply with these requests in a timely manner."

Before we recount the events that gave rise to this suit, we briefly introduce the key players in our discussion. On the Security Walls side, Juanita Walls is the contractor's chief manager, Scott Carpenter manages this particular contract between the contractor and the IRS, and Frederico Salazar supervises the Facility. On the IRS side, John Sears is the COR, and Bernadette Briggs is a senior contracting specialist.

On April 25, 2014, Security Walls, through Juanita Walls and Carpenter, adopted a new policy, the "Disciplinary Action/Policy Statement" (the "Policy

[2] A "determination of unfitness may be made from . . . violations of the Standards of Conduct."

Statement"). The Policy Statement, on its face, purports to be the "official policy of 'Security Walls' and supersedes all other policies concerning this subject." It puts forth a progressive disciplinary system: Though some violations result in immediate termination,[3] others result in more graduated discipline.

Fast forward about one year after the Policy Statement was adopted. On April 15, 2015, guard John Klabunde was manning the Facility's visitor center when guard Jason Schneider arrived to relieve him for his scheduled break. During the transition, while the two men were both focused on correcting an error in the logbook, a woman walked into the Facility undetected. Security Walls indefinitely suspended both guards the following day. Guard Christopher Marinez faced a similar fate. On April 22—exactly one week after the prior incident—Marinez was adjusting his chair when a woman and her child also passed through (undetected) the area he was supposed to be monitoring. He was indefinitely suspended the same day.

The day after Marinez's suspension, on April 23, the Union filed a grievance over all three suspensions. Because Security Walls had failed to follow the

[3] These offenses are refusing to cooperate in an investigation; sleeping or engaging in sexual activity while on duty; falsifying, concealing, removing, mutilating, or destroying official documents or records; and willfully concealing material facts from official documents, records, or statements.

progressive disciplinary protocol outlined in its own Policy Statement, the Union demanded reinstatement of the guards.

On the same day, Carpenter, who was effectively the customer-service representative for Security Walls, exchanged a series of emails with Sears, who was effectively the client.[4]

Sears, who initiated the communication, stated that he would not accept "substandard services" from Security Walls. "If individual guards do not have the character and self-discipline to work at a federal installation and comply with the responsibilities associated," he went on, "they will need to be removed." He nonetheless expressed hope that Security Walls would "adopt an effective system of discipline for these types of violations and deter them from happening." Later that day, after having reviewed the video footage involving Marinez, he contacted Carpenter again. From the footage, he concluded that Marinez "turned his back momentarily to apparently adjust his chair," which in Sears's mind did not constitute "careless behavior." He analogized this mishap to the incident the prior week involving Klabunde and Schneider. Sears qualified this concession, however, by stating that guards "must be able to multi-task and recognize what's going on around them." He expressed hope that Security Walls "can address this

[4] Carpenter managed this particular contract on behalf of Security Walls, and Sears was the IRS's COR, who under the PWS had the ability to demand an employee's removal.

so that guards are paying greater attention to details so we don't miss these types of incidents."

Carpenter responded by saying that the guards "neglected their most primary duty," by expressing gratitude that an "angry, armed person [didn't] gain access," and by indicating that he looked forward to an-already scheduled meeting between him and Sears the following day. Meanwhile, he would be conducting an internal investigation.

That's where Sears left it: fully aware of the incidents but deferring to Carpenter's judgment on how to proceed.

The following day, on April 24, Carpenter completed his investigation. He determined that Schneider, Klabunde, and Marinez violated two of the thirty-five offenses under the PWS: "[v]iolation of security procedures" and "[n]eglecting duties." In his view, the enumerated standards of conduct "are non-discretionary and necessarily supersede and take precedence over any other policy or standard not contained in the PWS, including Security Walls['s] internal disciplinary standards and policies." Invoking Security Walls's obligation under the PWS to ensure that its employees conform to "acceptable standards of conduct," Carpenter recommended that the three guards be terminated.

On April 28, Salazar notified Schneider, Klabunde, and Marinez that they were terminated. The following day, Security Walls, through counsel, clarified to

the Union that the guards were only suspended, not terminated. They would "remain on suspension pending a final decision by [Juanita Walls] as to whether either of the officers has committed a violation of the Standards of Conduct set out in the PWS." Counsel repeated Carpenter's assertion that the guards' actions "fall under the specifications of the PWS[] and are outside the conduct defined in Security Walls['s] [Policy Statement]." The guards were eventually terminated, and on May 14, 2015, the Union filed a charge alleging unfair labor practices under the NLRA, an action that prompted the Board to issue a complaint.

B.

The NLRA makes it unlawful for an employer to "refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5).[5] This refusal to bargain includes "unilaterally changing the terms and conditions of employment without first granting its employees' exclusive bargaining representative the opportunity to bargain about 'mandatory' subjects." *NLRB v. Haberman Constr. Co.*, 641 F.2d 351, 357 (5th Cir. Apr. 1981) (en banc).[6] An employer's disciplinary system is a mandatory subject, *Toledo Blade Co.*, 343

[5] Section 158(a)(1) makes it unlawful to "interfere with, restrain, or coerce employees" while they exercise various rights under the NLRA. 29 U.S.C. § 158(a)(1).

[6] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

N.L.R.B. 385, 387 (2004), as are negotiations over termination of employment, *Ryder Distrib. Res., Inc.*, 302 N.L.R.B. 76, 90 (1991).

The administrative law judge (the "ALJ") found that Security Walls violated these provisions when (1) in violation of the Policy Statement's graduated disciplinary protocol, it suspended indefinitely and then discharged the guards and (2) it refused to bargain with the Union following those discharges. *Security Walls, Inc.*, 365 N.L.R.B. No. 99, slip op. at 3 (June 15, 2017). The ALJ reasoned that the PWS—on its face—put the guards' removal within Security Walls's and the IRS's discretion. *Id.* He also observed that Security Walls admitted in its Answer that it exercised discretion in terminating the guards. *Id.* Security Walls appealed the ALJ's decision to the Board.

After the ALJ issued his decision but while the matter was pending before the Board, on March 16, 2016, Security Walls moved the Board, under its regulations, to reopen the record for two purposes: (1) to introduce an affidavit and (2) to amend its Answer. The affidavit, sworn to by Juanita Walls (the "Walls affidavit"), stated that she had received an email from Briggs[7] on March 9, 2016, in which Briggs stated that Schneider, Klabunde, and Marinez "[would] not be permitted to perform services under th[e] contract, effective immediately." Walls further swore, "I believe that if Ms. Briggs or the COR were aware of the

[7] Recall that Briggs was a senior contract specialist with the IRS.

circumstances surrounding the three officers in April 2015, they would have taken the same position as when they became aware of the incidents recently." In Security Walls's view, the Walls affidavit precluded any finding that the terminations were discretionary. Security Walls thus sought to amend its Answer to withdraw its admission to the contrary.

As to the violations, the Board affirmed the ALJ's findings. It held that neither the Policy Statement nor the PWS required Security Walls to remove the guards. *Id.* Under the PWS, the CO or the COR had the "authority to" require the guards' removal. *Id.* But Sears—as the COR—declined to exercise that authority, *id.*, and the record contained no evidence of any CO that was charged with enforcing the contract, *id.* at n.6. Contrary to Walls's speculation that if the COR were aware of the circumstances he would have required removal, the Board reasoned that Sears *was* aware of the circumstances and neither required the guards' removal nor told Carpenter that Security Walls's contract was in "jeopardy." *Id.* at 3. He was aware that he could take action, moreover, because he had required an employee's removal at least once in the past. *Id.*

As to reopening the record, the Board concluded that Security Walls had not made the requisite showing under the regulations. A party may move to reopen the record due to "extraordinary circumstances." 29 C.F.R. § 102.48(d)(1) (amended 2017). The evidence either must "ha[ve] become available only since the close of

the hearing" or, in the Board's view, "should have been taken at the hearing." *Id.* The movant must state "the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result." *Id.*

The Board denied the motion because neither admitting the Walls affidavit nor allowing the pleading amendment would have demanded a "different result." *Security Walls, Inc.*, slip op. at 6. It reasoned that (1) "neither the PWS nor the [Policy Statement] mandated these discharges. As such, [Security Walls's] admission is consistent with, but not an indispensable part of, the evidence underlying this finding," *id.* at 7 n.18, and (2) neither Sears nor any other IRS representative demanded the guards' removal at the time, and the Walls affidavit, sworn to "some 10 months after the discharges and after the [ALJ] had found that [Security Walls] acted unlawfully" would not change that fact, *id.* at 7.[8]

The Board required Security Walls to rescind the unilateral change to its Policy Statement; to offer Schneider, Klabunde, and Marinez reinstatement; to make them whole for any losses to earnings or other benefits; to remove any reference to the discharges from their personnel files; and to post a remedial notice at the Facility. *Id.* at 7−8.

[8] It also reasoned that the Walls affidavit came into existence "after the [alleged events] in this case" and thus, "by definition, is not 'newly discovered' or 'previously unavailable,'" which the Board's precedents required. *Id.*

Security Walls then petitioned this Court for review under 29 U.S.C. § 160(f), which grants us jurisdiction over final orders of the Board.

II.

The question in this case is not whether the guards' terminations were proper under the Policy Statement; everyone, including Security Walls, agrees that none of the guards' conduct could have resulted in their indefinite suspension and eventual termination under the Policy Statement.[9] Security Walls's argument on appeal is straightforward: the PWS—and this is Security Walls's phrasing, not ours—"supersedes" the Policy Statement, and Security Walls is absolved of liability to the extent the PWS compels an outcome that would otherwise place Security Walls in violation of its collective-bargaining obligations under the NLRA. From there, Security Walls tells us, it's easy to see why the record should be reopened. The Walls affidavit confirms its position that the PWS left it with "no choice" but to terminate the guards, and Security Walls should be permitted to amend its Answer to withdraw its admission to the contrary—that the terminations were in fact discretionary.

[9] The guards' conduct constituted "violation of written rules, regulations or policy." For first-time offenders, the Policy Statement prescribes verbal counseling and a memorandum to be included in the personnel file; second-time offenders get a letter of reprimand; third-time offenders get a two-day suspension; and fourth-time offenders are terminated. If a violation results in a security breach, however, the protocol accelerates the discipline for first offenses to suspension and for second offenses to termination. None of the three guards had previously been disciplined, so the Policy Statement called for, at most, two-day suspensions.

As an initial matter, we are skeptical of Security Walls's premise that it holds a get-out-of-jail-free card when it cannot simultaneously comport with both the PWS and the NLRA.[10] As the Board reasoned, the PWS is a "non-personal services contract between [Security Walls] and the IRS" and thus "reflects the agreement between [Security Walls] and the IRS, but not necessarily between [Security Walls] and its own employees." *Security Walls, Inc.*, slip op. at 4 n.8. Security Walls subjected itself to two masters—its contractual obligations to the IRS on the one hand and its duties under the NLRA to its employees on the other. As such, it might have voluntarily put itself between a rock and a hard place from which there is no painless resolution. We assume for purposes of discussion, however, that Security Walls's contention is correct and thus that the PWS "supersedes" the Policy Statement. We do so because nothing about the PWS required the guards' removal; Security Walls was able to comply with both the PWS and the Policy Statement.

We review the Board's "procedural determinations," like denial of a motion to reopen the record, for abuse of discretion. *See U.S. Mosaic Tile Co. v. NLRB*,

[10] The doctrinal hook for this argument is unclear, if for no other reason than because Security Walls has provided us no law on point. The argument sounds in something akin to conflict preemption, a doctrine corollary to the Supremacy Clause, *see* U.S. Const. art. VI, cl. 2, which results where "'compliance with both state and federal law is impossible,' or where 'the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Oneok, Inc. v. Learjet, Inc.*, ___ U.S. ___, 135 S. Ct. 1591, 1595 (2015) (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 100, 101, 109 S. Ct. 1661, 1665 (1989)).

935 F.2d 1249, 1254 (11th Cir. 1991); *see also* 5 U.S.C. § 706(2)(A). In doing so, we look through the decision to the logical pillars on which it rests. In *U.S. Mosaic Tile Co.*, for example, we reviewed the Board's denial of a motion for reconsideration, but that decision rested on interpretation of a statute and application of the agency's own caselaw. 935 F.2d at 1254. We afforded *Chevron* deference[11] to the statutory interpretation and subjected the caselaw application to arbitrary-and-capricious review. 935 F.2d at 1254. We then determined, in light of our conclusions on those issues, whether the Board abused its discretion in denying the motion. *Id.* at 1254–55.

What are the bases of the Board's decision here? The Board denied Security Walls's motion because neither the Walls affidavit nor a pleading amendment would have demanded a "different result." *Security Walls, Inc.*, slip op. at 6. Again, it reasoned that (1) the PWS did not mandate the terminations and (2) neither Sears nor any other IRS representative demanded the guards' removal when they were terminated. *Id.* at 7, 7 n.18.

The Board's first reason flows from its interpretation of the PWS. The deference we afford to an agency's interpretation of a contract, like the PWS, varies on a case-by-case basis. *See Muratore v. U.S. Office of Pers. Mgmt.*, 222

[11] *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984).

F.3d 918, 921–23 (11th Cir. 2000) (reasoning that whether an agency's interpretation of a contract is subject to *de novo* or arbitrary-and-capricious review turns on, among other things, the agency's "relevant expertise" in negotiating the contract at issue). We do not determine which standard applies here because our interpretation of the PWS and the Board's are identical: The PWS is purely permissive. The IRS "may request" removal of an employee, but nothing requires it to do so. That's it. From there, holding that the Board did not abuse its discretion is a cakewalk.

Security Walls wants to amend its Answer for no reason other than to argue that the terminations were required. But the Board—looking to the text of the PWS rather than Security Walls's self-serving statement—concluded otherwise. Indeed, the Board twice stated that the Answer was "consistent with" its conclusion but made perfectly clear that it was "not an indispensable part of[] the evidence underlying this finding." *Security Walls, Inc.*, slip op. at 7 n.18. The Walls affidavit serves the same purpose. Security Walls does not dispute the Board's finding that no one at the IRS ordered the guards' removal. So its argument that the IRS *would have* required as much is beside the point. The Walls affidavit is thus irrelevant.

In short, we find it "entirely reasonable" for the Board to deny Security Walls's motion to reopen the record when the record supports its conclusion that

doing so would not compel a "different result." *See U.S. Mosaic Tile Co.*, 935 F.2d at 1257.

III.

For these reasons, Security Walls's petition for review is **DENIED.**

SO ORDERED.

From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: First Move: Home Care Wage Cases Continue Under Trump Administration
Date: Wednesday, April 24, 2019 7:07:50 AM

What you need to know to start your day.

Home Care Wage Cases Continue Under Trump Administration

By Patricio Chile

The Labor Department is continuing to pursue wage and hour cases against home care businesses, putting to rest speculation that the Trump administration would move to exempt large swaths of the industry from federal minimum wage and overtime pay requirements.

See You in Court: The Department has sued at least three home care providers for wage and hour violations in the last month. It also recently convinced a federal judge in Virginia to hold a home care business owner personally liable for nearly $130,000 in unpaid overtime and liquidated damages.

"Companionship" Out: The latest wave of litigation is a likely sign that the DOL doesn't intend to soon revisit an Obama administration rule that removed most home care workers from a wage and hour law exemption for "companionship" service providers. Chris Opfer has the story.

A nurse practitioner uses a pulse oximeter on a client at her home in Plainfield, N.J., Oct. 26, 2016. The Labor Department continues to police wage and hour violations by home care businesses.
Photographer: John Taggart/Bloomberg via Getty Images

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A government contractor's attempt to rehash the reasons why it fired three bargaining unit security guards after their first infractions at an IRS facility in Texas was shot down yesterday by the Eleventh Circuit.

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DAILY RUNDOWN

Discrimination

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unsuccessful job candidate he could sue for hiring discrimination, in a case that could test the federal law that protects against age bias.

Shifting Rationales Revive Trash Collector's Race Bias Suit
A black trash collector's race discrimination lawsuit against his employer shouldn't have been kicked out of court, the Fourth Circuit ruled.

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Subject: Legal News FYI 04-24-19
Date: Wednesday, April 24, 2019 8:22:23 AM
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Wednesday, April 24, 2019

Home Care Wage Cases Continue Under Trump Administration
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Washington Post (Washington, DC) 23 Apr 2019 14:12

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To:	Robb, Peter; Lesesne, Katherine; McFerran, Lauren; Colwell, John F.; Krafts, Andrew J.; Waters-Burnett, Yolanda C.; Giannasi, Robert (ALJ); Meyers, Mary; Zick, Lara S.; Merberg, Elinor; Vazquez, Laura T.; Sophir, Jayme; Carlton, Peter J.; Murphy, James R.; Lennie, Rachel G.; Kaplan, Marvin E.; Emanuel, William; Free, Douglas; Kraus, Grant; Ring, John; Stock, Alice B.; Platt, Nancy; Lucy, Christine B.; Rothschild, Roxanne L.; Barham, Jeffrey; Rappaport, Steve; Jacob, Fred; Coleman, Jocelyn; Lambert, Malissa; Watts, Elicia
Subject:	FW: Decision - UPS Ground Freight v NLRB - 18-1161 DC Circ
Date:	Wednesday, April 24, 2019 8:35:48 AM
Attachments:	UPS 18-1161 Decision DC Circ.pdf

Not sure if this was circulated on Friday.

From: Kennedy, Margaret
Sent: Friday, April 19, 2019 10:31 AM
To: ML-HQ-Appellate and Supreme Court Litigation Brch <ML-HQ-AppellateSupremeCourtBranch@nlrb.gov>
Subject: Decision - UPS Ground Freight v NLRB - 18-1161 DC Circ

The DC Circuit issued the attached decision today. The Court was reviewing the Board's decision and order in UPS Ground, 366 NLRB 100 (2018). (Ring, Pearce, McFerran).

Margaret Yale Kennedy
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National Labor Relations Board
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202-273-0027
202-273-0191 (fax)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 21, 2019 Decided April 19, 2019

No. 18-1161

UPS GROUND FREIGHT, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION
NO. 773,
INTERVENOR

Consolidated with 18-1182

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Kurt G. Larkin argued the cause and filed the briefs for petitioner. *James P. Naughton* entered an appearance.

David R. Broderdorf and *Jonathan C. Fritts* were on the brief for *amici curiae* UPS Ground, et al. in support of petitioner.

Mark W. Mosier, *Kevin King*, *Steven P. Lehotsky*, and *Michael B. Schon* were on the brief for *amicus curiae* The Chamber of Commerce of the United States of America in support of petitioner and cross-respondent.

Eric Weitz, Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were *Peter B. Robb*, General Counsel, *John W. Kyle*, Deputy General Counsel, *David Habenstreit*, Associate General Counsel, and *Kira Dellinger Vol*, Supervisory Attorney.

Before: GARLAND, *Chief Judge*, SRINIVASAN, *Circuit Judge*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* SRINIVASAN.

SRINIVASAN, *Circuit Judge*: UPS Ground Freight, Inc. challenges the certification of a union at its Kutztown, Pennsylvania distribution facility. The National Labor Relations Board rejected UPS Ground's challenges to the union's certification and then determined that the company committed unfair labor practices by declining to bargain with the union. UPS Ground now seeks review in this court. We deny UPS Ground's petition for review and grant the Board's cross-application for enforcement.

I.

UPS Ground Freight, Inc., a subsidiary of United Parcel Service, Inc., provides transportation and delivery services throughout the United States. On December 10, 2015, International Brotherhood of Teamsters, Local 773, filed a petition with the Board seeking a representation election among all drivers at UPS Ground's distribution center in Kutztown, Pennsylvania. The Acting Regional Director

scheduled a pre-election hearing for December 21, at which the parties presented evidence on the supervisory status of Frank Cappetta, one of the drivers employed at the Kutztown center. On January 5, 2016, the Acting Regional Director directed a mail-ballot election at the Kutztown distribution center. The Acting Regional Director did not rule on the supervisory status of Cappetta.

The election occurred between January 11 and January 29. By a vote of twenty-seven to one, the employees voted in favor of representation by the union. UPS Ground sought review with the National Labor Relations Board.

On July 27, 2017, the Board issued a Decision on Review and Order. The Board found that Cappetta was not a statutory supervisor and that, in the alternative, he did not engage in objectionable conduct if he were a supervisor. On all other grounds, the Board denied review.

Subsequently, the Union made a formal request to bargain, and UPS Ground refused. The Board's General Counsel issued an unfair-labor-practice complaint, and the Board found that UPS Ground had committed unfair labor practices by refusing to bargain. UPS Ground petitions this Court for review, and the Board cross-petitions this Court for enforcement.

II.

Because UPS Ground has not identified a defect in the Board's decision to certify the Union, we deny UPS Ground's petition for review and grant the Board's cross-application for enforcement.

First, the Board certified an appropriate bargaining unit. Under the Act, a bargaining representative must be selected "by

the majority of the employees in a unit *appropriate* for [collective bargaining] purposes." 29 U.S.C. § 159(a) (emphasis added). "The Board need only select *an* appropriate unit, not *the* most appropriate unit." *Cleveland Constr., Inc. v. NLRB*, 44 F.3d 1010, 1013 (D.C. Cir. 1995) (emphases added). Under controlling Board precedent, a single-facility bargaining unit is "presumptively appropriate." *Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1084 (D.C. Cir. 2003). To assess that presumption in a given case, the Board considers "geographic proximity, employee interchange and transfer, functional integration, administrative centralization, common supervision, and bargaining history." *Id.* at 1085 (quoting *W. Jersey Health Sys.*, 293 NLRB 749, 751 (1989)).

Here, the Acting Regional Director reasonably found (and the Board ratified) that those factors favored a single-facility bargaining unit, rather than a unit encompassing all of UPS Ground's facilities. In particular, the Acting Regional Director reasonably relied on "the significant evidence of local autonomy over labor relations matters at the Kutztown facility" and "the considerable distance between the Kutztown facility and the other facilities." J.A. 677. We see no basis to set aside the Board's choice of bargaining unit.

Second, the Board reasonably determined that Cappetta was an "employee" under the Act and not a statutory "supervisor" who would be excluded from the Act's protections. Generally, if a supervisor's conduct "reasonably tends to have such a coercive effect on . . . employees that it is likely to impair their freedoms of choice in the election," that conduct can taint an election and require its results to be set aside. *Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 63 (D.C. Cir. 2015) (alterations omitted). Here, however, the Board properly concluded that Cappetta was not a supervisor, which renders irrelevant the question of taint.

UPS Ground argues that Cappetta performed four supervisory functions—namely, that he assigned work, made hiring recommendations, directed employees, and adjusted grievances. The Board reasonably rejected each of those claims. The authority to assign work requires that the employee "ha[ve] the ability to *require* that a certain action be taken." *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 729 (2006). And the evidence supports the conclusion that Cappetta lacked the authority to require a driver to accept a particular route; rather, if a driver objected, Cappetta was obligated to refer the matter to management. As for the ability to make hiring recommendations, the Board explains that Cappetta had input only insofar as he administered road tests to new hires and reported the results to management. The Board has consistently found that such involvement in the hiring process does not establish supervision. *See, e.g.*, *Pac. Beach Corp.*, 344 NLRB 1160, 1161–62 (2005). The last two alleged supervisory functions—the direction of employees, and the adjustment of grievances—find even less support in the record. For someone to direct employees, that person must be "accountable for the performance of the task by the [employees]." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692 (2006). UPS Ground points to no record evidence that Cappetta was so accountable. As for the authority to adjust grievances, it does not appear that Cappetta had the authority to resolve *any* disputes. At most, Cappetta had the authority to "bring any minor grievances to the attention of upper management for resolution," which does not suffice. *Ken-Crest Servs.*, 335 NLRB 777, 779 (2001).

UPS Ground would have us look to additional evidence of supervisory status, detailed in an offer of proof filed in support of its objections to the election results. But neither the Acting Regional Director nor the Board had an obligation to consider belatedly-presented evidence. "[T]he Board need not afford a

party objecting to a representation hearing more than one opportunity to litigate any particular issue," *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1182 (D.C. Cir. 2000), and UPS Ground received that opportunity at the pre-election hearing.

UPS Ground's remaining objections to the application of the Board's rules and regulations all lack merit. (UPS Ground has disclaimed a facial challenge to the Board's rules.) Various of UPS Ground's objections challenge the Acting Regional Director's failure to permit an all-embracing investigation of Cappetta's actions leading up to the election. Those objections all fail for the simple reason that the Board reasonably concluded that Cappetta was not a statutory supervisor. Thus, UPS Ground cannot demonstrate the requisite "prejudice" from any of those alleged errors. *Salem Hosp.*, 808 F.3d at 70.

Nor do any of UPS Ground's other objections carry the day. For example, UPS Ground argues that the pre-election hearing timeline was abusive because it allotted only eleven days to prepare for the hearing. The Acting Regional Director, though, was required by regulation to schedule the pre-election hearing on the eighth day after the Union petition. *See* 29 C.F.R. § 102.63(a)(1). Further, the Acting Regional Director partially granted UPS Ground's motion for a two-business-day postponement of the pre-election hearing. The Acting Regional Director did not abuse his discretion by complying with the regulation. And the decision to postpone the hearing by one business day, but not two, is in the heartland of his discretion. That timeline also comported with due process. Even assuming that due process requires any pre-election hearing whatsoever, *but see Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 710 (1945), an eight-day notice accords with both the Due Process Clause and UPS Ground's statutory right to an "appropriate" hearing, 29 U.S.C. § 159(c)(1).

Next, UPS Ground argues that it was prejudiced by the timeline because it was required to file a Statement of Position on the business day before the hearing. UPS Ground, though, cannot show any prejudice from that requirement, as the Statement of Position is not binding. The Regional Director "may permit the employer to amend its Statement of Position in a timely manner for good cause." 29 C.F.R. § 102.63(b)(1). Nor does the Statement of Position preclude the Regional Director from "direct[ing] the receipt of evidence concerning any issue . . . as to which the regional director determines that record evidence is necessary." *Id.* § 102.66(b). And despite UPS Ground's contention that its Statement of Position limited it to calling only certain witnesses at the pre-election hearing, at no point during this litigation has UPS Ground ever identified any additional witnesses it would have called at the hearing.

UPS Ground also challenges various rulings made by the hearing officer during the pre-election hearing—specifically, that the hearing officer asked UPS Ground for certain documents that UPS Ground did not possess, denied UPS Ground's request to grant a one-day adjournment for preparation for closing arguments, and refused the filing of posthearing briefs. None of those rulings was an abuse of discretion. A demand for documents is not an adverse ruling, in any sense. The denial of an adjournment was entirely proper, especially given that the regulations do not require even a *recess* prior to closing arguments. *See* 29 C.F.R. § 102.66(h). And UPS Ground had no entitlement to posthearing briefs, which "shall be filed only upon special permission of the regional director." *Id.*

The Acting Regional Director also properly directed a mail-ballot election. A mail-ballot election is proper when voters are "scattered" over a wide area or across different work

schedules. *San Diego Gas & Elec.*, 325 NLRB 1143, 1145 (1998). In this case, the Acting Regional Director reasonably determined that the employees travel long distances and that traffic and weather conditions, particularly in winter, might hinder employees from returning to the facility in time to permit them to vote. The Acting Regional Director reasonably rejected UPS Ground's alternative proposal—to arrange drivers' work schedules so they could vote before leaving on their assigned routes—which, by UPS Ground's own characterization, would have ensured the ability to vote only of "*most* of [the drivers] before they go." J.A. 320 (emphasis added). And the mail-ballot election did not impermissibly restrict UPS Ground's right to campaign. The Act proscribes only mass captive-audience assemblies (for employer and union alike) during a mail-ballot election. *See San Diego Gas*, 325 NLRB at 1146. UPS Ground was still free to campaign via other means. More generally, it is difficult to imagine any prejudice arising from the choice of a mail-ballot election when 94% of eligible voters cast ballots and those ballots overwhelmingly favored unionization. *Cf. Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1127 (D.C. Cir. 1996).

Finally, the Acting Regional Director did not abuse his discretion by declining to decide, before the election, whether two employees in disputed job classifications (safety instructors and dispatchers) were part of the bargaining unit. It is common practice to permit such employees to vote under challenge. *See Kirkhill Rubber Co.*, 306 NLRB 559, 559 (1992). Nor does that practice imperil the bargaining unit's right to make an informed choice, so long as the notice of election—as happened here—"alert[s] employees to the possibility of change" to the definition of the bargaining unit. *Sears, Roebuck & Co. v. NLRB*, 957 F.2d 52, 55 (2d Cir. 1992).

* * * * *

For the foregoing reasons, we deny the petition for review and grant the Board's cross-application for enforcement.

So ordered.

From:	Morning Shift
To:	Ring, John
Subject:	POLITICO"s Morning Shift: SCOTUS divided at census arguments — Pence to Ford — Exclusive: Brown presses Boeing on union
Date:	Wednesday, April 24, 2019 10:05:05 AM

View online version

2018 Newsletter Logo: Morning Shift

04/24/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

With help from Sam Mintz

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click

here.

QUICK FIX

— The Supreme Court appeared divided over challenges to the Trump administration adding a citizenship question to the 2020 census.

— Larry Kudlow inflated a government estimate of how many jobs NAFTA 2.0 will create.

— Sen. Sherrod Brown says Boeing should ease unionization in its South Carolina plant after a NYT report about workers' safety concerns.

GOOD MORNING! It's Wednesday, April 24, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

SCOTUS DIVIDED AT CENSUS ARGUMENTS: The Supreme Court seemed split along ideological lines at Tuesday's oral arguments over the Trump administration's addition of a citizenship question to the 2020 census, POLITICO's Josh Gerstein and Ted Hesson report.

All four Democratic appointees were skeptical of Commerce Secretary Wilbur Ross's rationale for adding the question, while most of the court's Republican appointees seemed to side with Ross. Justice Samuel Alito "said he was convinced of deep flaws in estimates that adding the question could lead to about five percent fewer responses from non-citizens," they report. But "Justice Brett Kavanaugh, who directed probing questions to both sides, seemed to give less away about his views of the case." Three federal courts so far have rejected the administration's addition of the question because it lacked a reasoned explanation. More from Gerstein and Hesson here.

TRADE WINDS

PENCE TO FORD TO TOUT TRADE PLAN: Vice President Mike Pence will embark today "on the administration's highest-profile trip thus far to promote the

USMCA, President Donald Trump's replacement for NAFTA," according to Playbook PM. "Pence will visit the Ford Dearborn Plant in Dearborn, Mich., meet with business leaders, and speak at an auto manufacturing supply plant. The VP is expected to tout three stats from the recently released Office of the U.S. Trade Representative report: USMCA is expected to result in $34 billion in new auto manufacturing investments, 76,000 U.S. automotive jobs, and $23 billion in yearly purchases of U.S.-manufactured automotive parts" over the next five years.

The U.S International Trade Commission was a lot less optimistic last week about USMCA's projected five-year job gain, predicting the creation of only 28,000 auto industry jobs, and 176,000 new jobs across the economy. On Tuesday, White House chief economic adviser Larry Kudlow met this challenge, POLITICO's Doug Palmer reports, by overstating the USITC's number by a factor of nearly five. "They came out with about $68 billion increase in GDP and I think seven or 800,000 jobs," Kudlow said during a speech at the National Press Club. "I'll call it a million just to round it up." Kudlow got the GDP estimate right, but 176,000 does not round up to a million, even if you squint. A White House official said Kudlow was using the USITC's high-range estimate (which was 588,900). But later in the day, Susan Varga, chief of staff on the National Economic Council, said Kudlow recognized that he misspoke and wanted to set the record straight. "He meant to say 'between 170,000 and 180,000 new jobs' (not 7 or 800,000 jobs). He stands corrected," Varga wrote. More from POLITICO on USCMA's potential gains here. More from Palmer here.

UNIONS

EXCLUSIVE: BROWN PRESSES BOEING ON UNION: Sen. Sherrod Brown (D-Ohio) urged Boeing President Dennis Muilenburg Tuesday to adopt card check neutrality in a union drive by the International Association of Machinists at Boeing's North Charleston, South Carolina plant. The New York Times reported over the weekend that employees there were pressured not to report safety concerns about the 787 Dreamliner. That followed two crashes of Boeing's 737 Max that killed nearly 350 people. "Unions play an important role in facilitating employee-managemen t collaboration and adherence to high-quality production standards," Brown said in the letter, "which would help to address the shortcomings in the Dreamliner production."

Boeing has not supported previous attempts to organize the South Carolina

facility. After a micro-unit of technicians and inspectors at the plant voted in representation by the Machinists last May, Boeing said it wouldn't negotiate with the union until its appeal over an NLRB decision that permitted the micro-unit vote to proceed was addressed. Boeing did not respond to Morning Shift's request for comment. Read the letter here.

CHICAGO DEMS TAKE ON AMTRAK: Three Chicago-based members of Congress will rally with union workers Wednesday to protest Amtrak's decision to outsource work amid what labor groups call "a hostile turn" in labor relations. The Trump administration has proposed scaling back federal funding drastically for Amtrak and cutting its long-distance routes. Reps. Dan Lipinski, Chuy García and Jan Schakowsky, all Illinois Democrats, are scheduled to appear along with Unite Here, the Transportation Communications Union, and the Transport Workers Union.

UNHW BUYS DC AD SPOT: The National Union of Healthcare Workers is running a TV commercial in Washington, D.C., that flags what it characterizes as understaffing and unacceptably long wait times for mental health care at Kaiser Permanente facilities. The union, which represents nearly 4,000 Kaiser psychologists and therapists, organized a strike last year throughout California demanding that the company hire more therapists; that came five years after the California Department of Managed Health Care fined Kaiser $4 million for "serious deficiencies" in providing access to mental health care.

According to the union, Kaiser's staffing ratios remain insufficient nationwide. "The public needs to know that Kaiser patients across the country can't get the mental health care they are paying for and legally entitled to receive," said Sal Rosselli, president of the NUHW. The union has been negotiating with Kaiser over a new contract since last June. Watch the ad here.

DIVERSITY

EEO-1 UPDATE: The plaintiffs who in March successfully reversed a Trump administration stay of a data-reporting requirement imposed by the Obama EEOC said in a court filing Monday that they would accept the government's proposed September 30 deadline, increasing the likelihood that federal Judge Tanya Chutkan will approve it. The measure requires that certain businesses report pay data to the EEOC broken down by gender and race. The plaintiffs, Democracy Forward and the National Women's Law Center, also requested that the judge

require the government to collect two years of data, as would have occurred had the Trump administration not stayed the data collection in 2017.

In a separate filing Monday, the government said that if the judge approves the September 30 deadline, it will publish promptly a Federal Register notice announcing that the stay has been lifted and alerting employers to the reinstated requirements. EEOC data chief Samuel Haffer said during the hearing last week that the government hadn't yet notified employers of the reinstated requirement because the agency "doesn't have the capacity" to answer the business community's inquiries about the data collection.

The Chamber of Commerce and a handful of other business associations oppose the September deadline. They argued in Monday court filing that employers had yet to receive the information necessary to begin collecting the data. Judge Chutkan is expected to set the data coll ection deadline in the coming days.

AT THE BORDER

MCALEENAN: FAMILY SEPARATIONS 'NOT ON THE TABLE': In his first interview as acting head of the DHS, Kevin McAleenan told NBC News Tuesday that the administration wasn't looking to revive its policy of separating migrant families at the U.S.-Mexico border, describing such a move as "not worth it" from an enforcement standpoint, POLITICO's Caitlin Oprysko reports. "I think the president has been clear that family separation is not on the table," McAleenan, the former Customs and Border Protection commissioner, told NBC's Lester Holt. "And again, this was a zero-tolerance prosecution initiative that was targeted at adults violating the law," he said. "They were always intended to be reunited." More on McAleenan's comments here.

COFFEE BREAK

— "Border Patrol finds abandoned toddler with phone number on his shoes at border," from NBC News

— "Northeastern Faculty Drop Unionization Bid to Avoid NLRB Ruling," from Bloomberg Law

— "Teachers at a D.C. charter school are trying to unionize, in a rare move," from The Washington Post

— "Stephen Moore's Paper Trail: Bashing Women, Gay Rights and More," from The New York Times

— "Trumka: AFL-CIO needs proof Mexico will eliminate 'sham union' contracts," from POLITICO

— "Pretty Hurts (Women's Careers)" from The New York Times

THAT'S ALL FOR MORNING SHIFT!

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From: Vines, Tomika
To: Ring, John
Cc: Bashford, Jo Ann
Subject: FW: USLERN SPRING SESSION GUEST SPEAKER
Date: Wednesday, April 24, 2019 2:32:45 PM
Attachments: US LERN 2019 Spring Session Agenda.docx
John Ring Bio.docx
Meeting Participants List May 2019 (2) (2).docx

Chairman Ring,

I have attached the current Participants List. Please note: this list has not been finalized and is active.

Do not hesitate to let me know if I can be of further assistance.

Kind Regards,

Tomika Vines
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From: Vines, Tomika
Sent: Tuesday, April 23, 2019 9:25 AM
To: 'John.Ring@nlrb.gov'
Cc: Bashford, Jo Ann; Kachadoorian, Karen; Gavigan, Teresa
Subject: USLERN SPRING SESSION GUEST SPEAKER

Hello Chairman Ring,

We look forward to your presentation at the US LERN Spring Session. The session will take place at the Renaissance Chicago Downtown Hotel, 1 West Wacker Drive in Chicago. In preparation for the session, enclosed are the following:

1. Agenda
2. Meeting participants list to date

Please approve the attached bio or send me your bio to include with the meeting materials at your earliest convenience. If you will have a presentation to display at the session send it to me by

end of day **Monday, May 6**. At that time, let me know if you have any special requirements (i.e., internet access to display videos, etc.). If you will be presenting a video it is recommended that you also bring the video on a USB in the event the firewall does not allow access to the website.

Note: If there are materials you would like to have produced for the session please send those to me by end of day **Thursday, May 2.**

We typically share presentations after the session. If your presentation can be shared (in PDF) with members, please provide your approval when you send your document or indicate that you will provide a version for distribution.

If you have any questions do not hesitate to contact me.

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May 9-10, 2019 Spring Session

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NOT FINAL

From:	Rothschild, Roxanne L.
To:	Ring, John; Lucy, Christine B.
Subject:	Procedural updates to Rules & Regs
Date:	Wednesday, April 24, 2019 3:42:33 PM
Attachments:	Federal Register updates to Rules and Regs 2-24-2017.pdf

---

John and Christine:

Attached is the Federal Register posting from 2/24/2017 when the procedural rules were updated.

Thanks,

Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE, Office 5010, Washington, DC 20570
roxanne.rothschild@nlrb.gov | 202-273-2917

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

Procedural Rules and Regulations

AGENCY: National Labor Relations Board.

ACTION: Final rule.

SUMMARY: The National Labor Relations Board amends its procedural Rules and Regulations to: Reflect modern technology, such as E-Filing, and eliminate references to telegraphs, carbon copies, and the requirements for hard copy submissions and multiple copies; use more plain language and eliminate legalistic terms such as ''therefrom,'' ''thereupon,'' ''therein,'' ''herein,'' and ''said;'' reorganize the Rules and add headings so that the subject matter is easier to find; incorporate current practices that had not been included in the published Rules, such as the Board's Alternative Dispute Resolution Program; and update and streamline procedural provisions of the FOIA regulations. The amendments also clarify the means by which documents are filed and service is made by the parties and the Board. They also promote the parties' use of E-Filing, which will facilitate sharing documents with the public. These revisions are procedural rather than substantive.

DATES: This rule will be effective on March 6, 2017.

FOR FURTHER INFORMATION CONTACT: Gary Shinners, Executive Secretary, National Labor Relations Board, 1015 Half Street SE., Washington, DC 20570, (202) 273–3737 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

Background on the Rulemaking

The changes are summarized below and grouped as follows: I. Global Changes; II. Definitions, Filing, and Service; III. Unfair Labor Practice Cases; IV. FOIA; and V. Other Sections.

I. Global Changes

Throughout the Rules the Board has eliminated requirements for filing multiple copies and references to antiquated technology, such as carbon paper, stenographic copies, and telegraphic communications. The Rules have also been revised to use plain language and eliminate terms such as ''therefrom.'' Time periods have been changed to multiples of 7, the use of gender specific pronouns has been minimized, and the term ''shall'' was replaced with ''must,'' ''will,'' or ''may'' as appropriate. The revisions also ensure that terms, such as E-Filing, and capitalization of titles, such as ''Regional Director'' and ''Administrative Law Judge,'' are consistent throughout the Rules. Changes were also made to ensure consistency in terminology by, for example, using only the term ''paragraph'' instead of using ''subsection'' interchangeably with ''paragraph.'' Where feasible, headings were added to facilitate finding particular rules.

II. Definitions, Filing, and Service

The filing and service requirements found in §§ 102.111 through 102.114 were moved to the beginning of part 102 so that these provisions, which apply to all parties and many different types of documents, are easily found in one location at the beginning of the Rules and not buried throughout the Rules. This change and others are discussed below in numerical sequence (based on where the material is located in the revised version).

A. Sections 102.1 Through 102.7

The changes convert subpart A to a definitions section and subpart B to a section that covers the service and filing of documents. The revisions renumber the definitions currently in §§ 102.1 through 102.8 as § 102.1(a) through (h). The service and filing provisions currently in §§ 102.111 through 102.114 are moved to §§ 102.2 through 102.5 to give them a higher profile position closer to the beginning of the Rules so that users who are not familiar with the Rules may find them more easily. Sections 102.6 and 102.7 are new and address notice to the Board of supplemental authority and signatures on E-Filed documents.

Section 102.2 (Formerly § 102.111), *Time requirements for filing with the Agency,* was reorganized and given headings. It first addresses filings, then extensions of time, and then late-filed documents. Other revisions are set forth below.

(a) *Time computation.* This paragraph was clarified with regard to the time for filing a responsive document. Specifically, it now provides that ''the designated period begins to run on the date the preceding document was required to be received by the Agency, even if the preceding document was filed prior to that date.'' This language was originally in § 102.112, which dealt with the date of service and the date of filing, but was moved here where it more logically fits. The last phrase was added to clarify what happens when a document is filed early.

(b) *Timeliness of filings.* This paragraph was updated to include E-Filing and specifies that E-Filed documents must be received on the due date by 11:59 p.m. of the receiving office's time zone. The Board deleted from this paragraph the language about extensions of time and placed that in a separate paragraph (c) below. This paragraph was also modified so that it directs the public to the Agency's Web site instead of appendix A for information on the official business hours of the Agency's offices, which will ensure that the public is provided with the most current information.

(c) *Extension of time to file.* This paragraph specifies that, except as otherwise provided in the Rules, a request for an extension of time to file a document must be filed no later than the date on which the document is due and that requests filed within 3 days of the due date must be grounded upon circumstances not reasonably foreseeable in advance. This paragraph was clarified to require that such requests be in writing and served simultaneously on the other parties. Language was added to encourage parties to seek agreement from the other parties for the extension, and to indicate the other parties' position in the extension of time request. Language was also added to require any party intending to file an opposition to the request to do so as soon as possible following receipt of the request.

(d) *Late-filed documents.* This paragraph codifies what has been permitted in practice.

Section 102.3 (Formerly § 102.112). *Date of service.* This section was revised to include a reference to email and was made more concise and reorganized for clarity.

Section 102.4 (Formerly § 102.113). *Methods of service of process and papers by the Agency; proof of service.* This section was revised to exclude service by telegraph and to provide that the Agency may serve documents by facsimile or email. General language authorizing email service was added to give the Agency flexibility to use this method where email service has been agreed to by the recipient. This section also adds authorization for service of subpoenas by private delivery service.

Section 102.5 (Formerly § 102.114). *Filing and service of papers by parties: Form of papers; manner and proof of filing or service.* Former § 102.114 articulated the requirements for service and filings by parties and the General Counsel, when acting as a party. This section was reordered to better match the chronology of events (for example, filings appear before service). Topic

headings were added for each paragraph to aid in navigating this section.

Paragraph (a) consolidates § 102.114(d) and other paragraphs that specified the form of filing (such as § 102.46(j)). The revisions change the font requirements from 12 points per inch to 12 point type with no more than 10.5 characters per inch, and add more detail to the spacing requirements. Multiple references to the requirement that briefs longer than 20 pages must contain a subject index and a table of cases are consolidated here.

Paragraph (b) specifies the means by which parties may file requests to exceed the page limits for documents. Previously this provision was located in a number of places.

Paragraph (c) is new and addresses E-Filing with the Agency. It provides that charges, petitions in representation proceedings, and showings of interest may be filed in paper format or by E-Filing, and that all other documents must be E-Filed unless the party filing also files an accompanying statement explaining why the party does not have access to the means for filing electronically or why filing electronically would impose an undue burden.

Paragraph (d) consolidates the oft-repeated requirement in the Rules that documents are to be filed with the Board in Washington, DC. For uniformity, it also specifies filing locations for the Regions and the Administrative Law Judges.

Paragraphs (e) and (f) continue the general limitation on filing documents via fax to encourage E-Filing instead.

Paragraph (e) limits the documents that may be filed via fax to unfair labor practice charges, petitions in representation cases, objections to elections, and requests for extension of time for filing documents with the Agency.

Paragraph (h) adds elements such as fax number and email address to the statement of service requirement. This paragraph was revised to eliminate language that restricted the types of documents that could be E-Filed, and permits E-Filing of charges, petitions in representation cases, and showings of interest.

Section 102.6 *Notice to the Administrative Law Judge or Board of Supplemental Authority.* This section is new and provides that authorities that come to a party's attention after the party's submission to the Administrative Law Judge or the Board has been filed may be brought to the Judge's or the Board's attention by the party promptly filing a letter with the Judge or the Board and simultaneously serving all other parties. The language of the section is based on *Reliant Energy,* 339 NLRB 66 (2003). The language specifies deadlines for responses.

Section 102.7 *Signature on documents E-Filed with the Agency.* This section is new and clarifies that E-filed documents may contain an electronic signature of the filer, which will have the same legal effect, validity, and enforceability as if signed manually.

III. Unfair Labor Practice Cases

The changes include: (a) In §§ 102.11 and 102.12, eliminating the requirement to submit an original copy of a charge filed by facsimile and making minor language changes to the contents of the charge; (b) in § 102.14 revising language regarding service of charges; (c) in § 102.19, eliminating the requirement that a Charging Party serve notice of appeal; (d) in § 102.24, adding language about replies and further responses to an opposition to a motion; (e) in the subpoena section (now § 102.32), including electronic data as well as the more traditional books and records; (f) in § 102.37, adding language about the unavailability of a judge; (g) in § 102.45, adding language about the Alternative Dispute Resolution (ADR) Program; and (h) in § 102.53, deleting the requirement that a Charging Party serve notice of appeal of a compliance determination and adding language specifically permitting the filing of an opposition to a compliance appeal. Those revisions are described more fully below.

A. Sections 102.11 and 102.12

Section 102.11 *Signature; sworn or declaration* was revised to eliminate the requirement to file an ''original'' and to provide an ''original'' for the Agency's records if filed by facsimile. This requirement had been added when the Rules first permitted filing by facsimile. The requirement to submit an original sometimes resulted in the mailed original being docketed as a new charge because someone did not realize it was a hard copy of a charge that had already been filed by facsimile. Because filings by facsimile have not been problematic, the language has been eliminated.

Section 102.12 *Contents* was revised to describe the person against whom the charge is filed as the ''Charged Party'' instead of the ''Respondent,'' as is the Agency's custom until a complaint issues. It was also revised to state that the charge should contain a ''brief statement of the conduct'' constituting the alleged unfair labor practices rather than a ''clear and concise statement of the facts.'' In practice, the Agency does not require or expect a factual recitation. A statement has been added providing that attachments to charges are not permitted.

B. Section 102.14 Service of Charge

(a) Charging Party's obligation to serve; methods of service. This paragraph was modified to add that the Charging Party may serve the charge on the Charged Party (Respondent) by email with the permission of the recipient and to remove the requirement that the permission of the recipient be obtained before serving the charge via facsimile transmission. The Rules retain the requirement that permission be obtained for service by email in case a party does not frequently check email.

(b) Service as courtesy by Region. This paragraph, which currently provides that the Regional Director will serve the charge by regular mail or facsimile transmission, was revised to reflect that charges may also be served in person, via private delivery service, by email, by any manner provided for in Rules 4 or 5 of the Federal Rules of Civil Procedure, or in any other agreed-upon manner. This change will permit service by more expedient means.

(c) Date of service of charge. In connection with the addition of email service (see paragraph (a) above), this provision was amended to show that, in the case of delivery by email, the date of service is the date the email is sent.

C. Section 102.19 Appeal to the General Counsel From Refusal To Issue or Reissue

This section was revised to eliminate the requirement that the Charging Party serve a copy of the appeal on all parties. This requirement was deemed unnecessary because the Office of Appeals routinely sends an acknowledgement letter notifying all parties of the appeal. Further, the existing rule specifically provides that the failure to serve a copy of the appeal does not invalidate the appeal. This requirement also sometimes led to confusion as to whether a party had to serve the appeal form on the other parties or had to serve the document explaining why the appeal should be granted, which might discuss specific affidavit evidence provided during the investigation.

D. Section 102.24 Motions; Where To File; Contents; Service on Other Parties; Promptness in Filing and Response; Default Judgment Procedures; Summary Judgment Procedures

A new paragraph was added addressing replies to an opposition to a motion and further responsive documents.

This section codifies the rule established by the Board in *D.L. Baker, Inc.,* 330 NLRB 521, fn. 4 (2000).

E. Section 102.31 Issuance of Subpoenas; Petitions To Revoke Subpoenas; Rulings on Claim of Privilege Against Self-Incrimination; Subpoena Enforcement Proceedings; Right To Inspect or Copy Data

Paragraph (a) of this section was revised to clarify that subpoenas can require production of ''electronic data'' as well as books, records, correspondence, and documents. Paragraph (b) was revised to reflect the current practice of allowing parties to file oppositions to petitions to revoke subpoenas and replies to oppositions, as well as the practice of allowing the party aggrieved by an adverse ruling to make the ruling and other filings part of the official record during a formal proceeding (rather than at the investigative stage of the proceeding). Paragraph (b) was also revised to reflect that petitions to revoke subpoenas filed in response to a subpoena issued upon request of the Contempt, Compliance, and Special Litigation Branch must be filed with that Branch, which shall refer the petition to the Board for ruling.

F. Section 102.36 Disqualification and Unavailability of Administrative Law Judges

This section was amended to add a paragraph (b) regarding the unavailability of Administrative Law Judges. This provision was previously in the Rules, but did not have a separate lettered paragraph.

G. Section 102.45 Administrative Law Judge's Decision; Contents of Record; Alternative Dispute Resolution Program

New paragraphs (c)(1) through (10) cover the Alternative Dispute Resolution (ADR) Program. The ADR Program provides for a neutral to assist in resolving unfair labor practice cases pending before the Board. Although the ADR pilot program was launched in December 2005 and was converted to permanent status in March 2009, it had not previously been incorporated in the Rules. Incorporating this provision in the Rules will help ensure that the public will be more fully aware of the ADR Program.

H. Section 102.53 Appeal of Compliance Determination to the General Counsel; General Counsel's Action; Request for Review by the Board; Board Action; Opposition to Appeal or Request for Review

Paragraph (a) of this section was revised to delete the requirement that the Charging Party serve a copy of the appeal on all other parties inasmuch as the Office of Appeals notifies all parties of the appeal.

A new paragraph (e) was added specifically to permit the filing of an opposition to the compliance appeal.

IV. FOIA

The revisions update and streamline procedural provisions of the FOIA regulations (§ 102.117). They are intended to make the regulations consistent with the restructuring of the Agency's Headquarters offices and centralization of the FOIA processing. *See* 78 FR 44981–82 (July 23, 2013). In addition, the changes make the FOIA regulations more readable and requester-friendly, including additional headings and subheadings, in accordance with the recommendations of the Office of Government Information Service (OGIS), the agency charged by Congress to review the regulations and policies of federal administrative agencies to improve compliance with the FOIA. They also reflect procedural changes mandated by the OPEN Government Act of 2007, Public Law 110–175, including, for example, the Agency's designation of a FOIA Officer, Chief FOIA Officer, and Public Liaison. Finally, they conform the Agency's regulations to the recently-enacted FOIA Improvement Act of 2016, Public Law 114–185 (June 30, 2016).

The changes explain that the FOIA Branch will handle all FOIA requests for Agency records, with the exception of Office of Inspector General records, which are handled by the Office of Inspector General. They also explain that all appeals for Agency documents will be decided by the Chief FOIA Officer, who is the Associate General Counsel for the Division of Legal Counsel.

The changes also set forth the various methods for submitting requests, and in particular, state that the Agency's preferred method of submission is through its Web site. Regarding requests for documents maintained by the Office of the Inspector General (OIG), the changes state that such requests should be submitted to the FOIA Branch, which will then forward such requests to the OIG for processing. This permits requesters to make requests for Inspector General documents through the Agency's Web site. Nonetheless, the revised Rules maintain the option for requesters to make requests directly to the Office of the Inspector General (by mail).

Some of the specific changes include:

- Section 102.117(a)(1) deletes a sentence stating the Agency's policy that discretionary disclosures may be made when there is no foreseeable harm to an interest protected by a FOIA exemption, as the FOIA Improvement Act now requires disclosure when there is no such foreseeable harm;
- Section 102.117(c)(1)(ii) updates the most significant procedural change, that all FOIA requests should be made to the FOIA Branch in Washington, DC, with electronic submissions being the preferred method for making requests, including requests to the Office of the Inspector General;
- Section 102.117(a)(2)(i)–(iii) is new and identifies the Agency's FOIA officials;
- Section 102.117(a)(3) is new and explains the authority of each of the FOIA officials to respond to requests and administrative appeals;
- Section 102.117(a)(4) deletes the list of records made available, as the FOIA itself provides what records are to be made available;
- Section 102.117(b)(2) was modified to specify that the Division of Legal Counsel will certify General Counsel records and that the Executive Secretary will continue to certify Board records;
- Section 102.117(c)(2)(v) was modified to provide 90 days, rather than 28 days, for a requester to file an administrative appeal of an adverse determination, as required by the FOIA Improvement Act;
- Section 102.117(c)(2)(vi) was modified to clarify that the Agency will provide requesters an opportunity to limit their requests so that the request may be processed within the statutory time periods.
- Several paragraphs have been modified to add that requesters will be notified of their right to seek assistance from the Agency's FOIA Public Liaison or the Office of Government Information Services, as required by the FOIA Improvement Act.

V. Other Sections

A. Section 102.96 Issuance of Complaint Promptly

This section was reworded to use plain language to make it more easily understandable.

B. Section 102.122 Subpart N—Reserved

This section dealt with Enforcement of Rights, Privileges, and Immunities Granted or Guaranteed Under Section 222(f), Communications Act of 1934 to Employees of Merged Telegraph Carriers. The section has been deleted because the original Section 222(f) to which this section refers was repealed, and the subpart and Section number have been reserved for future use.

C. Section 102.136 Establishment and Use of Advisory Committees

This section was revised to delete the reference to Office of Management and Budget Circular A–63 (rev. March 27, 1975) and Advisory Committee Management Guidance, 39 FR 12389–12391, because they are obsolete. Currently, each federal agency that sponsors advisory committees must adhere to the requirements established by the Federal Advisory Committee Act (FACA) as well as regulations promulgated by the U.S. General Services Administration's (GSA) Committee Management Secretariat. GSA has had the responsibility for overseeing the FACA since 1977. OMB Circular A–63 from 1975 and the Advisory Committee Management Guidance, 39 FR 12389–12391 were superseded by a 2001 Federal Advisory Committee Act (FACA) Final Rule. Accordingly, the references to the OMB Circular and Advisory Committee Management Guidance were deleted and replaced by a more generic reference to ''applicable rules and regulations.''

Appendix A—NLRB Official Office Hours (Local Times)

Appendix A was deleted because this information is already on the Agency's Web site, and would have to be modified frequently to keep it current. Section 102.2(b) directs the public to our Web site for this information.

Regulatory Flexibility Act Certification

Pursuant to Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Agency has determined that these rule amendments will not have a significant impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

These rule amendments will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This action is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. These amendments will not result in an annual effect on the economy of $100,000,000 or more or a major increase in costs or prices, nor will these amendments have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction

The amended regulations contain no additional information-collection or record-keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*

Public Participation

This rule is published as a final rule. The National Labor Relations Board considers this rule to be a procedural rule which is exempt from notice and public comment, pursuant to 5 U.S.C. 553(b)(3)(A), as a rule of ''agency organization, procedure, or practice.'' If you wish to contact the Agency, please do so at the above listed address. However, before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

List of Subjects in 29 CFR Part 102

Administrative practice and procedure, Labor management relations.

Gary Shinners,

Executive Secretary.

For the reasons stated in the preamble, the National Labor Relations Board amends 29 CFR part 102 as follows:

PART 102—RULES AND REGULATIONS, SERIES 8

■ 1. The authority citation for part 102 continues to read as follows:

Authority: Sections 1, 6, National Labor Relations Act (29 U.S.C. 151, 156). Section 102.117 also issued under section 552(a)(4)(A) of the Freedom of Information Act, as amended (5 U.S.C. 552(a)(4)(A)), and Section 102.117a also issued under section 552a(j) and (k) of the Privacy Act of 1974 (5 U.S.C. 552a(j) and (k)). Sections 102.143 through 102.155 also issued under section 504(c)(1) of the Equal Access to Justice Act, as amended (5 U.S.C. 504(c)(1)).

■ 2. Revise subparts A and B to read as follows:

Subpart A—Definitions

§ 102.1 Terms defined in Section 2 of the Act.

(a) *Definition of terms.* The terms *person, employer, employee, representative, labor organization, commerce, affecting commerce,* and *unfair labor practice* as used herein have the meanings set forth in Section 2 of the National Labor Relations Act, as amended by title I of the Labor Management Relations Act, 1947.

(b) *Act, Board, and Board agent.* The term *Act* means the National Labor Relations Act, as amended. The term *Board* means the National Labor Relations Board and must include any group of three or more Members designated pursuant to Section 3(b) of the Act. The term *Board agent* means any Member, agent, or agency of the Board, including its General Counsel.

(c) *General Counsel.* The term *General Counsel* means the General Counsel under Section 3(d) of the Act.

(d) *Region and Subregion.* The term *Region* means that part of the United States or any territory thereof fixed by the Board as a particular Region. The term *Subregion* means that area within a Region fixed by the Board as a particular *Subregion.*

(e) *Regional Director, Officer-in-Charge, and Regional Attorney.* The term *Regional Director* means the agent designated by the Board as the Regional Director for a particular Region, and also includes any agent designated by the Board as Officer-in-Charge of a Subregional office, but the Officer-in-Charge must have only such powers, duties, and functions appertaining to Regional Directors as have been duly delegated to such Officer-in-Charge. The term *Regional Attorney* means the attorney designated as Regional Attorney for a particular Region.

(f) *Administrative Law Judge and Hearing Officer.* The term *Administrative Law Judge* means the agent of the Board conducting the hearing in an unfair labor practice proceeding. The term *Hearing Officer* means the agent of the Board conducting the hearing in a proceeding under Section 9 or in a dispute proceeding under Section 10(k) of the Act.

(g) *State.* The term *State* includes the District of Columbia and all States, territories, and possessions of the United States.

(h) *Party.* The term *party* means the Regional Director in whose Region the proceeding is pending and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board

proceeding, including, without limitation, any person filing a charge or petition under the Act, any person named as Respondent, as employer, or as party to a contract in any proceeding under the Act, and any labor organization alleged to be dominated, assisted, or supported in violation of Section 8(a)(1) or 8(a)(2) of the Act; but nothing herein should be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of the party's interest only.

Subpart B—Service and Filings

Sec.

102.2 Time requirements for filings with the Agency.
102.3 Date of service.
102.4 Methods of service of process and papers by the Agency; proof of service.
102.5 Filing and service of papers by parties: Form of papers; manner and proof of filing or service.
102.6 Notice to the Administrative Law Judge or Board of supplemental authority.
102.7 Signature on documents E-Filed with the Agency.
102.8 [Reserved]

§ 102.2 Time requirements for filings with the Agency.

(a) *Time computation.* In computing any period of time prescribed or allowed by these Rules, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the next Agency business day. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and holidays are be excluded in the computation. Except as otherwise provided, in computing the period of time for filing a responsive document, the designated period begins to run on the date the preceding document was required to be received by the Agency, even if the preceding document was filed prior to that date.

(b) *Timeliness of filings.* If there is a time limit for the filing of a motion, brief, exception, request for extension of time, or other paper in any proceeding, such document must be received by the Board or the officer or agent designated to receive such matter on or before the last day of the time limit for such filing or the last day of any extension of time that may have been granted. Non E-Filed documents must be received before the official closing time of the receiving office (see *www.nlrb.gov* setting forth the official business hours of the Agency's several offices). E-Filed documents must be received by 11:59 p.m. of the time zone of the receiving office. In construing this section of the Rules, the Board will accept as timely filed any document which is postmarked on the day before (or earlier than) the due date; documents which are postmarked on or after the due date are untimely. ''Postmarking'' must include timely depositing the document with a delivery service that will provide a record showing that the document was given to the delivery service in sufficient time for delivery by the due date, but in no event later than the day before the due date. However, the following documents must be received on or before the last day for filing:

(1) Charges filed pursuant to Section 10(b) of the Act (see also § 102.14).

(2) Applications for awards and fees and other expenses under the Equal Access to Justice Act.

(3) Petitions to revoke subpoenas.

(4) Requests for extensions of time to file any document for which such an extension may be granted.

(c) *Extension of time to file.* Except as otherwise provided, a request for an extension of time to file a document must be filed no later than the date on which the document is due. Requests for extensions of time filed within 3 days of the due date must be grounded upon circumstances not reasonably foreseeable in advance. Requests for extension of time must be in writing and must be served simultaneously on the other parties. Parties are encouraged to seek agreement from the other parties for the extension, and to indicate the other parties' position in the extension of time request. An opposition to a request for an extension of time should be filed as soon as possible following receipt of the request.

(d) *Late-filed documents.* (1) The following documents may be filed within a reasonable time after the time prescribed by these Rules only upon good cause shown based on excusable neglect and when no undue prejudice would result:

(i) In unfair labor practice proceedings, motions, exceptions, answers to a complaint or a backpay specification, and briefs; and

(ii) In representation proceedings, exceptions, requests for review, motions, briefs, and any responses to any of these documents.

(2) A party seeking to file such documents beyond the time prescribed by these Rules must file, along with the document, a motion that states the grounds relied on for requesting permission to file untimely. The specific facts relied on to support the motion must be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts. The time for filing any document responding to the untimely document will not commence until the date a ruling issues accepting the untimely document. In addition, cross-exceptions are due within 14 days, or such further period as the Board may allow, from the date a ruling issues accepting the untimely filed documents.

§ 102.3 Date of service.

Where service is made by mail, private delivery service, or email, the date of service is the day when the document served is deposited in the United States mail, is deposited with a private delivery service that will provide a record showing the date the document was tendered to the delivery service, or is sent by email, as the case may be. Where service is made by personal delivery or facsimile, the date of service will be the date on which the document is received.

§ 102.4 Methods of service of process and papers by the Agency; proof of service.

(a) *Method of service for certain Agency-issued documents.* Complaints and compliance specifications (including accompanying notices of hearing, and amendments to either complaints or to compliance specifications), final orders of the Board in unfair labor practice cases and Administrative Law Judges' decisions must be served upon all parties personally, by registered or certified mail, by leaving a copy at the principal office or place of business of the person required to be served, by email as appropriate, or by any other method of service authorized by law.

(b) *Service of subpoenas.* Subpoenas must be served upon the recipient personally, by registered or certified mail, by leaving a copy at the principal office or place of business of the person required to be served, by private delivery service, or by any other method of service authorized by law.

(c) *Service of other Agency-issued documents.* Other documents may be served by the Agency by any of the foregoing methods as well as by regular mail, private delivery service, facsimile, or email.

(d) *Proof of service.* In the case of personal service, or delivery to a principal office or place of business, the verified return by the serving individual, setting forth the manner of such service, is proof of service. In the case of service by registered or certified mail, the return post office receipt is proof of service. However, these methods of proof of service are not

exclusive; any sufficient proof may be relied upon to establish service.

(e) *Service upon representatives of parties.* Whenever these Rules require or permit the service of pleadings or other papers upon a party, a copy must be served on any attorney or other representative of the party who has entered a written appearance in the proceeding on behalf of the party. If a party is represented by more than one attorney or representative, service upon any one of such persons in addition to the party satisfies this requirement. Service by the Board or its agents of any documents upon any such attorney or other representative may be accomplished by any means of service permitted by these Rules, including regular mail.

§ 102.5 Filing and service of papers by parties: Form of papers; manner and proof of filing or service.

(a) *Form of papers to be filed.* All papers filed with the Board, General Counsel, Regional Director, Administrative Law Judge, or Hearing Officer must be typewritten or otherwise legibly duplicated on 8½ by 11-inch plain white paper, and must have margins no less than one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there. Typeface that is single-spaced must not contain more than 10.5 characters per inch, and proportionally-spaced typeface must be 12 point or larger, for both text and footnotes. Condensed text is not permitted. The text must be double-spaced, but headings and footnotes may be single-spaced, and quotations more than two lines long may be indented and single-spaced. Case names must be italicized or underlined. Where any brief filed with the Board exceeds 20 pages, it must contain a subject index with page references and an alphabetical table of cases and other authorities cited.

(b) *Requests to exceed the page limits.* Requests for permission to exceed the page limits for documents filed with the Board must state the reasons for the requests. Unless otherwise specified, such requests must be filed not less than 10 days prior to the date the document is due.

(c) *E-Filing with the Agency.* Unless otherwise permitted under this section, all documents filed in cases before the Agency must be filed electronically (''E-Filed'') on the Agency's Web site (*www.nlrb.gov*) by following the instructions on the Web site. The Agency's Web site also contains certain forms that parties or other persons may use to prepare their documents for E-Filing. If the document being E-Filed is required to be served on another party to a proceeding, the other party must be served by email, if possible, or in accordance with paragraph (g) of this section. Unfair labor practice charges, petitions in representation proceedings, and showings of interest may be filed in paper format or E-Filed. A party who files other documents in paper format must accompany the filing with a statement explaining why the party does not have access to the means for filing electronically or why filing electronically would impose an undue burden. Notwithstanding any other provision in these Rules, if a document is filed electronically the filer need not also file a hard copy of the document, and only one copy of a document filed in hard copy should be filed. Documents may not be filed with the Agency via email without the prior approval of the receiving office.

(d) *Filing with the Agency by Mail or Delivery.* Documents to be filed with the Board are to be filed with the Office of the Executive Secretary in Washington, DC. Documents to be filed with the Regional Offices are to be filed with the Regional Office handling the case. Documents to be filed with the Division of Judges are to be filed with the Division office handling the matter.

(e) *Filing by fax with the Agency.* Only unfair labor practice charges, petitions in representation proceedings, objections to elections, and requests for extensions of time for filing documents will be accepted by the Agency if faxed to the appropriate office. Other documents may not be faxed. At the discretion of the receiving office, the person submitting a document by fax may be required simultaneously to file the original with the office by overnight delivery service. When filing a charge, a petition in a representation proceeding, or election objections by fax pursuant to this section, receipt of the faxed document by the Agency constitutes filing with the Agency. A failure to timely file or serve a document will not be excused on the basis of a claim that facsimile transmission could not be accomplished because the receiving machine was off-line or busy or unavailable for any other reason.

(f) *Service.* Unless otherwise specified, documents filed with the Agency must be simultaneously served on the other parties to the case including, as appropriate, the Regional Office in charge of the case. Service of documents by a party on other parties may be made personally, or by registered mail, certified mail, regular mail, email (unless otherwise provided for by these Rules), private delivery service, or by fax for documents of or under 25 pages in length. Service of documents by a party on other parties by any other means, including by fax for documents over 25 pages in length, is permitted only with the consent of the party being served. When a party does not have the ability to receive service by email or fax, or chooses not to accept service of a document longer than 25 pages by fax, the other party must be notified personally or by telephone of the substance of the filed document and a copy of the document must be served by personal service no later than the next day, by overnight delivery service, or by fax or email as appropriate. Unless otherwise specified elsewhere in these Rules, service on all parties must be made in the same manner as that used in filing the document with the Board, or in a more expeditious manner. When filing with the Board is done by hand, however, the other parties must be immediately notified of such action, followed by service of a copy in a manner designed to insure receipt by them by the close of the next business day. The provisions of this section apply to the General Counsel after a complaint has issued, just as they do to any other party, except to the extent that the provisions of § 102.4(a) provide otherwise.

(g) *Proof of service.* When service is made by registered or certified mail, the return post office receipt will be proof of service. When service is made by a private delivery service, the receipt from that service showing delivery will be proof of service. However, these methods of proof of service are not exclusive; any sufficient proof may be relied upon to establish service.

(h) *Statement of service.* The person or party filing a document with the Agency must simultaneously file a statement of service. Such statement must include the names of the parties served, the date and manner of service, and the location of service such as mailing address, fax number, or email address as appropriate. The Agency requires proof of service as defined in paragraph (g) of this section only if, subsequent to the receipt of the statement of service, a question is raised with respect to proper service. Failure to make proof of service does not affect the validity of the service.

(i) *Failure to properly serve.* Failure to comply with the requirements of this section relating to timeliness of service on other parties will be a basis for either:

(1) Rejecting the document; or

(2) Withholding or reconsidering any ruling on the subject matter raised by the document until after service has

been made and the served party has had reasonable opportunity to respond.

§ 102.6 Notice to the Administrative Law Judge or Board of supplemental authority.

Pertinent and significant authorities that come to a party's attention after the party's submission to the Administrative Law Judge or the Board has been filed may be brought to the Judge's or the Board's attention by the party promptly filing a letter with the judge or the Board and simultaneously serving all other parties. The body of the letter may not exceed 350 words. A party may file and serve on all other parties a response that is similarly limited. In unfair labor practice cases, the response must be filed no later than 14 days after service of the letter. In representation cases, the response must be filed no later than 7 days after service of the letter. No extension of time will be granted to file the response.

§ 102.7 Signature on documents E-Filed with the Agency.

Documents filed with the Agency by E-Filing may contain an electronic signature of the filer which will have the same legal effect, validity, and enforceability as if signed manually. The term ''electronic signature'' means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the document.

§ 102.8 [Reserved]

Subpart I—[Removed]

■ 4. Remove subpart I.

Subparts C Through H—[Redesignated Subparts D Through I]

■ 5. Redesignate subparts C through H as subparts D through I.

■ 6. Add new subpart C to read as follows:

Subpart C—Procedure Under Section 10(A) to (I) of the Act for the Prevention of Unfair Labor Practices

Sec.

102.9 Who may file; withdrawal and dismissal.
102.10 Where to file.
102.11 Signature; sworn; declaration.
102.12 Contents.
102.13 [Reserved]
102.14 Service of charge.
102.15 When and by whom issued; contents; service.
102.16 Hearing; change of date or place.
102.17 Amendment.
102.18 Withdrawal.
102.19 Appeal to the General Counsel from refusal to issue or reissue.
102.20 Answer to complaint; time for filing; contents; allegations not denied deemed admitted.
102.21 Where to file; service upon the parties; form.
102.22 Extension of time for filing.
102.23 Amendment.
102.24 Motions; where to file; contents; service on other parties; promptness in filing and response; default judgment procedures; summary judgment procedures.
102.25 Ruling on motions.
102.26 Motions; rulings and orders part of the record; rulings not to be appealed directly to the Board without special permission; requests for special permission to appeal.
102.27 Review of granting of motion to dismiss entire complaint; reopening of the record.
102.28 Filing of answer or other participation in proceedings not a waiver of rights.
102.29 Intervention; requisites; rulings on motions to intervene.
102.30 Depositions; examination of witnesses.
102.31 Issuance of subpoenas; petitions to revoke subpoenas; rulings on claim of privilege against self-incrimination; subpoena enforcement proceedings; right to inspect or copy data.
102.32 Payment of witness fees and mileage; fees of persons taking depositions.
102.33 Transfer of charge and proceeding from Region to Region; consolidation of proceedings in same Region; severance.
102.34 Who will conduct hearing; public unless otherwise ordered.
102.35 Duties and powers of Administrative Law Judges; stipulations of cases to Administrative Law Judges or to the Board; assignment and powers of settlement judges.
102.36 Disqualification and unavailability of Administrative Law Judges.
102.37 [Reserved]
102.38 Rights of parties.
102.39 Rules of evidence controlling so far as practicable.
102.40 Stipulations of fact admissible.
102.41 Objection to conduct of hearing; how made; objections not waived by further participation.
102.42 Filings of briefs and proposed findings with the Administrative Law Judge and oral argument at the hearing.
102.43 Continuance and adjournment.
102.44 [Reserved]
102.45 Administrative Law Judge's decision; contents of record; alternative dispute resolution program.
102.46 Exceptions and brief in support; answering briefs to exceptions; cross-exceptions and brief in support; answering briefs to cross-exceptions; reply briefs; failure to except; oral argument; filing requirements.
102.47 Filing of motion after transfer of case to Board.
102.48 No exceptions filed; exceptions filed; motions for reconsideration, rehearing, or reopening the record.
102.49 Modification or setting aside of Board order before record filed in court; action thereafter.
102.50 Hearings before the Board or a Board Member.
102.51 Settlement or adjustment of issues.
102.52 Compliance with Board order; notification of compliance determination.
102.53 Appeal of compliance determination to the General Counsel; General Counsel's action; request for review by the Board; Board action; opposition to appeal or request for review.
102.54 Issuance of compliance specification; consolidation of complaint and compliance specification.
102.55 Contents of compliance specification.
102.56 Answer to compliance specification.
102.57 Extension of date of hearing.
102.58 Withdrawal of compliance specification.
102.59 Hearing and posthearing procedures.

Subpart C—Procedure Under Section 10(A) to (I) of the Act for the Prevention of Unfair Labor Practices

§ 102.9 Who may file; withdrawal and dismissal.

Any person may file a charge alleging that any person has engaged in or is engaging in any unfair labor practice affecting commerce. The charge may be withdrawn, prior to the hearing, only with the consent of the Regional Director with whom such charge was filed; at the hearing and until the case has been transferred to the Board pursuant to § 102.45, upon motion, with the consent of the Administrative Law Judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to § 102.45, upon motion, with the consent of the Board. Upon withdrawal of any charge, any complaint based thereon will be dismissed by the Regional Director issuing the complaint, the Administrative Law Judge designated to conduct the hearing, or the Board.

§ 102.10 Where to file.

Except as provided in § 102.33, a charge must be filed with the Regional Director for the Region in which the alleged unfair labor practice has occurred or is occurring. A charge alleging that an unfair labor practice has occurred or is occurring in two or more Regions may be filed with the Regional Director for any of those Regions.

§ 102.11 Signature; sworn; declaration.

Charges must be in writing and signed, and either must be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or must contain a declaration by the person signing it,

under the penalty of perjury that its contents are true and correct (see 28 U.S.C. 1746).

§ 102.12 Contents.

(a) A charge must contain the following:

(1) The full name and address of the person making the charge.

(2) If the charge is filed by a labor organization, the full name and address of any national or international labor organization of which it is an affiliate or constituent unit.

(3) The full name and address of the person against whom the charge is made (referred to as the Charged Party).

(4) A brief statement of the conduct constituting the alleged unfair labor practices affecting commerce.

(b) Attachments to charges are not permitted.

§ 102.13 [Reserved]

§ 102.14 Service of charge.

(a) *Charging Party's obligation to serve; methods of service.* Upon the filing of a charge, the Charging Party is responsible for the timely and proper service of a copy upon the person against whom such charge is made. Service may be made personally, or by registered mail, certified mail, regular mail, private delivery service, or facsimile. With the permission of the person receiving the charge, service may be made by email or by any other agreed-upon method.

(b) *Service as courtesy by Regional Director.* The Regional Director will, as a matter of courtesy, serve a copy of the charge on the charged party in person, or send it to the charged party by regular mail, private delivery service, email or facsimile transmission, in any manner provided for in Rules 4 or 5 of the Federal Rules of Civil Procedure, or in any other agreed-upon method. The Region will not be responsible for such service.

(c) *Date of service of charge.* In the case of service of a charge by mail or private delivery service, the date of service is the date of deposit with the post office or other carrier. In the case of delivery by email, the date of service is the date the email is sent. In the case of service by other methods, including hand delivery or facsimile transmission, the date of service is the date of receipt.

§ 102.15 When and by whom issued; contents; service.

After a charge has been filed, if it appears to the Regional Director that formal proceedings may be instituted, the Director will issue and serve on all parties a formal complaint in the Board's name stating the alleged unfair labor practices and containing a Notice of Hearing before an Administrative Law Judge at a fixed place and at a time not less than 14 days after the service of the complaint. The complaint will contain:

(a) A clear and concise statement of the facts upon which the Board asserts jurisdiction, and

(b) A clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of Respondent's agents or other representatives who committed the acts.

§ 102.16 Hearing; change of date or place.

(a) Upon the Regional Director's own motion or upon proper cause shown by any other party, the Regional Director issuing the complaint may extend the hearing date or change the hearing place, except that the Regional Director's authority to extend the hearing date is limited to the following circumstances:

(1) Where all parties agree or no party objects to extension of the hearing date;

(2) Where a new charge or charges have been filed which, if meritorious, might be appropriate for consolidation with the pending complaint;

(3) Where negotiations which could lead to settlement of all or a portion of the complaint are in progress;

(4) Where issues related to the complaint are pending before the General Counsel's Division of Advice or Office of Appeals; or

(5) Where more than 21 days remain before the scheduled hearing date.

(b) In circumstances other than those set forth in paragraph (a) of this section, motions to reschedule the hearing may be filed with the Division of Judges in accordance with § 102.24(a). When a motion to reschedule has been granted, the Regional Director issuing the complaint retains the authority to order a new hearing date and the responsibility to make the necessary arrangements for conducting the hearing, including its location and the transcription of the proceedings.

§ 102.17 Amendment.

A complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the Regional Director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to § 102.45, upon motion, by the Administrative Law Judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to § 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.

§ 102.18 Withdrawal.

A complaint may be withdrawn before the hearing by the Regional Director on the Director's own motion.

§ 102.19 Appeal to the General Counsel from refusal to issue or reissue.

(a) If, after the charge has been filed, the Regional Director declines to issue a complaint or, having withdrawn a complaint pursuant to § 102.18, refuses to reissue it, the Director will so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for that action. The Charging Party may obtain a review of such action by filing the ''Appeal Form'' with the General Counsel in Washington, DC, and filing a copy of the ''Appeal Form'' with the Regional Director, within 14 days from the service of the notice of such refusal to issue or reissue by the Regional Director, except where a shorter period is provided by § 102.81. The Charging Party may also file a statement setting forth the facts and reasons upon which the appeal is based. If such a statement is timely filed, the separate ''Appeal Form'' need not be served. A request for extension of time to file an appeal must be in writing and be received by the General Counsel, and a copy of such request filed with the Regional Director, prior to the expiration of the filing period. Copies of the acknowledgment of the filing of an appeal and of any ruling on a request for an extension of time for filing of the appeal must be served on all parties. Consideration of an appeal untimely filed is within the discretion of the General Counsel upon good cause shown.

(b) Oral presentation in Washington, DC, of the appeal issues may be permitted by a party on written request made within 4 days after service of acknowledgement of the filing of an appeal. In the event such request is granted, the other parties must be notified and afforded, without additional request, a like opportunity at another appropriate time.

(c) The General Counsel may sustain the Regional Director's refusal to issue or reissue a complaint, stating the grounds of the affirmance, or may direct the Regional Director to take further action; the General Counsel's decision must be served on all the parties. A motion for reconsideration of the decision must be filed within 14 days of service of the decision, except as hereinafter provided, and must state with particularity the error requiring reconsideration. A motion for

reconsideration based upon newly discovered evidence which has become available only since the decision on appeal must be filed promptly on discovery of such evidence. Motions for reconsideration of a decision previously reconsidered will not be entertained, except in unusual situations where the moving party can establish that new evidence has been discovered which could not have been discovered by diligent inquiry prior to the first reconsideration.

§ 102.20 Answer to complaint; time for filing; contents; allegations not denied deemed admitted.

The Respondent must, within 14 days from the service of the complaint, file an answer. The Respondent must specifically admit, deny, or explain each of the facts alleged in the complaint, unless the Respondent is without knowledge, in which case the Respondent must so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the Respondent states in the answer that the Respondent is without knowledge, will be deemed to be admitted to be true and will be so found by the Board, unless good cause to the contrary is shown.

§ 102.21 Where to file; service upon the parties; form.

An original and four copies of the answer shall be filed with the Regional Director issuing the complaint. Immediately upon the filing of his answer, respondent shall serve a copy thereof on the other parties. An answer of a party represented by counsel or non-attorney representative shall be signed by at least one such attorney or non-attorney representative of record in his/her individual name, whose address shall be stated. A party who is not represented by an attorney or non-attorney representative shall sign his/her answer and state his/her address. Except when otherwise specifically provided by rule or statute, an answer need not be verified or accompanied by affidavit. The signature of the attorney or non-attorney party representative constitutes a certificate by him/her that he/she has read the answer; that to the best of his/her knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If an answer is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the action may proceed as though the answer had not been served. For a willful violation of this section an attorney or non-attorney party representative may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

§ 102.22 Extension of time for filing.

Upon the Regional Director's own motion or upon proper cause shown by any other party, the Regional Director issuing the complaint may by written order extend the time within which the answer must be filed.

§ 102.23 Amendment.

The Respondent may amend its answer at any time prior to the hearing. During the hearing or subsequently, the Respondent may amend the answer in any case where the complaint has been amended, within such period as may be fixed by the Administrative Law Judge or the Board. Whether or not the complaint has been amended, the answer may, in the discretion of the Administrative Law Judge or the Board, upon motion, be amended upon such terms and within such periods as may be fixed by the Administrative Law Judge or the Board.

§ 102.24 Motions; where to file; contents; service on other parties; promptness in filing and response; default judgment procedures; summary judgment procedures.

(a) All motions under §§ 102.22 and 102.29 made prior to the hearing must be filed in writing with the Regional Director issuing the complaint. All motions for default judgment, summary judgment, or dismissal made prior to the hearing must be filed in writing with the Board pursuant to the provisions of § 102.50. All other motions made prior to the hearing, including motions to reschedule the hearing under circumstances other than those set forth in § 102.16(a), must be filed in writing with the Chief Administrative Law Judge in Washington, DC, with the Associate Chief Judge in San Francisco, California, or with the Associate Chief Judge in New York, New York, as the case may be. All motions made at the hearing must be made in writing to the Administrative Law Judge or stated orally on the record. All motions filed subsequent to the hearing, but before the transfer of the case to the Board pursuant to § 102.45, must be filed with the Administrative Law Judge, care of the Chief Administrative Law Judge in Washington, DC, the Associate Chief Judge in San Francisco, or the Associate Chief Judge in New York, as the case may be. Motions must briefly state the order or relief applied for and the grounds therefor. All motions filed with a Regional Director or an Administrative Law Judge as set forth in this paragraph (a) must be filed together with an affidavit of service on the parties. All motions filed with the Board, including motions for default judgment, summary judgment, or dismissal, must be filed with the Executive Secretary of the Board in Washington, DC, together with an affidavit of service on the parties. Unless otherwise provided in these Rules, motions, oppositions, and replies must be filed promptly and within such time as not to delay the proceeding.

(b) All motions for summary judgment or dismissal must be filed with the Board no later than 28 days prior to the scheduled hearing. Where no hearing is scheduled, or where the hearing is scheduled less than 28 days after the date for filing an answer to the complaint or compliance specification, whichever is applicable, the motion must be filed promptly. Upon receipt of the motion, the Board may deny the motion or issue a Notice to Show Cause why the motion may not be granted. If a Notice to Show Cause is issued, the hearing, if scheduled, will normally be postponed indefinitely. If a party desires to file an opposition to the motion prior to issuance of the Notice to Show Cause to prevent postponement of the hearing, it may do so. However, any such opposition must be filed no later than 21 days prior to the hearing. If a Notice to Show Cause is issued, an opposing party may file a response notwithstanding any opposition it may have filed prior to issuance of the notice. The time for filing the response must be fixed in the Notice to Show Cause. Neither the opposition nor the response must be supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing. The Board in its discretion may deny the motion where the motion itself fails to establish the absence of a genuine issue, or where the opposing party's pleadings, opposition and/or response indicate on their face that a genuine issue may exist. If the opposing party files no opposition or response, the Board may treat the motion as conceded, and default judgment, summary judgment, or dismissal, if appropriate, will be entered.

(c) A party that has filed a motion may file a reply to an opposition to its motion within 7 days of receipt of the opposition, but in the interest of administrative finality, further responses are not permitted except where there are special circumstances warranting leave to file such a response.

§ 102.25 Ruling on motions.

An Administrative Law Judge designated by the Chief Administrative Law Judge, the Deputy Chief Administrative Law Judge, or an Associate Chief Administrative Law Judge as the case may be, will rule on all prehearing motions (except as provided in §§ 102.16, 102.22, 102.29, and 102.50), and all such rulings and orders will be issued in writing and a copy served on each of the parties. The Administrative Law Judge designated to conduct the hearing will rule on all motions after opening of the hearing (except as provided in § 102.47), and any related orders, if announced at the hearing, will be stated orally on the record; in all other cases, the Administrative Law Judge will issue such rulings and orders in writing and must cause a copy to be served on each of the parties, or will make the ruling in the decision. Whenever the Administrative Law Judge has reserved ruling on any motion, and the proceeding is thereafter transferred to and continued before the Board pursuant to § 102.50, the Board must rule on such motion.

§ 102.26 Motions; rulings and orders part of the record; rulings not to be appealed directly to the Board without special permission; requests for special permission to appeal.

All motions, rulings, and orders will become a part of the record, except that rulings on motions to revoke subpoenas will become a part of the record only upon the request of the party aggrieved thereby as provided in § 102.31. Unless expressly authorized by the Rules and Regulations, rulings by the Regional Director or by the Administrative Law Judge on motions and/or by the Administrative Law Judge on objections, and related orders, may not be appealed directly to the Board except by special permission of the Board, but will be considered by the Board in reviewing the record if exception to the ruling or order is included in the statement of exceptions filed with the Board pursuant to § 102.46. Requests to the Board for special permission to appeal from a ruling of the Regional Director or of the Administrative Law Judge, together with the appeal from such ruling, must be filed in writing promptly and within such time as not to delay the proceeding, and must briefly state the reasons special permission may be granted and the grounds relied on for the appeal. The moving party must simultaneously serve a copy of the request for special permission and of the appeal on the other parties and, if the request involves a ruling by an Administrative Law Judge, on the Administrative Law Judge. Any statement in opposition or other response to the request and/or to the appeal must be filed within 7 days of receipt of the appeal, in writing, and must be served simultaneously on the other parties and on the Administrative Law Judge, if any. If the Board grants the request for special permission to appeal, it may proceed immediately to rule on the appeal.

§ 102.27 Review of granting of motion to dismiss entire complaint; reopening of the record.

If any motion in the nature of a motion to dismiss the complaint in its entirety is granted by the Administrative Law Judge before the filing of the Judge's decision, any party may obtain a review of such action by filing a request with the Board in Washington, DC, stating the grounds for review, and, immediately on such filing must serve a copy on the Regional Director and on the other parties. Unless such request for review is filed within 28 days from the date of the order of dismissal, the case will be closed.

§ 102.28 Filing of answer or other participation in proceedings not a waiver of rights.

The right to make motions or to make objections to rulings upon motions will not be deemed waived by the filing of an answer or by other participation in the proceedings before the Administrative Law Judge or the Board.

§ 102.29 Intervention; requisites; rulings on motions to intervene.

Any person desiring to intervene in any proceeding must file a motion in writing or, if made at the hearing, may move orally on the record, stating the grounds upon which such person claims an interest. Prior to the hearing, such a motion must be filed with the Regional Director issuing the complaint; during the hearing, such motion must be made to the Administrative Law Judge. Immediately upon filing a written motion, the moving party must serve a copy on the other parties. The Regional Director will rule upon all such motions filed prior to the hearing, and will serve a copy of the rulings on the other parties, or may refer the motion to the Administrative Law Judge for ruling. The Administrative Law Judge will rule upon all such motions made at the hearing or referred to the Judge by the Regional Director, in the manner set forth in § 102.25. The Regional Director or the Administrative Law Judge, as the case may be, may, by order, permit intervention in person, or by counsel or other representative, to such extent and upon such terms as may be deemed proper.

§ 102.30 Depositions; examination of witnesses.

Witnesses must be examined orally under oath at a hearing, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.

(a) Applications to take depositions must be in writing and set forth the reasons why the depositions may be taken, the name, mailing address and email address (if available) of the witness, the matters concerning which it is expected the witness will testify, and the time and place proposed for taking the deposition, together with the name and mailing and email addresses of the person before whom it is desired that the deposition be taken (for the purposes of this section hereinafter referred to as the ''officer''). Such application must be made to the Regional Director prior to the hearing, and to the Administrative Law Judge during and subsequent to the hearing but before transfer of the case to the Board pursuant to § 102.45 or § 102.50. Such application must be served on the Regional Director or the Administrative Law Judge, as the case may be, and on all other parties, not less than 7 days (when the deposition is to be taken within the continental United States) and 15 days (if the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken. The Regional Director or the Administrative Law Judge, as the case may be, will upon receipt of the application, if in the Regional Director's or Administrative Law Judge's discretion, good cause has been shown, make and serve on the parties an order specifying the name of the witness whose deposition is to be taken and the time, place, and designation of the officer before whom the witness is to testify, who may or may not be the same officer as that specified in the application. Such order will be served on all the other parties by the Regional Director or on all parties by the Administrative Law Judge.

(b) The deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, including any Board agent authorized to administer oaths. If the examination is held in a foreign country, it may be taken before any secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States.

(c) At the time and place specified in the order, the officer designated to take

the deposition will permit the witness to be examined and cross-examined under oath by all the parties appearing, and the witness's testimony will be reduced to type-writing by the officer or under his direction. All objections to questions or evidence will be deemed waived unless made at the examination. The officer will not have power to rule upon any objections but the objections will be noted in the deposition. The testimony must be subscribed by the witness to the satisfaction of the officer who will attach a certificate stating that the witness was duly sworn by the officer, that the deposition is a true record of the testimony and exhibits given by the witness, and that the officer is not of counsel or attorney to any of the parties nor interested in the event of the proceeding or investigation. If the deposition is not signed by the witness because the witness is ill, dead, cannot be found, or refuses to sign it, such fact will be included in the certificate of the officer and the deposition may then be used as fully as though signed. The officer will immediately deliver the transcript, together with the certificate, in person, by registered or certified mail, or by E-File to the Regional Director or Division of Judges' office handling the matter.

(d) The Administrative Law Judge will rule upon the admissibility of the deposition or any part of the deposition.

(e) All errors or irregularities in compliance with the provisions of this section will be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or, with due diligence, might have been ascertained.

(f) If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used like other depositions.

§ 102.31 Issuance of subpoenas; petitions to revoke subpoenas; rulings on claim of privilege against self-incrimination; subpoena enforcement proceedings; right to inspect or copy data.

(a) The Board or any Board Member will, on the written application of any party, issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, electronic data, or documents, in their possession or under their control. The Executive Secretary has the authority to sign and issue any such subpoenas on behalf of the Board or any Board Member. Applications for subpoenas, if filed before the hearing opens, must be filed with the Regional Director. Applications for subpoenas filed during the hearing must be filed with the Administrative Law Judge. Either the Regional Director or the Administrative Law Judge, as the case may be, will grant the application on behalf of the Board or any Member. Applications for subpoenas may be made *ex parte.* The subpoena must show on its face the name and address of the party at whose request the subpoena was issued.

(b) Any person served with a subpoena, whether *ad testificandum* or *duces tecum,* if that person does not intend to comply with the subpoena, must, within 5 business days after the date of service of the subpoena, petition in writing to revoke the subpoena. The date of service for purposes of computing the time for filing a petition to revoke is the date the subpoena is received. All petitions to revoke subpoenas must be served on the party at whose request the subpoena was issued. A petition to revoke, if made prior to the hearing, must be filed with the Regional Director and the Regional Director will refer the petition to the Administrative Law Judge or the Board for ruling. Petitions to revoke subpoenas filed during the hearing must be filed with the Administrative Law Judge. Petitions to revoke subpoenas filed in response to a subpoena issued upon request of the Agency's Contempt, Compliance, and Special Litigation Branch must be filed with that Branch, which will refer the petition to the Board for ruling. Notice of the filing of petitions to revoke will be promptly given by the Regional Director, the Administrative Law Judge, or the Contempt, Compliance and Special Litigation Branch, as the case may be, to the party at whose request the subpoena was issued. The Administrative Law Judge or the Board, as the case may be, will revoke the subpoena if in their opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The Administrative Law Judge or the Board, as the case may be, will make a simple statement of procedural or other grounds for the ruling on the petition to revoke. The petition to revoke any opposition to the petition, response to the opposition, and ruling on the petition will not become part of the official record except upon the request of the party aggrieved by the ruling, at an appropriate time in a formal proceeding rather than at the investigative stage of the proceeding.

(c) Upon refusal of a witness to testify, the Board may, with the approval of the Attorney General of the United States, issue an order requiring any individual to give testimony or provide other information at any proceeding before the Board if, in the judgment of the Board:

(1) The testimony or other information from such individual may be necessary to the public interest; and

(2) Such individual has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination. Requests for the issuance of such an order by the Board may be made by any party. Prior to hearing, and after transfer of the proceeding to the Board, such requests must be made to the Board in Washington, DC, and the Board will take such action thereon as it deems appropriate. During the hearing, and thereafter while the proceeding is pending before the Administrative Law Judge, such requests must be made to the Administrative Law Judge. If the Administrative Law Judge denies the request, the ruling will be subject to appeal to the Board, in Washington, DC, in the manner and to the extent provided in § 102.26 with respect to rulings and orders by an Administrative Law Judge, except that requests for permission to appeal in this instance must be filed within 24 hours of the Administrative Law Judge's ruling. If no appeal is sought within such time, or if the appeal is denied, the ruling of the Administrative Law Judge becomes final and the denial becomes the ruling of the Board. If the Administrative Law Judge deems the request appropriate, the Judge will recommend that the Board seek the approval of the Attorney General for the issuance of the order, and the Board will take such action on the Administrative Law Judge's recommendation as it deems appropriate. Until the Board has issued the requested order, no individual who claims the privilege against self-incrimination will be required or permitted to testify or to give other information respecting the subject matter of the claim.

(d) Upon the failure of any person to comply with a subpoena issued upon the request of a private party, the General Counsel will, in the name of the Board but on relation of such private party, institute enforcement proceedings in the appropriate district court, unless in the judgment of the Board the enforcement of the subpoena would be inconsistent with law and with the

policies of the Act. Neither the General Counsel nor the Board will be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.

(e) Persons compelled to submit data or evidence at a public proceeding are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them. Persons compelled to submit data or evidence in the nonpublic investigative stages of proceedings may, for good cause, be limited by the Regional Director to inspection of the official transcript of their testimony, but must be entitled to make copies of documentary evidence or exhibits which they have produced.

§ 102.32 Payment of witness fees and mileage; fees of persons taking depositions.

Witnesses summoned before the Administrative Law Judge must be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the officer taking them are severally entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage will be paid by the party at whose instance the witnesses appear, and the persons taking the deposition will be paid by the party at whose instance the deposition is taken.

§ 102.33 Transfer of charge and proceeding from Region to Region; consolidation of proceedings in same Region; severance.

(a) Whenever the General Counsel deems it necessary to effectuate the purposes of the Act or to avoid unnecessary costs or delay, a charge may be filed with the General Counsel in Washington, DC, or, at any time after a charge has been filed with a Regional Director, the General Counsel may order that such charge and any proceeding regarding the charge be:

(1) Transferred to and continued before the General Counsel for investigation or consolidation with any other proceeding which may have been instituted in a Regional Office or with the General Counsel; or

(2) Consolidated with any other proceeding which may have been instituted in the same region; or

(3) Transferred to and continued in any other Region for the purpose of investigation or consolidation with any proceeding which may have been instituted in or transferred to such other region; or

(4) Severed from any other proceeding with which it may have been consolidated pursuant to this section.

(b) The provisions of §§ 102.9 through 102.32 will, insofar as applicable, govern proceedings before the General Counsel, pursuant to this section, and the powers granted to Regional Directors in such provisions will, for the purpose of this section, be reserved to and exercised by the General Counsel. After the transfer of any charge and any proceeding which may have been instituted with respect thereto from one Region to another pursuant to this section, the provisions of this subpart will, insofar as possible, govern such charge and such proceeding as if the charge had originally been filed in the Region to which the transfer is made.

(c) The Regional Director may, prior to hearing, exercise the powers in paragraphs (a)(2) and (4) of this section with respect to proceedings pending in the Director's Region.

(d) Motions to consolidate or sever proceedings after issuance of complaint must be filed as provided in § 102.24 and ruled upon as provided in § 102.25, except that the Regional Director may consolidate or sever proceedings prior to hearing upon the Director's own motion. Rulings by the Administrative Law Judge upon motions to consolidate or sever may be appealed to the Board as provided in § 102.26.

§ 102.34 Who will conduct hearing; public unless otherwise ordered.

The hearing for the purpose of taking evidence upon a complaint will be conducted by an Administrative Law Judge designated by the Chief Administrative Law Judge, Deputy Chief Administrative Law Judge, or any Associate Chief Judge, as the case may be, unless the Board or any Board Member presides. At any time, an Administrative Law Judge may be designated to take the place of the Administrative Law Judge previously designated to conduct the hearing. Hearings will be public unless otherwise ordered by the Board or the Administrative Law Judge.

§ 102.35 Duties and powers of Administrative Law Judges; stipulations of cases to Administrative Law Judges or to the Board; assignment and powers of settlement judges.

(a) The Administrative Law Judge will inquire fully into the facts as to whether the Respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint. The Administrative Law Judge has authority, with respect to cases assigned to the Judge, between the time the Judge is designated and transfer of the case to the Board, subject to the Rules and Regulations of the Board and within its powers, to:

(1) Administer oaths and affirmations.

(2) Grant applications for subpoenas.

(3) Rule upon petitions to revoke subpoenas.

(4) Rule upon offers of proof and receive relevant evidence.

(5) Take or cause depositions to be taken whenever the ends of justice would be served.

(6) Regulate the course of the hearing and, if appropriate or necessary, to exclude persons or counsel from the hearing for contemptuous conduct and to strike all related testimony of witnesses refusing to answer any proper question.

(7) Hold conferences for the settlement or simplification of the issues by consent of the parties, but not to adjust cases.

(8) Dispose of procedural requests, motions, or similar matters, including motions referred to the Administrative Law Judge by the Regional Director and motions for default judgment, summary judgment, or to amend pleadings; also to dismiss complaints or portions thereof; to order hearings reopened; and, upon motion, to order proceedings consolidated or severed prior to issuance of Administrative Law Judge decisions.

(9) Approve stipulations, including stipulations of facts that waive a hearing and provide for a decision by the Administrative Law Judge. Alternatively, the parties may agree to waive a hearing and decision by an Administrative Law Judge and submit directly to the Executive Secretary a stipulation of facts, which, if approved, provides for a decision by the Board. A statement of the issues presented may be set forth in the stipulation of facts, and each party may also submit a short statement (no more than three pages) of its position on the issues. If the Administrative Law Judge (or the Board) approves the stipulation, the Judge (or the Board) will set a time for the filing of briefs. In proceedings before an Administrative Law Judge, no further briefs may be filed except by special leave of the Judge. In proceedings before the Board, answering briefs may be filed within 14 days, or such further period as the Board may allow, from the last date on which an initial brief may be filed. No further briefs may be filed except by special leave of the Board. At the conclusion of the briefing schedule, the Administrative Law Judge (or the Board) will decide the case or otherwise dispose of it.

(10) Make and file decisions, including bench decisions delivered within 72 hours after conclusion of oral

argument, in conformity with Public Law 89–554, 5 U.S.C. 557.

(11) Call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence.

(12) Request the parties at any time during the hearing to state their respective positions concerning any issue in the case and/or supporting theory(ies).

(13) Take any other necessary action authorized by the Board's published Rules and Regulations.

(b) Upon the request of any party or of the Administrative Law Judge assigned to hear a case, or upon the Chief Judge, Deputy Chief Judge, or Associate Chief Judge's own motion, the Chief Judge, Deputy Chief Judge or an Associate Chief Judge may assign a Judge other than the trial judge to conduct settlement negotiations. In exercising this discretion, the Chief Judge, Deputy Chief Judge, or Associate Chief Judge making the assignment will consider, among other factors, whether there is reason to believe that resolution of the dispute is likely, the request for assignment of a settlement judge is made in good faith, and the assignment is otherwise feasible. However, no such assignment will be made absent the agreement of all parties to the use of this procedure.

(1) The settlement judge will convene and preside over conferences and settlement negotiations between the parties, assess the practicalities of a potential settlement, and report to the Chief Judge, Deputy Chief Judge, or Associate Chief Judge the status of settlement negotiations, recommending continuation or termination of the settlement negotiations. Where feasible, settlement conferences will be held in person.

(2) The settlement judge may require that the attorney or other representative for each party be present at settlement conferences and that the parties or agents with full settlement authority also be present or available by telephone.

(3) Participation of the settlement judge will terminate upon the order of the Chief Judge, Deputy Chief Judge, or Associate Chief Judges issued after consultation with the settlement judge. The conduct of settlement negotiations must not unduly delay the hearing.

(4) All discussions between the parties and the settlement judge will be confidential. The settlement judge must not discuss any aspect of the case with the trial judge, and no evidence regarding statements, conduct, offers of settlement, and concessions of the parties made in proceedings before the settlement judge will be admissible in any proceeding before the Board, except by stipulation of the parties. Documents disclosed in the settlement process may not be used in litigation unless voluntarily produced or obtained pursuant to subpoena.

(5) No decision of a Chief Judge, Deputy Chief Judge, or Associate Chief Judge concerning the assignment of a settlement judge or the termination of a settlement judge's assignment is appealable to the Board.

(6) Any settlement reached under the auspices of a settlement judge is subject to approval in accordance with the provisions of § 101.9 of the Board's Statements of Procedure.

§ 102.36 Disqualification and unavailability of Administrative Law Judges.

(a) An Administrative Law Judge may withdraw from a proceeding because of a personal bias or for other disqualifying reasons. Any party may request the Administrative Law Judge, at any time following the Judge's designation and before filing of the Judge's decision, to withdraw on grounds of personal bias or disqualification, by filing with the Judge promptly upon the discovery of the alleged facts a timely affidavit setting forth in detail the matters alleged to constitute grounds for disqualification. If, in the Administrative Law Judge's opinion, the affidavit is filed with due diligence and is sufficient on its face, the Judge will promptly disqualify himself/herself and withdraw from the proceeding. If the Administrative Law Judge does not disqualify himself/herself and withdraw from the proceeding, the Judge must rule upon the record, stating the grounds for that ruling, and proceed with the hearing, or, if the hearing has closed, the Judge will proceed with issuance of the decision, and the provisions of § 102.26, with respect to review of rulings of Administrative Law Judges, will apply.

(b) If the Administrative Law Judge designated to conduct the hearing becomes unavailable to the Board after the hearing has been opened, the Chief Administrative Law Judge, Deputy Chief Administrative Law Judge, or an Associate Chief Administrative Law Judge, as the case may be, may designate another Administrative Law Judge for the purpose of further hearing or other appropriate action.

§ 102.37 [Reserved]

§ 102.38 Rights of parties.

Any party has the right to appear at the hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the Administrative Law Judge may limit the participation of any party as appropriate. Documentary evidence must be submitted in duplicate for the record with a copy to each party.

§ 102.39 Rules of evidence controlling so far as practicable.

The hearing will, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, Sections 723–B, 723–C).

§ 102.40 Stipulations of fact admissible.

Stipulations of fact may be introduced in evidence with respect to any issue.

§ 102.41 Objection to conduct of hearing; how made; objections not waived by further participation.

Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection will be deemed waived by further participation in the hearing.

§ 102.42 Filings of briefs and proposed findings with the Administrative Law Judge and oral argument at the hearing.

Any party is entitled, upon request, to oral argument, for a reasonable period at the close of the hearing. Oral argument and any presentation of proposed findings and conclusions will be included in the transcript of the hearing. In the discretion of the Administrative Law Judge, any party may, upon request made before the close of the hearing, file a brief or proposed findings and conclusions, or both, with the Administrative Law Judge, who may fix a reasonable time for such filing, but not in excess of 35 days from the close of the hearing. Requests for further extensions of time must be made to the Chief Administrative Law Judge, Deputy Chief Administrative Law Judge, or an Associate Chief Administrative Law Judge, as the case may be. Notice of the request for any extension must be immediately served on all other parties, and proof of service must be furnished. The brief or proposed findings and conclusions must be served on the other parties, and a statement of such service must be furnished. In any case in which the Administrative Law Judge believes that written briefs or proposed findings of fact and conclusions may not be

necessary, the Judge must notify the parties at the opening of the hearing or as soon thereafter as practicable that the Judge may wish to hear oral argument in lieu of briefs.

§ 102.43 Continuance and adjournment.

In the Administrative Law Judge's discretion, the hearing may be continued from day to day, or adjourned to a later date or to a different place, by announcement at the hearing by the Administrative Law Judge, or by other appropriate notice.

§ 102.44 [Reserved]

§ 102.45 Administrative Law Judge's decision; contents of record; alternative dispute resolution program.

(a) *Administrative Law Judge's decision.* After a hearing for the purpose of taking evidence upon a complaint, the Administrative Law Judge will prepare a decision. The decision will contain findings of fact, conclusions of law, and the reasons or grounds for the findings and conclusions, and recommendations for the proper disposition of the case. If the Respondent is found to have engaged in the alleged unfair labor practices, the decision will also contain a recommendation for such affirmative action by the Respondent as will effectuate the policies of the Act. The Administrative Law Judge will file the decision with the Board. If the Judge delivers a bench decision, promptly upon receiving the transcript the Judge will certify the accuracy of the pages of the transcript containing the decision; file with the Board a certified copy of those pages, together with any supplementary matter the Judge may deem necessary to complete the decision; and serve a copy on each of the parties. Upon the filing of the decision, the Board will enter an order transferring the case to the Board, setting forth the date of the transfer and will serve on all the parties copies of the decision and the order. Service of the Administrative Law Judge's decision and of the order transferring the case to the Board is complete upon mailing.

(b) *Contents of record.* The charge upon which the complaint was issued and any amendments, the complaint and any amendments, notice of hearing, answer and any amendments, motions, rulings, orders, the transcript of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the Administrative Law Judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in § 102.46, constitutes the record in the case.

(c) *Alternative dispute resolution program.* The Alternative Dispute Resolution (ADR) Program is available to parties with unfair labor practice or compliance cases pending before the Board at any stage subsequent to the initial issuance of an Administrative Law Judge's decision or any other process involving the transfer to the Board of such cases. Participation in the ADR Program is voluntary, and a party that enters the ADR Program may withdraw any time after the first meeting with the neutral. No party will be charged fees or expenses for using the ADR Program.

(1) The parties may request participation in the ADR Program by contacting the program director. Deadlines for filing pleadings with the Board will be stayed effective the date that the case enters the ADR Program. If the case is removed from the ADR Program, the time period for filing will begin to run and will consist of the time period that remained when the case entered the ADR Program. Notice will be provided to the parties of the date the case enters the ADR Program and the date it is removed from the ADR Program.

(2) A case may remain in the ADR Program for 28 days from the first settlement meeting or until the parties reach a settlement, whichever occurs first. A request for extension of the stay beyond the 28 days will be granted only with the approval and in the discretion of both the neutral and the program director upon a showing that such an extension is supported by good cause.

(3) Once the case enters the ADR Program, the program director will arrange for the appointment of a neutral to assist the parties in settling the case.

(4) The preferred method of conducting settlement conferences is to have the parties or their representatives attend in person, and therefore the neutral will make every reasonable effort to meet with the participants face-to-face at the parties' location. Settlement conferences by telephone or through videoconference may be held if the parties so desire.

(5) Parties may be represented by counsel at the conferences, but representation by counsel is not required. However, each party must have in attendance a representative who has the authority to bind the party to the terms of a settlement agreement.

(6) The neutral may ask the parties to submit pre-conference memos setting forth the issues in dispute, prior settlement efforts, and anything else that the parties would like to bring to the neutral's attention. A party's memo will be treated as a confidential submission unless the party that prepared the memo authorizes its release to the other parties.

(7) Settlement discussions held under the ADR Program will be confidential. All documents submitted to the neutral and statements made during the ADR proceedings, including proposed settlement terms, are for settlement purposes only and are confidential. However, evidence otherwise admissible or discoverable will not be rendered inadmissible or undiscoverable because of its use in the ADR proceedings. No evidence as to what transpired during the ADR proceedings will be admissible in any administrative or court proceeding except to the extent it is relevant to determining the existence or meaning of a settlement agreement. The parties and their representatives will not discuss with the press any matters concerning settlement positions communicated during the ADR proceedings except by express written permission of the other parties. There will be no communication between the ADR Program and the Board on specific cases submitted to the ADR Program, except for procedural information such as case name, number, timing of the process, and status.

(8) The neutral has no authority to impose a settlement. Settlement agreements are subject to approval by the Board in accordance with its existing procedures for approving settlements.

(9) No party will at any time or in any proceeding take the position that participation in the ADR Program resulted in the waiver of any legal rights related to the underlying claims in the case, except as set forth in any settlement agreement.

(10) Nothing in the ADR Program is intended to discourage or interfere with settlement negotiations that the parties wish to conduct outside the ADR Program.

§ 102.46 Exceptions and brief in support; answering briefs to exceptions; cross-exceptions and brief in support; answering briefs to cross-exceptions; reply briefs; failure to except; oral argument; filing requirements.

(a) *Exceptions and brief in support.* Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to § 102.45, any party may (in accordance with Section 10(c) of the Act and §§ 102.2 through 102.5 and 102.7) file with the Board in Washington, DC, exceptions to the Administrative Law Judge's decision or to any other part of

the record or proceedings (including rulings upon all motions or objections), together with a brief in support of the exceptions. The filing of exceptions and briefs is subject to the filing requirements of paragraph (h) of this section

(1) *Exceptions.* (i) Each exception must:

(A) Specify the questions of procedure, fact, law, or policy to which exception is taken;

(B) Identify that part of the Administrative Law Judge's decision to which exception is taken;

(C) Provide precise citations of the portions of the record relied on; and

(D) Concisely state the grounds for the exception. If a supporting brief is filed, the exceptions document must not contain any argument or citation of authorities in support of the exceptions; any argument and citation of authorities must be set forth only in the brief. If no supporting brief is filed, the exceptions document must also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document is subject to the 50-page limit for briefs set forth in paragraph (h) of this section.

(ii) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(2) *Brief in support of exceptions.* Any brief in support of exceptions must contain only matter that is included within the scope of the exceptions and must contain, in the order indicated, the following:

(i) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(ii) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(iii) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page citations to the record and the legal or other material relied on.

(b) *Answering briefs to exceptions.* (1) Within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, a party opposing the exceptions may file an answering brief to the exceptions, in accordance with the filing requirements of paragraph (h) of this section.

(2) The answering brief to the exceptions must be limited to the questions raised in the exceptions and in the brief in support. It must present clearly the points of fact and law relied on in support of the position taken on each question. Where exception has been taken to a factual finding of the Administrative Law Judge and the party filing the answering brief proposes to support the Judge's finding, the answering brief must specify those pages of the record which the party contends support the Judge's finding.

(c) *Cross-exceptions and brief in support.* Any party who has not previously filed exceptions may, within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, file cross-exceptions to any portion of the Administrative Law Judge's decision, together with a supporting brief, in accordance with the provisions of paragraphs (a) and (h) of this section.

(d) *Answering briefs to cross-exceptions.* Within 14 days, or such further period as the Board may allow, from the last date on which cross-exceptions and any supporting brief may be filed, any other party may file an answering brief to such cross-exceptions in accordance with the provisions of paragraphs (b) and (h) of this section. Such answering brief must be limited to the questions raised in the cross-exceptions.

(e) *Reply briefs.* Within 14 days from the last date on which an answering brief may be filed pursuant to paragraphs (b) or (d) of this section, any party may file a reply brief to any such answering brief. Any reply brief filed pursuant to this paragraph (e) must be limited to matters raised in the brief to which it is replying, and must not exceed 10 pages. No extensions of time will be granted for the filing of reply briefs, nor will permission be granted to exceed the 10-page limit. The reply brief must be filed with the Board and served on the other parties. No further briefs may be filed except by special leave of the Board. Requests for such leave must be in writing and copies must be served simultaneously on the other parties.

(f) *Failure to except.* Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding.

(g) *Oral argument.* A party desiring oral argument before the Board must request permission from the Board in writing simultaneously with the filing of exceptions or cross-exceptions. The Board will notify the parties of the time and place of oral argument, if such permission is granted. Oral arguments are limited to 30 minutes for each party entitled to participate. No request for additional time will be granted unless timely application is made in advance of oral argument.

(h) *Filing requirements.* Documents filed pursuant to this section must be filed with the Board in Washington, DC, and copies must also be served simultaneously on the other parties. Any brief filed pursuant to this section must not be combined with any other brief, and except for reply briefs whose length is governed by paragraph (e) of this section, must not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited.

§ 102.47 Filing of motion after transfer of case to Board.

All motions filed after the case has been transferred to the Board pursuant to § 102.45 must be filed with the Board in Washington, DC, and served upon the other parties. Such motions must be printed or otherwise legibly duplicated.

§ 102.48 No exceptions filed; exceptions filed; motions for reconsideration, rehearing, or reopening the record.

(a) *No exceptions filed.* If no timely or proper exceptions are filed, the findings, conclusions, and recommendations contained in the Administrative Law Judge's decision will, pursuant to Section 10(c) of the Act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions must be deemed waived for all purposes.

(b) *Exceptions filed.* (1) Upon the filing of timely and proper exceptions, and any cross-exceptions or answering briefs, as provided in § 102.46, the Board may decide the matter upon the record, or after oral argument, or may reopen the record and receive further evidence before a Board Member or other Board agent or agency, or otherwise dispose of the case.

(2) Where exception is taken to a factual finding of the Administrative Law Judge, the Board, in determining whether the finding is contrary to a preponderance of the evidence, may limit its consideration to such portions of the record as are specified in the exceptions, the supporting brief, and the answering brief.

(c) *Motions for reconsideration, rehearing, or reopening the record.* A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

(1) A motion for reconsideration must state with particularity the material

error claimed and with respect to any finding of material fact, must specify the page of the record relied on. A motion for rehearing must specify the error alleged to require a hearing de novo and the prejudice to the movant from the error. A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this section must be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion to reopen the record must be filed promptly on discovery of the evidence to be adduced.

(3) The filing and pendency of a motion under this provision will not stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.

§ 102.49 Modification or setting aside of Board order before record filed in court; action thereafter.

Within the limitations of the provisions of Section 10(c) of the Act, and § 102.48, until a transcript of the record in a case is filed in a court, within the meaning of Section 10 of the Act, the Board may at any time upon reasonable notice modify or set aside, in whole or in part, any findings of fact, conclusions of law, or order made or issued by it. Thereafter, the Board may proceed pursuant to § 102.50, insofar as applicable.

§ 102.50 Hearings before the Board or a Board Member.

Whenever the Board deems it necessary to effectuate the purposes of the Act or to avoid unnecessary costs or delay, it may, at any time, after a complaint has issued pursuant to § 102.15 or § 102.33, order that such complaint and any proceeding which may have been instituted with respect thereto be transferred to and continued before it or any Board Member. The provisions of this subpart, insofar as applicable, govern proceedings before the Board or any Board Member pursuant to this section, and the powers granted to Administrative Law Judges in such provisions will, for the purpose of this section, be reserved to and exercised by the Board or the Board Member who will preside.

§ 102.51 Settlement or adjustment of issues.

At any stage of a proceeding prior to hearing, where time, the nature of the proceeding, and the public interest permit, all interested parties have an opportunity to submit to the Regional Director, with whom the charge was filed, for consideration, facts, arguments, offers of settlement, or proposals of adjustment.

§ 102.52 Compliance with Board order; notification of compliance determination.

After entry of a Board order directing remedial action, or the entry of a court judgment enforcing such order, the Regional Director will seek compliance from all persons having obligations under the order. As appropriate, the Regional Director will make a compliance determination and notify the parties of that determination. A Charging Party adversely affected by a monetary, make-whole, reinstatement, or other compliance determination will be provided, on request, with a written statement of the basis for that determination.

§ 102.53 Appeal of compliance determination to the General Counsel; General Counsel's action; request for review by the Board; Board action; opposition to appeal or request for review.

(a) *Appeal of compliance determination to the General Counsel.* The Charging Party may appeal a compliance determination to the General Counsel in Washington, DC, within 14 days of the written statement of compliance determination as set forth in § 102.52. The appeal must contain a complete statement setting forth the facts and reasons upon which it is based and must identify with particularity the error claimed in the Regional Director's determination. The General Counsel may for good cause shown extend the time for filing an appeal.

(b) *General Counsel's action.* The General Counsel may affirm or modify the Regional Director's determination or take such other action deemed appropriate, and must state the grounds for that decision.

(c) *Request for review by Board.* Within 14 days after service of the General Counsel's decision, the Charging Party may file a request for review of that decision with the Board in Washington, DC. The request for review must contain a complete statement of the facts and reasons upon which it is based and must identify with particularity the error claimed in the General Counsel's decision. A copy of the request for review must be served simultaneously on all other parties and on the General Counsel and the Regional Director.

(d) *Board action.* The Board may affirm or modify the General Counsel's decision, or otherwise dispose of the matter as it deems appropriate. The denial of the request for review will constitute an affirmance of the General Counsel's decision.

(e) *Opposition to appeal or request for review.* Within 7 days of receipt of a compliance appeal or request for review, a party may file an opposition to the compliance appeal or request for review.

§ 102.54 Issuance of compliance specification; consolidation of complaint and compliance specification.

(a) If it appears that controversy exists with respect to compliance with a Board order which cannot be resolved without a formal proceeding, the Regional Director may issue and serve on all parties a compliance specification in the name of the Board. The specification will contain or be accompanied by a Notice of Hearing before an Administrative Law Judge at a specific place and at a time not less than 21 days after the service of the specification.

(b) Whenever the Regional Director deems it necessary to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may issue a compliance specification, with or without a notice of hearing, based on an outstanding complaint.

(c) Whenever the Regional Director deems it necessary to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may consolidate with a complaint and Notice of Hearing issued pursuant to § 102.15 a compliance specification based on that complaint. After opening of the hearing, the Board or the Administrative Law Judge, as appropriate, must approve consolidation. Issuance of a compliance specification is not a prerequisite or bar to Board initiation of proceedings in any administrative or judicial forum which the Board or the Regional Director determines to be appropriate for obtaining compliance with a Board order.

§ 102.55 Contents of compliance specification.

(a) *Contents of specification with respect to allegations concerning the amount of backpay due.* With respect to allegations concerning the amount of backpay due, the specification will specifically and in detail show, for each

employee, the backpay periods broken down by calendar quarters, the specific figures and basis of computation of gross backpay and interim earnings, the expenses for each quarter, the net backpay due, and any other pertinent information.

(b) *Contents of specification with respect to allegations other than the amount of backpay due.* With respect to allegations other than the amount of backpay due, the specification will contain a clear and concise description of the respects in which the Respondent has failed to comply with a Board or court order, including the remedial acts claimed to be necessary for compliance by the Respondent and, where known, the approximate dates, places, and names of the Respondent's agents or other representatives described in the specification.

(c) *Amendments to specification.* After the issuance of the Notice of Compliance Hearing but before the hearing opens, the Regional Director may amend the specification. After the hearing opens, the specification may be amended upon leave of the Administrative Law Judge or the Board, upon good cause shown.

§ 102.56 Answer to compliance specification.

(a) *Filing and service of answer to compliance specification.* Each Respondent alleged in the specification to have compliance obligations must, within 21 days from the service of the specification, file an answer with the Regional Director issuing the specification, and must immediately serve a copy on the other parties.

(b) *Form and contents of answer.* The answer to the specification must be in writing, signed and sworn to by the Respondent or by a duly authorized agent with appropriate power of attorney affixed, and contain the address of the Respondent. The answer must specifically admit, deny, or explain each allegation of the specification, unless the Respondent is without knowledge, in which case the Respondent must so state, such statement operating as a denial. Denials must fairly meet the substance of the allegations of the specification at issue. When a Respondent intends to deny only a part of an allegation, the Respondent must specify so much of it as is true and deny only the remainder. As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial will not suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures.

(c) *Failure to answer or to plead specifically and in detail to backpay allegations of specification.* If the Respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the Respondent, find the specification to be true and enter such order as may be appropriate. If the Respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation will be deemed admitted as true, and may be so found by the Board without the taking of evidence supporting such allegation, and the Respondent will be precluded from introducing any evidence controverting the allegation.

(d) *Extension of time for filing answer to specification.* Upon the Regional Director's own motion or upon proper cause shown by any Respondent, the Regional Director issuing the compliance specification may, by written order, extend the time within which the answer to the specification must be filed.

(e) *Amendment to answer.* Following the amendment of the specification by the Regional Director, any Respondent affected by the amendment may amend its answer.

§ 102.57 Extension of date of hearing.

Upon the Regional Director's own motion or upon proper cause shown, the Regional Director issuing the compliance specification and Notice of Hearing may extend the hearing date.

§ 102.58 Withdrawal of compliance specification.

Any compliance specification and Notice of Hearing may be withdrawn before the hearing by the Regional Director upon the Director's own motion.

§ 102.59 Hearing and posthearing procedures.

After the issuance of a compliance specification and Notice of Hearing, the procedures provided in §§ 102.24 through 102.51 will be followed insofar as applicable.

Subpart E—Procedure for Unfair Labor Practice and Representation Cases Under Sections 8(b)(7) and 9(c) of the Act

■ 7. Revise §§ 102.73 through 102.76 to read as follows:

Sec.
102.73 Initiation of proceedings.
102.74 Complaint and formal proceedings.
102.75 Suspension of proceedings on the charge where timely petition is filed.
102.76 Petition; who may file; where to file; contents.

§ 102.73 Initiation of proceedings.

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of Section 8(b)(7) of the Act, the Regional Director will investigate such charge, giving it the priority specified in subpart H of this part.

§ 102.74 Complaint and formal proceedings.

If it appears to the Regional Director that the charge has merit, formal proceedings will be instituted in accordance with the procedures described in §§ 102.15 through 102.51, insofar as they are applicable, and insofar as they are not inconsistent with the provisions of this subpart. If it appears to the Regional Director that issuance of a complaint is not warranted, the Director will decline to issue a complaint, and the provisions of § 102.19, including the provisions for appeal to the General Counsel, are applicable unless an election has been directed under §§ 102.77 and 102.78, in which event the provisions of § 102.81 are applicable.

§ 102.75 Suspension of proceedings on the charge where timely petition is filed.

If it appears to the Regional Director that issuance of a complaint may be warranted but for the pendency of a petition under Section 9(c) of the Act, which has been filed by any proper party within a reasonable time not to exceed 30 days from the commencement of picketing, the Regional Director will suspend proceedings on the charge and will proceed to investigate the petition under the expedited procedure provided below, pursuant to the first proviso to subparagraph (C) of Section 8(b)(7) of the Act.

§ 102.76 Petition; who may file; where to file; contents.

When picketing of an employer has been conducted for an object proscribed by Section 8(b)(7) of the Act, a petition for the determination of a question concerning representation of the employees of such employer may be

filed in accordance with the provisions of §§ 102.60 and 102.61, insofar as applicable, except that if a charge under § 102.73 has been filed against the labor organization on whose behalf picketing has been conducted, the petition will not be required to contain a statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act; or that the union represents a substantial number of employees; or that the labor organization is currently recognized but desires certification under the Act; or that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative; or, if the petitioner is an employer, that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of the employees in the unit claimed to be appropriate.

■ 8. In § 102.77, revise the section heading and paragraph (b) to read as follows:

§ 102.77 Investigation of petition by Regional Director; directed election.

* * * * *

(b) If, after the investigation of such petition or any petition filed under subpart D of this part, and after the investigation of the charge filed pursuant to § 102.73, it appears to the Regional Director that an expedited election under Section 8(b)(7)(C) of the Act is warranted, and that the policies of the Act would be effectuated thereby, the Regional Director shall forthwith proceed to conduct an election by secret ballot of the employees in an appropriate unit, or make other disposition of the matter, except that in any case in which it appears to the Regional Director that the proceeding raises questions which cannot be decided without a hearing, the Director may issue and cause to be served on the parties, individuals, and labor organizations involved a Notice of Hearing before a Hearing Officer at a time and place fixed therein. In this event, the method of conducting the hearing and the procedure following, shall be governed insofar as applicable by §§ 102.63 through 102.68.

Subpart F—Procedure for Referendum Under Section 9(e) of the Act

■ 9. Revise § 102.83 to read as follows:

§ 102.83 Petition for referendum under Section 9(e)(1) of the Act; who may file; where to file; withdrawal.

A petition to rescind the authority of a labor organization to make an agreement requiring as a condition of employment membership in such labor organization may be filed by an employee or group of employees on behalf of 30 percent or more of the employees in a bargaining unit covered by such an agreement. The petition shall be in writing and signed, and either must be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. One original of the petition must be filed with the Regional Director wherein the bargaining unit exists or, if the unit exists in two or more Regions, with the Regional Director for any of such Regions. A person filing a petition by facsimile must also file an original for the Agency's records, but failure to do so must not affect the validity of the filing by facsimile, if otherwise proper. A person filing a petition electronically need not file an original. The petition may be withdrawn only with the approval of the Regional Director with whom such petition was filed. Upon approval of the withdrawal of any petition the case will be closed.

■ 10. Revise § 102.84(l) to read as follows:

§ 102.84 Contents of petition to rescind authority.

* * * * *

(l) Evidence supporting the statement that 30 percent or more of the bargaining unit employees desire to rescind the authority of their employer and labor organization to enter into an agreement made pursuant to Section 8(a)(3) of the Act. Such evidence must be filed together with the petition, but must not be served on any other party.

* * * * *

■ 11. Revise §§ 102.85 through 102.88 to read as follows:

Sec.

102.85 Investigation of petition by Regional Director; consent referendum; directed referendum.
102.86 Hearing; posthearing procedure.
102.87 Method of conducting balloting; postballoting procedure.
102.88 Refusal to conduct referendum; appeal to Board.

102.85 Investigation of petition by Regional Director; consent referendum; directed referendum.

Where a petition has been filed pursuant to § 102.83, and it appears to the Regional Director that the petitioner has made an appropriate showing, in such form as the Regional Director may determine, that 30 percent or more of the employees within a unit covered by an agreement between their employer and a labor organization requiring membership in such labor organization desire to rescind the authority of such labor organization to make such an agreement, the Regional Director will proceed to conduct a secret ballot of the employees involved on the question whether they desire to rescind the authority of the labor organization to make such an agreement with their employer, except that, in any case in which it appears to the Regional Director that the proceeding raises questions which cannot be decided without a hearing, the Director may issue and cause to be served on the parties a Notice of Hearing before a Hearing Officer at a time and place fixed therein. The Regional Director will fix the time and place of the election, eligibility requirements for voting, and other arrangements of the balloting, but the parties may enter into an agreement, subject to the approval of the Regional Director, fixing such arrangements. In any such consent agreements, provision may be made for final determination of all questions arising with respect to the balloting by the Regional Director or upon grant of a request for review, by the Board.

§ 102.86 Hearing; posthearing procedure.

The method of conducting the hearing and the procedure following the hearing will be governed, insofar as applicable, by §§ 102.63 through 102.68.

§ 102.87 Method of conducting balloting; postballoting procedure.

The method of conducting the balloting and the postballoting procedure will be governed by the provisions of § 102.69, insofar as applicable.

§ 102.88 Refusal to conduct referendum; appeal to Board.

If, after a petition has been filed, and prior to the close of the hearing, it appears to the Regional Director that no referendum should be conducted, the Regional Director will dismiss the petition by administrative action. Such dismissal will be in writing and accompanied by a simple statement of the procedural or other grounds. The petitioner may obtain a review of such action by filing a request therefor with the Board in Washington, DC, and filing a copy of such request with the Regional Director and the other parties within 14 days from the service of notice of such dismissal. The request must contain a complete statement setting forth the facts and reasons upon which the request is based.

■ 12. Revise newly redesignated subpart G to read as follows:

Subpart G—Procedure to Hear and Determine Disputes Under Section 10(k) of the Act

Sec.
102.89 Initiation of proceedings.
102.90 Notice of hearing; hearing; proceedings before the Board; briefs; determination of dispute.
102.91 Compliance with determination; further proceedings.
102.92 Review of determination.
102.93 Alternative procedure.

§ 102.89 Initiation of proceedings.

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of Section 8(b)(4)(D) of the Act, the Regional Director of the office in which such charge is filed or to which it is referred will, as soon as possible after the charge has been filed, serve on the parties a copy of the charge and will investigate such charge and if it is deemed appropriate to seek injunctive relief of a district court pursuant to Section 10(l) of the Act, the Regional Director will give it priority over all other cases in the office except other cases under Section 10(l) and cases of like character.

§ 102.90 Notice of hearing; hearing; proceedings before the Board; briefs; determination of dispute.

If it appears to the Regional Director that the charge has merit and the parties to the dispute have not submitted satisfactory evidence to the Regional Director that they have adjusted, or have agreed-upon methods for the voluntary adjustment of, the dispute out of which such unfair labor practice has arisen, the Regional Director will serve on all parties to such dispute a Notice of Hearing under Section 10(k) of the Act before a Hearing Officer at a time and place stated in the Notice. The hearing date will not be less than 10 days after service of the notice of the filing of the charge. The Notice of Hearing must contain a simple statement of the issues involved in such dispute. Such Notice will be issued promptly, and, in cases in which it is deemed appropriate to seek injunctive relief pursuant to Section 10(l) of the Act, will normally be issued within 5 days of the date upon which injunctive relief is first sought. Hearings will be conducted by a Hearing Officer, and the procedure will conform, insofar as applicable, to the procedure set forth in §§ 102.64 through 102.68. Upon the close of the hearing, the proceeding will be transferred to the Board, and the Board will proceed either promptly upon the record, or after oral argument, or the submission of briefs, or further hearing, to determine the dispute or otherwise dispose of the matter. Parties who desire to file a brief with the Board must do so within 7 days after the close of the hearing. However, no briefs will be filed in cases designated in the Notice of Hearing as involving the national defense, and the parties, after the close of the evidence, may argue orally upon the record their respective contentions and positions; except that, upon application for leave to file briefs expeditiously made to the Board in Washington, DC, after the close of the hearing, the Board may for good cause shown, grant leave to file briefs and set a time for filing. Simultaneously upon such filing, a copy must be served on the other parties. No reply brief may be filed except upon special leave of the Board.

§ 102.91 Compliance with determination; further proceedings.

If, after issuance of the determination by the Board, the parties submit to the Regional Director satisfactory evidence that they have complied with the determination, the Regional Director will dismiss the charge. If no satisfactory evidence of compliance is submitted, the Regional Director will proceed with the charge under Section 8(b)(4)(D) and Section 10 of the Act and the procedure prescribed in §§ 102.9 through 102.51 will, insofar as applicable, govern. However, if the Board determination is that employees represented by a Charged Union are entitled to perform the work in dispute, the Regional Director will dismiss the charge as to that union irrespective of whether the employer has complied with that determination.

§ 102.92 Review of determination.

The record of the proceeding under Section 10(k) and the determination of the Board will become a part of the record in such unfair labor practice proceeding and may be subject to judicial review in proceedings to enforce or review the final order of the Board under Section 10(e) and (f) of the Act.

§ 102.93 Alternative procedure.

If, either before or after service of the Notice of Hearing, the parties submit to the Regional Director satisfactory evidence that they have adjusted the dispute, the Regional Director will dismiss the charge and will withdraw the Notice of Hearing if Notice has issued. If, either before or after issuance of the Notice of Hearing, the parties submit to the Regional Director satisfactory evidence that they have agreed-upon methods for the voluntary adjustment of the dispute, the Regional Director will defer action upon the charge and will withdraw the Notice of Hearing if Notice has issued. If it appears to the Regional Director that the dispute has not been adjusted in accordance with such agreed-upon methods and that an unfair labor practice within the meaning of Section 8(b)(4)(D) of the Act is occurring or has occurred, the Regional Director may issue a complaint under § 102.15, and the procedure prescribed in §§ 102.9 through 102.51 will, insofar as applicable, govern; and §§ 102.90 through 102.92 are inapplicable, except that if an agreed-upon method for voluntary adjustment results in a determination that employees represented by a Charged Union are entitled to perform the work in dispute, the Regional Director will dismiss the charge as to that union irrespective of whether the employer has complied with that determination.

■ 13. Revise newly redesignated subpart H to read as follows:

Subpart H—Procedure in Cases Under Section 10(j), (l), and (m) of the Act

Sec.
102.94 Expeditious processing of Section 10(j) cases.
102.95 Priority of cases pursuant to Section 10(l) and (m) of the Act.
102.96 Issuance of complaint promptly.
102.97 Expeditious processing of Section 10(l) and (m) cases in successive stages.
102.94 Expeditious processing of Section 10(j) cases.

(a) Whenever temporary relief or a restraining order pursuant to Section 10(j) of the Act has been procured by the Board, the complaint which has been the basis for such temporary relief or restraining order will be heard expeditiously and the case will be given priority by the Board in its successive steps following the issuance of the complaint (until ultimate enforcement or dismissal by the appropriate circuit court of appeals) over all other cases except cases of like character and cases under Section 10(l) and (m) of the Act.

(b) In the event the Administrative Law Judge hearing a complaint, concerning which the Board has procured temporary relief or a restraining order pursuant to Section 10(j), recommends a dismissal in whole or in part of such complaint, the chief law officer will promptly suggest to the district court which issued such temporary relief or restraining order the possible change in circumstances arising out of the findings and recommendations of the Administrative Law Judge.

§ 102.95 Priority of cases pursuant to Section 10(l) and (m) of the Act.

(a) Whenever a charge is filed alleging the commission of an unfair labor practice within the meaning of Section 8(b)(4)(A), (B), (C), 8(b)(7), or 8(e) of the Act, the Regional Office in which such charge is filed or to which it is referred will give it priority over all other cases in the office except cases of like character and cases under Section 8(b)(4)(D) in which it is deemed appropriate to seek injunctive relief of a district court pursuant to Section 10(l) of the Act.

(b) Whenever a charge is filed alleging the commission of an unfair labor practice within the meaning of Section 8(a)(3) or 8(b)(2), the Regional Office in which such charge is filed or to which it is referred will give it priority over all other cases in the office except cases of like character and cases under Section 10(l) of the Act.

§ 102.96 Issuance of complaint promptly.

Whenever injunctive relief pursuant to Section 10(l) of the Act is sought in district court, a complaint against the party or parties sought to be enjoined, covering the same subject matter as the application for injunctive relief, will be issued promptly, normally within 5 days of the date when injunctive relief is first sought, except in cases in which a Notice of Hearing under Section 10(k) of the Act has issued.

§ 102.97 Expeditious processing of Section 10(l) and (m) cases in successive stages.

(a) Any complaint issued pursuant to § 102.95(a) or, in a case in which it is deemed appropriate to seek injunctive relief of a district court pursuant to Section 10(l) of the Act, any complaint issued pursuant to § 102.93 or Notice of Hearing issued pursuant to § 102.90 will be heard expeditiously and the case will be given priority in such successive steps following its issuance (until ultimate enforcement or dismissal by the appropriate circuit court of appeals) over all cases except cases of like character.

(b) Any complaint issued pursuant to § 102.95(b) will be heard expeditiously and the case will be given priority in its successive steps following its issuance (until ultimate enforcement or dismissal by the appropriate circuit court of appeals) over all cases except cases of like character and cases under Section 10(l) of the Act.

■ 14. Revise the heading for newly redesignated subpart I to read as follows:

Subpart I—Advisory Opinions and Declaratory Orders Regarding Board Jurisdiction

■ 15. Revise §§ 102.99 through 102.110 to read as follows:

Sec.
102.99 Contents of petition for advisory opinion.
102.100 Notice of petition; service of petition.
102.101 Response to petition; service of response.
102.102 Intervention.
102.103 Proceedings before the Board; briefs; advisory opinions.
102.104 Withdrawal of petition.
102.105 Petitions for declaratory orders; who may file; where to file; withdrawal.
102.106 Contents of petition for declaratory order.
102.107 Notice of petition; service of petition.
102.108 Response to petition; service of response.
102.109 Intervention.
102.110 Proceedings before the Board; briefs; declaratory orders.

§ 102.99 Contents of petition for advisory opinion.

(a) A petition for an advisory opinion, when filed by an agency or court of a State or territory, must allege the following:

(1) The name of the agency or court.

(2) The names of the parties to the proceeding and the docket number.

(3) The nature of the proceeding, and the need for the Board's opinion on the jurisdictional issue to the proceeding.

(4) The general nature of the business involved in the proceeding and, where appropriate, the nature of and details concerning the employing enterprise.

(5) The findings of the agency or court or, in the absence of findings, a statement of the evidence relating to the commerce operations of such business and, where appropriate, to the nature of the employing enterprise.

(b) The petition or request must be submitted to the Board in Washington, DC.

§ 102.100 Notice of petition; service of petition.

Upon the filing of a petition, the petitioner must simultaneously serve, in the manner provided by § 102.5(g), a copy of the petition on all parties to the proceeding and on the Director of the Board's Regional Office having jurisdiction over the territorial area in which such agency or court is located. A statement of service must be filed with the petition as provided by § 102.5(h).

§ 102.101 Response to petition; service of response.

Any party served with such petition may, within 14 days after service thereof, respond to the petition, admitting or denying its allegations. The response must be filed with the Board in Washington, DC. The response must simultaneously be served on all other parties to the proceeding, and a statement of service must be filed in accordance with the provisions of § 102.5(h).

§ 102.102 Intervention.

Any person desiring to intervene must file a motion for intervention, stating the grounds upon which such person claims to have an interest in the petition. The motion must be filed with the Board in Washington, DC.

§ 102.103 Proceedings before the Board; briefs; advisory opinions.

The Board will thereupon proceed, upon the petition, responses, and submission of briefs, to determine whether, on the facts before it, the commerce operations of the employer involved are such that the Board would or would not assert jurisdiction. Such determination will be in the form of an advisory opinion and will be served on the parties. No briefs may be filed except upon special permission of the Board.

§ 102.104 Withdrawal of petition.

The petitioner may withdraw the petition at any time prior to issuance of the Board's advisory opinion.

§ 102.105 Petitions for declaratory orders; who may file; where to file; withdrawal.

Whenever both an unfair labor practice charge and a representation case relating to the same employer are contemporaneously on file in a Regional Office of the Board, and the General Counsel entertains doubt whether the Board would assert jurisdiction over the employer involved, the General Counsel may file a petition with the Board for a declaratory order disposing of the jurisdictional issue in the case. Such petition may be withdrawn at any time prior to the issuance of the Board's order.

§ 102.106 Contents of petition for declaratory order.

(a) A petition for a declaratory order must allege the following:

(1) The name of the employer.

(2) The general nature of the employer's business.

(3) The case numbers of the unfair labor practice and representation cases.

(4) The commerce data relating to the operations of such business.

(5) Whether any proceeding involving the same subject matter is pending before an agency or court of a State or territory.

(b) The petition must be filed with the Board in Washington, DC.

§ 102.107 Notice of petition; service of petition.

Upon filing a petition, the General Counsel will simultaneously serve a copy thereof on all parties and must file a statement of service as provided by § 102.5(h).

§ 102.108 Response to petition; service of response.

Any party to the representation or unfair labor practice case may, within 14 days after service, respond to the petition, admitting or denying its allegations. The response must be filed with the Board in Washington, DC. The response must be served on the General Counsel and all other parties, and a statement of service must be filed as provided by § 102.5(h).

§ 102.109 Intervention.

Any person desiring to intervene must file a motion for intervention, stating the grounds upon which such person claims to have an interest in the petition. The motion must be filed with the Board in Washington, DC.

§ 102.110 Proceedings before the Board; briefs; declaratory orders.

The Board will proceed, upon the petition, responses, and submission of briefs, to determine whether, on the facts before it, the commerce operations of the employer involved are such that the Board would or would not assert jurisdiction over the employer. Such determination will be made by a declaratory order, with like effect as in the case of other orders of the Board, and will be served on the parties. Any party desiring to file a brief must file the brief with the Board in Washington, DC, with a statement that copies are being served simultaneously on the other parties.

§§ 102.111 through 102.114 [Added and Reserved]

■ 16. Add reserved §§ 102.111 through 102.114 to subpart I.

■ 17. Revise subparts J through M to read as follows:

Subpart J—Certification and Signature of Documents

Sec.

102.115 Certification of Board papers and documents.
102.116 Signature on Board orders.

§ 102.115 Certification of Board papers and documents.

The Executive Secretary of the Board, or, in the event of the Executive Secretary's absence or disability, whomever may be designated by the Board in the Executive Secretary's place, will certify copies of all papers and documents which are a part of any of the files or records of the Board as necessary or desirable from time to time.

§ 102.116 Signature on Board orders.

The Executive Secretary, Deputy Executive Secretary, or an Associate Executive Secretary, or, in the event of their absence or disability, whomever may be designated by the Board in their place, is hereby authorized to sign all orders of the Board.

Subpart K—Records and Information

Sec.

102.117 Freedom of Information Act Regulations: Agency materials including formal documents available pursuant to the Freedom of Information Act; requests for described records; time limit for response; appeal from denial of request; fees for document search, duplication, and review; files and records not subject to inspection.
102.118 Present and former Board employees prohibited from producing documents and testifying; production of witnesses' statements after direct testimony.
102.119 Privacy Act Regulations: notification as to whether a system of records contains records pertaining to requesting individuals; requests for access to records, amendment of requests; fees for document duplication; files and records exempted from certain Privacy Act requirements.

§ 102.117 Freedom of Information Act Regulations: Agency materials including formal documents available pursuant to the Freedom of Information Act; requests for described records; time limit for response; appeal from denial of request; fees for document search, duplication, and review; files and records not subject to inspection.

(a)(1) *Introduction.* This subpart contains the Rules that the National Labor Relations Board (Agency) follows in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The Rules in this subpart may be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (OMB Guidelines). Some records will be made available on the Agency's Web site at *www.nlrb.gov* to facilitate public access. Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552(a), are processed under § 102.119.

(2) *FOIA Officials.* The following are designated as the Agency's FOIA officials with responsibilities for complying with the FOIA:

(i) *FOIA Officer.* The Assistant General Counsel for the FOIA Branch is the Agency's designated FOIA Officer.

(ii) *Chief FOIA Officer.* The Associate General Counsel for the Division of Legal Counsel is the Agency's designated Chief FOIA Officer.

(iii) *FOIA Public Liaison.* The official(s) designated by the Chief FOIA Officer is the Agency's FOIA Public Liaison, with overall responsibilities for assisting in reducing delays, increasing transparency, understanding the status of requests, and assisting in the resolution of disputes. The designated FOIA Public Liaison is available on the Agency's Web site.

(3) *Authority to respond to requests and administrative appeals.* The FOIA Officer has the authority to act upon and respond on behalf of the Board and the General Counsel to all requests for Agency records, except for records maintained by the Agency's Office of the Inspector General. The Office of the Inspector General has the authority to respond to all requests for records maintained by that Office. The Chief FOIA Officer has the authority to respond on behalf of the Chairman of the Board and the General Counsel to all administrative appeals of adverse determinations. The Chief FOIA Officer's authority includes responding, on behalf of the Chairman of the Board, to appeals of initial determinations made by the Office of the Inspector General.

(4) *Records made available.* Records that are required by the FOIA under 5 U.S.C. 552(a)(2) may be accessed through the Agency's Web site at *www.nlrb.gov*.

(b)(1) *Formal documents.* The formal documents constituting the record in a case or proceeding are matters of official record and, until officially destroyed pursuant to applicable statutory authority, are available to the public pursuant to the procedures in this section.

(2) *Certification of records.* The Executive Secretary will certify copies of all formal documents maintained by the Board upon request made a reasonable time in advance of need and payment of lawfully prescribed costs. The Deputy General Counsel will certify copies of any record maintained by, or originating from, the Office of General Counsel and any division, branch, or office organizationally overseen by the Office of the General Counsel, including any Regional, Subregional, or Resident Office.

(c)(1) *Making FOIA requests to the Agency*—(i) *Content of requests*—(A) *Description of records sought.* Requests for records must be in writing and must reasonably describe the record so as to permit its identification and location. To the extent possible, requesters may include specific information, such as the NLRB case number, case name, date(s) of record(s) requested, and/or full name of the party, author, or recipient of the record(s) in question. Requesters should include as much detail as practicable about the records sought. Requesters may contact the FOIA Public Liaison to discuss the records sought and to receive assistance in describing the records.

(B) *Assumption of fees.* Requests must contain a specific statement assuming financial responsibility for the direct costs of responding to the request in accordance with paragraph (d)(2) of this section.

(C) *Specificity requirement.* Requests that do not reasonably describe the records sought or assume sufficient financial responsibility for responding to the request, or that otherwise fail to comply with this section, may delay the Agency's response to the request.

(ii) *Transmission of requests.* Requests for records maintained by the Agency should be made to the FOIA Branch, which is located in the Agency's Washington, DC headquarters. The FOIA Branch is responsible for responding to requests for records originating from, or maintained by, the Board and the Office of the General Counsel, including Regional, Subregional, and resident offices. Requests for records maintained by the Agency's Office of the Inspector General may be made directly to that office.

(A) Requesters may file FOIA requests electronically through the Agency's Web site (*https://www.nlrb.gov*), which is the preferred method of submission to allow for prompt receipt, including for requests for records maintained by the Agency's Office of the Inspector General. FOIA requests may also be made by mail to the Agency's Washington, DC headquarters address, by email to the Agency's designated mailbox, or by facsimile. The mailing address, email address, and facsimile number are available on the Agency's Web site.

(B) Requests not made through the Agency's Web site should be clearly marked to indicate that they contain a request for records under the Freedom of Information Act.

(C) Requests made to an Agency division, branch, or any office other than the FOIA Branch will be forwarded to the FOIA Branch by the receiving office, but in that event, the applicable time limit for response set forth in paragraph (i) of this section will be calculated from the date of receipt by the FOIA Branch. The receiving office will normally forward the request to the FOIA Branch within 10 days of the initial receipt.

(D) Requests made to the Agency for records that originated with another governmental agency may be referred to that agency.

(2) *Processing of FOIA requests*—(i) *Timing of response.* The Agency ordinarily responds to FOIA requests according to their order of receipt. An initial determination will be issued within 20 working days (*i.e.,* exempting Saturdays, Sundays, and legal public holidays) after the receipt of a request. Responsive records are released at the time of the determination or, if necessary, at a time thereafter on a rolling basis.

(ii) *Expedited treatment.* A request for expedited processing may be made at any time during the pendency of a FOIA request or appeal. Requests and appeals will be taken out of order and given expedited treatment when warranted. A requester must provide sufficient justification to grant such processing by showing that any one of the following circumstances exists:

(A) The lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(B) There is an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information; or

(C) The loss of substantial due process rights; or

(D)(*1*) There is widespread and exceptional media interest and possible questions exist about the government's integrity which may affect public confidence.

(*2*) Within 10 calendar days of receipt of a request for expedited processing, the Agency will decide whether to grant it and will notify the requester of the decision. Once the determination has been made to grant expedited processing, the request will be given priority and processed as soon as practicable. If a request for expedited processing is denied, the Agency will act expeditiously on any appeal of that decision.

(iii) *Initial determination of requests.* Within 20 working days after receipt of a request by the FOIA Branch, a determination will be made whether to comply with such request, and the requester will be notified in writing of that determination. In the case of requests made for records maintained by the Agency's Office of the Inspector General, that determination will be made by the Office of the Inspector General. Requesters will be made aware of their right to seek assistance from the Agency's FOIA Public Liaison.

(A) *Grants of requests.* If the determination is to comply with the request, the records will be made promptly available to the person making the request and, at the same time, a statement of any charges due in accordance with the fee schedule provisions of paragraph (d)(2) of this section will be provided.

(B) *Denials of requests.* If the determination is to deny the request in any respect, the requester will be notified in writing of that determination. The determination will set forth: The reason(s) for the denial; the name and title or position of each person responsible for the denial; and an estimate of the volume of records or information withheld, in number of pages or in some other reasonable form of estimation: However, this estimate does not need to be provided if the volume is otherwise indicated through deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption. The determination will also inform the requester of the right to seek dispute resolution services from the Agency's FOIA Public Liaison or the Office of Government Information Services, as well as the right to appeal the adverse determination under the administrative appeal provisions of paragraph (c)(2)(v) of this section.

(C) Adverse determinations may consist of: A determination to withhold any requested record in whole or in part; a determination that a requested record does not exist or cannot be located; a determination that what has been requested is not a record subject to the FOIA; a determination on any disputed fee matter, including a denial of a request for a fee waiver or reduction or placement in a particular fee category; and a denial of a request for expedited treatment. An adverse determination to an administrative appeal by the Chief FOIA Officer will be the final action of the Agency. An adverse determination will inform the requester of the right to seek dispute resolution services from the Agency's FOIA Public Liaison or the Office of Government Information Services, as well as the right to appeal the adverse determination under the administrative appeal provisions of paragraph (c)(2)(v) of this section.

(iv) *Records containing business information.* Business information

obtained by the Agency from a submitter will be disclosed under the FOIA only consistent with the procedures established in this section.

(A) For purposes of this section:

(*1*) *Business information* means commercial or financial information obtained by the Agency from a submitter that may be protected from disclosure under Exemption 4 of the FOIA.

(*2*) *Submitter* means any person or entity from whom the Agency obtains business information, directly or indirectly. The term includes corporations; state, local, and tribal governments; and foreign governments.

(B) A submitter of business information will use good faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire 10 years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period. The Agency will provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks its business information wherever required under paragraph (c)(2)(iv)(C) of this section, except as provided in paragraph (c)(2)(iv)(F) of this section, in order to give the submitter an opportunity to object to disclosure of any specified portion of that information under paragraph (c)(2)(iv)(D) of this section. The notice will either describe the business information requested or include copies of the requested records or record portions containing the information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish notification.

(C) Notice will be given to a submitter whenever: The information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or the Agency has reason to believe that the information may be protected from disclosure under Exemption 4.

(D) The Agency will allow a submitter a reasonable time to respond to the notice described in paragraph (c)(2)(iv)(B) of this section. If a submitter has any objection to disclosure, it is required to submit a detailed written statement. The statement must specify all grounds for withholding any portion of the information under any exemption of the FOIA and, in the case of Exemption 4, it must show why the information is a trade secret or commercial or financial information that is privileged or confidential. In the event that a submitter fails to respond to the notice within the time specified in it, the submitter will be considered to have no objection to disclosure of the information. Information provided by a submitter under this paragraph may itself be subject to disclosure under the FOIA.

(E) The Agency will consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose business information. Whenever the Agency decides to disclose business information over the objection of a submitter, the Agency will give the submitter written notice, which will include: A statement of the reason(s) why each of the submitter's disclosure objections was not sustained; a description of the business information to be disclosed; and a specified disclosure date, which will be a reasonable time subsequent to the notice.

(F) The notice requirements of paragraphs (c)(2)(iv)(B) and (E) of this section will not apply if: The Agency determines that the information may not be disclosed; the information lawfully has been published or has been officially made available to the public; disclosure of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600 (3 CFR, 1988 Comp., p. 235); or the designation made by the submitter under paragraph (c)(2)(iv)(B) of this section appears obviously frivolous—except that, in such a case, the Agency will, within a reasonable time prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.

(G) Whenever a requester files a lawsuit seeking to compel the disclosure of business information, the Agency will promptly notify the submitter.

(H) Whenever the Agency provides a submitter with notice and an opportunity to object to disclosure under paragraph (c)(2)(iv)(B) of this section, the Agency will also notify the requester(s). Whenever the Agency notifies a submitter of its intent to disclose requested information under paragraph (c)(2)(iv)(E) of this section, the Agency will also notify the requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, the Agency will notify the requester(s).

(v) *Administrative appeals.* (A) An appeal from an adverse determination made pursuant to paragraph (c)(2)(iii) of this section must be filed within 90 calendar days of the service of the notification of the adverse determination, in whole or in part. Appeals of adverse determinations made by the FOIA Officer or the Office of the Inspector General may be filed with the Division of Legal Counsel in Washington, DC.

(B) As provided in paragraph (c)(2)(iii) of this section, an adverse determination will notify the requester of the right to appeal the adverse determination and will specify where such appeal may be filed. Within 20 working days after receipt of an appeal, the Chief FOIA Officer will make a determination with respect to such appeal and will notify the requester in writing. If the determination is to grant the appeal, the responsive records will be made promptly available to the requester upon receipt of payment of any charges due in accordance with the provisions of paragraph (d)(2) of this section. If the appeal is denied, in whole or in part, the requester will be notified of the reasons for the decision, the name and title or position of any person responsible for the denial, and the provisions for judicial review of that determination under the provisions of 5 U.S.C. Section 552(4)(B).

(C) Before seeking judicial review of an adverse determination, a requester must first submit a timely administrative appeal.

(D) Even if no FOIA appeal is filed, the Chief FOIA Officer may, without regard to the time limit for filing of an appeal, initiate reconsideration of an adverse determination by issuing written notice to the requester. In such event, the time limit for making the determination will commence with the issuance of such notification.

(vi) *Extension of time to respond to requests.* In unusual circumstances as specified in this paragraph (c)(2)(vi), the Agency may extend the time limits prescribed in either paragraph (c)(2)(i) or (iv) of this section by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected, and notifying the requester of the right to seek dispute resolution services from the Office of Government Information Services. The extension of time will not exceed 10 working days. As used in this paragraph (c)(2)(vi), *unusual circumstances* means, but only to the extent reasonably necessary to the proper processing of the particular request:

(A) The need to search for and collect the requested records from other offices in the Agency that are separate from the FOIA Branch;

(B) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are sought in a single request;

(C)(*1*) The need for consultation, which will be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or with two or more offices in the Agency having a substantial subject matter interest in the request.

(*2*) If the request cannot be processed within the time limits prescribed above, the Agency will provide the requester with an opportunity to limit the request so that it may be processed within the 10-day extended time limit for response. The requester may also arrange an alternative time frame with the Agency for processing the request or a modified request. The Agency's FOIA Public Liaison is available to assist with any issues that may arise.

(vii) *Preservation of FOIA request files.* The Agency will preserve files created in response to requests for information under the FOIA and files created in responding to administrative appeals under the FOIA until disposition or destruction is authorized by Title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 4.2, item 020. Records will not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

(d)(1) *Fees.* For purposes of this section, the following definitions apply:

(i) *Direct costs* means those expenditures which are actually incurred in searching for and duplicating and, in the case of commercial use requests, reviewing documents to respond to a FOIA request.

(ii) *Search* refers to the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of material within documents and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. The Agency will ensure that searches are done in the most efficient and least expensive manner reasonably possible.

(iii) *Duplication* refers to the process of making a copy of a record, or the information contained in it, necessary to respond to a FOIA request. Such copies can take the form of paper, microfilm, videotape, audiotape, or electronic records (*e.g.,* magnetic tape or disk), among others. The Agency will honor a requester's specified preference of form or format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format by the office responding to the request.

(iv) *Review* refers to the process of examining documents located in response to a request that is for commercial use to determine whether any portion of it is exempt from disclosure. It includes processing any documents for disclosure, *e.g.,* doing all that is necessary to redact and prepare them for disclosure. Review time includes time spent considering any formal objection to disclosure made by a business submitter under paragraph (c)(2)(iv) of this section, but does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(v) *Commercial use request* refers to a request from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation.

(vi) *Educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

(vii) *Representative of the news media* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in instances where they can qualify as disseminators of *news*) who make their products available for purchase or subscription by the general public. For ''freelance'' journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract is the clearest proof, but the Agency will also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for commercial use. However, a request for records supporting the news dissemination function of the requester will not be considered to be for a commercial use.

(viii) *Working days,* as used in this section, means calendar days excepting Saturdays, Sundays, and legal holidays.

(2) *Fee schedule.* Requesters will be subject to a charge of fees for the full allowable direct costs of document search, review, and duplicating, as appropriate, in accordance with the following schedules, procedures, and conditions:

(i) *Schedule of charges:*

(A) For each one-quarter hour or portion thereof of clerical time $3.10.

(B) For each one-quarter hour or portion thereof of professional time $9.25.

(C) For each sheet of duplication (not to exceed 8½ by 14 inches) of requested records $0.12.

(D) All other direct costs of preparing a response to a request will be charged to the requester in the same amount as incurred by the Agency. Such costs will include, but not be limited to: Certifying that records are true copies; sending records to requesters or receiving records from the Federal records storage centers by special methods such as express mail; and, where applicable, conducting computer searches for information and for providing information in electronic format.

(ii) Fees incurred in responding to information requests are to be charged in accordance with the following categories of requesters:

(A) Commercial use requesters will be assessed charges to recover the full direct costs for searching for, reviewing for release, and duplicating the records sought. Requesters must reasonably describe the records sought.

(B) Educational institution requesters will be assessed charges for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made under the auspices of a qualifying institution and that the records are not sought for commercial use, but are sought in furtherance of scholarly research. Requesters must reasonably describe the records sought.

(C) Requesters who are representatives of the news media will be assessed charges for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in paragraph (d)(1)(vii) of this section, and the request must not be made for commercial use. In reference to this

class of requester, a request for records supporting the news dissemination function of the requester will not be considered to be a request for commercial use. Requesters must reasonably describe the records sought.

(D) All other requesters, not elsewhere described, will be assessed charges to recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first 2 hours of search time will be furnished without charge. Requesters must reasonably describe the records sought.

(E) Absent a reasonably based factual showing that a requester may be placed in a particular user category, fees will be imposed as provided for in the commercial use requester category.

(iii) *Unusual fee circumstances.* (A) In no event will fees be imposed on any requester when the total charges are less than $5, which is the Agency's cost of collecting and processing the fee itself.

(B) If the Agency reasonably believes that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the Agency may aggregate those requests and charge accordingly. The Agency may presume that multiple requests of this type made within a 30-day period have been made to avoid fees. Where requests are separated by a longer period, the Agency will aggregate them only where there exists a solid basis for determining that aggregation is warranted under all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

(iv) *Requests for fee waiver or reduction.* Documents are to be furnished without charge or at reduced levels if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest. A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. Where only some of the requested records satisfy the requirements for a fee waiver, a waiver will be granted for those records.

(v) *Failure to pay fees.* If a requester fails to pay chargeable fees that were incurred as a result of the Agency's processing of the information request, beginning on the 31st day following the date on which the notification of charges was sent, the Agency may assess interest charges against the requester in the manner prescribed in 31 U.S.C. Section 3717. Where appropriate, other steps permitted by federal debt collection statutes, including disclosure to consumer reporting agencies, use of collection agencies, and offset, will be used by the Agency to encourage payment of amounts overdue.

(vi) *Assumption of financial responsibility for processing requests.* Each request for records must contain a specific statement assuming financial liability, in full or to a specified maximum amount, for charges, in accordance with paragraphs (d)(2)(i) and (ii) of this section, which may be incurred by the Agency in responding to the request. If the anticipated charges exceed the maximum limit stated by the person making the request, or if the request contains no assumption of financial liability or charges, the requester will be notified and afforded an opportunity to assume financial liability. In either case, the request for records will not be deemed received for purposes of the applicable time limit for response until a written assumption of financial liability is received. The Agency may require a requester to make an advance payment of anticipated fees under the following circumstances:

(A) If the anticipated charges are likely to exceed $250, the Agency will notify the requester of the likely cost and obtain satisfactory assurance of full payment when the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment.

(B) If a requester has previously failed to pay fees that have been charged in processing a request within 30 days of the date the notification of fees was sent, the requester will be required to pay the entire amount of fees that are owed, plus interest as provided for in paragraph (d)(2)(v) of this section, before the Agency will process a further information request. In addition, the Agency may require advance payment of fees that the Agency estimates will be incurred in processing the further request before the Agency commences processing that request. When the Agency acts under paragraph (d)(2)(vi)(A) or (B) of this section, the administrative time limits for responding to a request or an appeal from initial determinations will begin to run only after the Agency has received the fee payments required in paragraph (d)(2) of this section.

(vii) *Fees may be charged even if no documents are provided.* Charges may be imposed even though the search discloses no records responsive to the request, or if records located are determined to be exempt from disclosure.

§ 102.118 Present and former Board employees prohibited from producing documents and testifying; production of witnesses' statements after direct testimony.

(a) *Prohibition on producing files and documents.* Except as provided in § 102.117 respecting requests cognizable under the Freedom of Information Act, no present or former employee or specially designated agent of the Agency will produce or present any files, documents, reports, memoranda, or records of the Board or of the General Counsel, whether in response to a *subpoena duces tecum* or otherwise, without the written consent of the Board or the Chairman of the Board if the document is in Washington, DC, and in control of the Board; or of the General Counsel if the document is in a Regional Office of the Board or is in Washington, DC, and in the control of the General Counsel.

(b) *Prohibition on testifying.* No present or former employee or specially designated agent of the Agency will testify on behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, territory, or the District of Columbia, or any subdivisions thereof, with respect to any information, facts, or other matter coming to that person's knowledge in that person's official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board or of the General Counsel, whether in answer to a subpoena or otherwise, without the written consent of the Board or the Chairman of the Board if the person is in Washington, DC, and subject to the supervision or control of the Board or was subject to such supervision or control when formerly employed at the Agency; or of the General Counsel if the person is in a Regional Office of the Agency or is in Washington, DC, and subject to the supervision or control of the General Counsel or was subject to such supervision or control when formerly employed at the Agency. A request that such consent be granted must be in writing and must identify the documents to be produced, or the person whose testimony is desired, the

nature of the pending proceeding, and the purpose to be served by the production of the document or the testimony of the official.

(c) *Motion to quash subpoena.* Whenever any subpoena *ad testificandum* or subpoena *duces tecum,* the purpose of which is to adduce testimony or require the production of records as described above, has been served on any present or former employee or specially designated agent of the Agency, that person will, unless otherwise expressly directed by the Board or the Chairman of the Board or the General Counsel, as the case may be, move pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or otherwise, to have such subpoena invalidated on the ground that the evidence sought is privileged against disclosure by this Rule.

(d) *Prohibition on disclosure of personal information.* No present or former employee or specially designated agent of the Agency will, by any means of communication to any person or to another agency, disclose personal information about an individual from a record in a system of records maintained by this Agency, as more fully described in the notices of systems of records published by this Agency in accordance with the provisions of Section (e)(4) of the Privacy Act of 1974, 5 U.S.C. 552a(e)(4), or by the Notices of Government-wide Systems of Personnel Records published by the Civil Service Commission in accordance with those statutory provisions, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be in accordance with the provisions of Section (b)(1) through (11), both inclusive, of the Privacy Act of 1974, 5 U.S.C. 552a(b)(1) through (11).

(e) *Production of statement for cross-examination.* Notwithstanding the prohibitions of paragraphs (a) and (b) of this section, after a witness called by the General Counsel or by the Charging Party has testified in a hearing upon a complaint under Section 10(c) of the Act, the Administrative Law Judge must, upon motion of the Respondent, order the production of any statement, as defined paragraph (g) of this section, of such witness in the possession of the General Counsel which relates to the subject matter as to which the witness has testified.

(1) If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the Administrative Law Judge must order the statement to be delivered directly to the respondent for examination and use for the purpose of cross-examination.

(2) If the General Counsel claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the Administrative Law Judge will order the General Counsel to deliver the statement for the inspection of the Administrative Law Judge *in camera.* Upon delivery, the Administrative Law Judge will excise the portions of such statement which do not relate to the subject matter of the testimony of the witness except that the Administrative Law Judge has discretion to decline to excise portions which, although not relating to the subject matter of the testimony of the witness, do relate to other matters raised by the pleadings. With the material excised, the Administrative Law Judge will then direct delivery of the statement to the Respondent for use on cross-examination. If any portion of the statement is withheld and the Respondent objects to the withholding, the General Counsel will preserve the entire text of the statement, and, if the Respondent files exceptions with the Board based upon such withholding, make the entire text available to the Board for the purpose of determining the correctness of the ruling of the Administrative Law Judge. If the General Counsel elects not to comply with an order of the Administrative Law Judge directing delivery to the Respondent of any statement, or portion thereof as the Administrative Law Judge may direct, the Administrative Law Judge will strike from the record the testimony of the witness.

(f) *Production of statement in postelection hearings.* The provisions of paragraph (e) of this section will also apply after any witness has testified in any postelection hearing pursuant to § 102.69(d) and any party has moved for the production of any statement, as defined in paragraph (g) of this section, of the witness in possession of any agent of the Board which relates to the subject matter as to which the witness has testified. The authority exercised by the Administrative Law Judge under paragraph (e) of this section will be exercised by the Hearing Officer presiding.

(g) *Definition of statement.* The term *statement* as used in this section means:

(1) A written statement made by the witness and signed or otherwise adopted or approved by the witness; or

(2) A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by the witness to an agent of the party obligated to produce the statement and recorded contemporaneously with the making of the oral statement.

§ 102.119 Privacy Act Regulations: notification as to whether a system of records contains records pertaining to requesting individuals; requests for access to records, amendment of requests; fees for document duplication; files and records exempted from certain Privacy Act requirements.

(a)(1) An individual will be informed whether a system of records maintained by the Agency contains a record pertaining to such individual. An inquiry may be made in writing or in person during normal business hours to the official of the Agency designated for that purpose and at the address set forth in a notice of a system of records published by this Agency, in a Notice of Systems of Government-wide Personnel Records published by the Office of Personnel Management, or in a Notice of Government-wide Systems of Records published by the Department of Labor. Copies of such notices, and assistance in preparing an inquiry, may be obtained from any Regional Office of the Board or at the Board offices in Washington, DC. The inquiry may contain sufficient information, as defined in the notice, to identify the record.

(2) Reasonable verification of the identity of the inquirer, as described in paragraph (e) of this section, will be required to assure that information is disclosed to the proper person. The Agency will acknowledge the inquiry in writing within 10 days (excluding Saturdays, Sundays, and legal public holidays) and, wherever practicable, the acknowledgment will supply the information requested. If, for good cause shown, the Agency cannot supply the information within 10 days, the inquirer will within that time period be notified in writing of the reasons therefor and when it is anticipated the information will be supplied. An acknowledgment will not be provided when the information is supplied within the 10-day period. If the Agency refuses to inform an individual whether a system of records contains a record pertaining to an individual, the inquirer will be notified in writing of that determination and the reasons therefor, and of the right to obtain review of that determination under the provisions of paragraph (f) of this section. The provisions of this paragraph (a)(2) do not apply to the extent that requested information from the relevant system of records has been exempted from this Privacy Act requirement.

(b)(1) An individual will be permitted access to records pertaining to such individual contained in any system of records described in the notice of system of records published by the Agency, or access to the accounting of disclosures from such records. The request for access must be made in writing or in person during normal business hours to the person designated for that purpose and at the address set forth in the published notice of system of records. Copies of such notices, and assistance in preparing a request for access, may be obtained from any Regional Office of the Board or at the Board offices in Washington, DC. Reasonable verification of the identity of the requester, as described in paragraph (e) of this section, will be required to assure that records are disclosed to the proper person. A request for access to records or the accounting of disclosures from such records will be acknowledged in writing by the Agency within 10 days of receipt (excluding Saturdays, Sundays, and legal public holidays) and, wherever practicable, the acknowledgment will inform the requester whether access will be granted and, if so, the time and location at which the records or accounting will be made available. If access to the record of accounting is to be granted, the record or accounting will normally be provided within 30 days (excluding Saturdays, Sundays, and legal public holidays) of the request, unless for good cause shown the Agency is unable to do so, in which case the individual will be informed in writing within that 30-day period of the reasons therefor and when it is anticipated that access will be granted. An acknowledgment of a request will not be provided if the record is made available within the 10-day period.

(2) If an individual's request for access to a record or an accounting of disclosure from such a record under the provisions of this paragraph (b) is denied, the notice informing the individual of the denial will set forth the reasons therefor and advise the individual of the right to obtain a review of that determination under the provisions of paragraph (f) of this section. The provisions of this paragraph (b)(2) do not apply to the extent that requested information from the relevant system of records has been exempted from this Privacy Act requirement.

(c) An individual granted access to records pertaining to such individual contained in a system of records may review all such records. For that purpose, the individual may be accompanied by a person of the individual's choosing, or the record may be released to the individual's representative who has written consent of the individual, as described in paragraph (e) of this section. A first copy of any such record or information will ordinarily be provided without charge to the individual or representative in a form comprehensible to the individual. Fees for any other copies of requested records will be assessed at the rate of 12 cents for each sheet of duplication.

(d) An individual may request amendment of a record pertaining to such individual in a system of records maintained by the Agency. A request for amendment of a record must be in writing and submitted during normal business hours to the person designated for that purpose and at the address set forth in the published notice for the system of records containing the record of which amendment is sought. Copies of such notices, and assistance in preparing a request for amendment, may be obtained from any Regional Office of the Board or at the Board offices in Washington, DC. The requester must provide verification of identity as described in paragraph (e) of this section, and the request must set forth the specific amendment requested and the reason for the requested amendment. The Agency will acknowledge in writing receipt of the request within 10 days of receipt (excluding Saturdays, Sundays, and legal public holidays) and, whenever practicable, the acknowledgement will advise the individual of the determination of the request. If the review of the request for amendment cannot be completed and a determination made within 10 days, the review will be completed as soon as possible, normally within 30 days (Saturdays, Sundays, and legal public holidays excluded) of receipt of the request unless unusual circumstances preclude completing the review within that time, in which event the requester will be notified in writing within that 30-day period of the reasons for the delay and when the determination of the request may be expected. If the determination is to amend the record, the requester will be so notified in writing and the record will be amended in accordance with that determination. If any disclosures accountable under the provisions of 5 U.S.C. 552a(c) have been made, all previous recipients of the record which was amended must be advised of the amendment and its substance. If it is determined that the request may not be granted, the requester will be notified in writing of that determination and of the reasons therefor, and advised of the right to obtain review of the adverse determination under the provisions of paragraph (f) of this section. The provisions of this paragraph (d) do not apply to the extent that requested information from the relevant system of records has been exempted from this Privacy Act requirement.

(e) Verification of the identification of individuals required under paragraphs (a), (b), (c), and (d) of this section to assure that records are disclosed to the proper person will be required by the Agency to an extent consistent with the nature, location, and sensitivity of the records being disclosed. Disclosure of a record to an individual will normally be made upon the presentation of acceptable identification. Disclosure of records by mail may be made on the basis of the identifying information set forth in the request. Depending on the nature, location, and sensitivity of the requested record, a signed notarized statement verifying identity may be required by the Agency. Proof of authorization as representative to have access to a record of an individual must be in writing, and a signed notarized statement of such authorization may be required by the Agency if the record requested is of a sensitive nature.

(f)(1) Review may be obtained with respect to:

(i) A refusal, under paragraph (a) or (g) of this section, to inform an individual if a system of records contains a record concerning that individual;

(ii) A refusal, under paragraph (b) or (g) of this section, to grant access to a record or an accounting of disclosure from such a record; or

(iii) A refusal, under paragraph (d) of this section, to amend a record.

(iv) The request for review may be made to the Chairman of the Board if the system of records is maintained in the office of a Member of the Board, the Office of the Executive Secretary, the Office of the Solicitor, the Office of Congressional and Public Affairs, or the Division of Administrative Law Judges. Consistent with the provisions of Section 3(d) of the Act, and the delegation of authority from the Board to the General Counsel, the request may be made to the General Counsel if the system of records is maintained by an office of the Agency other than those enumerated above. Either the Chairman of the Board or the General Counsel may designate in writing another officer of the Agency to review the refusal of the request. Such review will be completed within 30 days (excluding Saturdays, Sundays, and legal public holidays)

from the receipt of the request for review unless the Chairman of the Board or the General Counsel, as the case may be, for good cause shown, extends such 30-day period.

(2) If, upon review of a refusal under paragraph (a) or (g) of this section, the reviewing officer determines that the individual may be informed of whether a system of records contains a record pertaining to that individual, such information will be promptly provided. If the reviewing officer determines that the information was properly denied, the individual will be so informed in writing with a brief statement of the reasons therefor.

(3) If, upon review of a refusal under paragraph (b) or (g) of this section, the reviewing officer determines that access to a record or to an accounting of disclosures may be granted, the requester will be so notified and the record or accounting will be promptly made available to the requester. If the reviewing officer determines that the request for access was properly denied, the individual will be so informed in writing with a brief statement of the reasons therefor, and of the right to judicial review of that determination under the provisions of 5 U.S.C. 552a(g)(1)(B).

(4) If, upon review of a refusal under paragraph (i) of this section, the reviewing official grants a request to amend, the requester will be so notified, the record will be amended in accordance with the determination, and, if any disclosures accountable under the provisions of 5 U.S.C. 552a(c) have been made, all previous recipients of the record which was amended will be advised of the amendment and its substance. If the reviewing officer determines that the denial of a request for amendment may be sustained, the Agency will advise the requester of the determination and the reasons therefor, and that the individual may file with the Agency a concise statement of the reason for disagreeing with the determination, and may seek judicial review of the Agency's denial of the request to amend the record. In the event a statement of disagreement is filed, that statement:

(i) Will be made available to anyone to whom the record is subsequently disclosed together with, at the discretion of the Agency, a brief statement summarizing the Agency's reasons for declining to amend the record; and

(ii) Will be supplied, together with any Agency statements, to any prior recipients of the disputed record to the extent that an accounting of disclosure was made.

(g) To the extent that portions of systems of records described in notices of Government-wide systems of records published by the Office of Personnel Management are identified by those notices as being subject to the management of an officer of this Agency, or an officer of the Agency is designated as the official to contact for information, access, or contents of those records, individual requests for access to those records, requests for their amendment, and review of denials of requests for amendment will be in accordance with the provisions of 5 CFR 297.101 through 297.501, as promulgated by the Office of Personnel Management. To the extent that portions of systems of records described in notices of Government-wide systems of records published by the Department of Labor are identified by those notices as being subject to the management of an officer of the Agency, or an officer of the Agency is designated as the official to contact for information, access, or contents of those records, individual requests for access to those records, requests for their amendment, and review of denials of requests for amendment will be in accordance with the provisions of this section. Review of a refusal to inform an individual whether such a system of records contains a record pertaining to that individual and review of a refusal to grant an individual's request for access to a record in such a system may be obtained in accordance with the provisions of paragraph (f) of this section.

(h) Pursuant to 5 U.S.C. 552a(j)(2), the system of records maintained by the Office of the Inspector General of the National Labor Relations Board that contains Investigative Files will be exempted from the provisions of 5 U.S.C. 552a, except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i), from 29 CFR 102.117(c) and (d), and from 29 CFR 102.119(a), (b), (c), (d), (e), and (f), insofar as the system contains investigatory material compiled for criminal law enforcement purposes.

(i) Pursuant to 5 U.S.C. 552a(k)(2), the system of records maintained by the Office of the Inspector General of the National Labor Relations Board that contains the Investigative Files must be exempted from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f), from 29 CFR 102.117(c) and (d), and from 29 CFR 102.119(a), (b), (c), (d), (e), and (f), insofar as the system contains investigatory material compiled for law enforcement purposes not within the scope of the exemption at 29 CFR 102.119(h).

(j) Privacy Act exemptions contained in paragraphs (h) and (i) of this section are justified for the following reasons:

(1) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at that individual's request. These accountings must state the date, nature, and purpose of each disclosure of a record and the name and address of the recipient. Accounting for each disclosure would alert the subjects of an investigation to the existence of the investigation and the fact that they are subjects of the investigation. The release of such information to the subjects of an investigation would provide them with significant information concerning the nature of the investigation and could seriously impede or compromise the investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel, and their families and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

(2) 5 U.S.C. 552a(c)(4) requires an agency to inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of the Act. Since this system of records is being exempted from subsection (d) of the Act, concerning access to records, this section is inapplicable to the extent that this system of records will be exempted from subsection (d) of the Act.

(3) 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to the individual, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such records. Granting access to records in this system of records could inform the subject of an investigation of an actual or potential criminal violation, of the existence of that investigation, of the nature and scope of the information and evidence obtained as to the individual's activities, or of the identity of confidential sources, witnesses, and law enforcement personnel and could provide information to enable the subject to avoid detection or apprehension. Granting access to such information could seriously impede or compromise an investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel, and their families, lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony, and disclose investigative

techniques and procedures. In addition, granting access to such information could disclose classified, security-sensitive, or confidential business information and could constitute an unwarranted invasion of the personal privacy of others.

(4) 5 U.S.C. 552a(e)(1) requires each agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. The application of this provision could impair investigations and law enforcement because it is not always possible to detect the relevance or necessity of specific information in the early stages of an investigation. Relevance and necessity are often questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established. In addition, during the course of the investigation, the investigator may obtain information which is incidental to the main purpose of the investigative jurisdiction of another agency. Such information cannot readily be segregated. Furthermore, during the course of the investigation, the investigator may obtain information concerning the violation of laws other than those which are within scope of the investigator's jurisdiction. In the interest of effective law enforcement, OIG investigators may retain this information, since it can aid in establishing patterns of criminal activity and can provide valuable leads for other law enforcement agencies.

(5) 5 U.S.C. 552a(e)(2) requires an agency to collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs. The application of this provision could impair investigations and law enforcement by alerting the subject of an investigation, thereby enabling the subject to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Moreover, in certain circumstances, the subject of an investigation cannot be required to provide information to investigators and information must be collected from other sources. Furthermore, it is often necessary to collect information from sources other than the subject of the investigation to verify the accuracy of the evidence collected.

(6) 5 U.S.C. 552a(e)(3) requires an agency to inform each person whom it asks to supply information, on a form that can be retained by the person, of the authority under which the information is sought and whether disclosure is mandatory or voluntary; of the principal purposes for which the information is intended to be used; of the routine uses which may be made of the information; and of the effects on the person, if any, of not providing all or any part of the requested information. The application of this provision could provide the subject of an investigation with substantial information about the nature of that investigation that could interfere with the investigation. Moreover, providing such a notice to the subject of an investigation could seriously impede or compromise an undercover investigation by revealing its existence and could endanger the physical safety of confidential sources, witnesses, and investigators by revealing their identities.

(7) 5 U.S.C. 552a(e)(4)(G) and (H) require an agency to publish a **Federal Register** notice concerning its procedures for notifying an individual, at the individual's request, if the system of records contains a record pertaining to the individual, how to gain access to such a record, and how to contest its content. Since this system of records is being exempted from subsection (f) of the Act, concerning agency rules, and subsection (d) of the Act, concerning access to records, these requirements are inapplicable to the extent that this system of records will be exempt from subsections (f) and (d) of the Act. Although the system would be exempt from these requirements, OIG has published information concerning its notification, access, and contest procedures because, under certain circumstances, OIG could decide it is appropriate for an individual to have access to all or a portion of the individual's records in this system of records.

(8) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a **Federal Register** notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of the sources of information, to protect the privacy and physical safety of confidential sources and witnesses, and to avoid the disclosure of investigative techniques and procedures. Although the system will be exempt from this requirement, OIG has published such a notice in broad generic terms.

(9) 5 U.S.C. 552a(e)(5) requires an agency to maintain its records with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in making any determination about the individual. Since the Act defines *maintain* to include the collection of information, complying with this provision could prevent the collection of any data not shown to be accurate, relevant, timely, and complete at the moment it is collected. In collecting information for criminal law enforcement purposes, it is not possible to determine in advance what information is accurate, relevant, timely, and complete. Facts are first gathered and then placed into a logical order to prove or disprove objectively the criminal behavior of an individual. Material which seems unrelated, irrelevant, or incomplete when collected can take on added meaning or significance as the investigation progresses. The restrictions of this provision could interfere with the preparation of a complete investigative report, thereby impeding effective law enforcement.

(10) 5 U.S.C. 552a(e)(8) requires an agency to make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record. Complying with this provision could prematurely reveal an ongoing criminal investigation to the subject of the investigation.

(11) 5 U.S.C. 552a(f)(1) requires an agency to promulgate rules that establish procedures whereby an individual can be notified in response to the individual's request if any system of records named by the individual contains a record pertaining to the individual. The application of this provision could impede or compromise an investigation or prosecution if the subject of an investigation were able to use such rules to learn of the existence of an investigation before it could be completed. In addition, mere notice of the fact of an investigation could inform the subject and others that their activities are under or may become the subject of an investigation and could enable the subjects to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Since this system would be exempt from subsection (d) of the Act, concerning access to records, the requirements of subsection (f)(2) through (5) of the Act, concerning agency rules for obtaining access to such records, are inapplicable to the extent that this system of records will be exempted from subsection (d) of the Act. Although this system would be exempt from the requirements of

subsection (f) of the Act, OIG has promulgated rules which establish agency procedures because, under certain circumstances, it could be appropriate for an individual to have access to all or a portion of the individual's records in this system of records.

(12) 5 U.S.C. 552a(g) provides for civil remedies if an agency fails to comply with the requirements concerning access to records under subsections (d)(1) and (3) of the Act; maintenance of records under subsection (e)(5) of the Act; and any other provision of the Act, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual. Since this system of records would be exempt from subsections (c) (3) and (4), (d), (e)(1), (2), and (3) and (4)(G) through (I), (e)(5), and (8), and (f) of the Act, the provisions of subsection (g) of the Act would be inapplicable to the extent that this system of records will be exempted from those subsections of the Act.

(k) Pursuant to 5 U.S.C. 552a(k)(2), the system of records maintained by the NLRB containing Agency Disciplinary Case Files (Nonemployees) are exempt from the provisions of 5 U.S.C. 552a (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I), and (f) insofar as the system contains investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2).

(l) The Privacy Act exemption set forth in paragraph (k) of this section is claimed on the ground that the requirements of subsections (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I), and (f) of the Privacy Act, if applied to Agency Disciplinary Case Files, would seriously impair the ability of the NLRB to conduct investigations of alleged or suspected violations of the NLRB's misconduct rules, as set forth in paragraphs (j)(1), (3), (4), (7), (8), and (11) of this section.

(m) Pursuant to 5 U.S.C. 552a(k)(2), investigatory material compiled for law enforcement purposes that is contained in the Next Generation Case Management System (NxGen) (NLRB–33), are exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f). This information was formerly contained within the following legacy systems, which remain accessible and which also are exempt pursuant to 5 U.S.C. 552a(k)(2), as follows:

(1) The following three legacy systems of records are exempt in their entirety from provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f), because the systems contain investigatory material compiled for law enforcement purposes, other than material within the scope of 5 U.S.C. 552a(j)(2): Case Activity Tracking System (CATS) and Associated Regional Office Files (NLRB–25), Regional Advice and Injunction Litigation System (RAILS) and Associated Headquarters Files (NLRB–28), and Appeals Case Tracking System (ACTS) and Associated Headquarters Files (NLRB–30).

(2) Pursuant to 5 U.S.C. 552a(k)(2), limited categories of information from the following four systems of records are exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f), insofar as the systems contain investigatory material compiled for law enforcement purposes, other than material within the scope of 5 U.S.C. 552a(j)(2):

(i) The legacy Judicial Case Management Systems-Pending Case List (JCMS–PCL) and Associated Headquarters Files (NLRB–21)—information relating to requests to file injunctions under 29 U.S.C. 160(j), requests to initiate federal court contempt proceedings, certain requests that the Board initiate litigation or intervene in non-Agency litigation, and any other investigatory material compiled for law enforcement purposes;

(ii) The legacy Solicitor's System (SOL) and Associated Headquarters Files (NLRB–23)—information relating to requests to file injunctions under 29 U.S.C. 160(j), requests to initiate federal court contempt proceedings, certain requests that the Board initiate litigation or intervene in non-Agency litigation, and any other investigatory material compiled for law enforcement purposes;

(iii) The legacy Special Litigation Case Tracking System (SPLIT) and Associated Headquarters Files (NLRB–27)—information relating to investigative subpoena enforcement cases, injunction and mandamus actions regarding Agency cases under investigation, bankruptcy case information in matters under investigation, Freedom of Information Act cases involving investigatory records, certain requests that the Board initiate litigation or intervene in non-Agency litigation, and any other investigatory material compiled for law enforcement purposes; and

(iv) The Freedom of Information Act Tracking System (FTS) and Associated Agency Files (NLRB–32)—information requested under the Freedom of Information Act, 5 U.S.C. 552, that relates to the Agency's investigation of unfair labor practice and representation cases or other proceedings described in paragraphs (m)(1) and (2) of this section.

(n) The reasons for exemption under 5 U.S.C. 552a(k)(2) are as follows:

(1) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at such individual's request. These accountings must state the date, nature, and purpose of each disclosure of a record, and the name and address of the recipient. Providing such an accounting of investigatory information to a party in an unfair labor practice or representation matter under investigation could inform that individual of the precise scope of an Agency investigation, or the existence or scope of another law enforcement investigation. Accordingly, this Privacy Act requirement could seriously impede or compromise either the Agency's investigation, or another law enforcement investigation, by causing the improper influencing of witnesses, retaliation against witnesses, destruction of evidence, or fabrication of testimony.

(2) 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to such individual, to request amendment to such records, to request review of an agency decision not to amend such records, and, where the Agency refuses to amend records, to submit a statement of disagreement to be included with the records. Such disclosure of investigatory information could seriously impede or compromise the Agency's investigation by revealing the identity of confidential sources or confidential business information, or causing the improper influencing of witnesses, retaliation against witnesses, destruction of evidence, fabrication of testimony, or unwarranted invasion of the privacy of others. Amendment of the records could interfere with ongoing law enforcement proceedings and impose an undue administrative burden by requiring investigations to be continuously reinvestigated.

(3) 5 U.S.C. 552a(e)(1) requires an agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. This requirement could foreclose investigators from acquiring or receiving information the relevance and necessity of which is not readily apparent and could only be ascertained after a complete review and evaluation of all the evidence.

(4) 5 U.S.C. 552a(e)(4)(G) and (H) require an agency to publish a **Federal Register** notice concerning its procedures for notifying an individual, at the individual's request, if the system of records contains a record pertaining

to the individual, for gaining access to such a record, and for contesting its content. Because certain information from these systems of records is exempt from subsection (d) of the Act concerning access to records, and consequently, from subsection (f) of the Act concerning Agency rules governing access, these requirements are inapplicable to that information.

(5) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a **Federal Register** notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of sources of information, to protect against the disclosure of investigative techniques and procedures, to avoid threats or reprisals against informers by subjects of investigations, and to protect against informers refusing to give full information to investigators for fear of having their identities as sources revealed.

(6) 5 U.S.C. 552a(f) requires an agency to promulgate rules for notifying individuals of Privacy Act rights granted by subsection (d) of the Act concerning access and amendment of records. Because certain information from these systems is exempt from subsection (d) of the Act, the requirements of subsection (f) of the Act are inapplicable to that information.

Subpart L—Post-Employment Restrictions on Activities by Former Officers and Employees

Sec.
102.120 Post-employment restrictions on activities by former officers and employees.

§ 102.120 Post-employment restrictions on activities by former officers and employees.

Former officers and employees of the Agency who were attached to any of its Regional Offices or the Washington staff are subject to the applicable post-employment restrictions imposed by 18 U.S.C. 207. Guidance concerning those restrictions may be obtained from the Designated Agency Ethics Officer and any applicable regulations issued by the Office of Government Ethics.

Subpart M—Construction of Rules

Sec.
102.121 Rules to be liberally construed.
102.122 and 102.123 [Reserved]

§ 102.121 Rules to be liberally construed.

The Rules and Regulations in this part will be liberally construed to effectuate the purposes and provisions of the Act.

§§ 102.122 and 102.123 [Reserved]

Subpart N—[Removed and Reserved]

■ 18. Remove and reserve subpart N.

■ 19. Revise subpart O to read as follows:

Subpart O—Amendments

Sec.
102.124 Petitions for issuance, amendment, or repeal of rules.
102.125 Action on petition.

§ 102.124 Petitions for issuance, amendment, or repeal of rules.

Any interested person may petition the Board, in writing, for the issuance, amendment, or repeal of a rule or regulation. An original of such petition must be filed with the Board and must state the rule or regulation proposed to be issued, amended, or repealed, together with a statement of grounds in support of such petition.

§ 102.125 Action on petition.

Upon the filing of such petition, the Board will consider the same and may either grant or deny the petition in whole or in part, conduct an appropriate hearing thereon, or make other disposition of the petition. Should the petition be denied in whole or in part, prompt notice will be given of the denial, accompanied by a simple statement of the grounds unless the denial is self-explanatory.

Subpart P—*Ex Parte* Communications

■ 20. Revise § 102.126 to read as follows:

§ 102.126 Unauthorized communications.

(a) No interested person outside this Agency may, in an on-the-record proceeding of the types defined in § 102.128, make or knowingly cause to be made any prohibited *ex parte* communication to Board agents of the categories designated in that Section relevant to the merits of the proceeding.

(b) No Board agent of the categories defined in § 102.128, participating in a particular proceeding as defined in that section, may:

(i) Request any prohibited *ex parte* communications; or

(ii) Make or knowingly cause to be made any prohibited *ex parte* communications about the proceeding to any interested person outside this Agency relevant to the merits of the proceeding.

■ 21. Revise § 102.127(a) to read as follows:

§ 102.127 Definitions.

* * * * *

(a) The term *person outside this Agency,* to whom the prohibitions apply includes any individual outside this Agency, partnership, corporation, association, or other entity, or an agent thereof, and the General Counsel or the General Counsel's representative when prosecuting an unfair labor practice proceeding before the Board pursuant to Section 10(b) of the Act.

* * * * *

■ 22. Revise §§ 102.128 through 102. to read as follows:

Sec.
102.128 Types of on-the-record proceedings; categories of Board agents; duration of prohibition.
102.129 Communications prohibited.
102.130 Communications not prohibited.
102.131 Solicitation of prohibited communications.
102.132 Reporting of prohibited communications; penalties.
102.133 Penalties and enforcement.

§ 102.128 Types of on-the-record proceedings; categories of Board agents; duration of prohibition.

Unless otherwise provided by specific order of the Board entered in the proceeding, the prohibition of § 102.126 will be applicable in the following types of on-the-record proceedings to unauthorized *ex parte* communications made to the designated categories of Board agents who participate in the decision, from the stage of the proceeding specified until the issues are finally resolved by the Board for the purposes of that proceeding under prevailing rules and practices:

(a) In a pre-election proceeding pursuant to Section 9(c)(1) or 9(e), or in a unit clarification or certification amendment proceeding pursuant to Section 9(b) of the Act, in which a formal hearing is held, communications to the Regional Director and the Director's staff who review the record and prepare a draft of the decision, and Board Members and their staff, from the time the hearing is opened.

(b) In a postelection proceeding pursuant to Section 9(c)(1) or 9(e) of the Act, in which a formal hearing is held, communications to the Hearing Officer, the Regional Director and the Director's staff who review the record and prepare a draft of the report or decision, and Board Members and their staff, from the time the hearing is opened.

(c) In a postelection proceeding pursuant to Section 9(c)(1) or 9(e), or in a unit clarification or certification amendment proceeding pursuant to Section 9(b) of the Act, in which no formal hearing is held, communications to Board Members and their staff, from the time the Regional Director's report or decision is issued.

(d) In a proceeding pursuant to Section 10(k) of the Act, communications to Board Members and their staff, from the time the hearing is opened.

(e) In an unfair labor practice proceeding pursuant to Section 10(b) of the Act, communications to the Administrative Law Judge assigned to hear the case or to make rulings upon any motions or issues therein and Board Members and their staff, from the time the complaint and/or Notice of Hearing is issued, or the time the communicator has knowledge that a complaint or Notice of Hearing will be issued, whichever occurs first.

(f) In any other proceeding to which the Board by specific order makes the prohibition applicable, to the categories of personnel and from the stage of the proceeding specified in the order.

§ 102.129 Communications prohibited.

Except as provided in § 102.130, *ex parte* communications prohibited by § 102.126 include:

(a) Such communications, when written, if copies are not contemporaneously served by the communicator on all parties to the proceeding in accordance with the provisions of § 102.5(g).

(b) Such communications, when oral, unless advance notice is given by the communicator to all parties in the proceeding and adequate opportunity afforded to them to be present.

§ 102.130 Communications not prohibited.

Ex parte communications prohibited by § 102.126 do not include oral or written communications or requests:

(a) Which relate solely to matters which the Hearing Officer, Regional Director, Administrative Law Judge, or Board Member is authorized by law or Board Rules to entertain or dispose of on an *ex parte* basis.

(b) For information solely with respect to the status of a proceeding.

(c) Which all the parties to the proceeding agree, or which the responsible official formally rules, may be made on an *ex parte* basis.

(d) Proposing settlement or an agreement for disposition of any or all issues in the proceeding.

(e) Which concern matters of general significance to the field of labor-management relations or administrative practice and which are not specifically related to pending on-the-record proceedings.

(f) From the General Counsel to the Board when the General Counsel is acting as counsel for the Board.

§ 102.131 Solicitation of prohibited communications.

No person may knowingly and willfully solicit the making of an unauthorized *ex parte* communication by any other person.

§ 102.132 Reporting of prohibited communications; penalties.

(a) Any Board agent of the categories defined in § 102.128 to whom a prohibited oral *ex parte* communication is attempted to be made shall refuse to listen to the communication, inform the communicator of this rule, and advise the communicator that anything may be said in writing with copies to all parties. Any Board agent who receives, or who makes or knowingly causes to be made, an unauthorized *ex parte* communication will place or cause to be placed on the public record of the proceeding:

(1) The communication, if it was written;

(2) A memorandum stating the substance of the communication, if it was oral;

(3) All written responses to the prohibited communication; and

(4) Memoranda stating the substance of all oral responses to the prohibited communication.

(b) The Executive Secretary, if the proceeding is then pending before the Board, the Administrative Law Judge, if the proceeding is then pending before any such judge, or the Regional Director, if the proceeding is then pending before a Hearing Officer or the Regional Director, will serve copies of all such materials placed on the public record of the proceeding on all other parties to the proceeding and on the attorneys of record for the parties. Within 14 days after service of such copies, any party may file with the Executive Secretary, Administrative Law Judge, or Regional Director serving the communication, and serve on all other parties, a statement setting forth facts or contentions to rebut those contained in the prohibited communication. All such responses will be placed in the public record of the proceeding, and provision may be made for any further action, including reopening of the record which may be required under the circumstances. No action taken pursuant to this provision will constitute a waiver of the power of the Board to impose an appropriate penalty under § 102.133.

§ 102.133 Penalties and enforcement.

(a) Where the nature and circumstances of a prohibited communication made by or caused to be made by a party to the proceeding are such that the interests of justice and statutory policy may require remedial action, the Board, the Administrative Law Judge, or the Regional Director, as the case may be, may issue to the party making the communication a Notice to Show Cause, returnable before the Board within a stated period not less than 7 days from the date of issuance, why the Board may not determine that the interests of justice and statutory policy require that the claim or interest in the proceeding of a party who knowingly makes a prohibited communication, or knowingly causes a prohibited communication to be made may be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(b) Upon notice and hearing, the Board may censure, suspend, or revoke the privilege of practice before the Agency of any person who knowingly and willfully makes or solicits the making of a prohibited *ex parte* communication. However, before the Board institutes formal proceedings under this paragraph (b), it will first advise the person or persons concerned in writing that it proposes to take such action and that they may show cause, within a period to be stated in such written advice, but not less than 7 days from the date thereof, why it may not take such action.

(c) The Board may censure, or, to the extent permitted by law, suspend, dismiss, or institute proceedings for the dismissal of, any Board agent who knowingly and willfully violates the prohibitions and requirements of this rule.

§ 102.134 [Added and Reserved]

■ 23. Add reserved § 102.134 to subpart P.

■ 24. Revise subparts Q through S to read as follows:

Subpart Q—Procedure Governing Matters Affecting Employment-Management Agreements Under the Postal Reorganization Act

Sec.
102.135 Postal Reorganization Act.

§ 102.135 Postal Reorganization Act.

(a) *Employment-management agreements.* All matters within the jurisdiction of the National Labor Relations Board pursuant to the Postal Reorganization Act (chapter 12 of title 39, U.S. Code, as revised) are governed by the provisions of subparts A, B, C, D, F, G, H, J, K, L, M, O, and P of this part, insofar as applicable.

(b) *Inconsistencies.* To the extent that any provision of this subpart is

inconsistent with any provision of title 39, United States Code, the provision of title 39 governs.

(c) *Exceptions.* For the purposes of this subpart, references in the subparts cited in paragraphs (a) and (b) of this section to:

(1) *Employer* is deemed to include the Postal Service;

(2) *Act* will in the appropriate context mean *Postal Reorganization Act;*

(3) *Section 9(c) of the Act* and cited paragraphs will mean *39 U.S.C. 1203(c) and 1204;* and

(4) *Section 9(b) of the Act* will mean *39 U.S.C. 1202.*

Subpart R—Advisory Committees

Sec.

102.136 Establishment and use of advisory committees.

§ 102.136 Establishment and use of advisory committees.

Advisory committees may from time to time be established or used by the Agency in the interest of obtaining advice or recommendations on issues of concern to the Agency. The establishment, use, and functioning of such committees will be in accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 2, applicable Rules and Regulations.

Subpart S—Open Meetings

Sec.

102.137 Public observation of Board meetings.
102.138 Definition of *meeting.*
102.139 Closing of meetings; reasons.
102.140 Action necessary to close meeting; record of votes.
102.141 Notice of meetings; public announcement and publication.
102.142 Transcripts, recordings, or minutes of closed meetings; public availability; retention.

§ 102.137 Public observation of Board meetings.

Every portion of every meeting of the Board will be open to public observation, except as provided in § 102.139, and Board Members will not jointly conduct or dispose of Agency business other than in accordance with the provisions of this subpart.

§ 102.138 Definition of *meeting*.

For purposes of this subpart, *meeting* means the deliberations of at least three Members of the full Board, or the deliberations of at least two Members of any group of three Board Members to whom the Board has delegated powers which it may itself exercise, where such deliberations determine or result in the joint conduct or disposition of official Agency business, but does not include deliberations to determine whether a meeting may be closed to public observation in accordance with the provisions of this subpart.

§ 102.139 Closing of meetings; reasons.

(a) Except where the Board determines that the public interest requires otherwise, meetings, or portions thereof, will not be open to public observation where the deliberations concern the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition by the Board of particular representation or unfair labor practice proceedings under Section 8, 9, or 10 of the Act, or any court proceedings collateral or ancillary thereto.

(b) Meetings, or portions thereof, may also be closed by the Board, except where it determines that the public interest requires otherwise, when the deliberations concern matters or information falling within the reasons for closing meetings specified in 5 U.S.C. 552b(c)(1) (secret matters concerning national defense or foreign policy); (c)(2) (internal personnel rules and practices); (c)(3) (matters specifically exempted from disclosure by statute); (c)(4) (privileged or confidential trade secrets and commercial or financial information); (c)(5) (matters of alleged criminal conduct or formal censure); (c)(6) (personal information where disclosure would cause a clearly unwarranted invasion of personal privacy); (c)(7) (certain materials or information from investigatory files compiled for law enforcement purposes); or (c)(9)(B) (disclosure would significantly frustrate implementation of a proposed Agency action).

§ 102.140 Action necessary to close meeting; record of votes.

A meeting will be closed to public observation under § 102.139, only when a majority of the Board Members who will participate in the meeting vote to take such action.

(a) When the meeting deliberations concern matters specified in § 102.139(a), the Board Members will vote at the beginning of the meeting, or portion of the meeting, on whether to close such meeting, or portion of the meeting, to public observation, and on whether the public interest requires that a meeting which may properly be closed may nevertheless be open to public observation. A record of such vote, reflecting the vote of each Board Member, will be kept and made available to the public at the earliest practicable time.

(b) When the meeting deliberations concern matters specified in § 102.139(b), the Board will vote on whether to close such meeting, or portion of the meeting, to public observation, and on whether there is a public interest which requires that a meeting which may properly be closed may nevertheless be open to public observation. The vote will be taken at a time sufficient to permit inclusion of information concerning the open or closed status of the meeting in the public announcement of the vote. A single vote may be taken with respect to a series of meetings at which the deliberations will concern the same particular matters where such subsequent meetings are scheduled to be held within 30 days after the initial meeting. A record of such vote, reflecting the vote of each Board Member, will be kept and made available to the public within one day after the vote is taken.

(c) Whenever any person whose interests may be directly affected by deliberations during a meeting, or a portion of a meeting, requests that the Board close the meeting, or a portion of the meeting, to public observation for any of the reasons specified in 5 U.S.C. 552b(c)(5) (matters of alleged criminal conduct or formal censure), (c)(6) (personal information where disclosure would cause a clearly unwarranted invasion of personal privacy), or (c)(7) (certain materials or information from investigatory files compiled for law enforcement purposes), the Board Members participating in the meeting, upon request of any one of its Members, will vote on whether to close such meeting, or a portion of the meeting, for that reason. A record of such vote, reflecting the vote of each Board Member participating in the meeting will be kept and made available to the public within 1 day after the vote is taken.

(d) After public announcement of a meeting as provided in § 102.141, a meeting, or portion of a meeting, announced as closed may be opened, or a meeting, or portion of a meeting, announced as open may be closed, only if a majority of the Board Members who will participate in the meeting determine by a recorded vote that Board business so requires and that an earlier announcement of the change was not possible. The change made and the vote of each Board Member on the change will be announced publicly at the earliest practicable time.

(e) Before a meeting may be closed pursuant to § 102.139, the Solicitor of the Board will certify that in the Solicitor's opinion the meeting may

properly be closed to public observation. The certification will set forth each applicable exemptive provision for such closing. Such certification will be retained by the Agency and made publicly available as soon as practicable.

§ 102.141 Notice of meetings; public announcement and publication.

(a) A public announcement setting forth the time, place, and subject matter of meetings or portions of meetings closed to public observation pursuant to the provisions of § 102.139(a) will be made at the earliest practicable time.

(b) Except for meetings closed to public observation pursuant to the provisions of § 102.139(a), the Agency will publicly announce each meeting to be held at least 7 days before the scheduled date of the meeting. The announcement will specify the time, place, and subject matter of the meeting, whether it is to be open to public observation or closed, and the name, address, and phone number of an Agency official designated to respond to requests for information about the meeting. The 7-day period for advance notice may be shortened only upon a determination by a majority of the Board Members who will participate in the meeting that Agency business requires that such meeting be called at an earlier date, in which event the public announcements will be made at the earliest practicable time. A record of the vote to schedule a meeting at an earlier date will be kept and made available to the public.

(c) Within 1 day after the vote to close a meeting, or any portion of a meeting, pursuant to the provisions of § 102.139(b), the Agency will make publicly available a full written explanation of its action closing the meeting, or portion of a meeting, together with a list of all persons expected to attend the meeting and their affiliation.

(d) If after public announcement required by paragraph (b) of this section has been made, the time and place of the meeting are changed, a public announcement will be made at the earliest practicable time. The subject matter of the meeting may be changed after the public announcement only if a majority of the Members of the Board who will participate in the meeting determine that Agency business so requires and that no earlier announcement of the change was possible. When such a change in subject matter is approved a public announcement of the change will be made at the earliest practicable time. A record of the vote to change the subject matter of the meeting will be kept and made available to the public.

(e) All announcements or changes issued pursuant to the provisions of paragraphs (b) and (d) of this section, or pursuant to provisions of § 102.140(d), will be submitted for publication in the **Federal Register** immediately following their release to the public.

(f) Announcements of meetings made pursuant to the provisions of this section shall be made publicly available by the executive secretary.

§ 102.142 Transcripts, recordings, or minutes of closed meetings; public availability; retention.

(a) For every meeting or portion of a meeting closed under the provisions of § 102.139, the presiding officer will prepare a statement setting forth the time and place of the meeting and the persons present, which statement will be retained by the Agency. For each such meeting or portion of a meeting there will also be maintained a complete transcript or electronic recording of the proceedings, except that for meetings closed pursuant to § 102.139(a) the Board may, in lieu of a transcript or electronic recording, maintain a set of minutes fully and accurately summarizing any action taken, the reasons for taking the action, and views on the action taken, documents considered, and the Board Members' vote on each roll call vote.

(b) The Agency will promptly make available to the public copies of transcripts, recordings, or minutes maintained as provided in accordance with paragraph (a) of this section, except to the extent the items contain information which the Agency determines may be withheld pursuant to the provisions of 5 U.S.C. 552(c). Copies of transcripts or minutes, or transcriptions of electronic recordings including the identification of speakers, will, to the extent determined to be publicly available, be furnished to any person, subject to the payment of duplication costs in accordance with the schedule of fees set forth in § 102.117(c)(2)(iv), and the actual cost of transcription.

(c) The Agency will maintain a complete verbatim copy of the transcript, a complete electronic recording, or a complete set of the minutes for each meeting or portion of a meeting closed to the public, for a period of at least one year after the close of the Agency proceeding of which the meeting was a part, but in no event for a period of less than 2 years after such meeting.

Subpart T—Awards of Fees and Other Expenses

■ 25. Revise § 102.143(a) through (d) and (g) to read as follows:

§ 102.143 *Adversary adjudication* defined; entitlement to award; eligibility for award.

(a) The term *adversary adjudication,* as used in this subpart, means unfair labor practice proceedings pending before the Board on a complaint and backpay proceedings under §§ 102.52 through 102.59 pending before the Board on a Notice of Hearing at any time after October 1, 1984.

(b) A Respondent in an adversary adjudication who prevails in that proceeding, or in a significant and discrete substantive portion of that proceeding, and who otherwise meets the eligibility requirements of this section, is eligible to apply for an award of fees and other expenses allowable under the provisions of § 102.145.

(c) Applicants eligible to receive an award are as follows:

(1) An individual with a net worth of not more than $2 million;

(2) A sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in Section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, unit of local government, or public or private organization with a net worth of not more than $7 million and not more than 500 employees.

(d) For the purpose of eligibility, the net worth and number of employees of an applicant will be determined as of the date of the complaint in an unfair labor practice proceeding or the date of the Notice of Hearing in a backpay proceeding.

* * * * *

(g) The net worth and number of employees of the applicant and all of its affiliates will be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will

be considered an affiliate for purposes of this part, unless such treatment would be unjust and contrary to the purposes of the Equal Access to Justice Act (94 Stat. 2325) in light of the actual relationship between the affiliated entities. In addition, financial relationships of the applicant other than those described in this paragraph may constitute special circumstances that would make an award unjust.

* * * * *

■ 26. Revise § 102.145(b) and (c) to read as follows:

§ 102.145 Allowable fees and expenses.

* * * * *

(b) No award for the attorney or agent fees under these Rules may exceed $75 per hour. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or expert witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the following matters will be considered:

(1) If the attorney, agent, or expert witness is in practice, that person's customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or expert witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant; and

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the adversary adjudicative proceeding.

* * * * *

■ 27. Revise § 102.146 to read as follows:

§ 102.146 Rulemaking on maximum rates for attorney or agent fees.

Any person may file with the Board a petition under § 102.124 for rulemaking to increase the maximum rate for attorney or agent fees. The petition should specify the rate the petitioner believes may be established and explain fully why the higher rate is warranted by an increase in the cost of living or a special factor (such as the limited availability of qualified attorneys or agents for the proceedings involved).

■ 28. Revise § 102.147(a) through (c) and (e) through (h) to read as follows:

§ 102.147 Contents of application; net worth exhibit; documentation of fees and expenses.

(a) An application for an award of fees and expenses under the Act must identify the applicant and the adversary adjudication for which an award is sought. The application must state the particulars in which the applicant has prevailed and identify the positions of the General Counsel in that proceeding that the applicant alleges were not substantially justified. Unless the applicant is an individual, the application must also state the number, category, and work location of employees of the applicant and its affiliates and describe briefly the type and purpose of its organization or business.

(b) The application must include a statement that the applicant's net worth does not exceed $2 million (if an individual) or $7 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such Section; or

(2) It states that it is a cooperative association as defined in Section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application must state the amount of fees and expenses for which an award is sought.

* * * * *

(e) The application must be signed by the applicant or an authorized officer or attorney of the applicant. It must also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true.

(f) Each applicant, except a qualified tax-exempt organization or cooperative association, must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 102.143(g)) when the adversary adjudicative proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The Administrative Law Judge may require an applicant to file such additional information as may be required to determine its eligibility for an award.

(g)(1) Unless otherwise directed by the Administrative Law Judge, the net worth exhibit will be included in the public record of the fee application proceeding. An applicant that objects to public disclosure of information in any portion of the exhibit may submit that portion of the exhibit in a sealed envelope labeled *Confidential Financial Information,* accompanied by a motion to withhold the information from public disclosure. The motion must describe the information sought to be withheld and explain, in detail, why public disclosure of the information would adversely affect the applicant and why disclosure is not required in the public interest. The exhibit must be served on the General Counsel but need not be served on any other party to the proceeding. If the Administrative Law Judge finds that the information may not be withheld from disclosure, it will be placed in the public record of the proceeding.

(2) If the Administrative Law Judge grants the motion to withhold from public disclosure, the exhibit will remain sealed, except to the extent that its contents are required to be disclosed at a hearing. The granting of the motion to withhold from public disclosure will not determine the availability of the document under the Freedom of Information Act in response to a request made under the provisions of § 102.117. Notwithstanding that the exhibit may be withheld from public disclosure, the General Counsel may disclose information from the exhibit to others if required in the course of an investigation to verify the claim of eligibility.

(h) The application must be accompanied by full documentation of the fees and expenses for which an award is sought. A separate itemized statement must be submitted for each professional firm or individual whose services are covered by the application, showing the dates and the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The Administrative Law Judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

■ 29. Revise §§ 102.148 through 102.155 to read as follows:

Sec.
102.148 When an application may be filed; place of filing; service; referral to Administrative Law Judge; stay of proceeding.
102.149 Filing of documents; service of documents; motions for extension of time.
102.150 Answer to application; reply to answer; comments by other parties.
102.151 Settlement.
102.152 Further proceedings.
102.153 Administrative Law Judge's decision; contents; service; transfer of case to the Board; contents of record in case.
102.154 Exceptions to Administrative Law Judge's decision; briefs; action of the Board.
102.155 Payment of award.

§ 102.148 When an application may be filed; place of filing; service; referral to Administrative Law Judge; stay of proceeding.

(a) An application may be filed after entry of the final order establishing that the applicant has prevailed in an adversary adjudication proceeding or in a significant and discrete substantive portion of that proceeding, but in no case later than 30 days after the entry of the Board's final order in that proceeding. The application for an award must be filed with the Board in Washington, DC, together with a certificate of service. The application must be served on the Regional Director and on all parties to the adversary adjudication in the same manner as other pleadings in that proceeding, except as provided in § 102.147(g)(1) for financial information alleged to be confidential.

(b) Upon filing, the application will be referred by the Board to the Administrative Law Judge who heard the adversary adjudication upon which the application is based, or, in the event that proceeding had not previously been heard by an Administrative Law Judge, it will be referred to the Chief Administrative Law Judge for designation of an Administrative Law Judge, in accordance with § 102.34, to consider the application. When the Administrative Law Judge to whom the application has been referred is or becomes unavailable, the provisions of §§ 102.34 and 102.36 will apply.

(c) Proceedings for the award of fees, but not the time limit of this section for filing an application for an award, will be stayed pending final disposition of the adversary adjudication in the event any person seeks reconsideration or review of the decision in that proceeding.

(d) For purposes of this section the withdrawal of a complaint by a Regional Director under § 102.18 will be treated as a final order, and an appeal under § 102.19 will be treated as a request for reconsideration of that final order.

§ 102.149 Filing of documents; service of documents; motions for extension of time.

(a) All motions and pleadings after the time the case is referred by the Board to the Administrative Law Judge until the issuance of the Administrative Law Judge's decision must be filed with the Administrative Law Judge together with proof of service. Copies of all documents filed must be served on all parties to the adversary adjudication.

(b) Motions for extensions of time to file motions, documents, or pleadings permitted by § 102.150 or by § 102.152 must be filed with the Chief Administrative Law Judge, the Deputy Chief Administrative Law Judge, or an Associate Chief Administrative Law Judge, as the case may be, no later than 3 days before the due date of the document. Notice of the request must be immediately served on all other parties and proof of service furnished.

§ 102.150 Answer to application; reply to answer; comments by other parties.

(a) Within 35 days after service of an application, the General Counsel may file an answer to the application. Unless the General Counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file a timely answer may be treated as a consent to the award requested. The filing of a motion to dismiss the application will stay the time for filing an answer to a date 35 days after issuance of any order denying the motion. Within 21 days after service of any motion to dismiss, the applicant may file a response. Review of an order granting a motion to dismiss an application in its entirety may be obtained by filing a request with the Board in Washington, DC, pursuant to § 102.27.

(b) If the General Counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate toward a settlement. The filing of such a statement will extend the time for filing an answer for an additional 35 days.

(c) The answer must explain in detail any objections to the award requested and identify the facts relied on in support of the General Counsel's position. If the answer is based on alleged facts not already in the record of the adversary adjudication, supporting affidavits must be provided or a request made for further proceedings under § 102.152.

(d) Within 21 days after service of an answer, the applicant may file a reply. If the reply is based on alleged facts not already in the record of the adversary adjudication, supporting affidavits must be provided or a request made for further proceedings under § 102.152.

(e) Any party to an adversary adjudication other than the applicant and the General Counsel may file comments on a fee application within 35 days after it is served and on an answer within 21 days after it is served. A commenting party may not participate further in the fee application proceeding unless the Administrative Law Judge determines that such participation is required in order to permit full exploration of matters raised in the comments.

§ 102.151 Settlement.

The applicant and the General Counsel may agree on a proposed settlement of the award before final action on the application. If a prevailing party and the General Counsel agree on a proposed settlement of an award before an application has been filed, the proposed settlement must be filed with the application. All such settlements are subject to approval by the Board.

§ 102.152 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the documents in the record. The Administrative Law Judge, however, upon request of either the applicant or the General Counsel, or on the General Counsel's own initiative, may order further proceedings, including an informal conference, oral argument, additional written submission, or an evidentiary hearing. An evidentiary hearing will be held only when necessary for resolution of material issues of fact.

(b) A request that the Administrative Law Judge order further proceedings under this section must specifically identify the disputed issues and the evidence sought to be adduced, and must explain why the additional proceedings are necessary to resolve the issues.

(c) An order of the Administrative Law Judge scheduling further proceedings will specify the issues to be considered.

(d) Any evidentiary hearing held pursuant to this section will be open to the public and will be conducted in accordance with §§ 102.30 through 102.43, except §§ 102.33, 102.34, and 102.38.

(e) Rulings of the Administrative Law Judge are reviewable by the Board only in accordance with the provisions of § 102.26.

§ 102.153 Administrative Law Judge's decision; contents; service; transfer of case to the Board; contents of record in case.

(a) Upon conclusion of proceedings under §§ 102.147 through 102.152, the Administrative Law Judge will prepare a decision, which will include written findings and conclusions as necessary to dispose of the application. The Administrative Law Judge will transmit the decision to the Board. Upon receipt of the decision, the Board will enter an order transferring the case to the Board and will serve copies on all the parties of the Judge's decision and the Board's order, setting forth the date of the transfer.

(b) The record in a proceeding on an application for an award of fees and expenses includes the application and any amendments or attachments, the net worth exhibit, the answer and any amendments or attachments, any reply to the answer, any comments by other parties, motions, rulings, orders, stipulations, written submissions, the transcript of any oral argument, the transcript of any hearing, exhibits, and depositions, together with the Administrative Law Judge's decision and exceptions, any cross-exceptions or answering briefs as provided in § 102.46, and the record of the adversary adjudication upon which the application is based.

§ 102.154 Exceptions to Administrative Law Judge's decision; briefs; action of the Board.

Procedures before the Board, including the filing of exceptions to the Administrative Law Judge's decision and briefs, and action by the Board, will be in accordance with §§ 102.46, 102.47, 102.48, and 102.50. The Board will issue a decision on the application or remand the proceeding to the Administrative Law Judge for further proceedings.

§ 102.155 Payment of award.

To obtain payment of an award made by the Board, the applicant must submit to the Director of the Division of Administration, a copy of the Board's final decision granting the award, accompanied by a statement that the applicant will not seek court review of the decision. If such statement is filed, the Agency will pay the amount of the award within 60 days, unless judicial review of the award or of the underlying decision has been sought.

Subpart U—Debt-Collection Procedures by Administrative Offset

■ 30. Revise § 102.156 to read as follows:

§ 102.156 Administrative offset; purpose and scope.

The regulations in this subpart specify the Agency procedures that will be followed to implement the administrative offset procedures set forth in the Debt Collection Act of 1982 (Pub. L. 97–365), 31 U.S.C. 3716.

■ 31. Revise § 102.157(e) to read as follows:

§ 102.157 Definitions.

* * * * *

(e) A debt is considered *delinquent* if it has not been paid by the date specified in the Agency's initial demand letter (§ 102.161), unless satisfactory payment arrangements have been made by that date, or if, at any time thereafter, the debtor fails to satisfy the debtor's obligations under a payment agreement with the Agency.

■ 32. Revise § 102.159 to read as follows:

§ 102.159 Exclusions.

(a)(1) The Agency is not authorized by the Debt Collection Act of 1982 (31 U.S.C. 3716) to use administrative offset with respect to:

(i) Debts owed by any State or local government;

(ii) Debts arising under or payments made under the Social Security Act, the Internal Revenue Code of 1954, or the tariff laws of the United States; or

(iii) When a statute explicitly provides for or prohibits using administrative offset to collect the claim or type of claim involved.

(2) No claim that has been outstanding for more than 10 years after the Board's right to collect the debt first accrued may be collected by means of administrative offset, unless facts material to the right to collect the debt were not known, and could not reasonably have been known, by the official of the Agency who was charged with the responsibility to discover and collect such debts until within 10 years of the initiation of the collection action. A determination of when the debt first accrued may be made according to existing laws regarding the accrual of debts, such as under 28 U.S.C. 2415. Unless otherwise provided by contract or law, debts or payments owed the Board which are not subject to administrative offset under 31 U.S.C. 3716 may be collected by administrative offset under the common law or other applicable statutory authority, pursuant to this paragraph (a) or Board regulations established pursuant to such other statutory authority.

(b) Collection by offset against a judgment obtained by a debtor against the United States will be accomplished in accordance with 31 U.S.C. 3728.

■ 33. Revise § 102.160(a) and (d) to read as follows:

§ 102.160 Agency responsibilities.

(a) The Agency will provide appropriate written or other guidance to Agency officials in carrying out this subpart, including the issuance of guidelines and instructions. The Agency will also take such administrative steps as may be appropriate to carry out the purposes and ensure the effective implementation of this subpart.

* * * * *

(d) Administrative offset must be considered by the Agency only after attempting to collect a claim under 31 U.S.C. 3711(a).

■ 34. Revise § 102.161 to read as follows:

§ 102.161 Notification.

(a) The Agency must send a written demand to the debtor in terms which inform the debtor of the consequences of failure to cooperate. In the demand letter, the Agency must provide the name of an Agency employee who can provide a full explanation of the claim. When the Agency deems it appropriate to protect the Government's interests (for example, to prevent the statute of limitations, 28 U.S.C. 2415, from expiring), written demand may be preceded by other appropriate actions.

(b) In accordance with guidelines established by the Agency, the Agency official responsible for collection of the debt must send written notice to the debtor, informing the debtor, as appropriate, of the:

(1) Nature and amount of the Board's claim;

(2) Date by which payment is to be made (which normally may be not more than 30 days from the date that the initial notification was mailed or hand delivered);

(3) Agency's intent to collect by administrative offset and of the debtor's rights in conjunction with such an offset;

(4) Agency's intent to collect, as appropriate, interest, penalties, administrative costs and attorneys fees;

(5) Rights of the debtor to a full explanation of the claim, of the opportunity to inspect and copy Agency records with respect to the claim and to dispute any information in the Agency's records concerning the claim;

(6) Debtor's right to administrative appeal or review within the Agency concerning the Agency's claim and how such review must be obtained;

(7) Debtor's opportunity to enter into a written agreement with the Agency to repay the debt; and

(8) Date on which, or after which, an administrative offset will begin.

■ 35. Revise § 102.163 to read as follows:

§ 102.163 Opportunity for repayment.

(a) The Agency must afford the debtor the opportunity to repay the debt or enter into a repayment plan which is agreeable to the Agency and is in a written form signed by the debtor. The Agency may deem a repayment plan to be abrogated if the debtor, after the repayment plan is signed, fails to comply with the terms of the plan.

(b) The Agency has discretion and may exercise sound judgment in determining whether to accept a repayment agreement in lieu of administrative offset.

■ 36. Revise § 102.164(e) to read as follows:

§ 102.164 Review of the obligation.

* * * * *

(e) Nothing in this subpart will preclude the Agency from *sua sponte* reviewing the obligation of the debtor, including reconsideration of the Agency's determination concerning the debt, and the accuracy, timeliness, relevance, and completeness of the information on which the debt is based.

Subpart V—Debt-Collection Procedures by Federal Income Tax Refund Offset

■ 37. Revise § 102.168 to read as follows:

§ 102.168 Federal income tax refund offset; purpose and scope.

The regulations in this subpart specify the Agency procedures that will be followed to implement the federal income tax refund offset procedures set forth in 26 U.S.C. 6402(d) of the Internal Revenue Code (Code), 31 U.S.C. 3720A, and 301.6402–6 of the Treasury Regulations on Procedure and Administration (26 CFR 301.6402–6). This statute and the implementing regulations of the Internal Revenue Service (IRS) at 26 CFR 301.6402–6 authorize the IRS to reduce a tax refund by the amount of a past-due legally enforceable debt owed to the United States. The regulations apply to past-due legally enforceable debts owed to the Agency by individuals and business entities. The regulations are not intended to limit or restrict debtor access to any judicial remedies to which the debtor may otherwise be entitled.

■ 38. Revise § 102.169(a) and (b) to read as follows:

§ 102.169 Definitions.

(a) *Tax refund offset* refers to the IRS income tax refund offset program operated under authority of 31 U.S.C. 3720A.

(b) *Past-due legally enforceable debt* is a delinquent debt administratively determined to be valid, whereon no more than 10 years have lapsed since the date of delinquency (unless reduced to judgment), and which is not discharged under a bankruptcy proceeding or subject to an automatic stay under 11 U.S.C. 362.

* * * * *

■ 39. Revise § 102.170(a)(3), (b), (c), and (d) to read as follows:

§ 102.170 Agency referral to IRS for tax referral effect; Agency responsibilities.

(a) * * *

(3) The amount of the debt; and

* * * * *

(b) The Agency will ensure the confidentiality of taxpayer information as required by the IRS in its Tax Information Security Guidelines.

(c) As necessary, the Agency will submit updated information at the times and in the manner prescribed by the IRS to reflect changes in the status of debts or debtors referred for tax refund offset.

(d) Amounts erroneously offset will be refunded by the Agency or the IRS in accordance with the Memorandum of Understanding.

■ 40. Revise § 102.173(a) to read as follows:

§ 102.173 Relation to other collection efforts.

(a) Tax refund offset is intended to be an administrative collection remedy to be used consistent with IRS requirements for participation in the program, and the costs and benefits of pursuing alternative remedies when the tax refund offset program is readily available. To the extent practical, the requirements of the program will be met by merging IRS requirements into the Agency's overall requirements for delinquent debt collection.

* * * * *

■ 41. Revise § 102.174(a), (b) introductory text, (b)(2), and (d) to be read as follows:

§ 102.174 Debtor notification.

(a) The Agency must send appropriate written demand to the debtor in terms which inform the debtor of the consequences of failure to repay debts or claims owed to the Board.

(b) Before the Agency refers a debt to the IRS for tax refund offset, it will make a reasonable attempt to notify the debtor that:

* * * * *

(2) Unless the debt is repaid or a satisfactory repayment agreement is established within 60 days thereafter, the debt will be referred to the IRS for offset from any overpayment of tax remaining after taxpayer liabilities of greater priority have been satisfied; and

* * * * *

(d) The notification required by paragraph (b) of this section and sent to the address specified in paragraph (c) of this section may, at the option of the Agency, be incorporated into demand letters required by paragraph (a) of this section.

■ 42. Revise § 102.175 to read as follows:

§ 102.175 Agency review of the obligation.

(a) The Agency official responsible for collection of the debt will consider any evidence submitted by the debtor as a result of the notification required by § 102.174 and notify the debtor of the result. If appropriate, the debtor will also be advised where and to whom to request a review of any unresolved dispute.

(b) The debtor will be granted 30 days from the date of the notification required by paragraph (a) of this section to request a review of the determination of the Agency official responsible for collection of the debt on any unresolved dispute. The debtor will be advised of the result.

§ 102.176 [Removed and Reserved]

■ 43. Remove and reserve § 102.176.

■ 44. Revise subpart W to read as follows:

Subpart W—Misconduct by Attorneys or Party Representatives

Sec.
102.177 Exclusion from hearings; refusal of witness to answer questions; misconduct by attorneys and party representatives before the Agency; procedures for processing misconduct allegations.

§ 102.177 Exclusion from hearings; refusal of witness to answer questions; misconduct by attorneys and party representatives before the Agency; procedures for processing misconduct allegations.

(a) Any attorney or other representative appearing or practicing before the Agency must conform to the standards of ethical and professional conduct required of practitioners before

the courts, and the Agency will be guided by those standards in interpreting and applying the provisions of this section.

(b) Misconduct by any person at any hearing before an Administrative Law Judge, Hearing Officer, or the Board may be grounds for summary exclusion from the hearing. Notwithstanding the procedures set forth in paragraph (e) of this section for handling allegations of misconduct, the Administrative Law Judge, Hearing Officer, or Board has the authority in the proceeding in which the misconduct occurred to admonish or reprimand, after due notice, any person who engages in misconduct at a hearing.

(c) The refusal of a witness at any such hearing to answer any question which has been ruled to be proper may, in the discretion of the Administrative Law Judge or Hearing Officer, be grounds for striking all testimony previously given by such witness on related matters.

(d) Misconduct by an attorney or other representative at any stage of any Agency proceeding, including but not limited to misconduct at a hearing, may be grounds for discipline. Such misconduct of an aggravated character may be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions.

(e) All allegations of misconduct pursuant to paragraph (d) of this section, except for those involving the conduct of Agency employees, will be handled in accordance with the following procedures:

(1) Allegations that an attorney or party representative has engaged in misconduct may be brought to the attention of the Investigating Officer by any person. The Investigating Officer, for purposes of this paragraph (e)(1), is the head of the Division of Operations-Management, or designee.

(2) The Investigating Officer or designee will conduct such investigation as is deemed appropriate and will have the usual powers of investigation provided in Section 11 of the Act. Following the investigation, the Investigating Officer will make a recommendation to the General Counsel, who will make the determination whether to institute disciplinary proceedings against the attorney or party representative. The General Counsel's authority to make this determination is not delegable to the Regional Director or other personnel in the Regional Office. If the General Counsel determines not to institute disciplinary proceedings, all interested persons will be notified of the determination, which is final.

(3) If the General Counsel decides to institute disciplinary proceedings against the attorney or party representative, the General Counsel or designee will serve the respondent with a complaint which will include: A statement of the acts which are claimed to constitute misconduct including the approximate date and place of such acts together with a statement of the discipline recommended; notification of the right to a hearing before an Administrative Law Judge with respect to any material issues of fact or mitigation; and an explanation of the method by which a hearing may be requested. The complaint will not be issued until the respondent has been notified of the allegations in writing and has been afforded a reasonable opportunity to respond.

(4) Within 14 days of service of the disciplinary complaint, the Respondent must file an answer admitting or denying the allegations, and may request a hearing. If no answer is filed or no material issue of fact or relevant to mitigation warranting a hearing is raised, the matter may be submitted directly to the Board. If no answer is filed, then the allegations will be deemed admitted.

(5) Sections 102.24 through 102.51, rules applicable to unfair labor practice proceedings, apply to disciplinary proceedings under this section to the extent that they are not contrary to the provisions of this section.

(6) The hearing will be conducted at a reasonable time, date, and place. In setting the hearing date, the Administrative Law Judge will give due regard to the Respondent's need for time to prepare an adequate defense and the need of the Agency and the Respondent for an expeditious resolution of the allegations.

(7) The hearing will be public unless otherwise ordered by the Board or the Administrative Law Judge.

(8) Any person bringing allegations of misconduct or filing a petition for disciplinary proceedings against an attorney or party representative will be given notice of the scheduled hearing. Any such person will not be a party to the disciplinary proceeding, however, and will not be afforded the rights of a party to call, examine or cross-examine witnesses and introduce evidence at the hearing, to file exceptions to the Administrative Law Judge's decision, or to appeal the Board's decision.

(9) The Respondent will, upon request, be provided with an opportunity to read the transcript or listen to a recording of the hearing.

(10) The General Counsel must establish the alleged misconduct by a preponderance of the evidence.

(11) At any stage of the proceeding prior to hearing, the Respondent may submit a settlement proposal to the General Counsel, who may approve the settlement or elect to continue with the proceedings. Any formal settlement reached between the General Counsel and the Respondent, providing for entry of a Board order reprimanding, suspending, disbarring or taking other disciplinary action against the Respondent, is subject to final approval by the Board. In the event any settlement, formal or informal, is reached after opening of the hearing, such settlement must be submitted to the Administrative Law Judge for approval. In the event the Administrative Law Judge rejects the settlement, either the General Counsel or the Respondent may appeal such ruling to the Board as provided in § 102.26.

(12) If it is found that the Respondent has engaged in misconduct in violation of paragraph (d) of this section, the Board may issue a final order imposing such disciplinary sanctions as it deems appropriate, including, where the misconduct is of an aggravated character, suspension and/or disbarment from practice before the Agency, and/or other sanctions.

(f) Any person found to have engaged in misconduct warranting disciplinary sanctions under paragraph (d) of this section may seek judicial review of the administrative determination.

Subpart X—Special Procedures When the Board Lacks a Quorum

■ 45. Revise §§ 102.179 through 102.182 to read as follows:

Sec.
102.179 Motions for default judgment, summary judgment, or dismissal referred to Chief Administrative Law Judge.
102.180 Requests for special permission to appeal referred to Chief Administrative Law Judge.
102.181 Administrative and procedural requests referred to Executive Secretary.
102.182 Representation cases should be processed to certification.

§ 102.179 Motions for default judgment, summary judgment, or dismissal referred to Chief Administrative Law Judge.

During any period when the Board lacks a quorum, all motions for default judgment, summary judgment, or dismissal filed or pending pursuant to § 102.50 will be referred to the Chief Administrative Law Judge in Washington, DC, for ruling. Such rulings by the Chief Administrative Law

Judge, and orders in connection therewith, may not be appealed directly to the Board, but will be considered by the Board in reviewing the record if exception to the ruling or order is included in the statement of exceptions filed with the Board pursuant to § 102.46.

§ 102.180 Requests for special permission to appeal referred to Chief Administrative Law Judge.

During any period when the Board lacks a quorum, any request for special permission to appeal filed or pending pursuant to § 102.26 will be referred to the Chief Administrative Law Judge in Washington, DC, for ruling. Such rulings by the Chief Administrative Law Judge, and orders in connection therewith, may not be appealed directly to the Board, but will be considered by the Board in reviewing the record if exception to the ruling or order is included in the statement of exceptions filed with the Board pursuant to § 102.46.

§ 102.181 Administrative and procedural requests referred to Executive Secretary.

During any period when the Board lacks a quorum, administrative and procedural requests that would normally be filed with the Office of the Executive Secretary for decision by the Board prior to the filing of a request for review under § 102.67, or exceptions under §§ 102.46 and 102.69, will be referred to the Executive Secretary for ruling. Rulings by the Executive Secretary, and orders in connection therewith, may not be appealed directly to the Board, but will be considered by the Board if such matters are raised by a party in its request for review or exceptions.

§ 102.182 Representation cases should be processed to certification.

During any period when the Board lacks a quorum, the second proviso of § 102.67(b) regarding the automatic impounding of ballots will be suspended. To the extent practicable, all representation cases may continue to be processed and the appropriate certification should be issued by the Regional Director notwithstanding the pendency of a request for review, subject to revision or revocation by the Board pursuant to a request for review filed in accordance with this subpart.

Appendix A [Removed]

■ 46. Remove appendix A.

[FR Doc. 2017–01288 Filed 2–23–17; 8:45 am]

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Highlights

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TOP STORIES

Supreme Court Backs Businesses, Curbs Class Arbitration (2)

By Greg Stohr (Bloomberg) and Perry Cooper (Bloomberg Law)

An ideologically divided U.S. Supreme Court gave businesses more power to channel disputes into individual arbitration proceedings April 24.

EEOC Trailblazing on LGBT Rights May Stop at High Court

By Robert Iafolla and Erin Mulvaney

The Equal Employment Opportunity Commission could be sidelined when the U.S. Supreme Court considers whether federal law protects LGBT workers, despite its leading role in expanding civil rights protections in the workplace.

Detective's Failure to Prosecute Age Bias Claim Dismissal Tossed

By Patrick Dorrian

A federal judge in Pennsylvania must reconsider whether an Allegheny County detective's age bias claim should have been dismissed for failure to prosecute, the Third Circuit ruled April 24.

Obama Playbook Still Governs Policing of Home Care Pay (1)

By Chris Opfer

The Labor Department continues to go after home care companies for minimum wage and overtime pay violations, putting to rest, for now, any debate over whether Congress meant for the rapidly growing industry to be covered by federal wage law.

DISCRIMINATION

Long Island Company, EEOC Reach $407K Job Bias Settlement

By Patrick Dorrian

A Long Island, N.Y., fire protection services provider will pay $407,500 and make changes to its anti-discrimination policies to settle an EEOC lawsuit accusing it of harassing black and Hispanic workers.

Placing 'Barrier' Between Black Workers Not Adverse Job Action

By Patrick Dorrian

Two black assembly workers at a HVAC equipment manufacturing plant in Oklahoma can't show they were subjected to race discrimination, a federal appeals court ruled.

VMware Accused of Hiring Bias Against DACA Recipients (2)

By Laura D. Francis

VMware Inc. discriminates against job applicants who aren't U.S. citizens, green card holders, or who don't have a transferable visa, a new proposed class action alleges.

WAGE & HOUR

Birmingham Stays Neutral in Alabama Minimum Wage Law Fight

By Porter Wells

The city of Birmingham isn't taking a side in a fight in the Eleventh Circuit that will decide if a racial bias suit challenging Alabama's wage preemption law can go forward, according to its April 24 filing.

HARASSMENT & RETALIATION

BNSF Worker Gets $1M-Plus Added to $2.2M Retaliation Win

By Patrick Dorrian

A former BNSF Railway Co. employee can keep the roughly $2.2 million a jury awarded him for retaliation he faced after reporting an on-the-job injury, a federal judge ruled.

STATE & LOCAL LAWS

Colorado Bill Boosting Fines for Not Paying Wages Goes to Gov.

By Tripp Baltz

The Colorado Senate approved a bill increasing penalties for employers that fail to pay wages due their workers.

Dallas Employers Face Sick Leave Mandate as Proposal Passes

By Genevieve Douglas

Dallas employers will be required to provide workers with paid sick leave for illness and family-care needs under an ordinance passed by the City Council April 24.

Los Angeles Vows to Defend NRA Disclosure Law Amid Lawsuit (3)

By Porter Wells and David McAfee

The City of Los Angeles said it would defend itself against litigation brought by the National Rifle Association that challenged a recent ordinance.

California Contract Ban With Immigration Data Brokers Advances

By Joyce E. Cutler

Microsoft and Amazon are among the companies that could be off the list of contractors for California public agencies under legislation moving through the state Assembly.

LABOR RELATIONS

Pay Increases for Union Members Hit a Speed Bump

By Andrew Wallender

Workers represented by unions saw average year-to-date pay increases trend downward, according to Bloomberg Law data.

University of Illinois at Chicago Avoids Strike With Professors

By Michael J. Bologna

The University of Illinois at Chicago avoided a strike by 1,200 tenure and non-tenure track professors, reaching a last-minute deal that raises minimum salaries and provides firmer job protections for non-tenured faculty.

IMMIGRATION

New Protocol at Northern Border Could Strand Canadian Workers

By Laura D. Francis

The process for bringing skilled Canadian workers into the U.S. was supposed to be quick and easy. That's no longer the case.

SUPREME COURT

No Class Arbitration When Agreement Silent, High Court Says

By Perry Cooper

An ambiguous agreement can't be the basis for concluding parties agreed to class arbitration, the U.S. Supreme Court ruled April 24.

LEGAL PROFESSION

Eschewing Big Law Roots for Boutique in Chicago

By Stephen Joyce

Cara Hendrickson's choice to move to Massey & Gail LLP illustrates a cyclical swing in the Chicago legal market toward litigation boutiques and away from Big Law.

HEALTH CARE & BENEFITS

Safeway Settles Twin 401(k) Would-be Class Suits Ahead of Trial

By Jacklyn Wille

Safeway Inc. settled two proposed class actions challenging its 401(k) plan two weeks before the cases were scheduled for trial.

Banner Health Employees Lose Round Against 401(k) Adviser

By Jacklyn Wille

Jeffrey Slocum & Associates Inc. scored a big victory in a lawsuit over Banner Health's 401(k) plan, when a federal judge blocked seven Banner plan investors from seeking plan-wide losses from the investment consultant.

Dignity Health Settles Church Pension Suit That Went to SCOTUS

By Jacklyn Wille

California hospital system Dignity Health settled a lawsuit claiming it misused a religious exemption in federal benefits law to underfund its pension plan by more than $1.8 billion.

SAFETY & HEALTH

Oilfield Worker Who Lost Parts of Arm Gets Damages Cap Lifted

By Paul Stinson

An Oklahoma law capping monetary awards for pain and suffering in personal injury lawsuits is unconstitutional, the state Supreme Court ruled April 23 in a case involving an oilfield worker who lost parts of his arm in an oil rig site accident.

ALSO IN THE NEWS

Trump's Proposed Hiring Requirement Faces Bipartisan Opposition

By Vivek Shankar

The Trump administration's proposal to require people applying for federal jobs to disclose their participation in so-called criminal diversion programs undermines criminal justice reform, according to a bipartisan group of senators.

IRS Contractor Loses Bid to Shift Blame for Too-Quick Firings

By Porter Wells

A government contractor's attempt to rehash the reasons why it fired three bargaining unit security guards after their first infractions at an IRS facility in Texas was shot down by the Eleventh Circuit April 23.

Quorum Question Complicates Government Pay Data Collection

By Paige Smith

The unexpected revival of an Obama-era employee pay data collection sent employers and management attorneys into a tizzy. Now a lingering snag with the Equal Employment Opportunity Commission's quorum could further complicate the already muddled issue, as a new deadline looms.

Industry-Led Apprenticeship Guidelines Under White House Review

By Jaclyn Diaz

The Labor Department's proposed guidelines that would govern accreditors of an industry-led apprenticeship program are undergoing review by the White

House's Office of Information and Regulatory Affairs—the first step of regulatory review before a proposal can be released to the public for comments.

Florida Sheriff Properly Suspended After Parkland Shooting

By Martina Barash

Florida Governor Ron DeSantis (R) constitutionally suspended the sheriff of Broward County for neglect of duty and incompetence in the wake of two mass shootings, the Florida Supreme Court ruled April 23.

New Work Suits: Kroger Worker Alleges Pregnancy Discrimination

By Cynthia Harasty

Kroger Co. was accused of pregnancy bias in a lawsuit filed by a fired worker who alleges the supermarket giant ignored her doctor's order that she be placed on light duty, gave her shifts requiring heavy lifting, and retaliated when she complained.

PRACTITIONER INSIGHTS

INSIGHT: Law Firm Branding—Four PR Strategies to Build Awareness

Law firms are increasing marketing staff and focusing more on public relations to grow and stay competitive. Communications and marketing expert Tom Orewyler and Kip Guthrie, Perkins Coie LLP chief marketing officer, team up and outline four strategies for law firms to build a solid PR strategy to showcase reputation and brand.

LATEST CASES

Case: Discrimination/Discharge (7th Cir.)

A black employee at a Wal-Mart store in New Lennox, Illinois, was properly denied a trial on his claims that he was discharged because of his race and his discrimination complaint. The employee had accumulated a certain number of

unauthorized absence “points” that subjected him to termination, a co-worker who had called him "boy" and slapped his hand when he pointed his finger at her and was reprimanded rather than fired wasn't similarly situated to him, and the supervisor who fired him was unaware that the black employee had complained about his co-worker's conduct, the court ruled. The case is .

Case: Individual Employment Rights/Due Process (D. Kan.)

Two former police officers of the Lenexa Police Department don't have claims that their former captain deprived them of their due process rights when she sent letters to their new employers that referenced and attached a Facebook exchange in which they allegedly discussed "losing their minds on citizens they should be serving." The officers failed to show that the former captain acted under color of state law because she sent the letters to individuals outside her jurisdiction, they were anonymous, and the officers don't allege that she used her "badge of authority" in sending them. The case is Oliver v. City of Lenexa, 2019 BL 144121, D. Kan., 2:18-cv-02374-HLT-GEB, 4/23/19.

Case: Disability Discrimination/'Disability' (11th Cir.)

A Florida sawmill employee's disability bias claim after he was fired for attendance policy violations following separate ankle and knee injuries was properly dismissed, because neither injury constituted a protected disability or perceived disability given that he was fully healed when he returned to work after a 13-week leave for his ankle injury and he was only out three days for his knee injury. The case is Wood v. Gilman Bldg. Prods. Inc., 11th Cir., 18-12261 Non-Argument Calendar, unpublished 4/22/19.

Case: FMLA/Interference (11th Cir.)

A Florida sawmill employee wasn't entitled to proceed with his Family and Medical Leave Act interference claim based on his discharge for attendance policy violations shortly after he injured his knee, because his injury didn't qualify as a serious health condition under the FMLA given that he wasn't incapacitated for more than three days. His FMLA retaliation claim was also properly dismissed, because he didn't show that his earlier request for leave after sustaining a separate ankle injury was linked to his firing for an unexcused absence seven months later, and extension of his attendance

monitoring period for the time he was on leave for his injuries wasn't an adverse employment action. The case is Wood v. Gilman Bldg. Prods. Inc., 2019 BL 141971, 11th Cir., 18-12261 Non-Argument Calendar, unpublished 4/22/19.

Case: Discrimination/Discharge (E.D. Ky.)

A black applicant for a server position at an Olive Garden restaurant in Lexington, Kentucky, has no triable claim based on her allegation that she was fired when she reported for training the day after she was hired. Although she was provided with a training schedule during her interview, the record showed that the restaurant sent her a rejection e-mail that she never saw to an address that she supplied on her application, and she was unsure as to why she provided an email address that she no longer used, the court stated. The case is .

Case: Discrimination/Arbitration (E.D. Pa.)

A registered nurse must arbitrate her age discrimination claims against a Pennsylvania health services company pursuant to an arbitration agreement that she failed to opt out of on time. Despite her contention that the agreement was invalid and unenforceable because she never signed it, she accepted it by continuing her employment with the company after electronically receiving it in her work inbox and failing to opt out within the required time; additionally, she didn't show that it was unenforceable because it allegedly restricted her statutory right to recover attorney's fees if she prevailed. The case is Hoffman v. Compassus, 2019 BL 145381, E.D. Pa., 18-0776, 4/23/19.

Case: Disability Discrimination/Joint Employer (E.D. Mo.)

A legally blind teacher can sue the St. Louis Public Schools for unlawful discharge under the Americans with Disabilities Act after SLPS declined to renew her contract for the coming school year, allegedly because her assistive software caused computer-access problems, even though she worked for an independent contractor that provided her services teaching vision-impaired students to SLPS. She alleged enough facts to raise a question as to whether SLPS was her joint employer, and while SLPS didn't technically fire her, its non-renewal of her contract was a materially adverse employment action, the

court found. The case is Lenk v. St. Louis Pub. Sch., 2019 BL 143353, E.D. Mo., 4:18 CV 1296 DDN, 4/23/19.

Case: Wage & Hour/Damages (D. Or.)

Oregon employees of a janitorial services company may only recover the greater of their actual damages or a single $200 sum for the company's alleged wrongful paycheck deductions under Oregon law, because the state wage payment statute doesn't expressly state that the $200 penalty is for each individual violation, and a statement in a state supreme court opinion about the "minimum recovery" on wage claims, as well as other state court opinions, indicate that there is a single minimum $200 penalty for each type of wage violation, rather than a penalty for each instance of a violation. The case is Brinkman v. ABM Onsite Servs.-West, Inc., 2019 BL 144403, D. Or., 3:17-cv-00275-SI (Lead) 3:17-cv-00478-SI, 4/23/19.

Case: Discrimination/Retaliation (W.D. Ky.)

The Russellville Independent Board of Education in Kentucky is entitled to summary judgment on a claim by a black teacher's aide alleging that he was ostracized and excluded from the Russellville Alumni Association Athletic Hall of Fame in retaliation for filing a charge with the EEOC, even though an allegedly retaliatory letter criticizing the aide for being absent from his class for an hour was sent by the school superintendent within three months of the charge-filing. The school board plays no role in the selection process for the Hall of Fame, ostracism alone is insufficient to establish retaliation, and the aide's absence from his classroom is an intervening event warranting discipline that extinguishes any inference based on temporal proximity, the court said. The case is Morris v. Russellville Indep. Bd. of Educ., 2019 BL 143497, W.D. Ky., 1:17-CV-00101-GNS-HBB, 4/23/19 .

Case: Wage & Hour/Arbitration (Cal. Ct. App., 2d Dist.)

Packing employees who worked for a California produce company must submit their claims for various wage violations, including unpaid minimum and overtime wages, to arbitration in accordance with their agreement with the staffing company that assigned them their work. Despite the fact that they didn't name the staffing company as a defendant, the arbitration agreement still

applies because the staffing company was a co-employer responsible for paying the employees and equally liable for wage and hour violations. The case is Vasquez v. San Miguel Produce, Inc., 2019 BL 143606, Cal. Ct. App., 2d Dist., B287696, unpublished 4/23/19.

Case: Discrimination/Discharge (N.D. Tex.)

A flight attendant may not proceed with his claim that Southwest Airlines Company in Texas fired him because of his race, rather than for violating a company rule which required him to be within two hours driving distance of an assigned airport during the duration of his shift. He wasn't qualified to be a flight attendant at the time of his termination because the Social Security Administration had found that, given his ongoing medical issues, there weren't any "jobs that exist in significant numbers in the national economy" that he was able to perform. The case is Browning v. Southwest Airlines Co., 2019 BL 143919, N.D. Tex., No. 3:17-CV-03488-N, 4/23/19.

Case: Discrimination/Discharge (4th Cir.)

A federal district court erred in dismissing a black driver's claim that a waste management company in South Carolina fired him because of his race, rather than for poor performance and job abandonment. His allegations, including that a Caucasian co-worker with whom he shared a supervisor had committed similar infractions but wasn't fired, and that the reasons for his termination had changed significantly over time, could show that his race was a factor in the firing decision. The case is Haynes v. Waste Connections, Inc., 2019 BL 143596, 4th Cir., No. 17-2431, 4/23/19.

Case: Labor Relations/Refusal to Bargain (N.L.R.B.)

A corrugated box manufacturer unlawfully refused to recognize and bargain with a union that accepted the administrative transfer of another local that was placed in trusteeship five years prior. The manufacturer argued that there wasn't continuity of representation with the transferred local, but ordinary changes as a result of transfers among labor unions don't constitute a lack of continuity of representation, and an administrative law judge found that the main effects of the transfer were more financial stability and bargaining power. The case is Cascades Containerboard Packaging-Lancaster, a Division of

Cascades New York, Inc., 2019 BL 141912, N.L.R.B., 4/22/19.

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EMPLOYMENT

Thursday, April 25, 2019

TOP NEWS

Analysis

Supreme Court Ruling Cuts Off Avenue To Class Proceedings

The U.S. Supreme Court's conservative majority dealt its latest body blow to class actions on Wednesday, issuing a 5-4 decision that experts say puts another roadblock in the way of workers and consumers who want to pursue collective claims.

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Justices Say Class Arbitration Must Be Explicitly Authorized

The U.S. Supreme Court on Wednesday ruled that arbitration agreements must explicitly call for class arbitration for that process to be invoked, handing lighting retailer Lamps Plus Inc. a win in its challenge of a Ninth Circuit ruling that allowed a worker's data breach class arbitration to move forward.

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Analysis

Arbitration Pacts Dented By Amazon Transpo Worker Ruling

A Washington district court ruling that Amazon's independent contractor drivers are exempt from the Federal Arbitration Act creates new potholes in the once-smooth path paved for transportation employers to shield themselves from employment disputes, experts say.

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3rd Circ. Revives Pa. Detective's Age Bias Suit

A Pennsylvania federal judge botched his analysis of whether a three-year lull in an ex-detective's age bias suit against the Allegheny County district attorney was unfair to the district attorney's office, the Third Circuit said Wednesday, concluding the case shouldn't have gotten the ax.

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Law Firm Leaders: Jackson Lewis' Anthony And Lauri

William Anthony and Kevin Lauri took over as co-chairs of national employment boutique Jackson Lewis PC in January. Here, they chat with Law360 on topics that include how their firm is adapting to a changing legal industry and what makes a good law firm partner.

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DISCRIMINATION

Walmart's Firing Of Worker Not Retaliation, 7th Circ. Says

The Seventh Circuit on Wednesday upheld a lower court's decision to toss a discrimination lawsuit brought by a former Walmart Inc. employee, agreeing the company fired him for tardiness and not in retaliation for filing complaints about a co-worker.

Read full article »

Pa. Hospital Worker's Age, Disability Suit Comes Up Short

A Pennsylvania federal judge has tossed an age and disability bias suit from

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New Cases

Discrimination (36)
ERISA (32)
Labor (41)

LAW FIRMS

BakerHostetler
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DLA Piper
Dorsey & Whitney
Eversheds Sutherland
Falls Legal LLC
Fisher Phillips
Fleming Nolen
Goldstein & Russell
Hagens Berman
Hanson Bridgett
Haynsworth Sinkler
Hedger Friend
Holland & Knight
Jackson Lewis
Jones Day
Lewis Brisbois
Littler Mendelson
Locke Lord
Mayer Brown
McCune Wright

a hospital worker who didn't get rehired after taking medical leave for cancer treatment, accepting Mercy Catholic Medical Center's argument that it was following internal policy when it hired a less experienced replacement.

Read full article »

WAGE & HOUR

Smokey Bones Reaches $2.7M Settlement In Tip Credit Suit

Smokey Bones has reached a $2.7 million settlement with workers to end claims that the chain took a tip credit against the minimum wage while requiring servers and bartenders to do considerable nontipped work, according to a Tuesday filing in South Carolina federal court.

Read full article »

FedEx Unit Workers' $3M Wage, FCRA Deal Gets Final OK

A California federal judge greenlit a $3.15 million deal Tuesday ending a pair of putative class actions accusing FedEx unit Genco I Inc. of not giving breaks to workers and of violating the Fair Credit Reporting Act by conducting secret background checks.

Read full article »

Players Run Full-Court Press To Save Last NCAA Pay Suit

Student athletes are pushing back against the NCAA's efforts to snuff out a remaining U.S. district court case over limits on their compensation after the organization lost a multidistrict antitrust litigation in California federal court, saying the case can be litigated after appeals in the MDL run their course.

Read full article »

LABOR

Evidence Shows Philly Union Leader Offered Bribes, Feds Say

Prosecutors pushed back Tuesday against a powerful Philadelphia union leader's argument that a bribery case against him is unwarranted, saying that putting a city council member on the union payroll in exchange for exerting government influence in the union's favor amounts to a bribe.

Read full article »

TRADE SECRETS

Texas Justices Told Free Speech Law Kills IP Theft Claims

The Texas Supreme Court has been asked to resolve a split among the intermediate appellate courts over whether a state free speech law can be used to dismiss a lawsuit brought by a company alleging its former consultant helped steal its software to sell to competitors.

Read full article »

WHISTLEBLOWER

Whistleblower, Gov't Urge Justices To Deny Challenge To FCA

A whistleblower doctor and the federal government urged the U.S. Supreme Court on Wednesday to reject a petition brought by hospital giant Intermountain Healthcare that challenges the constitutionality of the False Claims Act.

Read full article »

WORKER PRIVACY

Ex-Nursing Center Worker Says Scans Break Biometric Law

A suburban Chicago nursing center was sued in Illinois state court Tuesday for allegedly requiring employees to scan their fingerprints multiple times a workday without getting informed consent under Illinois' biometric privacy law.

McDermott Will
O'Hagan Meyer
Pearson Simon
Peiffer Wolf
Polsinelli
Post & Schell
Pritzker Levine
Reed Smith
Schiff Hardin
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GOVERNMENT AGENCIES

Equal Employment Opportunity Commission
European Union
Federal Deposit Insurance Corp.

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WRONGFUL TERMINATION

7th Circ. OKs United Pilot's Firing Over Failed Alcohol Test

A pilot who was fired after failing multiple alcohol tests while working for Continental Airlines has presented "no valid reason" to reverse an arbitration award upholding her termination, the Seventh Circuit ruled Wednesday.

Read full article »

Judge Huffs At BNSF's Protest Of $2M Verdict, Adds $1M Fees

A former BNSF conductor who won $2.1 million over his firing will not only keep that money, including punitive damages, he'll receive nearly $1 million more for his legal fees and costs, a Montana federal judge ruled Tuesday.

Read full article »

EXPERT ANALYSIS

Illinois Courts Will Continue To Interpret BIPA Broadly

Against the backdrop of the Illinois Supreme Court's Biometric Information Privacy Act opinion in Rosenbach v. Six Flags, an Illinois appellate court's recent decision in Liu v. Four Seasons reinforces that companies must carefully design and implement stringent BIPA policies to protect against class actions and related liability, say attorneys with Eversheds Sutherland.

Read full article »

Gov't Contractors, Be Prepared For FCA Parallel Proceedings

The continued sprawl of False Claims Act cases warrants scrutiny of one of the statute's less understood characteristics — one set of facts can lead to concurrent or successive proceedings initiated by a combination of criminal, civil or administrative authorities, as well as private plaintiffs, say attorneys at DLA Piper.

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LEGAL INDUSTRY

Analysis

Trump's Legal End Game: Run Out The Clock Until 2020

With his latest push against congressional investigations of his finances, his response to the Russia investigation and other actions by the White House, President Donald Trump appears to be trying to run out the clock before the 2020 election rather than waging a substantive legal fight likely to prevail in court.

Read full article »

Firms, In-House Attys Predict Hike In Cybersafety Spending

More than three-quarters of law firms and corporate legal departments plan to increase their spending on cybersecurity during the next year, according to the results of a Robert Half Legal survey announced Wednesday.

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Tech Competency Could Become A Must For Mich. Attys

Michigan appears set to join dozens of other states that require lawyers to stay up to date on technological advances as part of their duty to provide competent legal help.

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Major League Soccer Lures NFL Deputy GC As Top Atty

The NFL’s former deputy general counsel will join Major League Soccer as its executive vice president and general counsel, as its longtime top lawyer moves into a commercial-side role, MLS announced Tuesday.

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Illinois Supreme Court
Texas Supreme Court
U.S. Attorney's Office
U.S. Department of Justice
U.S. House of Representatives
U.S. Supreme Court
United States Court of Appeals for the Third Circuit
United States District Court for the Eastern District of Pennsylvania
Vermont Natural Resources Agency

Atty Stuck With Court Escort Can't Appeal To 7th Circ.

A federal court order requiring a Chicago lawyer to be escorted by U.S. Marshals when in court was "not the result of judicial action" and thus not under the Seventh Circuit's jurisdiction for appeal, a circuit panel said Tuesday.

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Subject: FW: Procedural updates to Rules & Regs
Date: Thursday, April 25, 2019 7:37:50 AM
Attachments: Federal Register updates to Rules and Regs 2-24-2017.pdf

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From:	Ring, John
To:	Emanuel, William
Subject:	FW: Procedural updates to Rules & Regs
Date:	Thursday, April 25, 2019 7:40:00 AM
Attachments:	Federal Register updates to Rules and Regs 2-24-2017.pdf

I asked Roxanne for a copy of what was printed in the Federal Register when the Agency updated its internal procedural rules (without notice and comment rulemaking). For your information, attached is what was printed.

From: Rothschild, Roxanne L.
Sent: Wednesday, April 24, 2019 3:43 PM
To: Ring, John <John.Ring@nlrb.gov>; Lucy, Christine B. <Christine.Lucy@nlrb.gov>
Subject: Procedural updates to Rules & Regs

John and Christine:

Attached is the Federal Register posting from 2/24/2017 when the procedural rules were updated.

Thanks,

Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE, Office 5010, Washington, DC 20570
roxanne.rothschild@nlrb.gov | 202-273-2917

From:	Ring, John
To:	Kaplan, Marvin E.
Subject:	FW: Procedural updates to Rules & Regs
Date:	Thursday, April 25, 2019 7:40:00 AM
Attachments:	Federal Register updates to Rules and Regs 2-24-2017.pdf

I asked Roxanne for a copy of what was printed in the Federal Register when the Agency updated its internal procedural rules (without notice and comment rulemaking). For your information, attached is what was printed.

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To: Ring, John <John.Ring@nlrb.gov>; Lucy, Christine B. <Christine.Lucy@nlrb.gov>
Subject: Procedural updates to Rules & Regs

John and Christine:

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Thanks,

Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE, Office 5010, Washington, DC 20570
roxanne.rothschild@nlrb.gov | 202-273-2917

From:	Ring, John
To:	Jacob, Fred
Cc:	Lucy, Christine B.; Rothschild, Roxanne L.
Subject:	FW: Procedural updates to Rules & Regs
Date:	Thursday, April 25, 2019 7:41:00 AM
Attachments:	Federal Register updates to Rules and Regs 2-24-2017.pdf

Fred - I asked Roxanne for a copy of what was printed in the Federal Register when the Agency updated its internal procedural rules (without notice and comment rulemaking). For your information, attached is what was printed.

From: Rothschild, Roxanne L.
Sent: Wednesday, April 24, 2019 3:43 PM
To: Ring, John <John.Ring@nlrb.gov>; Lucy, Christine B. <Christine.Lucy@nlrb.gov>
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Thanks,

Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE, Office 5010, Washington, DC 20570
roxanne.rothschild@nlrb.gov | 202-273-2917

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To: R ng Jo n
Subject: O TICO"s Mo n ng Shift Bus ness s co e anothe a bit a on v c o y — Ruli g on EEO-1 co lec ion to ay — The ost of $15
Da e: Thu sday Ap l 25 2019 10 03 33 AM

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2018 Newslet er Logo Morn ng Shift

04/25/2019 10 00 AM EDT

By REBECCA RAINE (ainey@pol t co com @RebeccaARainey)

Editor's Note Th s edit on of Morning Shift s published weekdays at 10 a m. POLITICO Pro Employment & Immigrat on subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehens ve policy inte ligence coverage policy tools and services click h .

QUICK FIX

he Supreme Court made it harder for employees to band together to settle workp ace disputes co lectively

A federal judge will rule this morn ng on a proposed September 30 deadline to submit pay data broken down by race and gender to the EEOC

CBO says House Democrats' bi l to raise he hourly minimum wage to $15 will cost $48 b llion per year

GOOD MORNING! It's Thursday April 25 and this is Morning Shi t your daily t psheet on labor and imm gration news. Send tips exclusives and suggest ons to y@p l t th @p l t k llg @p l t and t h@p l t . Fo low us on Twitter at @R b R y @t h @I K lg and @T thyN h .

DRIVING THE DAY

BUSINESS SCORES ANO HER ARBI RA ION VIC ORY: The Supreme Court ruled Wednesday that mandatory arbitration clauses in employment contracts bar workers from arbitrating collectively w th their employer unless he contract expressly allows t. "Courts may not infer from an ambiguous agreement that parties have consented to arb trate on a classwide basis " Ch ef Justice John Roberts wrote in *Lamps Plus Inc. v. Varela*.

hat decision fo lowed the high court' 20 8 l g in *Ep Sy t C p L* which sa d employers could use mandatory arbitration clauses to bar the filing of class-act on lawsuits aga nst hem. A p t earlier this month by the law firm Car ton Fields found hat n 2018 nearly 48 9 percent of compan es required employees to waive class act ons up from 37.2 percent in 2017. More from POLITICO's Rebecca Rainey here.

DIVERSITY

RULING ON EEO 1 COLLEC ON ODAY: Judge Tanya Chutkan wi l deliver at 11 a.m her order on whether the EEOC can have unt l September 30 to co lect from certain bus nesses expanded pay data broken down by gender and race. The requirement that the EEOC collect such information from companies hat employ 100 or more people initially imposed under the Obama admin strat on was reinstated by Chutkan n March after she resc nded a Trump administration stay. The plaintiffs Democracy Forward and the National Women's Law Center said they would agree to the September 30 deadline which was proposed by Trump administration lawyers provided the government co lect two years of data as would have occurred had he Trump admin strat on not stayed the data co lection n 2017.

IMMIGRATION

CBP MOVES O EXPAND B OME R C COLLEC ION: The White House O fice of Management and Budget is reviewing a regulation to a low Customs and Border Protection to collect b ometric data from foreign nationals traveling to and from the U.S. POLITICO's Stephanie Beasley and Ted Hesson report. The interim final rule "would essentially perm t CBP to move forward w th plans to expand its entry-exit tracking program currently l m ted to a handful of airports land and sea ports throughout the country " they write. The reg fo lows President Donald Trump's Monday memo ramp ng up penalt es against countr es whose nationals consistently overstay valid travel and business visas.

Amit Narang a regulatory expert at the left-leaning Public C tizen explained to Morning Shift that by establ shing the policy under an " nterim f nal rule " CBP can put the change into effect wi hout going through a public comment per od. The agency can st ll collect public comment after the rule s in place Narang said but "it's not a given" that CBP w ll use those comments to make any changes. More from POLITICO h .

RUMP OFFERS OWN CENSUS ARGUMEN : The Commerce Department argued Tuesday before the Supreme Court hat it wants to add a citizenship question to the 2020 census to better enforce the Voting Rights Act. But President Donald Trump set forth a d fferent argument Wednesday POLITICO's Caitlin Oprysko reports. "The American people deserve to know who is in this Country " Trump wrote on Twitter. "Yesterday he Supreme Court took up the Census C tizensh p quest on a really big deal. MAKE AMERICA GREAT AGAIN!"

his is a bit nconvenient Oprysko notes because internal communications and memos have demonstrated already that before the decision was made Ross was "in contact w th imm gration hard-liners like then-Kansas Secretary of State Kr s Kobach and then-White House chief strateg st Steve Bannon over the question." DOJ d dn't send Ross a memo saying a cit zenship question would aid Voting Rights Act enforcement until a ter he requested one. More here.

FLORIDA REPUBL CANS EYE SANC UARY CI Y BAN: R ding the tailwinds of Florida Governor Ron DeSantis touting the Trump admin stration's imm gration policies the Republ can-led leg slature is preparing to ban the state's municipalities from becoming "sanctuary" c ties that limit cooperation with federal mmigration officials POLITICO's Gary F neout reports. "The b ll would mark a tr umph for a w ng of the party that has pushed to call he bluff of moderates and Democrats who have long predicted that anti-immigrat on policies would mean electoral catastrophe for Republicans " he wr tes. Flor da has no sanctuary c ties at the moment but if hat were to change penalt es would be levied on local elected off c als. More h .

WAGES

HE COS OF $15: Rep. Bobby Scott's Ra se the Wage Act H R. 582 (116) which would phase in a $15 hourly minimum wage over f ve years and index future increases to inflat on would cost private businesses $48 billion a year according to the Congressional Budget Off ce POLITICO's Ian Kullgren reports. That estimate also found state and local governments would have to pay an addit onal $3 bi lion annually to workers.

Sco t says the overall effect of his bill "wi l increase employers' costs by just one-half of one percent (0 5 percent) of total private-sector wages by 2025 " based on the CBO est mate. More here.

STRIKES

R DESHARE DRIVER S RIKE NEX MON H: On May 8 4 200 members of R deshare Drivers United- Los Angeles w ll strike Uber and Lyft for 24 hours. At issue s a wage reduct on that the group blames on the companies' attempted entrance into he stock market. The group demands that "Uber mmed ately reverse a recent 25 percent wage [cu] and that both companies guarantee drivers a $28 per hourly minimum rate ($17/hr a ter expenses) as they do in New York City." Lyft launched ts initial public offering at the end of March and Uber plans to enter the market this month.

Drivers in San Francisco San Diego Chicago M nneapol s Philadelphia and Washington D.C. plan to join the protest according to Gizmodo. Read the R deshare Drivers United -LA press release here.

S OP & SHOP S RIKE COS $100 MILL ON: Ahold Delhaize the company that owns the Stop & Shop supermarket chain said Wednesday that the 10-day strike cost the company between $90 mi lion and $110 mill on the Associated Press reports. "The company says generally lower sales lost revenue from 'seasonal and perishable inventory ' and supply chain costs were the main drivers." Some 31 000 Stop & Shop employees went on strike ahead of the Easter/Passover holiday to protest proposed cuts to pay and benefits. A three-year agreement h Sunday between the company and the Un ted Food and Commercial Workers. More from the AP h .

WORKER SAFETY

AMAZON MCDONALD S NCLUDED N 'DIR Y DOZEN': The National Counc l for Occupational Safety and Hea th a federation of state and local occupational safety nonprof ts released ts annual "D rty Dozen" report Wednesday listing 12 employers that put workers at risk. Amazon was c ted for he deaths of six employees over a period of seven months. It was Amazon's second appearance on the list n two years in 2018 it was c ted for three workers killed over a period of five weeks. Fast-food giant McDonald's was cited for its "fa lure to act" on more han two dozen sexual harassment compla nts an ssue that in September prompted McDonald's workers to stage a walkout n 10 citi es. The report also s ngled out warehouse distributor XPO Log stics the subject of an October New York Times expose on allegations of pregnancy d scr m nation and dangerous work ng conditions that prompted ninety-seven members of Congress to call on the House Labor and the Workforce Comm ttee to investigate the company. According to the Bureau of Labor Statist cs 5 147 people died from workplace njuries in 2017 the last year for which data are available and 2.8 mi lion suffered nonfatal njuries. Read the report here.

IN THE COURTS

AMAZON DRIVERS' MISCLASSIFICA ION CLAIMS GE GREEN L GH : "Amazon com Inc. drivers will get to fight out their cla ms the nternet g ant misclassified them as ndependent contractors in court " Bloomberg Law's Porter Wells reports. "In a move that affects tens of thousands of Amazon workers nationwide Judge Jon Coughenour said the ndividual arb tration clauses used in the drivers' employment contracts aren't enforceable." The udge noted hat the Federal Arbitration Act provides an exemption for workers engaged in "fore gn or interstate commerce " as aff rmed by the Supreme Court n January. Coughenour said that applied to the plaintiffs because Amazon s "in the business of delivering packages and goods across the country that are not transformed or modified dur ng the sh pping process." More from Wells here.

COFFEE BREAK

— "Unions crank t up for Biden launch " from POLITICO

— "Thousands of Dreamers graduate from high school every year analysis finds " from POLITICO

— "Five th ngs we st ll don t know about the Boeing 737 Max crisis " from Th W h gt P t

— "Two Cap talists Worry About Cap talism's Future " from The Wall Street Journal

— "U S. solar manufacturers shed obs despite tariffs " from < a href="https //gcc01.safelinks protect on.outlook com/?url=http%3A%2F%2Fgo polit coema l.com%2F%3Fqs%3D8e7b347b76b123dfa11f0b14aa20f33d86dc72ba9411e0589a0fb23ed25c7c6d75e7421744ad8d2aa12dc6c 6aef3738&data=02%7C01%7C%7C9bf0673935d64fb5b26a08d6c986c779%7C5e453ed8e33843bb90754ed5b8a8caa4%7C0%7C0%7C636917978042344857&sdata=axpHSTI1Ft2FrFNSXX7rLtAmLFQoWvKzvkanOM%2FRAKU%3D&reserved=0" originalSrc="h tp //go polit coemail.com/?qs=8e7b347b76b123dfa11 0b14aa20 33d86dc72ba9411e0589a0fb23ed25c7c6d75e7421744ad8d2aa12dc6cf6aef3738" shash="wXYq2nvlYfIsLr N/x3dHZr0mscqqOHj1SDufFgyPtfH3crq7IIoZ9YGO0lysZs YKajBfCa4I9kRQUy1J4b6i4KKf0jrmnwsK9MsDzJ1VtD//chFI00bjgRC7z6EzCKhQtcXMjHz10eFg26LKVXaRPudu55Wv Z3D8s / 9DKQ=" target="_blank">POLITICO

— "Judge approves $235 mi lion in bonuses for 10 000 PG&E employees " from Th S F Ch l

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Subject: Legal News FYI 04-25-19
Date: Thursday, April 25, 2019 10:53:24 AM
Attachments: image001.png

Thursday, April 25, 2019

#No Filter: Terminating an Employee for Social Media Posts

JD Supra Law News 25 Apr 2019 09:50

Prior to the advent of social media and especially the #MeToo movement, employers were generally comfortable drawing a bright line between what employees did on their own ime and workplace misconduct. Those bygone times, however, have been replaced by a...

New York City Poised to Bar Pre-employment Marijuana Testing

National Law Review 25 Apr 2019 07:16

, the New York City Council overwhelmingly passed a bill hat would prohibit most pre-employment screening for marijuana by public and private employers. The bill is supported by Mayor Bill de Blasio and would take effect one year after the mayor signs...

Second D.C. Charter School Makes Effort To Form A Union

WAMU-FM 88.5 (Washington, DC) 24 Apr 2019 20 51

Teachers at Mundo Verde Bilingual Charter school in Washington have made efforts to form a union, he second unionization attempt by charter school teachers in the District over he past two years. The teachers at the Truxton Circle school say they're...

Supreme Court Doubles Down on Enforceability of Class Arbitration Waivers

National Law Review 24 Apr 2019 18:17

Article By The United States Supreme Court today ruled that arbitration agreements must explicitly provide for class arbitration for that process to be invoked, bolstering the Court's 2018 decision in Epic Systems Corp. v. Lewis which held that class...

Case: Labor Relations/Refusal to Bargain (N.L.R.B.)

BloombergLaw - Labor Relations News 24 Apr 2019 17:26

XPO Logistics Freight, Inc. unlawfully refused to recognize and bargain with a union the NLRB certified as the exclusive representative of a unit of driver sales representatives and driver sales representative students at a Los Angeles service center....

Case: Labor Relations/Refusal to Bargain (11th Cir.)

BloombergLaw - Daily Labor Report 24 Apr 2019 16 57

The NLRB properly denied an Internal Revenue Service security contractor's motion to reopen the administrative record in unfair-labor-practice proceedings to show hat the IRS would have required it to fire three security guards who misbehaved. Although...

Workers accuse Google of retaliating against them for organizing efforts

HR Dive 24 Apr 2019 13:25

Dive Brief: Google workers Meredith Whittaker and Claire Stapleton accused Google of retaliating against them after they attempted to organize workers, according to reporting by Fortune . Whittaker's and Stapleton's efforts include the worker-led...

Can You Terminate An Employee For Talking To The Press?

National Law Review 24 Apr 2019 11:23

Article By It's a potential nightmare scenario for employers. Something happens at the company. Maybe it's a safety hazard that resulted in a significant employee injury, or a product defect that is resulting in public outcry. The press gets wind of it...

EEOC Trailblazing on LGBT Rights May Stop at High Court

BloombergLaw - Daily Labor Report 24 Apr 2019 11:16

• Justices to hear trio of cases on scope of Title VII • DOJ has let EEOC voice conflicting views before By Robert Iafolla and Erin Mulvaney The Equal Employment Opportunity Commission could be sidelined when the U.S. Supreme Court considers whether...

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From:	Burdick, Ruth E.
To:	Arbesfeld, Mark; Barham, Jeffrey; Bock, Richard; Carlton, Peter J.; Coleman, Jocelyn; Colwell, John F.; Cowen, William B.; Emanuel, William; Finkelstein, Marci J.; Free, Douglas; Giannasi, Robert (ALJ); Goldstein, Steven; Head, Brittani; Jacob, Fred; Kaplan, Marvin E.; Krafts, Andrew J.; Kraus, Grant; Lambert, Malissa; Lennie, Rachel G.; Lucy, Christine B.; McFerran, Lauren; ML-HQ-Advice; ML-HQ-Appellate and Supreme Court Litigation Brch; ML-HQ-Contempt, Compliance, and Special Lit Branch; ML-HQ-Solicitor"s Office; Murphy, James R.; Pearce, Mark G.; Platt, Nancy; Qureshi, Farah Z.; Rappaport, Steve; Ring, John; Robb, Peter; Rothschild, Roxanne L.; Sophir, Jayme; Stock, Alice B.; Walkowiak, Robert G; Zick, Lara S.
Cc:	Walsh, Dennis; Maier, Harold A.; Heller, Richard P.; Kaminski, James F.
Subject:	D.C. Circuit decision in UPS Ground Freight, Inc., Board Case 04-CA-205359 (reported at 366 NLRB No. 100)
Date:	Thursday, April 25, 2019 4:35:59 PM
Attachments:	UPS Ground Freight v NLRB_18_1161_FINAL Brief.pdf (1).pdf

In a published opinion that issued in this test-of-certification case on Friday, April 19, 2019, the D.C. Circuit enforced the Board's bargaining order issued against this subsidiary of United Parcel Service, Inc., after drivers at its Kutztown, Pennsylvania distribution center voted 27 to 1 in a mail-ballot election in January 2016 to be represented by International Brotherhood of Teamsters, Local Union No. 773. In doing so, the court concluded that the Board did not abuse its discretion in determining the appropriate bargaining unit or in overruling the employer's election objections. The court also agreed with the Board that the regional director had not abused his discretion in applying the Board's Rules and Regulations during the representation proceeding.

In the underlying representation case, the union filed a petition to represent the drivers at the Kutztown distribution center in December 2015. In response, the employer argued that the appropriate unit was instead a multi-facility unit that should include all 290 drivers employed across nine distribution centers it operated in Connecticut, Florida, Georgia, Kansas, Mississippi, North Carolina, Ohio, and Virginia, under a contract with Advance Auto Parts. After a hearing was held, the regional director issued a decision finding that the employer failed to present evidence to rebut the presumptive appropriateness of a single-facility bargaining unit, and directed a mail-ballot election. Although fully litigated at hearing, the regional director did not address whether a potential voter was a statutory supervisor who engaged in conduct that would taint the election, or whether two job classifications should be excluded from the unit, finding resolution of those issues would not significantly affect the size or character of the unit. The employer filed a request for review, which was denied by the Board (Members Pearce, Miscimarra, and McFerran).

After the election, the employer filed objections to the election and a supporting offer of proof. The regional director issued a supplemental decision rejecting the employer's post-election objections without a hearing, and certified the union. Thereafter, the employer filed a request for review raising a variety of arguments, including contesting the appropriateness of the unit, reasserting the status and conduct of the alleged supervisor, and challenging various procedural rulings made by the regional director under the Board's representation-case procedures. On review, the Board (Members Pearce and McFerran, Member Miscimarra, dissenting in part) issued a decision providing analysis for why the supervisory claim failed, but in all other respects, denied the request for review.

The employer then refused to bargain in order to seek court review.

Before the court, the employer only briefly challenged the substantive merits of the underlying certification. Nonetheless, the court reviewed and upheld the Board's determination of an appropriate unit, as well as the Board's findings on the issue of the status of the putative supervisor, holding that the claims of authority to assign, responsibly direct, hire, and adjust grievances were unsupported. On the procedural issues, the court rejected the employer's contentions that the regional director abused his discretion and that the pre-election timeline was unfairly abbreviated. The court held that those rulings fully comported with the Board's Rules and Regulations and with due process. Lastly, the court held that the regional director properly directed a mail-ballot election, and that such an election did not unduly restrict the employer's right to campaign.

The court's opinion is here, and the Board's brief to the court is attached.

Final Brief Oral Argument Scheduled Mar. 21, 2019

Nos. 18-1161, 18-1182

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UPS GROUND FREIGHT, INC.
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL UNION NO. 773
Intervenor

ON PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UPS GROUND FREIGHT, INC.	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 18-1161, 18-1182
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	04-CA-205359
	)	
and	)	
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 773	)	
	)	
Intervenor	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certifies the following:

A. Parties and Intervenor

UPS Ground Freight, Inc. ("the Company") was the respondent before the Board in the unfair-labor-practice proceeding on review and is the Petitioner/ Cross-Respondent in this court proceeding. The Board's General Counsel was a party before the Board in the unfair-labor-practice proceeding. International Brotherhood of Teamsters, Local Union No. 773 ("the Union") was the charging party before the Board in the unfair-labor-practice proceeding, and is the Intervenor in this court proceeding. Amici curiae in support of the Company in

this court proceeding are Coalition for a Democratic Workplace et al., and the Chamber of Commerce of the United States.

B. Rulings Under Review

This case is before the Court on the Company's petition for review of an unfair-labor-practice Decision and Order of the Board, issued on June 1, 2018, and reported at 366 NLRB No. 100. The Board seeks full enforcement of that Order. The Board's Order is based, in part, on findings made in an underlying representation (election) proceeding, and thus the record in that proceeding is also before the Court. 29 U.S.C. § 159(d). The Board's Decision on Review and Order in the underlying representation proceeding issued on July 27, 2017, and is reported at 365 NLRB No. 113.

C. Related Cases

The case on review was not previously before this Court or any other court. Board counsel is unaware of any related cases pending in this Court or any other court.

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Dated at Washington, D.C.
this 13th day of February, 2019

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GLOSSARY

Act	National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*
Board	National Labor Relations Board
Company	UPS Ground Freight, Inc.
Union	International Brotherhood of Teamsters, Local Union 773
Regional Director	Acting Regional Director Harold A. Maier
JA	Joint Appendix
Br.	UPS Ground Freight, Inc.'s Opening Brief
CDW Amici Br.	Coalition for a Democratic Workplace *et al.* Amici Brief
Chamber Amicus Br.	Chamber of Commerce of U.S. Amicus Brief

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18-1161, 18-1182

UPS GROUND FREIGHT, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL UNION NO. 773

Intervenor

ON PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of UPS Ground Freight, Inc. ("the Company") for review, and the cross-application of the National Labor

Relations Board ("the Board") for enforcement, of a Board Decision and Order issued against the Company on June 1, 2018, and reported at 366 NLRB No. 100. The Board had jurisdiction over the unfair-labor-practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*, as amended ("the Act"). 29 U.S.C. § 160(a). The Board's Order is final with respect to all parties, and this Court has jurisdiction pursuant to Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e), (f). The petition and application are timely, as the Act provides no time limit for such filings. International Brotherhood of Teamsters, Local Union No. 773 ("the Union") intervened in support of the Board.

The Board's Order is based, in part, on findings made in an underlying representation (election) proceeding (Board Case No. 04-RC-165805), and thus the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act. 29 U.S.C. § 159(d); *see Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). The Court has jurisdiction to review the Board's actions in the representation proceeding for the limited purpose of "enforcing, modifying, or setting aside in whole or in part the [unfair-labor-practice] order of the Board." 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act to resume processing the representation case in a manner consistent with the Court's rulings. 29 U.S.C. § 159(c); *see Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

STATEMENT OF THE ISSUES

The Company has refused to recognize or bargain with the union that its employees overwhelmingly chose as their representative by a vote of 27 to 1 in a Board-supervised election. The ultimate issue is whether the Board properly found that the Company's refusal violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1). That finding depends on the validity of the Union's certification as representative, which depends, in turn, on the resolution of the following issues raised by the Company:

1. Whether the Board reasonably found that the Company failed to rebut the presumptive appropriateness of a single-facility bargaining unit at its Kutztown, Pennsylvania distribution center.

2. Whether the Board reasonably overruled the Company's election objections relating to driver Frank Cappetta without a post-election hearing.

3. Whether the Board reasonably found that the Regional Director acted within his discretion when applying the Board's Rules and Regulations during the representation proceeding.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are included in the attached Addendum.

STATEMENT OF THE CASE

As noted, this unfair-labor-practice case concerns the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1), by admittedly refusing to recognize or bargain with the Union as the certified representative of a unit of the Company's employees. The question before the Court is whether the Union's certification was proper based on the Board's findings and procedural rulings in the representation proceeding.

I. STATEMENT OF FACTS

A. Background; the Company's Contract with Advance Auto Parts

The Company is a subsidiary of United Parcel Service, Inc., that provides transportation and delivery services throughout the United States. (JA.666-67, 1134-35; JA.18-19.)[1] Pursuant to a contract with its customer, Advance Auto Parts, the Company transports products from nine distribution centers to retail stores nationwide. (JA.666-67; JA.19-23.) The Company's contract with Advance Auto Parts is administered by a centralized management team. (JA.666-67; JA.24-27.)

In addition to the Kutztown, Pennsylvania distribution center at issue in this case, the Company operates out of facilities in Connecticut, Florida, Georgia,

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[1] "JA" references are to the Joint Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to the Company's opening brief.

Kansas, Mississippi, North Carolina, Ohio, and Virginia, which are between 250 and 1,265 miles from Kutztown. (JA.666-67, 676; JA.23.) Each distribution center covers a distinct geographic area, and the centers' respective delivery territories do not overlap. (JA.667; JA.79-80.)

Across all nine distribution centers, the Company employs approximately 290 drivers. (JA.667; JA.39.) The drivers share skills and perform functions that are essentially identical. (JA.672; JA.38.) Recordkeeping functions for the Company's drivers are centralized at its headquarters, and drivers are all subject to the same general personnel policies, wage-and-benefit structures, performance criteria, and work guidelines. (JA.669-71, 677; JA.46-47, 51, 75-76, 105.) Drivers at the various distribution centers have virtually no contact with drivers from other facilities. (JA.673; JA.95, 247-48.)

Each distribution center is run by a local management team, including an operations manager and an operations supervisor. (JA.667; JA.28-31.) The Company's centralized recruiting department screens job applicants, and then local managers review the applications, interview and test prospective drivers, and make the final hiring decisions. (JA.671; JA.113-14.) Local managers are responsible for the day-to-day supervision of drivers and for monitoring their performance: they regularly test, train, and evaluate the drivers. (JA.670-71; JA.44.) Scheduling, leave requests, disputes over assignments, and similar issues are

resolved locally. (JA.670; JA.123-24.) Local managers also independently address disciplinary problems, maintain drivers' disciplinary files, and issue oral and written warnings. (JA.670-71; JA.38, 50, 81-82, 106-07.) The local managers are responsible for recommending suspensions and terminations, which require higher approval from central management before being implemented. (JA.671; JA.79, 107-10.)

B. The Kutztown Distribution Center

The Kutztown distribution center is responsible for a delivery territory that includes central Pennsylvania, New Jersey, New York, and Delaware. (JA.667.) At the time of the election in this case, the Company employed approximately thirty drivers at the Kutztown facility. (JA.667-68; JA.222.) Drivers report to work at staggered times between 12:00 a.m. and 8:00 a.m., and return to the facility between 7:00 a.m. and 7:00 p.m. (JA.667; JA.130-32.) Their delivery routes range from 150 to 600 miles, and most of the Company's tractor-trailers contain a bunk for overnight runs. (JA.667; JA.33, 131, 320.)

Although they are subject to the same pay structure as drivers at facilities in other geographic regions, the Kutztown drivers receive higher mileage rates. (JA.670-72; JA.77-78, 96-99.) Unlike the Company's other distribution centers, the Kutztown facility has an off-site center for product returns approximately ten

miles away, which creates additional job duties for the Kutztown drivers. (JA.672; JA.41-43, 166-67, 249.)

Over the three years prior to the hearing in this case, a small percentage of the work at the Kutztown facility was performed by temporarily transferred drivers from other facilities. (JA.675; JA.67-68, 221-22, 290-91, 497.) Over the five years prior to the hearing, sixteen non-supervisory employees permanently transferred to or from the Kutztown facility. (JA.676; JA.298-305, 498.) All but four such transfers occurred less than one month after hire, and at least some were the result of temporary training assignments. (JA.676; JA.298-305, 498.)

C. The Job Duties of Frank Cappetta

One of the drivers employed by the Company at the Kutztown facility, Frank Cappetta, performs several functions. Cappetta spends approximately eighty percent of his time working as a dispatcher, ten percent as a certified safety instructor, and ten percent as a road driver. (JA.1026; JA.190, 216-19.) When working as a dispatcher, Cappetta receives emails from Advance Auto Parts providing a detailed schedule of routes and stops to be made on those routes. (JA.1026; JA.219-21.) The majority of the Kutztown drivers, approximately twenty-five out of thirty, are permanently assigned to particular routes. (JA.668, 1026; JA.222-23.) Cappetta matches the remaining drivers to unclaimed routes. (JA.1026; JA.223.) In doing so, Cappetta primarily relies on the preferences

expressed by the drivers themselves, although he occasionally considers a driver's known skills, such as whether a route that involves driving into New York City should go to an experienced "city driver." (JA.1026; JA.223-24, 236-38, 272-73, 311.) If a driver objects to a route, then Cappetta can switch that driver to another route. (JA.1026; JA.223-24, 269.) If a driver objects to the only route available, then Cappetta must refer the driver to a management official to resolve the dispute. (JA.1026; JA.224, 235-36, 269-70, 276-77.)

As a dispatcher, Cappetta is also required to note "call outs" when drivers are on vacation or sick leave, and to transfer those drivers' routes to available drivers while balancing driver workloads. (JA.1026; JA.183, 278-79.) Cappetta does not approve leave requests, which drivers must submit to the local managers. (JA.1026; JA.244-46, 278.) When Advance Auto Parts schedules more routes than there are available drivers, the Company will bring in temporary drivers from a third-party provider. (JA.1026; JA.226.) Cappetta is required to notify the Kutztown operations supervisor when temporary drivers are needed, and the operations supervisor then contacts the third-party provider. (JA.1026; JA.226, 229-30.) There was a brief period of time in mid-2015 when, due to the absence of an operations supervisor at the Kutztown facility, Cappetta was authorized to contact the provider directly. (JA.1026 & n.2; JA.229-31.)

When working as a certified safety instructor, Cappetta administers road tests for potential hires, as well as drivers' semi-annual safety tests. (JA.1027; JA.232-34.) Cappetta reports the results of those tests to management, and has no further involvement in the hiring process. (JA.1027; JA.232-33, 248-49.) Cappetta cannot discipline other drivers or review their work. (JA.1025-27.) Other drivers at the Kutztown facility also spend part of their time working as certified safety instructors. (JA.678.)

II. PROCEDURAL HISTORY

A. The Union's Petition; the Pre-Election Hearing

On December 10, 2015, the Union filed a petition with the Board's Region 4 in Philadelphia seeking a representation election among all full-time and regular part-time drivers at the Kutztown distribution center. (JA.504.) The same day, the Regional Director scheduled a pre-election hearing for Friday, December 18, which in turn required the Company to file a statement of position by Thursday, December 17. (JA.511.) Five days later, on December 15, the Company filed a motion requesting a two-business-day postponement such that the statement of position would be due Monday, December 21, and the hearing would occur Tuesday, December 22. (JA.519-21.) According to the Company's motion, the attorney who filed the motion was traveling and would be unavailable to meet with company representatives until the following day, and the timing of the petition was

burdensome due to the Company's significant holiday delivery commitments. (JA.520.) The Company's motion did not provide any additional explanation as to why it needed additional time to prepare. (JA.519-21.) The petitioner Union opposed the motion. (JA.521.) The following day, the Acting Regional Director[2] granted the Company's motion in part and ordered a one-business-day postponement, such that the hearing was rescheduled to Monday, December 21, and the statement of position was due Friday, December 18. (JA.523.)

The Company filed its statement of position on December 18, and the pre-election hearing was held before a Hearing Officer on December 21. (JA.1.) The Hearing Officer indicated at the start of the hearing that post-hearing briefs would only be available upon the special permission of the Regional Director. (JA.12.) During the hearing, the parties fully litigated the supervisory status of Cappetta. (JA.1025; JA.14, 124-293.) They were not permitted to litigate whether drivers in two disputed classifications, dispatcher and certified safety instructor, should be excluded from the unit. (JA.795; JA.13-14.) Near the end of the eight-hour hearing—which the Hearing Officer had continued past 6:00 p.m. without objection from either party—counsel for the Company requested that the parties reconvene the following morning for the sole purpose of presenting closing statements. (JA.329-30.) The Hearing Officer denied that request and offered the

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[2] Hereinafter "Regional Director," for ease of reference.

parties thirty minutes to prepare closing statements, after which the Company used its closing statement to argue that it was being treated unfairly. (JA.329-50.)

B. The Mail-Ballot Election; the Union's Election Victory and Certification; the Company's Refusal to Bargain

On January 5, 2016, the Regional Director issued a Decision and Direction of Election finding that a single-facility unit at the Kutztown distribution center was appropriate and directing a mail-ballot election. (JA.666-83.) The Regional Director did not resolve whether Cappetta was a statutory supervisor, or whether dispatchers and safety instructors should be excluded from the unit, because those issues could not significantly affect the size or character of the unit. (JA.678.) The Company filed a request for review of the Regional Director's decision to direct a mail-ballot election, which the Board denied. (JA.749.)

The Board-supervised election was held between January 11 and January 29, 2016. (JA.681.) Two employees in the disputed classifications, including Cappetta, were permitted to vote under challenge. (JA.681, 790.) Thirty out of thirty-two eligible voters cast ballots, and—by a vote of 27 to 1—the employees voted in favor of representation by the Union. (JA.790.) The two challenged ballots were not opened or counted because they could not affect the election result. (JA.790.) Following the election, the Company requested the issuance of investigatory subpoenas, and the Regional Director denied that request given the absence of a scheduled hearing. (JA.752, 796-97.) The Company filed objections

to the election and a supporting offer of proof. (JA.791.) On March 11, 2016, the Regional Director issued a Supplemental Decision on Objections, rejecting the Company's post-election objections without a hearing and certifying the Union as the exclusive bargaining representative of the employees. (JA.790-98.) The two disputed classifications were neither included in, nor excluded from, the unit. (JA.798 n.5.) The Company filed a request for review with the Board challenging the Union's certification and raising a variety of arguments, including contesting the appropriateness of the bargaining unit, the status and conduct of Cappetta, and various procedural rulings made by the Regional Director. (JA.1025.)

On July 27, 2017, the Board (Members Pearce and McFerran; Chairman Miscimarra, dissenting in part) issued a Decision on Review and Order granting in part the Company's request for review as to Cappetta's supervisory status. (JA.1025.) On review, the Board found that Cappetta was not a statutory supervisor, and that, in the alternative, the Company failed to show objectionable conduct. (JA.1025-27.) The Board otherwise denied the Company's request for review, and expressly affirmed the Regional Director's rulings. (JA.1025 n.1.)

In August 2017, the Union made a formal request to bargain, and the Company stated that it would not recognize or bargain with the Union. (JA.1135.) The Board's General Counsel issued an unfair-labor-practice complaint, and subsequently moved for summary judgment. (JA.1133.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On June 1, 2018, the Board (Chairman Ring; Members Pearce and McFerran) granted the General Counsel's motion for summary judgment and found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize or bargain with the Union. (JA.1133-35.) The Board found that all representation issues raised by the Company were or could have been litigated in the underlying representation proceeding. (JA.1133.)

The Board's Order requires the Company to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by the Act. (JA.1135.) Affirmatively, the Board's Order requires the Company to, on request, recognize and bargain with the Union as the exclusive representative of employees in the certified unit, and to post a remedial notice. (JA.1135-36.)

SUMMARY OF ARGUMENT

This case involves a unit of the Company's drivers who have sought to exercise their rights under federal law by voting, in near unanimity, to be represented by the Union in collective bargaining. Nearly three years later, the Company still refuses to recognize or bargain with the Union.

On review, the Company only briefly addresses the substantive merits of the underlying certification, and largely ignores the detailed analysis provided by the

Board and the Regional Director. The Board reasonably found that the Company failed to rebut the presumptive appropriateness of a single-facility unit at the Kutztown facility, which was petitioned for by the Union on behalf of the employees. Despite fully litigating the issue at the pre-election hearing, the Company did not carry its heavy burden of showing that the *only* appropriate unit was instead a multi-facility unit involving nine facilities hundreds of miles apart and composed of distinct local workforces that have virtually no routine contact or interaction with each other.

The Board further reasonably found that the Company failed to carry its burden to show that driver Frank Cappetta was a statutory supervisor, again despite fully litigating the issue at the hearing. Remarkably, the Company based its substantive objections to the conduct of the election solely on its unsubstantiated speculation that, as a putative supervisor, Cappetta theoretically *could have* solicited union authorization cards from other employees. The Board acted well within its discretion in overruling such objections given that Cappetta was not a supervisor and given that the Company did not proffer a single specific allegation of objectionable conduct. Rather, the only evidence proffered by the Company was hearsay testimony from a non-unit employee about Cappetta allegedly stating that he and other drivers were trying to unionize, and testimony from a supervisor who allegedly observed a missed call from a union organizer on Cappetta's

cellphone the day after the Union received a Board-ordered voter list containing employees' cellphone numbers. Neither incident would have been objectionable even assuming, in the alternative, that Cappetta was a supervisor.

The Company focuses much of its attention on arguing that the Regional Director abused his discretion under the Board's Rules and Regulations while overseeing the representation proceeding. The Company, however, expressly states that it does not challenge the facial validity of the governing Rules and Regulations. Tellingly, the Company barely acknowledges a central requirement of an alleged abuse of discretion: a showing of actual prejudice. All of the rulings at issue were reasonable and well within the discretion of the Board and the Regional Director—and, in any event, the Company has failed to show that it was prejudiced by any of those rulings. The Board's representation proceedings are non-adversarial, and the Company had a full opportunity to present evidence and to litigate all material issues.

This Court has historically expressed grave concern over employers that disregard their "solemn obligations" under the Act by utilizing delay tactics or refusing to bargain based on arguments that are without merit. *Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 426 F.2d 1243, 1249-50 (D.C. Cir. 1970); *cf. E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1445-46 (D.C. Cir. 1996). Many of the Company's arguments in the present case warrant such opprobrium.

ARGUMENT

THE COMPANY VIOLATED THE ACT BY REFUSING TO RECOGNIZE OR BARGAIN WITH THE UNION

An employer violates Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1), when it refuses to recognize or bargain with the duly certified bargaining representative of its employees. *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 961-62 (D.C. Cir. 1999). The Company has admittedly refused to recognize or bargain with the Union in order to contest the Board's certification of the Union as the exclusive representative of the drivers at the Kutztown distribution center, despite the drivers overwhelmingly voting in favor of union representation. Thus, assuming the Court upholds the Board's certification of the Union, the Company has violated the Act. *Id.*

In contesting the Union's certification, the Company makes two substantive arguments: first, that the single-facility unit certified by the Board was inappropriate; and second, that driver Frank Cappetta was a statutory supervisor whose suspected pro-union sympathies tainted the results of the election. The Company also makes numerous procedural arguments regarding the Regional Director's rulings during the representation proceeding. As shown below, the Company's arguments are wholly without merit.

A. The Board Reasonably Found That the Company Failed To Rebut the Presumptive Appropriateness of a Single-Facility Unit at the Kutztown Distribution Center

Section 9(a) of the Act provides for the selection of an exclusive bargaining representative by the majority of employees in "a unit appropriate for such purposes." 29 U.S.C. § 159(a). Section 9(b) vests in the Board the authority to determine "the unit appropriate for the purposes of collective bargaining," in order to assure to employees "the fullest freedom in exercising the rights guaranteed by [the Act]." 29 U.S.C. § 159(b). Congress thus granted the Board broad discretion in order to ensure "flexibility in shaping the bargaining unit to the particular case." *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985). In accordance with the Act, "the Board need only select *an* appropriate unit, not *the most* appropriate unit." *Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31, 38 (D.C. Cir. 2015).

When a union files a petition seeking to represent a unit of employees at a single facility in an employer's multi-facility operation, the Board has long maintained that the single-facility unit is presumptively appropriate. *J&L Plate, Inc.*, 310 NLRB 429, 429 (1993); *see Dean Transp., Inc. v. NLRB*, 551 F.3d 1055, 1063 (D.C. Cir. 2009); *Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1085-86 (D.C. Cir. 2003). The party opposing the single-facility unit carries the "heavy burden" of producing affirmative evidence to rebut the unit's presumptive appropriateness. *Catholic Healthcare W.*, 344 NLRB 790, 790 (2005); *J&L Plate*,

310 NLRB at 429; *see Cmty. Hosps.*, 335 F.3d at 1085. A multi-facility unit will only be required upon a showing that the single facility "has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity." *Dean Transp.*, 551 F.3d at 1063; *J&L Plate*, 310 NLRB at 429. The Board considers factors such as: (1) central control over daily operations and labor relations, including the extent of local autonomy; (2) the similarity of employee skills, functions, and working conditions; (3) the degree of employee interchange; (4) the distance between locations; and (5) the parties' bargaining history, if any. *J&L Plate*, 310 NLRB at 429.

Determining on a case-by-case basis whether a particular unit is appropriate necessarily involves "a large measure of informed discretion," and the Board's determinations are "rarely to be disturbed." *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000) (quoting *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947)). The Court will uphold the Board's unit determinations unless "arbitrary" or based on factual findings "not supported by substantial evidence in the record." *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 420 (D.C. Cir. 2008).

Here, the Board's analysis of the appropriateness of a single-facility unit at the Kutztown distribution center (JA.669-77, 1025 n.1) is consistent with settled precedent and supported by substantial evidence in the record. The Company

failed to carry its burden of rebutting the presumptive appropriateness of the Kutztown single-facility unit by demonstrating that the *only* appropriate unit was a multi-facility unit including several hundred drivers at all nine distribution centers servicing the Advance Auto Parts contract. Accordingly, the Board acted within its broad discretion in approving the petitioned-for unit.

The Board first found that the Company's centralized control over "many aspects of personnel and labor relations for all nine facilities" is insufficient to rebut the single-facility presumption, because the local managers at the Kutztown facility exercise significant autonomy over the day-to-day work of the drivers at that facility. (JA.669-72.) *See Dean Transp.*, 551 F.3d at 1064 (upholding single-facility unit where employer maintained "highly centralized operation" but onsite supervisors oversaw drivers' day-to-day work). Among other things, the local managers make final hiring decisions, issue discipline short of suspension without oversight, recommend suspensions and terminations, schedule and assign drivers' work and leave, train and monitor drivers, and resolve day-to-day problems. *See D&L Transp., Inc.*, 324 NLRB 160, 160-61 (1997) (directing single-facility unit where local managers' control over hiring, assignments, time off, and minor discipline outweighed centralized administration); *cf. Jerry's Chevrolet, Cadillac, Inc.*, 344 NLRB 689, 691 n.9 (2005) (rejecting single-facility unit, but noting one

would be appropriate if local managers were responsible for scheduling, assignments, vacations, sick leave, and addressing minor disciplinary problems).

The Board also explained that the lack of functional integration between the Company's distribution centers weighs in favor of a single-facility unit. (JA.672-73.) The distribution centers do not have overlapping delivery territories, and the Kutztown drivers have virtually no contact with drivers from other facilities, which service different areas of the country often hundreds of miles away. In short, the drivers do not contribute to different stages of a single work process. *See Rental Unif. Serv., Inc.*, 330 NLRB 334, 336 (1999) (finding single-facility presumption unrebutted where employees performed same job but did not "interact with [employees at other facilities] to perform their jobs or on any regular basis"); *cf. Prince Telecom*, 347 NLRB 789, 792-93 (2006) (noting inter-facility employee contact as key consideration, and directing multi-facility unit based on facility's integration into one of two distinct service networks).

Likewise, the Board found insufficient evidence of significant employee interchange to require broadening the unit beyond the Kutztown facility. (JA.673-76.) As an initial matter, the Company failed to make the required showing not only that there was interchange but also that it affected a significant percentage of the total amount of work performed. *New Britain Transp. Co.*, 330 NLRB 397, 398 (1999). The Board reasonably inferred from the limited evidence in the record

that temporary transfers accounted for, at most, five percent of the Kutztown facility's operations, and roughly one percent of the Company's operations across all nine distribution centers. (JA.675.) That level of interchange is far below the amount required to rebut the single-facility presumption. *New Britain Transp.*, 330 NLRB at 398 (citing cases). In addition, there were just sixteen non-supervisory permanent transfers at the Kutztown facility over a five-year period, and some of those "transfers" involved new hires who were at the facility solely for training. (JA.676.) *See Red Lobster*, 300 NLRB 908, 911 (1990) (finding permanent transfers less significant and describing eleven transfers in one-year period as "minimal").

The Board acknowledged that one relevant factor, the similarity of drivers' skills and functions, supports a multi-facility unit. (JA.672.) The Board reasonably found, however, that the other factors—including local control over day-to-day work, and lack of substantial interchange or integration with other facilities—outweigh the similarity of skills and functions. In addition, there are certain working conditions unique to the Kutztown facility, including a higher mileage rate and additional job duties, which diminish the significance of the drivers' shared skills and functions. (JA.672.)

Finally, the Board emphasized that, while not always dispositive, the fact that the Kutztown facility is hundreds of miles from the other eight distribution

centers strongly supports a single-facility unit. (JA.676.) The substantial distances involved, and the lack of functional integration or regular contact with other drivers, reinforces the appropriateness of a unit among the Kutztown drivers. *E.g.*, *Rental Unif. Serv.*, 330 NLRB at 336 (relying on distances of twenty-two and fifty miles in support of single-facility unit); *cf. Jerry's Chevrolet*, 344 NLRB at 690-91 (stressing close proximity of facilities, such that employees used same parking lot, in rejecting single-facility unit).

In its brief to the Court (Br. 63-66), the Company largely ignores the Board's detailed analysis. Instead, it merely repeats factual considerations that were fully addressed in the Decision and Direction Election (JA.669-76), without rebutting that analysis or providing any supporting authority.[3] Moreover, even if the Company had shown that a multi-facility unit involving facilities thousands of miles apart was "equally or more appropriate," it would not establish that the petitioned-for Kutztown unit was "truly inappropriate," as required to warrant

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[3] The Company has thus waived any response to the Board's analysis on these points and should not be permitted to raise new arguments in its reply brief. *See Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (holding that arguments not raised in opening brief are deemed waived).

overturning the Board's unit determination. *Country Ford Trucks*, 229 F.3d at 1189-91.[4]

B. The Board Reasonably Overruled the Company's Election Objections Relating to Driver Frank Cappetta Without a Post-Election Hearing

In addition to affirming the appropriateness of the single-facility unit, the Board also reasonably overruled the Company's objections regarding driver Frank Cappetta without holding a post-election hearing. Cappetta's supervisory status was fully litigated at the pre-election hearing, and the Board ultimately found that Cappetta was not a supervisor whose conduct could have coerced voters or tainted the election. That finding alone disposes of the substantive and procedural objections relating to his purported misconduct. In the alternative, however, the Board found that—even assuming Cappetta *was* a supervisor—the Company failed to proffer any evidence substantiating its vague claims of misconduct. The Board then reasonably rejected the Company's additional objections relating to Cappetta, which are based on meritless procedural arguments.

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[4] For the reasons discussed further below, *see* pp. 44-51, the Company's bare assertions that the Regional Director and the Hearing Officer only permitted a "partial record" to be established (Br. 63), and that it was prevented from presenting "additional evidence" (Br. 9), are false. The Company fails to identify any evidence regarding the appropriateness of the single-facility unit that it was unable to introduce at the pre-election hearing or any arguments that it was unable to fully present to the Board.

Congress has entrusted the Board with an especially "wide degree of discretion" in establishing "the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996). The party seeking to overturn an election bears a "heavy burden," and the Court will overturn the Board's decision to certify an election's results "in only the rarest of circumstances." *800 River Rd. Operating Co., LLC v. NLRB*, 846 F.3d 378, 386 (D.C. Cir. 2017).

It is well established that an objecting party does not have an absolute right to a post-election objections hearing. *Amalgamated Clothing Workers v. NLRB*, 424 F.2d 818, 828 (D.C. Cir. 1970). Instead, to justify such a hearing, the burden is on the objecting party to proffer evidence raising "substantial and material factual issues" that could constitute grounds for setting aside the election. 29 C.F.R. § 102.69(c)(1); *Durham Sch. Servs., LP v. NLRB*, 821 F.3d 52, 58 (D.C. Cir. 2016); *Amalgamated Clothing Workers*, 424 F.2d at 828. Thus, when the proffered evidence, even if credited, would not justify setting aside the results of the election as a matter of Board law, a post-election hearing is not warranted and the objections should be overruled. *Durham Sch. Servs.*, 821 F.3d at 58.

The Court reviews the Board's decision to overrule election objections without holding a post-election hearing only for an abuse of discretion. *Canadian*

Am. Oil, 82 F.3d at 473. The abuse-of-discretion standard is "highly deferential." *AT&T, Inc. v. FCC*, 886 F.3d 1236, 1245 (D.C. Cir. 2018). That is particularly true here, given the substantial deference afforded to the Board in the context of representation proceedings. In order to establish an abuse of discretion, there must be a showing of actual prejudice. *Veritas Health Servs., Inc. v. NLRB*, 895 F.3d 69, 87-88 (D.C. Cir. 2018); *Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 67 (D.C. Cir. 2015); *see also* 5 U.S.C. § 706 (requiring "due account . . . of the rule of prejudicial error"). It is well established that "[t]he burden of showing prejudice from assertedly erroneous rulings is on the party claiming injury." *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 123 (D.C. Cir. 2001).

1. The Company failed to establish that Cappetta was a statutory supervisor

In order to establish that an employee constitutes a "supervisor" within the meaning of Section 2(11) of the Act, the party alleging such status must demonstrate: (1) that the individual has authority to engage in any one of the twelve supervisory functions listed in the statute, which includes the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, responsibly direct, or adjust the grievances of other employees, or "effectively to recommend" such actions; (2) that the employee's exercise of such authority requires the use of "independent judgment"; and (3) that the employee's authority is held "in the interest of the employer." *NLRB v. Ky. River Cmty. Care,*

Inc., 532 U.S. 706, 713 (2001) (quoting 29 U.S.C. § 152(11)). Congress took "great care" to distinguish between "true supervisors vested with 'genuine management prerogatives,'" and lead employees "who are protected by the Act even though they perform 'minor supervisory duties.'" *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687-88 & n.15 (2006) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974)). The Board "must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their [statutory] rights." *Beverly Enters.-Mass.*, 165 F.3d at 963.

An employer asserting supervisory status and attempting to preclude one of its workers from enjoying rights under federal labor law carries the burden of proof. *Ky. River*, 532 U.S. at 711-12. Conclusory evidence unsupported by specific examples is insufficient to establish supervisory authority. *Golden Crest Healthcare Ctr.*, 348 NLRB 727, 729 (2006); *see Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (requiring "tangible examples"). As such, "[s]tatements by management purporting to confer authority do not alone suffice." *Beverly Enters.-Mass.*, 165 F.3d at 963. Moreover, an employer does not carry its burden of proof if the record evidence remains in conflict or is otherwise inconclusive. *Salem Hosp.*, 808 F.3d at 69. The Board's determinations with regard to supervisory status are entitled to "special weight,"

and the Court will affirm them if they have warrant in the record and reasonable basis in law. *Desert Hosp. v. NLRB*, 91 F.3d 187, 193 (D.C. Cir. 1996).

In the present case, Board reasonably rejected the Company's assertion that Cappetta was a supervisor. (JA.1025-27.) The Board first found insufficient evidence that Cappetta had supervisory authority to assign work to other drivers using independent judgment within the meaning of the Act. (JA.1026.) Under Section 2(11), the term "assign" refers to the act of designating an employee to a place, appointing an employee to a time, or "giving significant overall duties." *Oakwood Healthcare*, 348 NLRB at 689. The party alleging supervisory status must show that the putative supervisor has the authority to independently *require* employees to accept assigned duties, not merely to *request* that such duties be accepted. *Golden Crest Healthcare*, 348 NLRB at 729.

As the Board explained (JA.1026), Cappetta received detailed route schedules from the Company's customer, Advance Auto Parts. Although the majority of the drivers were permanently matched to particular routes, Cappetta matched unclaimed routes to drivers as necessary, including when regular drivers were on leave, primarily by relying on the drivers' own preferences. Contrary to the Company (Br. 60), Cappetta himself could not require a driver to accept a particular route: if a driver objected to one, Cappetta would switch that driver to a different route or "direct the driver to a management official for resolution of the

dispute." (JA.1026.) *See, e.g.*, *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 15-16 (1st Cir. 2015) (affirming lack of supervisory assignment authority where dispatchers could ask employees to work overtime but, if employees objected, could not require overtime without consulting management).[5]

Moreover, even assuming that Cappetta "assigned" work, the Board reasonably found that he did not do so with the independent judgment required to confer supervisory status. Cappetta relied primarily on drivers' own preferences in distributing routes, though he occasionally considered drivers' known skills, such as matching city routes to "city driver[s]" (JA.311) who were comfortable with urban driving. As the Board explained (JA.1026), however, distributing predetermined duties to employees based on their "known skill[s] or experience" does not involve independent judgment within the meaning of the Act. *Cranesville Block Co. v. NLRB*, --- F. App'x ---, 2018 WL 5919224, at *1 (D.C. Cir. Oct. 30, 2018); *Shaw, Inc.*, 350 NLRB 354, 355-56 & n.9 (2007); *see S.D.I. Operating Partners, LP*, 321 NLRB 111, 111 (1996) (finding no independent judgment in assigning employees based on "skills they [had] previously demonstrated," while

[5] Cappetta's brief role in requesting temporary drivers from a third-party provider did not involve "assigning" work to coworkers using independent judgment. (JA.1026 & n.2.) In any event, supervisory authority that is no longer in effect is not controlling. *E.g.*, *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1550 (D.C. Cir. 1984).

"inquiring of the employees, as needed, whether a particular job [was] within their expertise").

The Board also reasonably rejected the Company's contention that Cappetta had the authority "effectively to recommend" hiring decisions within the meaning of the Act. (JA.1026.) Cappetta was one of several drivers who spent a small portion of their time acting as certified safety instructors and, in connection with that role, he administered road tests to potential hires. Cappetta had no input in the hiring process other than reporting to management whether an applicant had passed or failed the objective road tests. It is well established that the routine act of administering tests to applicants and reporting the results to management does not constitute effectively recommending hiring decisions, much less doing so with the independent judgment necessary to qualify as a statutory supervisor. *E.g.*, *Pac. Beach Corp.*, 344 NLRB 1160, 1161-62 (2005) (finding that administration of diving tests to prospective hires did not constitute supervisory hiring authority).

The Company largely ignores the Board's detailed findings and analysis regarding Cappetta's supervisory status, and instead simply repeats transcript citations regarding Cappetta's various duties, many of which are irrelevant. (Br. 57-59.) The Company relies almost exclusively on the equivocating testimony of supervisor Matt DiBiase, who was new to the job when he testified, and who admitted that he was not completely familiar with Cappetta's work or the role of

Advance Auto Parts managers. (*E.g.*, JA.126-29, 136-37, 181-84.) DiBiase's testimony was, moreover, devoid of tangible examples and contradicted by Cappetta's own detailed explanation of his job duties. *See Salem Hosp.*, 808 F.3d at 69 (noting that conflicting or inconclusive evidence does not satisfy burden of proof). In any event, the Company provides no developed legal argumentation—for example, in responding to the Board's dispositive finding that Cappetta did not exercise independent judgment—and the Company should not be permitted to "sandbag[]" the Board or the Union by being "obscure on the issue in [its] opening brief" and then "warm[ing] to the issue" in its reply brief. *CTS Corp. v. EPA*, 759 F.3d 52, 60 (D.C. Cir. 2014); *see Corson & Gruman*, 899 F.2d at 50 n.4.[6]

Although irrelevant, the Company also improperly cites uncorroborated assertions made in the offer of proof it filed in support of its post-election objections. (Br. 59-60.) However, the Company sought a post-election hearing to present evidence of Cappetta's allegedly objectionable *conduct*; as the Board found, the parties had already litigated Cappetta's supervisory *status* at the pre-

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[6] Similarly, the Company now makes the conclusory assertions (Br. 59) that Cappetta "directed [employees'] work" and "adjusted grievances" within the meaning of Section 2(11), without providing further explanation or citing applicable caselaw. *See Oakwood Healthcare*, 348 NLRB at 690-92 (setting forth elements of supervisory responsible direction); *Ken-Crest Servs.*, 335 NLRB 777, 779-80 (2001) (discussing supervisory grievance adjustment). There is no allegation that Cappetta exercised any of the other eight statutory indicia of supervisory status.

election evidentiary hearing. (JA.1025.) The Company has never explained why, having "had ample opportunity to present evidence on Cappetta's supervisory status" (JA.795), it should have been granted a "second bite at the apple" (JA.795) to introduce further evidence that it could have presented the first time. *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1183 (D.C. Cir. 2000) (reaffirming principle that Board need not afford a party "more than one opportunity to litigate any particular issue"); *e.g.*, *NLRB v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478, 490 (6th Cir. 2003) (noting that "the law does not permit yet another bite at the same apple" to relitigate supervisory status in second hearing). Notably, the proffered evidence allegedly showing that employees could not refuse Cappetta's dispatch assignments (Br. 60) was testimony from DiBiase (JA.777)—a witness who had already been called and thoroughly examined at the pre-election hearing when Cappetta's supervisory status was being litigated (JA.122-214). The additional claim that Cappetta once used a figure of speech about having "run" the facility in the past (Br. 59) is not probative of anything. In any event, the assertions in the Company's offer of proof would not alter the Board's substantive analysis, for the reasons described above.

In sum, despite fully litigating Cappetta's supervisory status at the pre-election hearing, the Company failed to carry its burden of proving that he was a statutory supervisor rather than an employee.

2. In the alternative, the Company failed to proffer evidence of objectionable conduct

As noted above, the Board initially resolved the Company's election objections relating to Cappetta on the grounds that he was not, in fact, a statutory supervisor. However, the Board also found, in the alternative, that no hearing was required, because "[e]ven assuming for the sake of argument that Cappetta was a supervisor," the Company failed to proffer any evidence to show that Cappetta engaged in objectionable conduct that could warrant setting aside the results of the election. (JA.1027.) Accordingly, the Board acted well within its discretion in overruling the Company's objections without holding a post-election hearing.

A statutory supervisor engaging in pro-union conduct is not per se objectionable—instead, the Board considers, *inter alia*, the nature and extent of supervisory authority possessed, and the nature, extent, and context of the conduct in question. *Harborside Healthcare, Inc.*, 343 NLRB 906, 909 (2004); *see Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1272 (D.C. Cir. 2012). The objecting party must establish not only that objectionable conduct occurred, but also that it interfered with employees' free choice to such an extent that it "materially affected" the election results. *Harborside Healthcare*, 343 NLRB at 909; *see Veritas Health Servs.*, 671 F.3d at 1272. Pro-union statements by a statutory supervisor, standing alone, do not constitute objectionable conduct. *Veritas Health Servs.*, 671 F.3d at 1272.

In its offer of proof in support of its election objections, and again in its brief to the Court, the Company proffered just two pieces of evidence regarding Cappetta's alleged misconduct. The first was that a temporary administrative assistant from a Kansas distribution center—who was not part of the bargaining unit or eligible to vote—would testify that Cappetta approached her on one occasion, asked her if she knew "what's going on here," and stated, "[w]e're trying to get a union at this location [the Kutztown distribution center], you may want to share that with your drivers." (Br. 39, JA.787.) The second was that a supervisor would testify that, as he was returning from lunch in early January 2016, he heard Cappetta's unattended cellphone ring and observed an incoming call from an organizer for the Union. (Br. 39, JA.788.) The sum total of the Company's proffered "evidence" was thus that Cappetta made a non-coercive statement to a single employee who was not part of the bargaining unit, and that Cappetta missed a call on his cellphone from a Union organizer. (JA.1027.)

Cappetta's alleged statement—which purportedly occurred weeks or months before the election—was not even unambiguously pro-union, much less indicative of objectionable misconduct. The Board has consistently found that it is not coercive for a statutory supervisor, particularly a low-level supervisor without disciplinary authority, merely to favor unionization. *Ne. Iowa Tel. Co.*, 346 NLRB

465, 466-67 (2006); *Waldinger Corp.*, 331 NLRB 544, 545-46 (2000), *enforced*, 262 F.3d 1213 (11th Cir. 2001); *accord Veritas Health Servs.*, 671 F.3d at 1272.

The Company is equally brazen to rely on its innocuous claim that Cappetta once received a phone call from the Union. The Company claims that the missed call occurred on January 8 (Br. 39), just one day after the Company had been required to provide the Union with a list of prospective voters *and personal cellphone numbers* for the purpose of campaigning (JA.682). In any event, for the Company to insist that a prospective voter receiving a call from the Union is evidence of the voter's status as a covert agent for the Union is absurd.

Furthermore, even if the Company had proffered evidence of supervisory conduct that could be deemed objectionable, it failed to show conduct that would have "materially affected" the outcome so as to warrant setting aside the election results. *Veritas Health Servs.*, 671 F.3d at 1272; *Harborside Healthcare*, 343 NLRB at 909. Here, employees overwhelmingly chose the Union by a vote of 27 to 1, and the Company has not proffered evidence that a single eligible voter was aware of Cappetta's alleged support for the Union. Moreover, the Company had sufficient time prior to the election to counteract any hypothesized coercion. *See, e.g.*, *Talladega Cotton Factory, Inc.*, 91 NLRB 470, 472 (1950) (finding that employer with knowledge of supervisor's pro-union conduct has obligation to dissipate any alleged coercive effects prior to election). Unlike the case cited by

the Company (Br. 50-51), in which the court held that the employer proffered circumstantial evidence of a complex hiring scheme that would have constituted objectionable conduct if proven, *Jam Prods., Ltd. v. NLRB*, 893 F.3d 1037, 1042-46 (7th Cir. 2018), here the Company based its objections entirely on "vague, unsubstantiated accusations," *id.* at 1045, which would not warrant a different outcome even if true.

In sum, the Company failed to establish material questions of fact warranting a post-election objections hearing, and the Board reasonably overruled the Company's objections and upheld the certification of the Union.

3. The Company's procedural objections relating to Cappetta are without merit

The Company also argues that the Regional Director abused his discretion in making several procedural rulings relating to Cappetta's conduct or status. If the Court affirms the Board's initial finding as to Cappetta's supervisory status, then the Company's claims are irrelevant. Even if Cappetta *were* a supervisor, the Company's arguments are without merit for the reasons discussed below.

a. The Regional Director had no obligation to independently investigate the Company's baseless allegations of misconduct

As the Board found (JA.1025 n.1), the Regional Director fully considered the negligible evidence of objectionable conduct proffered by the Company, and reasonably concluded that the Company's proffer did not justify a post-election

hearing. Nonetheless, the Company makes the extraordinary suggestion that the Regional Director should have affirmatively sought out evidence in support of the Company's uncorroborated suspicions. In particular, the Company contends that the Regional Director was required to contact employees and formally "review" all of the signed authorization cards submitted by the Union in support of its election petition to "ascertain whether Cappetta had witnessed card signings."[7] (Br. 40.) In making that argument, the Company ignores the applicable burden of proof for post-election objections and confuses distinct aspects of the Board's representation proceedings.

While it is true that, under certain circumstances, a supervisor's pre-petition solicitation of authorization cards may be grounds for subsequent objections to the validity of the election itself, *Harborside Healthcare*, 343 NLRB at 911-13, the Board's regional directors have no obligation to gather evidence in support of the employer's effort to overturn an election, *see* 29 C.F.R. § 102.69(a), (c)(1)(i) (placing burden on objecting party to provide offer of proof justifying hearing); *Durham Sch. Servs.*, 821 F.3d at 58 (same). In order to justify a post-election

[7] A union filing a representation petition seeking an election is required to include a "showing of interest" demonstrating that a sufficient number of employees support an election, which often involves the presentation of signed authorization cards. *See* 29 C.F.R. § 102.61(a)(7), (f); NLRB Casehandling Manual, Part Two: Representation Proceedings § 11020 (2017), *available at* https://www.nlrb.gov/reports-guidance/manuals.

hearing, the objecting party must itself proffer "specific evidence which prima facie would warrant setting aside the election," because it is "not up to the Board staff to seek out evidence that would warrant setting aside the election." *Sitka Sound Seafoods*, 206 F.3d at 1182; *accord NLRB v. Dobbs House, Inc.*, 613 F.2d 1254, 1256 (5th Cir. 1980).

Moreover, the Company's argument that the Regional Director was "obligated to investigate" (Br. 40) its pre-election accusation that the Union's showing of interest was tainted is misplaced. The showing of interest serves a purely administrative function and is used to determine "whether there is sufficient employee interest to warrant the expenditure of the Agency's time, effort and resources." *See* NLRB Casehandling Manual, Part Two: Representation Proceedings §§ 11020-21. The case cited by the Company (Br. 40) affirms that *if* a regional director is presented with objective evidence calling into question the validity of a showing of interest, then further administrative investigation may be warranted. *Perdue Farms, Inc.*, 328 NLRB 909, 911 (1999); *see* NLRB Casehandling Manual, Part Two: Representation Proceedings §§ 11021, 11027.1, 11028.1. But the Company failed to present any such objective evidence.[8]

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[8] Despite the lack of any credible allegation that the Union's showing of interest was somehow tainted, the Regional Director nonetheless *did* conduct an administrative investigation in this case and reasonably concluded that Cappetta was not a statutory supervisor whose conduct could have tainted the showing of interest. (JA.795-96, 1025 n.1.)

More fundamentally, the Company cites no authority for the proposition that a regional director's investigation, or lack thereof, is relevant to any post-election question. In fact, because the showing of interest is merely an administrative tool used to determine whether to commence further proceedings, its validity is not subject to litigation at any stage. *Lampcraft Indus., Inc.*, 127 NLRB 92, 92 n.2 (1960); *see, e.g.*, *Wright Mem'l Hosp. v. NLRB*, 771 F.2d 400, 406-07 (8th Cir. 1985) (citing cases). As the Board found (JA.1025 n.1), the Regional Director properly resolved the Company's claim administratively.

In the past, the Court has described an employer's suggestion that the Court "carefully peruse all election campaign activities (even perfectly lawful conduct) to satisfy itself that there is no taint to the election" as being "outlandish" and in defiance of "both common sense and every known precept governing judicial review of [Board] decisions." *E.N. Bisso & Son*, 84 F.3d at 1445. Indeed, the Court has held that pressing such arguments in order to delay bargaining bordered on "sanctionable conduct." *Id.* at 1445-46. The Company's arguments in the present case are equally meritless.

b. The Regional Director lacked authority to issue post-election investigatory subpoenas

Contrary to the Company (Br. 49-52), the Regional Director did not abuse his discretion in denying the Company's request for the issuance of subpoenas after the election (JA.1025 n.1). As the Regional Director explained (JA.796-97),

he had no authority to issue investigatory subpoenas to the Company in the absence of a post-election objections hearing. Subpoena applications may only be filed with a regional director "before [a] hearing opens" or "prior to [a] hearing." 29 C.F.R. §§ 102.31(a), 102.66(f), 102.69(c)(1)(iii); *e.g.*, *Imperial Apartment Hotel*, 181 NLRB 391, 391-92 & n.1 (1970) (affirming regional director's denial of investigatory subpoenas in absence of objections hearing). To permit parties to demand free-standing subpoenas as investigatory tools in their attempts to make preliminary showings of objectionable conduct would create "chaos in the administrative process." (JA.796.) The Company cites nothing to the contrary. *Cf. Jam Prods.*, 893 F.3d at 1046 (affirming parties are "[w]ithout subpoena power" in the absence of a post-election hearing). Indeed, even in the context of an evidentiary hearing, parties are not entitled to broad subpoenas that would constitute mere "fishing expedition[s]." *Millsboro Nursing & Rehab. Ctr., Inc.*, 327 NLRB 879, 879 n.2 (1999). Here, the Company was unable to make the minimal showing that material issues of fact existed for which the introduction of evidence was warranted, or for which the subpoenas would have been relevant.

In any event, the Company has also failed to demonstrate the prejudice required to establish an abuse of discretion. It rests its argument solely on its inability to subpoena cellphone records that it speculates might have shown "frequent contact between Cappetta and the Union." (Br. 49.) As the Board noted

(JA.1027), however, the mere fact that a statutory supervisor supports a union is not objectionable. *Harborside Healthcare*, 343 NLRB at 909-10. Thus, even assuming that Cappetta frequently contacted the Union, it would not warrant invalidating the election. *See 800 River Rd.*, 846 F.3d at 386 (reaffirming that no prejudice occurs where "excluded evidence would not compel or persuade to a contrary result").

c. The Company was not entitled to a finding prior to the election as to Cappetta's supervisory status

Finally, the Company makes vague allusions to a nonexistent "statutory right to the undivided loyalty of its representatives" (Br. 37-38, 44) in order to argue that the Regional Director erred by not formally making a finding as to Cappetta's supervisory status prior to the election. Once again, the Company has failed to show either error or actual prejudice. (JA.1025 n.1.)

Under the Board's Rules and Regulations, the Regional Director was not required to issue a decision on supervisory status prior to the election: the sole purpose of the pre-election proceeding is to determine whether a "question of representation" exists that warrants an election, and the status of a single putative supervisor had no bearing on that question here. (JA.678-79.) *See* 29 U.S.C. § 159(c); 29 C.F.R. §§ 102.64(a), 102.67(a). Furthermore, it has been an accepted practice since the earliest days of the Act to defer final resolution of nondeterminative questions of supervisory status until after an election, and to

permit disputed supervisors to vote under challenge. *See Med. Ctr. at Bowling Green v. NLRB*, 712 F.2d 1091, 1093 (6th Cir. 1983) (upholding challenged-ballot procedure and rejecting employer's claim of "right to utilize supervisors in its opposition to unionization"); *see, e.g.*, *Allied Aviation Serv. Co. of N.J. v. NLRB*, 854 F.3d 55, 60 (D.C. Cir. 2017) (putative supervisors permitted to vote under challenge); *Cocoline Prods., Inc.*, 79 NLRB 1426, 1427 (1948) (same).

In any event, the lack of a ruling caused the Company no prejudice, as the Regional Director explained. (JA.795.) A preliminary finding by a regional director, or even a pre-election finding by the Board on review, would not give the Company the certainty that it demands. *See* 79 Fed. Reg. 74,308, 74,388-89 (Dec. 15, 2014). The Board's decisions are subject to post-election judicial review. Indeed, the Company is still litigating Cappetta's status despite the Board's finding that he was a statutory employee. Moreover, the Company has not shown that its campaign activities would have been altered in any way. The Board ultimately found that Cappetta was not a supervisor, and thus if the Board had delayed the election to make that same finding earlier, it still would not have licensed the Company to treat him as a supervisor in connection with its election campaign.

C. The Regional Director Did Not Otherwise Abuse His Discretion in Applying the Board's Rules and Regulations

The Company has expressly disclaimed any facial challenge to the Board's Rules and Regulations, while confining its arguments to the Regional Director's

allegedly "prejudicial and, at times, irrational application of the Rule[s]." (Br. 4.) Thus, although both the Company and Amici occasionally reference policy disagreements with particular provisions in the Board's Rules and Regulations, the facial validity of those provisions is not before the Court. Moreover, while the Company and Amici focus particular attention on the Board's 2014 revisions to its Rules and Regulations, those revisions are not implicated by the majority of the Regional Director's rulings in this case and have, in any event, been upheld by every court to consider them. *See Associated Builders & Contractors of Tex., Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2016); *Chamber of Commerce of U.S. v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015).[9]

The relevant question here is, as the Company partially acknowledges (Br. 23), whether the Regional Director abused his discretion, to the prejudice of the Company, in applying the Board's Rules and Regulations. The Court's review of such claims is "highly deferential." *AT&T*, 886 F.3d at 1245. To demonstrate

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[9] To the extent that Amici nonetheless attempt to improperly raise generalized challenges to the Board's Rules and Regulations (*e.g.*, CDW Amici Br. 9-14), those arguments are not fairly encompassed by the as-applied challenges raised by the Company. *See Eldred v. Ashcroft*, 255 F.3d 849, 851 (D.C. Cir. 2001). The factual claims made by Amici are erroneous, and Amici repeat many of the same "dramatic pronouncements . . . predicated on mischaracterizations of [the Board's 2014 rule revisions]," disregard of regulatory provisions that contradict the intended narrative, and other "misleading" policy assertions that were rejected by the district court in a decision that several Amici declined to appeal to this Court. *Chamber of Commerce*, 118 F. Supp. 3d at 177-78.

an abuse of discretion, the Company bears the burden of proving not only error but also actual prejudice. *Salem Hosp.*, 808 F.3d at 67; *Tasty Baking*, 254 F.3d at 123; *see supra* p. 25.

With respect to the applicable standard of review, it is also necessary to address a number of red herrings raised by the Company and Amicus Chamber of Commerce. (Br. 22-27, Chamber Amicus Br. 1-17.) First, the Supreme Court's opinion in *Auer v. Robbins*, 519 U.S. 452 (1997), is not implicated here, because the Company has not offered a conflicting interpretation of any provision in the Board's Rules and Regulations. As noted, the Company has explicitly limited its arguments to the question of whether the Regional Director's application of the Rules and Regulations constituted an abuse of discretion.

Second, the suggestion that regional directors' decisions are entitled to less deference in general because they are made by "low-level agency employee[s]" rather than the Board (Br. 25, Chamber Amicus Br. 3) simply ignores the law. Based on the expertise of regional directors, and in order to expedite representation proceedings, Congress expressly afforded regional directors the authority to decide representation questions under the Act, with or without review by the Board. *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 138-43 (1971) (citing 29 U.S.C. § 153(b)). Moreover, the Board expressly affirmed the Regional Director's rulings in this case. (JA.1025 n.1.)

Finally, the Company misrepresents the facts by repeatedly claiming that "[m]any of the [Regional Director's] rulings" (Br. 27) were based on a General Counsel guidance memorandum rather than the Board's Rules and Regulations. The memorandum in question, like the agency casehandling manual, is not binding on the parties and is merely used to assist regional directors in exercising their discretionary authority. *See, e.g.*, *Starlite Cutting*, 280 NLRB 1071, 1071 n.3 (1986). Its independent validity is irrelevant to this case.

As explained below, the Company has failed to establish that any of the Regional Director's rulings in this case were arbitrary or, even assuming that they were, that they actually prejudiced the Company. (JA.1025 n.1.)

1. The Regional Director's decision to partially grant the Company's postponement motion was reasonable

Despite the Company's conclusory assertions (Br. 28-32), it never explains how the Regional Director's application of the Board's Rules and Regulations in scheduling the pre-election hearing constituted an abuse of discretion (JA.792-95). The Board's Rules and Regulations instruct regional directors to schedule the pre-election hearing for a date eight days after service of the representation petition. 29 C.F.R. § 102.63(a)(1). The Board's 2014 rule revisions extended that timeline from the prior minimum-notice requirement of five business days. *Croft Metals, Inc.*, 337 NLRB 688, 688 (2002). Regional directors have discretion to postpone a pre-election hearing for up to two business days "upon request of a party showing

special circumstances." 29 C.F.R. § 102.63(a)(1). Longer postponements are possible upon request and a showing of "extraordinary circumstances." 29 C.F.R. § 102.63(a)(1).

In the present case, the Regional Director initially scheduled the pre-election hearing for Friday, December 18. Five days after the hearing was scheduled, on December 15, the Company filed a motion requesting a two-business-day "special circumstances" postponement. (JA.519-21.) In support of its motion, the Company stated that one of the attorneys representing it was traveling and would be unable to meet with company representatives until the following day, December 16, and also vaguely asserted that the Company found it "burdensome" to have to deal with the election petition because the Company was "busy meeting its significant holiday delivery commitments." (JA.520.) The Company's motion did not provide any additional explanation.

Contrary to the Company's claims that it was disadvantaged or mistreated (Br. 31), the Regional Director *granted* in part the Company's motion, over the opposition of the Union, and postponed the hearing by one business day, resulting in a three-calendar-day extension. (JA.523.) The Company has failed to show that the Regional Director's ruling was arbitrary, much less to establish actual prejudice stemming from the Regional Director's failure to extend the pre-election hearing by one additional day, as requested. (JA.792-93, 1025 n.1.) In its brief, the

Company asserts (Br. 6, 29-30) that necessary employee or management witnesses were dispersed, that it was transitioning to a new delivery schedule, that it considered the applicable legal standard unsettled at the time of the hearing, and that it was unable to interview necessary witnesses regarding Cappetta's supervisory status. However, those various post-hoc arguments were never articulated to the Regional Director, and thus his failure to consider them cannot be deemed arbitrary.

In any event, the Company fails to substantiate its claims. For example, it never identifies any specific witnesses who were dispersed or unavailable, and never explains how a new "delivery schedule" would have prevented its upper management or outside counsel from addressing the election petition.[10] Likewise, in the postponement motion actually presented to the Regional Director prior to the hearing, the Company merely stated that it had "significant holiday delivery commitments," without ever explaining the impact those commitments would have on its managers, outside counsel, or ability to prepare for the hearing. Federal law guarantees workers the right to join together to form a union, and an employer

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[10] Any possible uncertainty about the applicability of *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB 934 (2011), is immaterial, insofar as the Board and the Regional Director ultimately applied well-established precedent. (JA.1025 n.1, 1133 n.2.) In any event, the Company's ability to prepare for the evidentiary hearing was not affected, given that it claims uncertainty over having to meet a *more* demanding standard for rebutting a single-facility unit.

cannot temporarily suspend that right simply by alleging that it is busy—particularly when the employer is a sizable corporation, like the Company, that is more than capable of preparing for a pre-election hearing in a timely manner. Indeed, the Company ultimately filed a lengthy and detailed statement of position prior to the pre-election hearing (JA.679 n.8; JA.360-92), and the Company was ably represented by counsel at the hearing, where it fully litigated the appropriateness of the unit and Cappetta's supervisory status.[11]

The Company makes several vague allusions to its constitutional or statutory due process rights being violated (Br. 1, 21-22, 32), without fully explaining its argument. *See Veritas Health Sys.*, 895 F.3d at 89 ("[T]he procedures available to [an objecting party] are not constitutionally inadequate simply because [that party] opposes the substantive outcome they may produce."). As an initial matter, the Company has not adequately demonstrated that an employer even enjoys constitutional due process rights in connection with the Board's pre-election

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[11] Contrary to the Company (Br. 30-32), the pre-hearing statement of position is irrelevant in this case. The required statement of position is a form that instructs the employer to, *inter alia*, state issues that it "intends to raise at the [pre-election] hearing." 29 C.F.R. § 102.63(b)(1); *see* JA.360. Employers may be permitted to amend the statement of position "in a timely manner for good cause." 29 C.F.R. § 102.66(b). Here, the Company did not fail to preserve any issue, and it had an opportunity to refine any written legal arguments at the hearing itself or in its request for review to the Board. (JA.794-95, 798.) Representation hearings are non-adversarial, and the Union did not receive an unfair "advantage" (Br. 31) by having access to the statement of position in advance.

representation proceedings, which are non-adversarial and are designed merely to determine whether a question of representation exists warranting an election. *See Chamber of Commerce*, 118 F. Supp. 3d at 202 (questioning presence of property interest); *see also Inland Empire Dist. Council, Lumber & Sawmill Workers Union v. Millis*, 325 U.S. 697, 706-10 (1945) (holding that constitutional due process does not require any hearing prior to a Board election); *cf.* 5 U.S.C. § 554(a)(6) (excepting Board representation proceedings from the formal adjudication requirements of the Administrative Procedure Act). Assuming, *arguendo*, that such rights are implicated, the eleven-day notice that the Company received in this case was more than adequate. *See* 79 Fed. Reg. 74,308, 74,371-73 (Dec. 15, 2014); *see, e.g.*, *Ungar v. Sarafite*, 376 U.S. 575, 590-91 (1964) (holding five-day notice adequate for criminal contempt hearing where defendant could hire counsel who would be prepared on time and evidence was readily available).

The Company also has not demonstrated that it was denied "an appropriate hearing upon due notice" within the meaning of the Act. 29 U.S.C. § 159(c)(1)(B). Even in the context of adversarial unfair-labor-practice hearings, which typically involve much more complex factual disputes than those at issue here, the Act contemplates hearings within "five days" of a complaint. 29 U.S.C. § 160(b). Tellingly, Congress omitted any similar statutory language setting minimum timelines in the context of non-adversarial representation proceedings, which were

intended to be comparatively expeditious. *See, e.g.*, *Boire*, 376 U.S. at 477-79; *see also* 5 U.S.C. § 554(a)(6). The eleven-day notice in the present case did not contravene any clear statutory mandate.

2. The rulings by the Regional Director and Hearing Officer during the pre-election hearing were reasonable

The Company has also failed to establish error or prejudice with respect to the rulings by the Hearing Officer and Regional Director during the hearing. (JA.1025 n.1.) Contrary to the assertions in its brief (Br. 9, 56-57, 63), the Company was not prevented from introducing any evidence regarding the single-facility unit or Cappetta's supervisory status. Near the end of the hearing, counsel for the Company made a request that the parties reconvene the following morning for the sole purpose of presenting closing statements. (JA.329-30.) The Company did not indicate that it had further witnesses to call or evidence to present, and it identifies no such evidence now. The Hearing Officer's suggestions that the Company produce certain documents (JA.36-37, 200-01, 296) were not adverse rulings, and the Company cannot claim prejudice from its failure to present evidence on its own behalf at the hearing.

The hearing itself was a little over eight hours long. (JA.794.) Although the Company now complains (Br. 33-34) that the Hearing Officer unreasonably extended the hearing to finish receiving evidence in one day, the Company never specifically objected to the Hearing Officer's decision to continue the hearing past

6:00 p.m. Approximately fifty minutes before a final recess was called to allow the parties to prepare closing statements, as the Union was preparing to call its final witness, counsel for the Company asked the Hearing Officer "[h]ow late [she] planned to go." (JA.294-95, 331.) The Hearing Officer stated that her preference was to finish the hearing that evening if possible. (JA.295.) Counsel for the Company indicated that he was willing to resume the hearing the following day, but he did not specifically object to the Hearing Officer's decision to continue the hearing past 6:00 p.m. (JA.294-329.)

As noted, counsel for the Company later requested that the parties reconvene the following morning for the sole purpose of presenting closing statements, and the Hearing Officer reasonably denied that request. (JA.329-30.) The Board's Rules and Regulations do not even definitively require a recess prior to parties presenting closing statements, *see* 29 C.F.R. § 102.66(h) (affording parties a "reasonable period" to *present* the closing statements), and yet the Hearing Officer gave both parties a thirty-minute recess to prepare, then offered additional time when they reconvened (JA.794; JA.330-31). The Union presented a substantive closing statement on the merits of the case, but the Company elected to use its allotted time to argue that it was being treated unfairly. (JA.329-50.)

Finally, the Regional Director had discretion over whether to allow post-hearing briefing, and reasonably concluded that it was not warranted given the

relatively straightforward nature of this case. (JA.794-95.) Contrary to the Company (Br. 36-37), the Hearing Officer made clear at the beginning of the hearing that post-hearing briefing would not be allowed *unless* the parties secured special permission from the Regional Director (JA.12). *See* 29 C.F.R. § 102.66(h); *cf.* 5 U.S.C. § 554(a)(6) (excepting representation proceedings from privileges of formal adjudications, such as written briefs). Moreover, the Company cannot show prejudice where it had a subsequent opportunity to file a written request for review to the Board.

3. The Regional Director's decision to direct a mail-ballot election was reasonable

The Company next fails to show any legal error or prejudice stemming from the Regional Director's choice of a mail-ballot election. Regional directors are afforded broad discretion to determine the time and manner of an election, subject to Board review for a clear abuse of discretion. 29 C.F.R. § 102.67(b); *Nouveau Elevator Indus., Inc.*, 326 NLRB 470, 471 (1998); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367-68 (1954). The Board's Rules and Regulations permit parties to state their positions at the pre-election hearing regarding the type, date, time, and location of an election, but do not permit parties to litigate such matters. 29 C.F.R. § 102.66(g)(1). Given the discretion entrusted to the Board by Congress, the choice of a mail-ballot election must be upheld as long as it was not arbitrary,

even if the Court would have selected a different kind of election. *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002).

The Board has consistently affirmed that mail-ballot elections are proper where eligible voters are "scattered" over a wide geographic area or across varying work schedules, such as when employees "work different shifts" or "travel on the road." *San Diego Gas & Elec.*, 325 NLRB 1143, 1145 & n.7 (1998). Here, as the Regional Director explained (JA.680), the Company's drivers had widely varying and uncertain schedules, they were not normally present at a common place at a common time, and a manual election would have required them to rely on the Company or its customer to specially rearrange their work schedules. Moreover, some drivers would have had to travel long distances during uncertain traffic and winter weather conditions in order to vote. Under such circumstances, a mail-ballot election was perfectly reasonable. *See Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1127 (D.C. Cir. 1996) (upholding decision to conduct mail-ballot election where manual election would have required employees to modify normal work schedules and spend significant time and effort traveling to vote); *cf. Nouveau Elevator Indus.*, 326 NLRB at 471 (upholding regional director's direction of manual election under similar circumstances but indicating mail-ballot election would have been preferable).

The Regional Director also did not abuse his discretion by declining to adopt the Company's "revised" manual-election proposal (Br. 46-47). The Company revised its proposal at the last minute, on January 7, with no explanation as to why such proposal had not been presented at the pre-election hearing. (JA.796.) *But see* 29 C.F.R. 102.66(g) (granting parties limited opportunity to present positions as to election details at pre-election hearing). By then, the notice of election had already been sent to the parties. (JA.681-86.) *See* 29 C.F.R. § 102.67(b). Modifying the election details or issuing a second notice of election at that point would have risked sowing confusion among voters or the parties themselves. (JA.694-95, 796.) Furthermore, a mail-ballot election remained preferable for essentially the same reasons.

Contrary to the Company, the Regional Director's decision in this case does not mean that manual elections "[cannot] be held in the transportation industry." (Br. 46.) Even if a manual election may have also been reasonable on these or similar facts, *see Nouveau Elevator Indus.*, 326 NLRB at 471, the appropriate inquiry is whether the Regional Director abused his discretion. In any event, a claim of actual prejudice is foreclosed in this case due to the fact that thirty out of thirty-two eligible voters ultimately cast ballots in the election, and the two employees who did not cast ballots could not have affected the outcome. (JA.796.)

Thus, traditional concerns about reduced voter participation are inapposite. *See Kwik Care*, 82 F.3d at 1127.

Insofar as the Company suggests that the mail-ballot procedure violated its purported "statutory right to campaign" (Br. 48), that argument is without merit. By its terms, Section 8(c) of the Act merely prohibits the Board from finding certain types of conduct to constitute evidence of unfair labor practices. 29 U.S.C. § 158(c). It does not affirmatively grant employers rights that are, for example, enforceable in representation proceedings. *See Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 959 n.19 (D.C. Cir. 2013); *Rosewood Mfg. Co.*, 263 NLRB 420, 420 (1982).

Moreover, to the extent that the Company is arguing more generally that the mail-ballot election gave it inadequate time to campaign, the Company's argument is misleading and illogical. Under Board law, both employers and unions are prohibited from holding mass captive-audience meetings after a designated point in time prior to the start of an election, but they are not prohibited from continuing to campaign for or against unionization. *San Diego Gas*, 325 NLRB at 1146. Whether the date on which mass captive-audience meetings must cease corresponds to the start of a *manual* election or the start of a *mail-ballot* election is immaterial. Here, the Company's own election proposals requested a manual election on a date in January to be chosen by the Regional Director (JA.326-27,

691), and a manual election could have been scheduled on the same date that the mail-ballot election began. Furthermore, the Company had a full *month* after the date on which the Union's petition was filed to hold mass captive-audience meetings and to otherwise campaign against the Union prior to the start of the election.

4. The Regional Director reasonably declined to resolve the status of two disputed classifications prior to certification

In attempting to manufacture a final challenge to the Board's decision, the Company argues (Br. 52-56) that the Regional Director abused his discretion by declining to resolve whether two employees in disputed job classifications, who also regularly spend part of their time as drivers, should be excluded from the unit. Once again, the Company inexplicably fails to acknowledge well-settled precedent. As the Board indicated (JA.1135 n.5), it has been an established procedure for decades that when employees in certain job classifications are permitted to vote under challenge, and their challenged ballots are ultimately not determinative of the election outcome, then those classifications are neither included in nor excluded from the unit. *See, e.g.*, *Kirkhill Rubber Co.*, 306 NLRB 559, 559 & n.2 (1992). Instead, the status of the disputed classifications can be resolved by the parties through the collective-bargaining process, or through either party filing a unit-clarification petition with the Board. *DIC Entm't, LP*, 329 NLRB 932, 932 n.2 (1999), *enforced*, 238 F.3d 434 (D.C. Cir. 2001); *see* 29 C.F.R. § 102.60(b)

(providing for unit-clarification petitions); *Med. Ctr. at Bowling Green*, 712 F.2d at 1093; *see also Lakeside Cmty. Hosp., Inc. v. NLRB*, 8 F.3d 71 (D.C. Cir. 1993) (unpublished). The Company has refused to engage in bargaining with the Union now for several years, and it has declined to file a petition to clarify the scope of the unit. Thus, the Company cannot now complain to the Court that the scope of the unit is unclear.[12]

There was nothing arbitrary about the Regional Director's application of the established procedure here, where the Company challenged the status of just two employees, and where, not counting those two challenged ballots, the Union won the election by a decisive vote of 27 to 1. *See* 29 C.F.R. § 102.69(b) (requiring immediate certification of election results in absence of determinative number of challenged ballots). Withholding certification of the Union pending litigation of two employees' status would have served no purpose other than to facilitate the Company's efforts to delay bargaining with the Union. By contrast, had the Company bargained with the Union, as it has been legally obligated to do since the

---

[12] The Company and Amici cite inapposite cases (Br. 55 n.8, CDW Amici Br. 18-19) in which certified units differed dramatically from the unit descriptions voted on by employees. Here, by contrast, the notice of election explained that the inclusion of the two challenged employees would only be resolved, as necessary, after the election. (JA.685.) *See Sears, Roebuck & Co. v. NLRB*, 957 F.2d 52, 55-56 (2d Cir. 1992) (explaining inapplicability of cited cases where notice of election "alert[s] employees to the possibility of change").

Union was certified in March 2016, such bargaining could have led to an amicable resolution regarding the disputed classifications.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board
February 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UPS GROUND FREIGHT, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	Nos. 18-1161 & 18-1182
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 773	)	Board No. 04-CA-205359
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its final brief contains 12,821 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016. This document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6).

/s/ David Habenstreit

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Dated at Washington, D.C.
this 13th day of February, 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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and	)	
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 773	)	Board No. 04-CA-205359
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

/s/David Habenstreit
David Habenstreit
Assistant General Counsel
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Washington, D.C. 20570

Dated at Washington, D.C.
this 13th day of February, 2019

STATUTORY ADDENDUM

Except for the following, all pertinent statutes and regulations are contained in the statutory addendum to the Company's opening brief to the Court.

Federal Statutes **Page(s)**

Administrative Procedure Act
(5 U.S.C. §§ 500 *et seq.*)

5 U.S.C. § 554(a)(6) i

Rules and Regulations

29 C.F.R. § 102.60(b) iii
29 C.F.R. § 102.61(a)(7) iii
29 C.F.R. § 102.61(f) iv

5 U.S.C. § 554

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved--

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

29 C.F.R. § 102.60(b)

(b) Petition for clarification of bargaining unit or petition for amendment of certification. A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question of representation, may be filed by a labor organization or by an employer. Where applicable the same procedures set forth in paragraph (a) of this section shall be followed.

29 C.F.R. § 102.61(a)

(a) RC Petitions. A petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, shall contain the following:

(1) The name of the employer.

(2) The address of the establishments involved.

(3) The general nature of the employer's business.

(4) A description of the bargaining unit which the petitioner claims to be appropriate.

(5) The names and addresses of any other persons or labor organizations who claim to represent any employees in the alleged appropriate unit, and brief descriptions of the contracts, if any, covering the employees in such unit.

(6) The number of employees in the alleged appropriate unit.

(7) A statement that a substantial number of employees in the described unit wish to be represented by the petitioner. Evidence supporting the statement shall be filed

with the petition in accordance with paragraph (f) of this section, but shall not be served on any party.

(8) A statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act or that the labor organization is currently recognized but desires certification under the Act.

(9) The name, affiliation, if any, and address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(10) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(11) Any other relevant facts.

(12) The type, date(s), time(s) and location(s) of the election sought.

29 C.F.R. § 102.61(f)

(f) Provision of original signatures. Evidence filed pursuant to paragraphs (a)(7), (b)(8), or (c)(8) of this section together with a petition that is filed by facsimile or electronically, which includes original signatures that cannot be transmitted in their original form by the method of filing of the petition, may be filed by facsimile or in electronic form provided that the original documents are received by the regional director no later than 2 days after the facsimile or electronic filing.

From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: Daily Labor Report Highlights
Date: Thursday, April 25, 2019 4:36:10 PM

Bloomberg Law

DAILY LABOR REPORT®

Highlights

Print/Download These Articles

TOP STORIES

Employers Must Turn Over Pay Data to EEOC by Sept. 30: Judge (2)

By Paige Smith

More than 60,000 employers will have to turn over worker pay data to the Equal Employment Opportunity Commission by Sept. 30, as part of an annual workforce data report known as the EEO-1.

Arbitration Pacts Get Supreme Boost Over State Contract Law

By Robert Iafolla

Workers will have more difficulty preventing the enforcement of mandatory arbitration agreements based on state contract law in light of the U.S. Supreme Court's April 24 ruling on class arbitration, attorneys told Bloomberg Law.

Union Pacific Applicant's Disability Bias Case Ready for Trial

By Patrick Dorrian

A man who alleges Union Pacific Corp. pulled his job offer because it believed a cerebral aneurysm he suffered three years earlier made him a safety risk can take his disability bias claims to trial in two phases, a federal judge ruled.

Res-Care Worker Gets Chance to Show Age, Sex Drove Rehire Denial

By Patrick Dorrian

A 59-year-old man who was denied rehire by PharMerica subsidiary Res-Care Inc. will get a trial on his claims that his age and gender drove the company's decision, a federal judge ruled.

DISCRIMINATION

Eighth Circuit Stays Consideration of Sex Orientation Bias Case

By Patrick Dorrian

A gay sales and marketing executive will have to wait a little longer to find out if a St. Louis nursing-care provider committed sex discrimination when it pulled his job offer after he inadvertently disclosed his same-sex marriage.

Fired Thomson Reuters Director Sues Alleging Sex, Age Bias (1)

By Patrick Dorrian

Thomson Reuters is accused in a new lawsuit of firing the female 60-year-old senior director of support services and operations effectiveness in its tax and accounting division based on her age and sex.

Cablevision to Face Trial on Worker's Age, Disability Claims

By Patrick Dorrian

A former Cablevision Systems Corp. employee may be able to show she was fired because she was 52 years old and had just returned from gallbladder surgery, the New Jersey Appellate Division ruled.

Eddie Money Gets Ticket to Calif. Supreme Court

By Joyce E. Cutler

Singer Eddie Money’s firing of his long-time drummer is the second act in the California Supreme Court behind a discrimination case involving Cable News

Network.

WAGE & HOUR

Western Express Truckers Get Wage Fight Conditionally Certified

By Porter Wells

Long haul truckers working for Western Express Inc. won conditional certification of their collective action claiming the company misclassified them as independent contractors in order to avoid paying minimum wages.

SF Giants Pay Claim Heads Back to Home Plate in California Court

By Laura Mahoney

A San Francisco Giants security guard's claims that the team must pay him immediately after every homestand or event at AT&T Park must go back to state trial court, the California Supreme Court said April 25.

Custom Home Reno Company Accused of Unpaid Wages, Race Bias (1)

By Porter Wells

A Maryland-based custom home remodeling company misclassified hundreds of its "lead developers" as independent contractors and didn't pay them for all their hours worked, a new lawsuit alleges.

HARASSMENT & RETALIATION

Boys Coach Says He Was Fired for Saying Girls Teams Get Perks (1)

By David McAfee

The head baseball coach at a magnet school is suing the Los Angeles Unified School District for retaliation, saying he was fired after alleging girls teams at the school got preferential treatment over boys teams.

Cantor Fitzgerald Doesn't Want This Woman Talking About Her Mug in Court

By Katia Porzecanski and Max Abelson

A former Cantor Fitzgerald junk-bond saleswoman filed a lawsuit accusing her former boss, a colleague, and the company of harassment, discrimination, and retaliation, all of which they deny. Cantor quickly filed a motion to send the lawsuit from open court to a venue that companies much prefer: arbitration.

STATE & LOCAL LAWS

Colorado Senate OKs Family Leave With Concessions to Business

By Genevieve Douglas

The Colorado Senate passed legislation to establish a paid family and medical leave program April 25, but following strong opposition from business groups, the bill now requires more research before a program can begin.

Oklahoma State Employee Overtime Mandate Heads to Governor

By Paul Stinson

Oklahoma state government employees earning less than $31,000 annually would receive overtime pay—not comp time—for hours worked beyond 40 in a workweek under a bill sent to Gov. Kevin Stitt (R).

States of Work: Colorado Advances Worker Protection Proposals

By Chris Marr

This week's "States of Work" looks at Colorado legislation aimed at easing the blow of wage garnishments and coal industry job losses, plus a California effort to require employers to accommodate breastfeeding mothers.

LABOR RELATIONS

First Stop & Shop Workers Approve Contract (1)

By Aaron Nicodemus

A group of unionized Stop & Shop supermarket workers agreed to a three-year contract in the wake of an 11-day strike that cost the company as much as $10 million per day.

SUPREME COURT

Supreme Court Adopts Rules Changes Aimed at Modernization

By Patrick L. Gregory

The U.S. Supreme Court adopted amendments to federal appellate and evidentiary rules intended to make them more modernized and user-friendly.

LEGAL PROFESSION

Holder, Other Figures From World Stage Team Up at Covington

By Melissa Heelan Stanzione

Covington & Burling partner and former Attorney General Eric Holder still stays in touch with a senior Nigerian government official he met in 2016 while helping to represent a telecommunications client as part of the firm's Global Problem Solving team.

Weil To Invest $1M Per Year in Pre-Law Students' Nonprofit Work

By Melissa Heelan Stanzione

Weil, Gotshal & Manges is introducing an initiative that will give students entering prestigious law schools the chance to work with U.S.-based nonprofits for a year.

HEALTH CARE & BENEFITS

Widow Alleging Forged Signature Loses Bid for Teamsters Pension

By Jacklyn Wille

A woman who said her late husband forged her signature on documents

waiving her right to his pension lost her appeal against the Central States, Southeast and Southwest Areas Pension Fund.

CalPERS Won't Face Class Action Seeking Interest on Benefits

By Jacklyn Wille

Municipal employees who accused the California Public Employees' Retirement System, or CalPERS, of failing to pay them proper interest on late-paid benefits can't prosecute their case as a class action.

SAFETY & HEALTH

Safety Review Panel Shrinks to One Member, Complicating Appeals

By Fatima Hussein

The Occupational Safety and Health Review Commission will soon lack a quorum—the minimum number of members needed to make decisions. That doesn't just mean a possible slowdown in safety case reviews—employers could also see higher costs for appealing citations and a worse chance of prevailing.

Poultry Cleanup Firm Appeals Citations in Finger Amputation Case

By Fatima Hussein

A poultry sanitation company disagrees with a judge's decision to uphold all but one safety citation issued against it after a worker's pinky finger was amputated in a quill puller machine at a plant in Gainesville, Ga.

ALSO IN THE NEWS

No College Degree? NYC, D.C. Seen as Worst Areas for Job Seekers

By Shelly Hagan

With unemployment near a half-century low, employers are struggling to find workers and lowering educational requirements as a result. That means job seekers without a bachelor’s degree have better options than in prior years but

may have to migrate to a more receptive area within a polarized U.S. economy.

U.S. Jobless Claims Rise Most Since 2017, Topping Estimates (1)

By Katia Dmitrieva

Filings for U.S. unemployment benefits rose the most since late 2017, while still remaining in the range of what's considered a tight labor market.

The Future of Work Could Bring More Inequality, Social Tensions

By William Horobin

Automation, robots and globalization are rapidly changing the workplace and governments must act fast and decisively to counter the effects or face a worsening of social and economic tensions, the OECD warned.

GM Adding 400 Jobs to Corvette Plant Girding for New Model (1)

By David Welch

General Motors Co. is adding 400 workers, some of whom will transfer from plants that are at risk of shutting down, to its Chevrolet Corvette factory in Kentucky that's preparing to produce the next-generation sports car.

LATEST CASES

Case: Discrimination/Injunctive Relief (N.D. Cal.)

A former employee of Equilon Enterprises, LLC, who was awarded $475,000 in damages by a jury on her harassment and failure to prevent harassment claims under California law, but denied relief on her gender discrimination and retaliation claims, lacks standing to pursue injunctive relief. The former employee doesn't seek reinstatement, the jury didn't find in her favor on any claim as to which reinstatement would be a remedy, and she can't seek any injunctive relief that wouldn't benefit her. The case is .

Case: Discrimination/Promotion (D. Colo.)

A Mexican-American employee for the Denver, Colorado, Board of Water Commission will receive a trial on his claim that he wasn't selected for a promotion to customer relations manager because of his national origin. A reasonable jury could conclude that the explanation for the hiring decision---the decision-maker believed that the selected white candidate had superior leadership and communication skills based on his interviews---was pretextual given the decisionmaker's heavy reliance on subjective criteria and his failure to review either candidate's personnel files or to speak with any of the Mexican-American's supervisors about his leadership, combined with the Mexican-American applicant's qualifications as compared to those of the white candidate, the court said. The case is Duran v. City of Denver, 2019 BL 146522, D. Colo., 17-cv-03124-STV, 4/23/19.

Case: Individual Employment Rights/Due Process (E.D. Va.)

A fired child counselor for the city of Norfolk wasn't denied due process when a letter written by a Virginia Beach child protective services investigator, concerning an incident where he used force to restrain a seventeen-year-old resident of a juvenile detention center, was admitted against him at a grievance hearing. The counselor was a public employee with a property interest in his continued employment, but the risk of erroneous deprivation of his property wasn't heightened by the introduction of the evidence, because he was permitted to present his side of the story, a court said. The case is Hagans v. City of Norfolk, 2019 BL 145825, E.D. Va., 2:17CV654, 4/23/19.

Case: Wage & Hour/Overtime Exemption (W.D. Wis.)

A class of current and former employees may not proceed with their Wisconsin state-law unpaid overtime wages claim against a healthcare organization because a federal district court concluded that the state's overtime regulations don't apply to nonprofits such as the organization. Despite the contention that, due to the law's ambiguity, nonprofits such as the organization could be classified as "mercantile establishments," which are subject to the regulation, the administrative agency that promulgated the regulation has only spoken of nonprofit organizations being required to pay overtime to employees who work in “certain establishments, such as restaurants or hotels." The case is Paczkowski v. My Choice Family Care, Inc., 2019 BL 146244, W.D. Wis., 18-cv-759-slc, 4/24/19.

Case: Discrimination/Rehiring (S.D. W.Va.)

A male protected-age program manager for Res-Care, Inc. in West Virginia, who lost his job when the company consolidated two of its locations and he wasn't rehired, will get a trial on his age and sex discrimination claims. He alleged that the human resources manager suggested that he may be fired because of his age, and he presented evidence that he was effectively replaced by a 27-year-old female applicant, that three women with significantly less experience were hired instead of him, that he would have less post-consolidation responsibility in areas that were allegedly his weakness, and that the only other non-retained management employee was also male, the court stated. The case is .

Case: Disability Discrimination/'Disability' (D. Del.)

A Delaware State University assistant professor's post-traumatic stress disorder wasn't necessarily a protected disability for purposes of his failure-to-accommodate claim, given that his psychiatrist merely said that the professor showed symptoms related to PTSD secondary to job-related stress, and evidence that the university regarded him as having PTSD doesn't mean that he was actually disabled under the Americans with Disabilities Act. The case is Issa v. Del. State Univ., 2019 BL 144805, D. Del., C.A. No. 14-168-LPS, 4/23/19.

Case: Discrimination/Discharge (5th Cir.)

An apartment complex in Lafayette, Louisiana, was properly granted summary judgment on claims by two protected-age maintenance technicians that they were fired because of their age, rather than their performance. While they alleged that they were replaced by younger technicians, the evidence showed that both younger employees were hired before the older ones were discharged, both older technicians had documented performance issues, one of them had frequent absenteeism, and the other one responded to a disciplinary report by accusing his supervisor of “borderline stupidity” in a letter sent to the property administrator, the court said. The case is Breaux v. Rosemont Realty, 2019 BL 146344, 5th Cir., 18- 30870 Summary Calendar, unpublished 4/24/19.

Case: Individual Employment Rights/Negligence (Cal. Ct. App., 2d Dist.)

Dollar Tree Stores Inc. isn't vicariously liable for the criminal conduct of a store manager who allegedly used his cell phone to surreptitiously record female employees and customers while they used a restroom. The plaintiffs alleged invasion of privacy and negligent hiring, supervision and retention by Dollar Tree. California courts have declined to impose respondeat superior liability based on sexual misconduct other than assault, which is motivated solely by the employee's personal reasons, a court said. The case is Sabori v. Dollar Tree Stores, Inc., 2019 BL 146050, Cal. Ct. App., 2d Dist., B284350, 4/24/19.

Case: Wage & Hour/Settlement Agreements (S.D.N.Y.)

A New York fitness company and one of its former swim instructors must revise their agreement settling her federal and state unpaid wages claims, because the agreement improperly requires her to release claims unrelated to the ones at issue in the settlement, the non-disparagement provisions may prevent her from speaking truthfully about the litigation, and the confidentiality clause impermissibly prevents her from speaking about the settlement to anyone except an attorney, tax preparer, or family member. The case is Lemoine v. Liv UnLtd, LLC, 2019 BL 145547, S.D.N.Y., 18 Civ. 8804 (PAC), 4/24/19.

Case: Discrimination/Constructive Discharge (M.D.N.C.)

A protected-age employee for Biogen, Inc. in North Carolina isn't entitled to a trial on his claim that he was subjected to a constructive discharge when he was transferred from an associate director position with supervisory responsibilities over a division to an individual contributor role. His salary and benefits remained the same, he failed to show that his working conditions were intolerable, his replacement was only five years younger and was also over 40 years old, and the transfer was motivated by an independent investigation that revealed that his behavior was negatively affecting the culture in his department. The case is .

Case: Disability Discrimination/Discharge (N.J. Super. Ct. App. Div.)

A Cablevision employee in New Jersey should have been allowed to go ahead

with her state-law disability bias claims after she was fired following gallbladder surgery, because she may show that she has a protected disability, and her firing soon after surgery suggests that the real reason for her termination was the company's hostility toward her medical condition, as amplified by its discontent with her prior medical leaves. The case is Caballero v. Cablevision Sys. Corp., 2019 BL 145327, N.J. Super. Ct. App. Div., A-2778-17T4, unpublished 4/24/19.

Case: Wage & Hour/Overtime Exemptions (D. Mass.)

A Massachusetts-headquartered marketing company didn't show that its brand representatives' primary duty was "making sales" for the purpose of establishing that they are overtime-exempt outside sales employees, because there is a dispute as to whether the purpose of their primary responsibilities, such as demonstrating products and handing out samples, was to convince customers to purchase the products or to promote them. The case is Modeski v. Summit Retail Sols., Inc., 2019 BL 145681, D. Mass., No. 18-12383-FDS, 4/23/19.

Case: FMLA/Retaliation (D. Del.)

A former assistant manager may proceed with her claim that an operator of a franchise of Wendy's restaurants in Delaware demoted her from a general manager position, which resulted in a decrease in her salary of $30,000, in retaliation for taking leave under the Family and Medical Leave Act. Her allegations that the vice president told her that the demotion and reduction in salary were because she "had been out for awhile," and that he expressed concerns that she “would not be able to do her job because of her age and her time off related to her disability," could show that the operator acted in a retaliatory manner. The case is Forestieri v. Wendover, Inc., 2019 BL 146136, D. Del., 18-1171 (MN), 4/24/19.

Case: Wage & Hour/Preemption (E.D. Cal.)

California employees of Sun-Maid must have their claim for unpaid overtime wages heard by a federal court, rather than a California court. Although their only claim arises from a state wage order, their collective-bargaining agreement provides for state-law compliant overtime pay, so their overtime

rights are governed by the agreement, and their state-law claim is preempted by the federal collective-bargaining law. The case is Diaz v. Sun-Maid Growers of Cal., 2019 BL 146660, E.D. Cal., 1:19-CV-00149-LJO-SKO, 4/23/19.

Case: Disability Discrimination/'Disability' (D. Del.)

A former Wendy's restaurant general manager in Delaware can't go ahead with disability bias claims based on her demotion and later discharge after a four-month leave for a broken wrist, because her wrist injury wasn't a protected disability given that she returned to work with no restrictions and her injury was viewed as transitory and minor, precluding a finding that she was regarded as disabled. Forestieri v. Wendover, Inc., 2019 BL 146136, D. Del., 18-1171 (MN), 4/24/19.

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EMPLOYMENT

Friday, April 26, 2019

TOP NEWS

Analysis

How Is The #MeToo Movement Affecting Organiz ed Labor?

The Harvard Graduate Students Union recently staked out ground at the vanguard of the labor movement when it put #MeToo-inspired demands front-and-center in its negotiations with the university. And though other unions have also made changes in response to #MeToo, many have been slower to react.

Read full article »

Analysis

2nd Circ. Disability Bias Revamp R aises ADA Bar For Workers

The Second Circuit recently aligned its legal standard for workers looking to prove workplace disability bias under the Rehabilitation Act and its test for assessing employees' Americans with Disabilities Act claims, a decision that experts say makes it easier for workers to pursue suits under the former but harder under the latter.

Read full article »

Lamps Plus Case Noted As $10M Class Arbi tral Win Is Axed

A Wisconsin federal judge referenced Wednesday's U.S. Supreme Court decision in the Lamps Plus case in a ruling Thursday that wiped out a mortgage worker's $10 million class arbitration win, saying the employee's arbitration agreement with her company unambiguously bars class arbitration.

Read full article »

Employers Told To Provide Pay Data To EEOC B y Sept. 30

Mid-size and large employers have until Sept. 30 to tell the U.S. Equal Employment Opportunity Commission how much they paid workers of different sexes, races and ethnicities last year, a Washington, D.C., federal judge said Thursday.

Read full article »

DOL Scores Quick Win In Ex-Budget Analyst's Bi as Suit

A Washington, D.C., federal judge on Thursday tossed a former U.S. Department of Labor budget official's suit accusing the agency of firing her because of her race, age, sex or national origin, saying she wasn't a bias victim, but rather a disgruntled demotee who phoned in her work.

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FilmOn, Exec Hit With $4.6M Verdict Af ter Sex Case Outburst

A California jury ordered FilmOn, Hologram USA and their founder Alki David to pay a combined $4.6 million and queued up possible punitive damages in an explosive sexual harassment and battery trial that saw the billionaire executive ordered out of the courtroom when he blew up at an opposing attorney.

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DISCRIMINATION

Indiana Hospital Escapes Ex-Worker's Disability, Sex Bias Suit

An Indiana federal judge on Thursday let an Indiana hospital dodge a suit from the former clinical coordinator of its radiology program who claimed she was wrongly fired because she is a woman and because she had an autoimmune disease.

Read full article »

No Signature On Arbitration Pact? No Pro blem, Judge Says

A former Compassus hospice nurse who claimed she was fired after taking medical leave for anxiety induced following a fight with management must pursue her claims in arbitration, not court, even though she didn't sign the company's arbitration agreement, a Pennsylvania federal judge has ruled.

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Former Calif. Democratic Party Boss Ac cused Of Sex Assault

A California Democratic Party worker says he was repeatedly sexually assaulted and harassed by the political organization's former top boss while the party turned a blind eye to the inappropriate behavior, according to a Los Angeles County court suit.

Read full article »

NY Sprinkler Co. Settles EEOC Race Bias Suit

A New York fire sprinkler contractor has agreed to a six-figure settlement to resolve a U.S. Equal Employment Opportunity Commission suit alleging black and Hispanic workers were subjected to continual racial slurs and a manager using a ringtone that sounded like a gorilla.

Read full article »

WAGE & HOUR

SF Giants Guards' Wages Suit Sent Back To Trial Court

A California state appeals court on Thursday sent a suit by a group of security guards for the San Francisco Giants back to trial court after the team had moved for arbitration, ruling the dispute hinges on an interpretation of state law, not provisions of the collective bargaining agreement.

Read full article »

SkyWest Flight Attendants As k Justices To Pass On Pay Fight

SkyWest Airlines flight attendants asked the U.S. Supreme Court on Wednesday not to review a Seventh Circuit decision reviving their wage lawsuit, arguing the airline hasn’t shown conflicting court rulings that warrant consideration by the nation’s top court.

Read full article »

LABOR

NLRB Chides Union For Booting Unhappy Members

The National Labor Relations Board has affirmed an administrative law judge’s finding that a security officers union flouted federal labor law when it stopped representing the officers at certain government buildings in Philadelphia after spinning them off into their own local.

Read full article »

NONCOMPETES

Oncology Co. Says Ch. 11 Plan Defeats Noncompete Suit

A group of Florida oncologists should not be able to bring an antitrust suit over noncompete agreements with 21st Century Oncology, because the agreements were previously accepted during a bankruptcy case, the company told a New York bankruptcy court.

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Wash. AG Wants Docs In Jersey Mike's No-Poach Case

The Washington Attorney General's Office has urged a state court to force nearly two dozen Jersey Mike's franchisees to hand over documents in the agency's suit challenging the sandwich chain's practice of forbidding franchisees from hiring one another's employees.

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NEGLIGENT HIRING

Dollar Tree Not Liable For Peeping Worker, Calif. Panel Says

A California appeals court has affirmed the dismissal of a suit from several women accusing Dollar Tree of negligently hiring a man who filmed female customers and employees in a restroom, saying it could not have foreseen the employee's criminal conduct.

Read full article »

WHISTLEBLOWER

Whistleblower Won't Get Atty-Client Docs In Debt Deal Suit

Even though Roche Diagnostics Corp. turned over documents showing it consulted lawyers ahead of an allegedly illegal deal to get its diabetes medication back on Humana's Medicare Advantage formulary, a whistleblower doesn't have a right to see privileged Roche communications, an Illinois federal judge said Wednesday.

Read full article »

Kimberly-Clark Whistleblow er Seeks Revival Of Axed FCA Suit

A former Kimberly-Clark worker has urged a Georgia federal judge to revive his False Claims Act allegations the company lied to the government about its compliance with U.S. Food and Drug Administration regulations, saying the court wrongly found his claims were too close to those reported in the media.

Read full article »

WORKER SAFETY

Ex-NFL Players Seek Rethink Of Concussion De al Changes

Former professional football players are contesting newly adopted medical rules in the NFL concussion settlement, arguing the changes only benefit the league and were approved without giving the retired players a chance to review them, according to Wednesday filings in Pennsylvania federal court.

Read full article »

WRONGFUL TERMINATION

Calif. Court Rejects Arbitration Bid I n Hotel Firing Suit

A California appeals court has affirmed a lower court's denial of Carneros Resort and Spa's bid to force arbitration of a former worker's claims that he was wrongfully fired after raising concerns about the hotel's water use and Americans with Disabilities Act compliance.

Read full article »

EXPERT ANALYSIS

OFCCP Case Changes The Game For Contractor P ay Audits

An administrative law judge's decision in Office of Federal Contract Compliance Programs v. Analogic rejected the theory of disparate impact that the OFCCP applied to sex-based pay discrimination and provides lessons on how contractors should respond to OFCCP pay system audits, say Soul Cherradi of BP, Dan Kuang of Biddle Consulting and attorneys at

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GOVERNMENT AGENCIES

Bello Welsh.

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LEGAL INDUSTRY

Mass. Judge Charged With Helping Man Escape ICE

A Massachusetts trial court judge and a court security officer were indicted by a federal grand jury Thursday on charges that they helped a defendant escape the custody of immigration officials at a courthouse last April.

Read full article »

Calif. Judicial Watchdog Agency N eeds Overhaul, Audit Finds

California's auditor on Thursday delivered a scathing report on the state's judicial watchdog agency, finding flaws in its investigative processes that she said run the risk of allowing judicial misconduct to go "undetected and uncorrected."

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Eversheds Retakes Top Spot As Strongest UK Fi rm Brand

Eversheds Sutherland reclaimed the No. 1 position as the United Kingdom's most well-known law firm brand in a survey of legal department leaders released Thursday, after being briefly unseated last year by Pinsent Masons LLP.

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Jones Day Partner Tapped To Lead Walmart's Litigation Team

Jones Day's head of litigation in Washington, D.C., will join Walmart this summer as senior vice president of litigation, the retailer said Thursday.

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Bar Prep Co. Flunks 2nd Circ. Antitrust Appeal

A Second Circuit panel refused in short order Thursday to revive LLM Bar Exam LLC's federal antitrust claims accusing major law schools like Columbia and New York University of conspiring with a rival to stifle competition for bar exam preparation.

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Analysis

Law360's Weekly Verdict: Legal Lions & Lambs

Lewis Brisbois and Mayer Brown were this week's top legal lions with a win at the U.S. Supreme Court for a client fighting a data breach class action, while Drinker Biddle ended up on the legal lambs list after a jury slammed client J&J with $120 million in damages.

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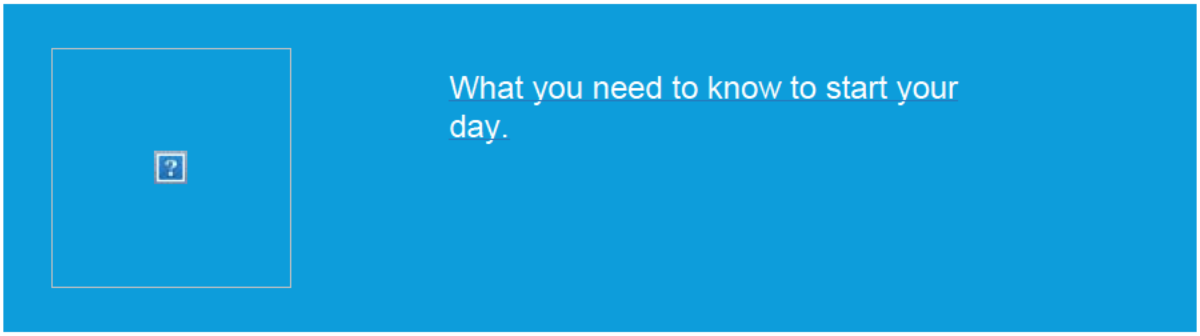
From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: First Move: Law Firm Scrutiny Next for Labor Department
Date: Friday, April 26, 2019 7:07:37 AM



Law Firm Scrutiny Next for Labor Department

By Patricio Chile

Labor Department regulators signaled they would dig deeper into the pay and promotion practices of law firms that receive federal contracts. The scrutiny casts light on the unequal share of promotions for attorneys of color and women in an industry where white men far outstrip other groups at the partnership level.

Agency Digs Deep: The small, but mighty Office of Federal Compliance Contract Programs has the oversight to look into such practices at law firms with government contracts. It will pay particularly close attention to how those firms' employment practices affect diversity, Paige Smith reports today.

Blurred Lines: The Labor Department's action follows a spate of class action lawsuits in recent years charging unequal treatment of women attorneys compared to their male counterparts. But is a law firm partner considered an "employee" under federal bias law, or an owner? That's a key distinction, but the courts have not been clear on the answer. Erin Mulvaney looks at the debate.

The question of whether law firm partners are owners or employees continues to be debated in Big Law discrimination cases.
Photographer: DAN EL LEAL-OLIVAS/AFP/Getty Images

TOP STORIES

Employers Must Turn Over Pay Data to EEOC by Sept. 30: Judge
More than 60,000 employers will have to turn over worker pay data to the Equal Employment Opportunity Commission by Sept. 30, as part of an annual workforce data report known as the EEO-1.

Supreme Court Adopts New Federal Rules Aimed at Modernization
The U.S. Supreme Court adopted amendments to federal appellate and evidentiary rules intended to make them more modernized and user-friendly.

Eighth Circuit Stays Consideration of Sex Orientation Bias Case
A gay sales and marketing executive will have to wait a little longer to find out if a St. Louis nursing-care provider committed sex discrimination when it pulled his job offer after he inadvertently disclosed his same-sex marriage.

IN CASE YOU MISSED IT

Discrimination

Union Pacific Applicant's Disability Bias Case Ready for Trial
A man who alleges Union Pacific Corp. pulled his job offer because it believed a cerebral aneurysm he suffered three years earlier made him a safety risk can take his disability bias claims to trial in two phases, a federal judge ruled.

Res-Care Worker Gets Chance to Show Age, Sex Drove Rehire Denial
A 59-year-old man who was denied rehire by PharMerica subsidiary Res-Care Inc. will get a trial on his claims that his age and gender drove the company's decision, a federal judge ruled.

Fired Thomson Reuters Director Sues Alleging Sex, Age Bias
Thomson Reuters is accused in a new lawsuit of firing the female 60-year-old senior director of support services and operations effectiveness in its tax and accounting division based on her age and sex.

Cablevision to Face Trial on Worker's Age, Disability Claims
A former Cablevision Systems Corp. employee may be able to show she was fired because she was 52 years old and had just returned from gallbladder surgery, the New Jersey Appellate Division ruled.

Wage & Hour

Western Express Truckers Get Wage Fight Conditionally Certified
Long haul truckers working for Western Express Inc. won conditional certification of their collective action claiming the company misclassified them as independent contractors in order to avoid paying minimum wages.

SF Giants Pay Claim Heads Back to Home Plate in California Court
A San Francisco Giants security guard's claims that the team must pay him immediately after every homestand or event at AT&T Park must go back to state trial court, the California Supreme Court said April 25.

State & Local Laws

Oklahoma State Employee Overtime Mandate Heads to Governor
Oklahoma state government employees earning less than $31,000 annually would receive overtime pay—not comp time—for hours worked beyond 40 in a workweek under a bill sent to Gov. Kevin Stitt (R).

Harassment & Retaliation

Cantor Fitzgerald Doesn't Want This Woman Talking About Her Mug in Court
A former Cantor Fitzgerald saleswoman filed a lawsuit accusing her former boss, a colleague, and the company of harassment, discrimination, and retaliation, all of which they deny.

Boys Coach Says He Was Fired for Saying Girls Teams Get Perks
The head baseball coach at a magnet school is suing the Los Angeles Unified School District for retaliation, saying he was fired after alleging girls teams at the school got preferential treatment over boys teams.

Labor Relations

First Stop & Shop Workers Approve Contract
A group of unionized Stop & Shop supermarket workers agreed to a three-year contract in the wake of an 11-day strike that cost the company as much as $10 million per day.

Legal Profession

Weil, Gotshal & Manges is introducing an initiative that will give students entering prestigious law schools the chance to work with U.S.-based nonprofits for a year.

WORKFLOWS

Morrison & Foerster's Boston office added two new corporate partners; Todd Boudreau as the co-head of the Global Private Equity Investments + Buyouts Group and as a partner in its Private Funds Group, and Matt Karlyn as a partner in the Technology Transactions Group | **Paul Hastings** hired Frank Lopez as co-head of the global Capital Markets practice and a partner in the Leveraged

Finance practice in New York from Proskauer | **White & Case** added Rodrigo Dominguez and Bill Parish as partners to the Global Mergers & Acquisitions (M&A) Practice in Houston | **Weil, Gotshal & Manges LLP** added Anne-Sophie Noury as a Business Finance & Restructuring partner in Paris | **Shearman & Sterling** announced that Richard Sitton will join as counsel in its Houston office | **Debevoise & Plimpton** said that Will C. Giles has joined as a counsel and member of the Financial Institutions Group and Banking Group in Washington, DC | **Kramer Levin** hired Michael McKay as of counsel to the Leveraged Finance practice in New York from Vinson & Elkins LLP

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From: Martin, Andrew
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Friday, April 26, 2019

Google Accused of Retaliating Against Staff in New Labor Case

Bloomberg News Feed 25 Apr 2019 21:17

(Bloomberg) -- A complaint has been filed with the National Labor Relations Board accusing Alphabet Inc.'s Google of violating federal law by retaliating against an employee. The filing was made his week by an uniden ified individual and the case has...

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Blog Post: NLRB Chides Union For Booting Unhappy Members

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 25 Apr 2019 17:00

The National Labor Relations Board has affirmed an administrative law judge's finding that a security officers union flouted federal labor law when it stopped representing the officers at certain government buildings in Philadelphia after spinning hem...

Teachers At Another D.C. Charter School Are Trying To Unionize

DCist 25 Apr 2019 14:01

Teachers at Mundo Verde Bilingual Charter school in Washington have made efforts to form a union, he second unionization attempt by charter school teachers in the District over he past two years. The teachers at the Truxton Circle school say they're...

NLRB: Employer Lawfully Took Control Of Investigatory Interview

JD Supra: Labor & Employment Law 25 Apr 2019 13:03

The NLRB has ruled that, under he particular circumstances, an employer representa ive lawfully barred a union representative from asking questions during an inves igatory interview while he employer representative was questioning the employee to.....

SCOTUS Deals Another Blow to Classwide Arbitration

National Law Review 25 Apr 2019 12:11

Solicitude for Sailors: The United States' Supreme Court Balances in... by: Dillon Ambrose April, 2019 Regulatory Developments by: Frank R. Ciesla and Beth Christian CSPI Calls for National Registry of Gene-Edited Agricultural Crops by: Food and Drug Law...

Volkswagen lawyer attempts to strike down request for new union election in Chattanooga

Chattanooga Times/Free Press (Chattanooga, TN) 25 Apr 2019 11:39

A Volkswagen lawyer on Wednesday sought to strike down a request for a new union election at the Chattanooga plant, while a United Auto Workers (UAW) attorney stepped up the case for a vote. "Volkswagen is not opposed to union elections as its history...

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From:	Morning Shift
To:	Ring, John
Subject:	POLITICO"s Morning Shift: Expanded EEO-1 due Sept. 30 — Draft DHS proposal would speed up deportations — 2020 contenders to speak at SEIU forum this weekend
Date:	Friday, April 26, 2019 10:03:36 AM

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2018 Newsletter Logo: Morning Shift

04/26/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click here.

QUICK FIX

— Large employers have until September 30 to submit payroll data to the EEOC broken down by race, ethnicity, and gender, a district court judge ruled.

— A draft DHS proposal could speed up deportations.

—Six Democratic presidential hopefuls will address an SEIU-sponsored forum tomorrow on wages and working people.

GOOD MORNING! It's Friday, April 26, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

EXPANDED EEO-1 DUE SEPTEMBER 30: A federal judge on Thursday gave the EEOC until September 30 to collect expanded pay data broken down by race, ethnicity, and gender, POLITICO's Rebecca Rainey reports. In March, U.S. District Judge Tanya Chutkan overturned a Trump administration stay of an Obama-era policy that required all companies with more than 100 employees to submit the data, on the grounds that the stay violated the Administrative Procedures Act. Judge Chutkan's March order reinstated the Obama EEOC's expanded EEO-1 form, which was introduced in 2016 to help the EEOC and the Office of Federal Contract Compliance Programs "better focus investigations on employers who are illegally shortchanging workers' pay based on their gender, race, or ethnicity."

In Thursday's ruling, Judge Chutkan extended the submission deadline, at the Trump administration's request, from May 31 to September 30. She also ordered the EEOC to collect two years' worth of data, as would have occurred had the collection not been stayed. "Today was a major victory for equal pay," Robin Thurston, senior counsel for Democracy Forward, one of the plaintiffs in the lawsuit, told Morning Shift in an emailed statement. "At every turn, the Trump administration has acted unlawfully to protect big business over women and American workers." More here.

IMMIGRATION

DRAFT PROPOSAL WOULD SPEED UP DEPORTATIONS: The Department of Homeland Security is considering a plan "to bypass immigration courts and remove undocumented immigrants who cannot prove they've been present continuously in the U.S. for two years or more," POLITICO's Ted Hesson reports. The draft notice would "increase significantly the number of recently arrived undocumented immigrants subject to rapid deportation," which right now is limited to those picked up within two weeks of arriving. The change could ease some of the backlog in the immigration courts. More here.

DEMOCRATS DEMAND INFO ON DHS SHAKEUP: Three House Democrats are demanding that the Homeland Security Department hand over emails and communications related to the forced exit earlier this month of several top agency officials, citing reports that White House senior adviser Stephen Miller had pressed department officials "to make extreme immigration policy decisions," POLITICO's Ted Hesson reports.

"We are deeply concerned that the firing and forced resignation of these officials puts the security of the American people at risk," Reps. Elijah Cummings (D-Md.), Jerry Nadler (D-N.Y.) and Bennie Thompson (D-Miss.) wrote. "We are also concerned that the president may have removed DHS officials because they refused his demands to violate federal immigration law and judicial orders." The inquiry comes after the White House said it won't make Miller available to testify before the House Oversight and Reform Committee about his role in shaping Trump's immigration agenda. More here.

WILL THE CHAMBER DRIFT FROM THE GOP?: "The U.S. Chamber of Commerce, navigating dramatic cultural change that's transforming the worlds of politics and business, plans to become less aligned with the Republican Party than it has been for decade," James Hohmann reports for The Washington Post. "The GOP's drift toward protectionism, nativism and isolationism since Donald Trump took over the party in 2016 is also at odds with the Chamber's longtime support for expanding free trade, growing legal immigration, and investing in infrastructure," Hohmann writes. Chamber leaders told the Post that they will change their member scorecard to make it easier for Democratic legislators to improve their scores, for example by sponsoring bipartisan legislation.

The Chamber's shift has been in the works since before Trump took office, but the

group signaled in recent months that it's willing to cross the aisle on such issues as raising the minimum wage. More from the Post here.

JOBS, JOBS, JOBS

CANNABIS JOBS GROW LIKE WEEDS: Although it's difficult to track the number of legal cannabis-industry jobs (partly because DOL doesn't provide the numbers), listings for marijuana-related jobs "have rocketed to the top echelon of the fastest-growing-job categories on sites like Indeed and ZipRecruiter," Conor Dougherty reports for The New York Times. "Julia Pollak, a labor economist at ZipRecruiter, said the company's data put the number of cannabis jobs nationwide at 200,000 to 300,000." Most of those listings are for minimum wage jobs such as trimming the marijuana plant, but there has also been an uptick in demand for higher-skilled and better-paid positions such as "chemists, software engineers, and nurses." More here.

WORKER SAFETY

AFL-CIO TRACKS WORKPLACE DEATHS: The AFL-CIO reported Thursday that workplace deaths numbered 5,147 in 2017, down slightly from 5,190 in 2016. (The same numbers were reported in December by the Bureau of Labor Statistics.) According to the labor federation's annual "Death on the Job" report, job fatalities increased in mining, transportation, health care, and social assistance. The report quoted a recent estimate from Liberty Mutual Insurance that severe injuries cost employers $55 billion a year.

"It's well past the time that folks in Washington, D.C. stop playing politics and take actions to prevent these tragedies," AFL-CIO President Richard Trumka said in a press call, criticizing the Trump administration's rollback of worker safety protections in underground mine safety inspections and injury and illness reporting. Read the report here.

2020 WATCH

2020 CONTENDERS TO SPEAK AT WORKING PEOPLE FORUM: Six Democratic presidential candidates will court union rank and file this Saturday at the National Forum on Wages and Working People, convened by the SEIU and the Center for American Progress Action Fund. California Sen. Kamala Harris, former HUD Secretary Julián Castro, Former Colorado Gov. John Hickenlooper,

Minnesota Sen. Amy Klobuchar, Former Texas Rep. Beto O'Rourke, and Massachusetts Sen. Elizabeth Warren will speak at the event in Las Vegas. Earlier this month, nearly half the field of Democratic presidential candidates courted union leaders at the North America's Building Trades Unions conference in D.C. More about Saturday's event here.

DEMOCRATIC PRESIDENTIAL CONTENDERS WOULD REPEAL TAX CUT: "Nearly every Democratic candidate has vowed to roll back Trump's 2017 tax reform legislation, which they say unfairly benefits corporations and top earners," POLITICO's Beatrice Jin and Caitlin Oprysko report. "Most candidates say they would give the wealthy a tax hike and give Americans with middle and low incomes more tax relief." A recent NBC/Wall Street Journal poll found that just 17 percent of Americans believe their taxes went down as a result of the 2017 Tax Cuts and Jobs Act; another CBS News poll found that 32 percent said their taxes went up, and only 25 percent said they went down. More here.

Related: "The data is in: More Americans received tax refunds in 2019, but checks were leaner," from The Washington Post

COFFEE BREAK

— "DOJ charges judge with helping undocumented immigrant evade arrest," from POLITICO

— "Mexico's crackdown forces migrants to more dangerous routes," from The Associated Press

— "Typical Worker's Pay Nears $200,000 at Oil Refiner," from The Wall Street Journal

— "Trump can drag out auto tariff decision for years, report notes," from POLITICO Pro

— "3M Plans to Cut 2,000 Jobs as Its Sales Fall," from The Wall Street Journal

— "GM adding 400 jobs in Kentucky for mid-engine Corvette," from The Detroit News

— "Even in Strong Job Market, High-School Graduates Flock to College," from The Wall Street Journal

THAT'S ALL FOR MORNING SHIFT!

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Highlights

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TOP STORIES

$10M Class Wage Arbitration Award Quashed After SCOTUS Ruling

By Porter Wells

A $10 million class arbitration award must be set aside and the named plaintiff must pursue her wage and hour claims against Waterstone Mortgage Corp. on her own behalf, a federal judge ruled.

Law Firm Bias Cases Hinge on Meaning of Partner

By Erin Mulvaney

Kerrie Campbell joined Chadbourne & Parke as a partner in Washington in 2014, and two years later a question emerged in her gender discrimination lawsuit against the firm: Did her role as a partner mean she was an employee or an owner at the firm?

Arizona Prison Guard to Get Trial on Some Harassment Claims (1)

By Patrick Dorrian

The state of Arizona must defend at trial claims by a Mexican-American corrections officer that he was harassed based on his national origin, a federal judge ruled.

Big Law Pay Equity Gets Closer Scrutiny by Small Labor Agency

By Paige Smith

A small Labor Department agency with sizable oversight is looking closely at Big Law firms like Morgan Lewis & Bockius, Fox Rothschild, and Paul Hastings, as part of its mission to address compensation and promotion practices in the legal industry.

DISCRIMINATION

D.C. Dorm Manager Inches Forward in Job Bias, Negligence Suit

By Porter Wells

A dormitory manager in Washington can go forward with some, but not all, of his retaliations claims against his employer, his alleged harasser, and his harasser's employer, a federal judge ruled.

Baker & McKenzie Paralegal Fined for Disobeying Court Orders

By Porter Wells

A former Baker & McKenzie LLP paralegal of Russian descent is on the hook for $35,445 in attorneys' fees after disobeying a trial judge's order to substantiate her demand for $200 million in damages in a job bias suit, the Seventh Circuit said April 26.

Wilmington Capital Securities Hit With Race Discrimination Suit

By Peter Hayes

Wilmington Capital Securities LLC was hit with a suit by two former traders alleging they were fired because of their race.

HARASSMENT & RETALIATION

Google Accused of Retaliating Against Staff in New Labor Case

By Josh Eidelson and Mark Bergen

A complaint has been filed with the National Labor Relations Board accusing Alphabet Inc.'s Google of violating federal law by retaliating against an employee.

STATE & LOCAL LAWS

Wisconsin Could Be First State to Exempt Tipped Income

By Michael J. Bologna

Wisconsin could be the first state in the country to provide an income tax exemption for cash tips paid to bartenders, wait staff, taxi drivers, hair stylists, and other service industry workers.

LABOR RELATIONS

Apprenticeship Laws Survive Suit by Non-Union Group (Corrected)

By Jacklyn Wille

Local ordinances favoring government contractors that participate in apprenticeship programs are valid under the U.S. Constitution and the Employee Retirement Income Security Act, a federal judge in Pennsylvania ruled.

FedEx Freight Workers in California Vote to Keep Union

By Andrew Wallender

The International Brotherhood of Teamsters will maintain a foothold at FedEx Corp. after drivers at a FedEx Freight facility in Stockton, Calif., voted to continue membership in the union.

HUMAN RESOURCES

HR Buzz: Madison-Bound • Women at Helm • New Moms Urged to Exit?

By Cathleen O'Connor Schoultz

The news isn't all rosy for women: A researcher found that new moms can get a subtle message from their workplaces that they should consider bagging the outside job for now, and a science association delves into bias against women —especially of color—in leadership roles.

HEALTH CARE & BENEFITS

Feds Appeal Decision Striking Trump's Group Health Plan Rule

By Jacklyn Wille

The Labor Department will ask a federal appeals court in Washington, D.C., to revive the Trump administration's rule on association health plans.

Perks of Work: Today's Nightcaps Are Real Snoozers

By Warren Rojas

Time for Perks of Work, our weekly recap of intriguing data, surveys, and trends about the 21st century workplace.

ADP's Non-Competes Upheld but Remanded to Judge for Tailoring

By Mike Leonard

Payroll company ADP LLC didn't violate New Jersey antitrust laws by conditioning some stock options on non-compete agreements, but a judge will have to decide if some of their terms were overbroad.

ALSO IN THE NEWS

Federal Workers Get Year to Earn Comp Time for Religious Leave

By Louis C. LaBrecque

Federal employees whose beliefs require them to abstain from work at certain times for religious reasons will be able to do so by earning compensatory time off during the 13 pay periods before the observances and the 13 pay periods after, under a final rule issued April 26.

Third-Party Lenders Get Big Win in NFL Concussion Appeal (3)

By Steven M. Sellers

A federal district court went too far in restricting the rights of retired NFL players to use third-party lenders to get advance payouts under the league's $1 billion concussion settlement, a federal appeals court ruled April 26.

Labor Reform Is Coming to Mexico, Where Low Pay Fuels Exports

By Nacha Cattan

Mrs. Martínez earns $79 for a six-day week working in the produce section of a Walmart in Mexico City. A labor union bargained with the retail giant to get her that salary, but she's never met a representative. She didn't want to be named for fear of reprisals, but she says she hasn't even heard of the union.

U.S. Growth of 3.2% Tops Forecasts on Trade, Inventory Boost

By Reade Pickert and Jeff Kearns

U.S. economic growth accelerated by more than expected in the first quarter on a big boost from inventories and trade that offset a slowdown in consumer spending, bolstering hopes that growth is stabilizing after its recent soft patch.

Google Announces More Policy Changes After Employee Protests

By Josh Eidelson

Google unveiled another round of policy changes to address employee concerns about misconduct at the world's largest internet search company.

LATEST CASES

Case: Discrimination/Attorneys' Fees (7th Cir.)

A federal district court in Illinois properly granted a motion to strike a response to a motion to compel discovery and awarded attorneys' fees in the amount of $35,445 to the law firm of Baker & McKenzie LLP in a discrimination action by

a former paralegal who dismissed her case rather than respond to discovery requests. There was no reason to preserve the response as the paralegal voluntarily abandoned her case before the court even considered it and Baker & McKenzie found her response to be defamatory, and the fees were warranted due to the paralegal's repeated refusal to obey the court's orders to produce discovery. The case is Stephens v. Baker & McKenzie LLP, 2019 BL 149352, 7th Cir., 18-2375 & 18-2963, unpublished 4/26/19.

Case: Discrimination/Discharge (S.D. Ind.)

A female employee may not proceed with her claim that a hospital in Indiana fired her because of her sex, rather than for failure to secure another position within the hospital in a timely manner after she was removed from the clinical coordinator position due to dissatisfaction and trust issues. She didn't show that she was similarly situated to a male co-worker who was allegedly treated more favorably under similar circumstances because he didn't have the same job duties that led to her removal and discharge and they reported to different supervisors; additionally, the fact that all of the firing decisionmakers were males isn't enough to show that her sex was a factor in the decision. The case is Aaron v. St. Vincent Anderson Reg'l Hosp., Inc., 2019 BL 148295, S.D. Ind., 1:17-cv-03299-SEB-TAB, 4/25/19.

Case: Discrimination/Hostile Work Environment (S.D. W.Va.)

A fired female fiscal manager may not proceed with her claim that a West Virginia planning and development agency subjected her to a sexually hostile work environment through comments made by a male former executive director. The comments, including one incident where he said that he was "sitting here looking at you, pretending like you don't have any clothes on," weren't continuously addressed to her, pervasive, or severe enough to a create a sexually hostile environment. The case is Price v. Region 4 Planning & Dev. Council, 2019 BL 148465, S.D. W.Va., 2:16-cv-1529, 4/25/19.

Case: Discrimination/Discharge (D.D.C.)

A black "budget analyst team lead" of West Indian descent may not proceed with her claim that the Department of Labor fired her because of her race, age, and national origin, rather than for excessive and improper use of time and

equipment for personal purposes surrounding an unauthorized role as a professor at an online university. She provided no factual support for her allegations, including that younger, Caucasian, American-born analysts weren't "micromanaged" or monitored by supervisors as closely as she was, to show that she was treated less favorably than analysts outside of her protected-classes or that her race, national origin, or age were factors in the firing decision. The case is Francis v. Acosta, 2019 BL 148575, D.D.C., No. 16-763 (RMC), 4/25/19.

Case: Disability Discrimination/Discharge (S.D. Ind.)

St. Vincent Anderson Regional Hospital in Indiana prevails over a disability discrimination claim brought by a former Radiology program Clinical Coordinator with an autoimmune disease who was fired because students complained that she created a negative learning environment and exacerbated tensions in the department. No one involved in the firing decision knew about her condition, and it doesn't matter that a coworker may have also contributed to the negative environment reported by students, the court ruled. The case is Aaron v. St. Vincent Anderson Reg'l Hosp., Inc., 2019 BL 148295, S.D. Ind., 1:17-cv-03299-SEB-TAB, 4/25/19.

Case: Disability Discrimination/Discharge (6th Cir.)

Munro Muffler Brake in Medina, Ohio, didn't discriminate against an automotive technician with lifting restrictions from an on-the-job hand injury when it fired him after discovering that he had ordered inventory that could not be accounted for and was presumed missing. He was fired shortly after the inventory discrepancy was discovered, and he couldn't show that Munro had ever retained an employee who committed the same infraction. The case is Hunt v. Monro Muffler Brake, Inc., 2019 BL 147967, 6th Cir., 18-3737, unpublished 4/25/19.

Case: Discrimination/National Origin Harassment (D. Ariz.)

A Mexican-American correctional officer for the Arizona Department of Corrections who also had some Sicilian or Italian heritage is entitled to a trial on his claim that he was subjected to a hostile work environment due to his national origin based on his allegations that one of his co-workers called him

an “Italian n****r and “wet back” on a daily basis, repeatedly threatened to call Immigration and Naturalization Service to have him deported to Mexico, and physically threatened him. The department may be liable for the co-worker's harassment because it failed to interview key eyewitnesses who could have substantiated the Mexican-American officer's allegations, the court said. The case is .

Case: Wage & Hour/Arbitration (W.D.Wis.)

A Wisconsin loan originator for a mortgage company didn't show that her arbitration agreement with the company permits collective arbitration of wage-and-hour claims, because the agreement unambiguously states that any arbitration proceeding may not be joined with claims by anyone who isn't a party to it, and the fact that other loan originators signed identical agreements doesn't make them party to the same agreement, which refers specifically to the individual loan originator and the company. The case is Herrington v. Waterstone Mortg. Corp., 2019 BL 148375, W.D. Wis., 11-CV-779-BBC, 4/25/19.

Case: Wage & Hour/Overtime Exemptions (S.D. W.Va.)

The fiscal manager for a West Virginia planning and development agency may not move forward with her claim for unpaid overtime work. She is subject to the administrative exemption under both state and federal wage law, because her salary exceeded the $455 per week threshold for the exemption, and her duties, which included payroll administration, establishing staff priorities, and overseeing financial requirements, were non-manual and managerial in nature. The case is Price v. Region 4 Planning & Dev. Council, 2019 BL 148465, S.D. W.Va., 2:16-cv-1529, 4/25/19.

Case: Labor Relations/Airline Employees (7th Cir.)

A former Continental Airlines pilot who was fired after twice failing alcohol tests administered by the carrier can't show that a system board of adjustment should have reinstated her. She argued that the board misconstrued her last-chance agreement when it applied the agreement's requirement that she abstain from alcohol for "the remainder of her career" at Continental to a period when she was receiving rehabilitation treatment, but the board's alleged

misinterpretation of the agreement was still an interpretation. The case is Betts v. United Airlines, Inc., 2019 BL 145321, 7th Cir., 18-3336, 4/24/19.

Case: Labor Relations/Refusal to Bargain (N.L.R.B.)

A company that operates KOIN-TV in Portland, Oregon unlawfully refused to provide a union with requested information about which piece of news graphics equipment had replaced its "still store." Although there are times when parties must exercise their right to have the board resolve information request disputes, parties in circumstances such as this are more likely to obtain satisfactory and timely resolution through more extensive good-faith discussions between themselves, the NLRB says. The case is Nexstar Broadcasting, Inc. d/b/a KOIN-TV, 2019 BL 145687, N.L.R.B., 4/24/19.

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From: Employment Law360
To: Ring, John
Subject: Week In Review: Justices Eye Title VII Protections For LGBT Workers & Slap Down Class Arbitration
Date: Saturday, April 27, 2019 11:05:40 AM

Employment Week In Review

Saturday, April 27, 2019

TOP NEWS

Politics Looms As High Court Agrees To Weigh LGBT Rights

The U.S. Supreme Court's decision Monday to wade into litigation over whether Title VII protects LGBT workers makes it a virtual certainty that the high court's ruling will drop in the heat of the 2020 presidential race, turning the blockbuster result into a potentially decisive political issue, experts say. Here are three factors to keep an eye on as the case moves forward.

Supreme Court Ruling Cuts Off Avenue To Class Proceedings

The U.S. Supreme Court’s conservative majority dealt its latest body blow to class actions on Wednesday, issuing a 5-4 decision that experts say puts another roadblock in the way of workers and consumers who want to pursue collective claims.

High Court Skeptical Of Limiting Courts' Title VII Purview

The U.S. Supreme Court appeared to be leaning Monday toward ruling that courts can hear job bias claims even if workers don't bring them to government enforcers first, as justices quizzed a Texas county seeking to use a discrimination accuser's clerical flub to escape a seven-year-old lawsuit.

LAW FIRMS

BakerHostetler
Ballard Spahr
Cooley Iuliano
Dorsey & Whitney
Eversheds Sutherland
Fisher Phillips
Haynes and Boone
Hogan Lovells
Littler Mendelson
Locke Lord
Mintz Levin
Ogletree Deakins
Pierce Bainbridge
Schiff Hardin
Seyfarth Shaw
Ulmer & Berne
Wright Close

COMPANIES

AT&T Inc.
American Civil Liber ties Union
Burger King Holdings Inc.
Four Seasons Holdings Inc.
LVMH Group
LinkedIn Corp.
National Women's Law Cente r
PricewaterhouseCoopers
Stolt-Nielsen SA
U.S. Chamber of Commerce

GOVERNMENT AGENCIES

Equal Employment Opportunity Commission
Illinois Supreme Court
Texas Workforce Commission
U.S. Department of Justice
U.S. Merit Systems Protection Board
U.S. Supreme Court

Employers Told To Provide Pay Data To EEOC By Sept. 30

Mid-size and large employers have until Sept. 30 to tell the U.S. Equal Employment Opportunity Commission how much they paid workers of different sexes, races and ethnicities last year, a Washington, D.C., federal judge said Thursday.

LVMH Legal Affairs VP Alleges Sex Harassment At Luxury Co.

The vice president of legal affairs and litigation counsel at LVMH Moet Hennessy Louis Vuitton Inc. says she's been sexually harassed for years on the job, and when she reported it, the company chastised her, intimidated her and suggested promoting the man who harassed her.

Olive Garden Gets $35M Skin Color Bias Suit Thrown Out

A Kentucky federal judge handed Olive Garden a win Monday in an African American woman's $35 million lawsuit alleging she was fired because her skin was "too dark," though he said the conduct of the restaurant chain's counsel "leaves something to be desired."

EXPERT ANALYSIS

Illinois Courts Will Continue To Interpret BIPA Broadly

Against the backdrop of the Illinois Supreme Court's Biometric Information Privacy Act opinion in Rosenbach v. Six Flags, an Illinois appellate court's recent decision in Liu v. Four Seasons reinforces that companies must carefully design and implement stringent BIPA policies to protect against class actions and related liability, say attorneys with Eversheds Sutherland.

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From: Employment Law360
To: Ring, John
Subject: Interns In The Trump Era: What Employers Need To Know
Date: Monday, April 29, 2019 3:51:18 AM

EMPLOYMENT
<
/a>

Monday, April 29, 2019

TOP NEWS

Interns In The Trump Era: What Employers Nee d To Know

Unpaid internships don't pose the same legal risks for employers as they did in the past, since the Trump administration has relaxed the federal test for assessing intern versus employee status. But experts say businesses that want to hire summer interns still need to be cautious.

Read full article »

3rd Circ. Sends ADP Noncompetes Back For Revisions

The Third Circuit ruled Friday that while human resources company ADP LLC had a legitimate interest in protecting its client relationships when it made two top sales employees sign rigid restrictive covenants in exchange for stock options, those pacts still need to be narrowed to be deemed valid.

Read full article »

7th Circ. OKs Sanctions Against Ex-Baker McKenzie Paralegal

The Seventh Circuit on Friday affirmed that a former Baker McKenzie paralegal must pay the firm's attorney fees after she dropped her $200 million discrimination lawsuit against the firm in order to avoid complying with court-ordered discovery.

Read full article »

FilmOn Exec Hit With $8M P unitives Verdict For Sexual Battery

A California jury on Friday ordered FilmOn founder Alki David to pay $8 million in punitive damages for committing sexual battery against a former worker, but the panel also reduced the compensatory damages it had awarded the day before in the explosive trial.

Read full article »

AM Retail's 'Confusing' Wage Deal Needs Work, Judge Says

A California federal judge on Friday told AM Retail Group, which operates hundreds of Wilsons Leather and G.H. Bass & Co. stores, that it needs to revise a $1.3 million settlement over claims it shorted workers' wages and didn't provide breaks, saying the deal is "very confusing" and needs work.

Read full article »

DISCRIMINATION

Legal Aid Atty's Firing Violated D isability Law, EEOC Says

An organization that provides legal services to poor and underage defendants violated federal law when it terminated an attorney diagnosed with various mental health issues rather than transfer her to another role, the Equal Employment Opportunity Commission alleged Friday in Pennsylvania federal court.

Read full article »

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New Cases

Discrimination (51)
ERISA (34)
Labor (58)

LAW FIRMS

Akin Gump
Allen Garrett
Alston & Bird
Anapol Weiss
Anderson & Karrenberg
Atkinson Andelson
Baker McKenzie
Boies Schiller
Bradley Arant
Brotman Law (San Diego, CA)
Butler Rubin
Chamberlain Hrdlicka
Copeland & Rice
DLA Piper
David Yeremian & Associates
Debevoise & Plimpton
Epstein Becker Green
Fenwick & West
Fox Rothschild
Genova Burns
Gibson Dunn
Gleason Dunn
Gonzalez Saggio

NC Judge Adds $1.6M To Ex-Cop's Sex Bias Trial Win

A North Carolina federal judge on Friday awarded about $1.6 million for lost wages to a former Charlotte police officer who won $125,000 at trial on his claim that the department fired him based on his sex following a consensual relationship with another officer.

Read full article »

WAGE & HOUR

Cellphone Retailer Won't Face Clas s Action In NY Wage Suit

A New York federal judge on Friday refused to certify a hybrid class and collective action accusing a Verizon Wireless authorized retailer of wage violations, saying the key question of whether the class members were misclassified as independent contractors isn't one that can be resolved on a classwide basis.

Read full article »

Truckers' Attys Want $16M Cut Of $100M CR England Deal

Attorneys for a class of drivers allegedly tricked into giving trucking company C.R. England free labor want a federal judge to award them $15.8 million for their work securing a settlement worth about $100 million in cash and debt relief.

Read full article »

WORKER SAFETY

3rd Circ. Partially Revives NFL Concus sion Funding Dispute

The Third Circuit in a precedential opinion Friday ruled that a Pennsylvania federal judge overstepped her bounds in voiding all cash advance agreements between class members in the NFL's landmark 2015 concussion suit and litigation funding companies.

Read full article »

PEOPLE

Jackson Lewis Nabs Seasoned Employ ment Litigator In Wis.

Jackson Lewis PC has bolstered its ranks in Milwaukee by luring a seasoned employment law litigator away from Mallery & Zimmerman SC, the management-side powerhouse has announced.

Read full article »

EXPERT ANALYSIS

Class Arbitration Is Almost Dead

The U.S. Supreme Court's recent decision in Lamps Plus v. Varela virtually forecloses a court's ability to order parties to class arbitration — but one trapdoor remains, say Jay Bogan and Allen Garrett of Kilpatrick Townsend.

Read full article »

Inside OFCCP's New Affirmative Act ion Compliance Proposal

Earlier this month, the U.S. Department of Labor's Office of Federal Contract Compliance Programs proposed changes to affirmative action monitoring procedures. If approved, federal construction contractors may be subject to oversight more often, say Aron Beezley and Amandeep Kahlon at Bradley Arant.

Read full article »

Guest Feature

Preet Bharara On The Human Factor In The J ustice System

A key theme in Preet Bharara's new book is the enormous role the human element plays in the administration of justice. The former U.S. attorney for the Southern District of New York discussed this theme, among other topics,

Greenberg Traurig
Hagens Berman
Hinman Straub
Hogan Lovells
Jackson Lewis
Jones Day
Kilpatrick Townsend
Kim & Chang
King & Spalding
Kirkland & Ellis
Kravit Hovel
Latham & Watkins
Lindabury McCormick
Mallery & Zimmerman, S.C.
McDonald Hopkins
Michael Best
Modus Law
Morgan Brown & Joy
Morgan Lewis
Morrison & Foerster
Norton Rose Fulbright
Orrick Herrington
Paul Weiss
Pepper Hamilton
Quinn Emanuel
Ray Quinney
Reed Smith
Reid Collins
Sandler Reiff
Saul Ewing
Schiff Hardin
Seeger Weiss
Sidley Austin
Simpson Thacher
Skadden
SmithAmundsen LLC
Steptoe & Johnson LLP
Stradley Ronon
Stumphauzer Foslid
The Bloom Firm
Venable LLP
Vinson & Elkins
Weil Gotshal
White and Williams
Wilentz Goldman
Wilson Sonsini
Winston & Strawn
Zuckerman Spaeder

COMPANIES

21st Century Fox Inc.
AbbVie Inc.
Abbott Laboratories

in a recent conversation with White and Williams attorney Randy Maniloff.

Read full article »

Rebuttal

Forced Arbitration Is A Far Wors e 'Product' Than Jury Trials

Jury trials are not dying because arbitration is a “better product,” as alleged in a recent Law360 guest article, but because corporations have rigged the system through forced arbitration to ensure they cannot be held accountable before a judge or jury, say attorneys at Hagens Berman.

Read full article »

LEGAL INDUSTRY

Skadden's DOJ Settlement Off The Table In Cra ig Case

Former Skadden partner Gregory Craig and federal prosecutors have struck a deal to keep the elite law firm’s $4.6 million settlement with the U.S. Justice Department for unregistered foreign lobbying out of Craig’s ongoing criminal case, according to a Friday filing.

Read full article »

Greenberg Traurig Forgery Suit Ends 12 Years After It Began

A suit that kicked off in 2007 by a former Apollo fund manager who says Greenberg Traurig LLP knowingly used a forged document in litigation against him has ended, according to documents filed in New York state court Friday.

Read full article »

Analysis

Mueller Report Shows Policy Gaps Wh ere Congress Could Act

The redacted version of special counsel Robert Mueller's report on Russian interference in the 2016 presidential election unveiled clear need for changes to election law, lobbying disclosures and more, experts said, but first lawmakers must gather the fortitude to tackle vulnerabilities to our political system.

Read full article »

High Court's 'Hot Bench' Approach Comes With Risks< /a>

Research shows that in recent decades, U.S. Supreme Court justices have become much more vocal during oral arguments and that phenomenon, known as the “hot bench,” has both benefits and drawbacks for the court’s legitimacy, according to a new law review article.

Read full article »

Could Politics Make Courts A Sidekick Branch Of Government?

Across the country, lawmakers are trying to alter how the judges in their home state are selected, crafting a wave of legislation this year that critics say will undermine the integrity of what’s supposed to be a politically independent branch of government and, with it, the rule of law.

Read full article »

Ex-AG Mukasey Won’t Testify At Pl atinum Founder’s Trial

A New York federal judge accused Platinum Partners co-founder Mark Nordlicht on Friday of trying to “dazzle” a jury by having former U.S. Attorney General Michael B. Mukasey testify at his criminal trial, knocking down a subpoena targeting Mukasey and another attorney at Debevoise & Plimpton.

Read full article »

Bear Stearns Fights Reed Smith Dism issal Bid In $500M Suit

Two now-defunct Bear Stearns investment funds fought back against a bid to dismiss their $500 million malpractice suit against Reed Smith LLP, saying

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Andreessen Horowitz LLC
Automatic Data Processing Inc.
C.R. England Inc.
Calvin Klein Inc.
Cellular Sales Inc.
Center for Justice
Democratic National Committee
Epic Systems Corp.
FilmOn PLC
Fitch Ratings Ltd.
Google Inc.
Hologram USA Inc.
Instagram Inc.
JAMS Inc.
Johnson & Johnson
Miami Heat
Microsoft Corp.
NFL Enterprises LLC
New York Times Co.
New York University
Platinum Partners LP
Public Broadcasting Service
RD Legal Funding LLC
Robert Half International Inc.
S&P Global Inc.
Spirit Airlines Inc.
Spotify Technology SA
Stolt-Nielsen SA
Temple University
Twitter Inc.
United Way International Inc.
Verizon Communications Inc.
YouTube Inc.

GOVERNMENT AGENCIES

Commodity Futures Trading Commission
Consumer Financial Protection Bureau
Delaware Court of Chancery
Department of Commerce
Equal Employment Opportunity Commission
European Union
Executive Office of the President
Federal Bureau of Investigation
Federal Deposit Insurance Corp.
Information Commissioner's Office
New Jersey Supreme Court
New York State Assembly
Office of Federal Contract Compliance Programs
U.S. Attorney's Office

the firm had failed to poke holes in claims that it bungled Bear Stearns' underlying suit accusing ratings agencies of overvaluing residential mortgage-backed securities.

Read full article »

'Next Generation' Law Firm Co-Founder Steps Down

The managing partner of the "next generation" corporate law firm Atrium, one of several BigLaw expats who founded the firm, has stepped down less than two years after its launch, Atrium said Friday.

Read full article »

GC Cheat Sheet: The Hottest Corporate New s Of The Week

Certain employers have until September to give pay data to the Equal Employment Opportunity Commission, firm and corporate lawyers say they expect a hike in their cybersecurity spending, and U.S. regulators remain wary of imposing strict structures on fintech companies. These are some of the stories in legal news you may have missed in the past week.

Read full article »

In Case You Missed It: Hottest Firms And Stories On Law360

For those who missed out, here's a look back at the law firms, stories and expert analyses that generated the most buzz on Law360 last week.

Read full article »

Podcast

Law360's Pro Say: 'Because Of Sex'

The U.S. Supreme Court agreed this week to decide whether federal sex discrimination laws cover LGBTQ workers, setting the stage for the next landmark civil rights ruling. Vin Gurrieri, Law360's employment law reporter, joins us on this week's Pro Say to explain the case.

Read full article »

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U.S. Department of Justice

U.S. Department of Labor

U.S. Senate

U.S. Supreme Court

United States Court of Appeals for the Third Circuit

United States District Court for the Eastern District of Pennsylvania

United States District Court for the Southern District of New York

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From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: First Move: Labor Secretary Faces Epstein, Ethics Questions from Democrats
Date: Monday, April 29, 2019 7:07:06 AM

What you need to know to start your day.

Labor Secretary Faces Epstein, Ethics Questions from Democrats

By Patricio Chile

Labor Secretary Alexander Acosta heads to the Hill this week for the agency's first oversight hearing of the Committee on Education and Labor since Democrats took control of the House. One area of questioning will be about former DOL official Michael Avakian's ethics violations. The Labor Department missed a deadline to respond to 13 questions related to Avakian from the panel's chair, Rep. Bobby Scott (D-Va.).

Overtime, Too: Some of the 28 Democratic committee members are expected to press Acosta over Avakian, as well as regulations such as the proposed rule expanding overtime eligibility.

Epstein Questions: It's likely the committee also will zero in on Acosta's role in a decade-old plea deal related to hedge fund manager Jeffrey Epstein's sex ring.

Labor Secretary Alexander Acosta testifies during a House Appropriations Committee hearing on the Labor Budget for Fiscal Year 2020, on Capitol Hill April 3.
Photographer: Al Drago/Getty Images

TOP STORIES

$10M Class Wage Arbitration Award Quashed After SCOTUS Ruling

A $10 million class arbitration award must be set aside and the named plaintiff must pursue her wage and hour claims against Waterstone Mortgage Corp. on her own behalf, a federal judge ruled.

Federal Workers Get Year to Earn Comp Time for Religious Leave

Federal employees whose beliefs require them to abstain from work at certain times for religious reasons will be able to do so by earning compensatory time off.

Baker & McKenzie Paralegal Fined for Disobeying Court Orders
A former Baker & McKenzie LLP paralegal of Russian descent is on the hook for $35,445 in attorneys' fees after disobeying a trial judge's order to substantiate her demand for $200 million in damages in a job bias suit, the Seventh Circuit said.

Spending, Infrastructure Deals Top Agenda: Spring Hill Watch
The House and Senate face a packed summer agenda that includes work on must-do spending bills, infrastructure proposals, new trade deals, drug pricing plans, immigration, and more.

IN CASE YOU MISSED IT

Discrimination

D.C. Dorm Manager Inches Forward in Job Bias, Negligence Suit
A dormitory manager in Washington can go forward with some, but not all, of his retaliations claims against his employer, his alleged harasser, and his harasser's employer, a federal judge ruled.

Wilmington Capital Securities Hit With Race Discrimination Suit
Wilmington Capital Securities LLC was hit with a suit by two former traders alleging they were fired because of their race.

Harassment & Retaliation

Arizona Prison Guard to Get Trial on Some Harassment Claims
The state of Arizona must defend at trial claims by a Mexican-American corrections officer that he was harassed based on his national origin, a federal judge ruled.

State & Local Laws

Wisconsin Could Be First State to Exempt Tipped Income
Wisconsin could be the first state in the country to provide an income tax exemption for cash tips paid to bartenders, wait staff, taxi drivers, hair stylists, and other service industry workers.

Labor Relations

Apprenticeship Laws Survive Suit by Non-Union Group
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FedEx Freight Workers in California Vote to Keep Union
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WORKFLOWS

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From: Access to Justice Law360
To: Ring, John
Subject: Land Grab: Property Owners Fight Back Against Pipeline IOUs
Date: Monday, April 29, 2019 7:32:17 AM

Access to Justice

AP_17199789574012.jpg

Land Grab: Property Owners Fight Back Against Pipeline IOUs

Judges routinely grant gas pipeline companies the right to take private land using eminent domain and pay for it later, leaving represented and unrepresented landowners alike on uneven footing. Now, some landowners are asking the U.S. Supreme Court to step in.
Read full article

Their TrialWatch Begins: Clooneys Target Global Injustice

It's not every day the former United Nations high commissioner for human rights makes fun of George Clooney's basketball game while the presidents of Microsoft and Columbia University look on.
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Could Politics Make Courts A Sidekick Branch Of Government?

Across the country, lawmakers are trying to alter how the judges in their home state are selected, crafting a wave of legislation this year that critics say will

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undermine the integrity of what's supposed to be a politically independent branch of government and, with it, the rule of law.
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Big Name GCs Implore Congress To Boost Legal Aid Funding

General counsel from Walmart, Amazon, General Motors and more than 250 other American companies are urging Congress to increase federal funding for the Legal Services Corporation, the country's largest single funder of civil legal aid, despite the Trump Administration's repeated calls to ax the program.
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US Prison Population Down, But Some States Buck Trend

There were nearly 20,000 fewer people in state and federal prisons in 2018 than in 2017, a 1.8% decline fueled by steeper decreases in states such as Missouri and New York — and offset by increases in 19 states, according to a newly released report.
Read full article

Blood Draw Case Tests Limits Of Consent To Cop Searches

A drunk driving suspect's challenge to a blood draw ordered by police officers without a warrant while he was unconscious has the U.S. Supreme Court facing bigger questions of whether a statute can convey someone's consent to a government search.
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Legal Aid Atty's Firing Violated Disability Law, EEOC Says

An organization that provides legal services to poor and underage defendants violated federal law when it terminated an attorney diagnosed with various mental health issues rather than transfer her to another role, the Equal Employment Opportunity Commission alleged Friday in Pennsylvania federal court.
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Pro Bono Spotlight

Pro Bono Team Helps Overhaul Colo. Treatment Of Mentally Ill

In 2006, Eugene Zuniga was arrested in Colorado for stealing a bike and was declared unable to stand trial because of severe mental illness. But instead of being sent for treatment, he spent five months in a local jail without appropriate services, causing his mental state to deteriorate even further.
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Perspectives

The First Step Act Is A Major Step For Sentencing Reform

While many have heralded the First Step Act as an example of bipartisan cooperation, the mainstream press has said surprisingly little about the law's specific sentencing improvements — many stemming from recommendations made by the U.S. Sentencing Commission, says Judge Patti Saris, chief judge for the U.S. District Court for the District of Massachusetts.

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Monday, April 29, 2019

D.C. Charter School Teachers Say 'Union Yes'

Labor Press 28 Apr 2019 23:26

Washington, DC — Over 80 percent of teachers and staff at Mundo Verde Bilingual Public Charter School have signed authorization cards to join the American Federation of Teachers— The petition at the high-performing school in the Truxton Circle...

FedEx Freight Workers in California Vote to Keep Union

BloombergLaw - Labor Relations News 26 Apr 2019 14:46

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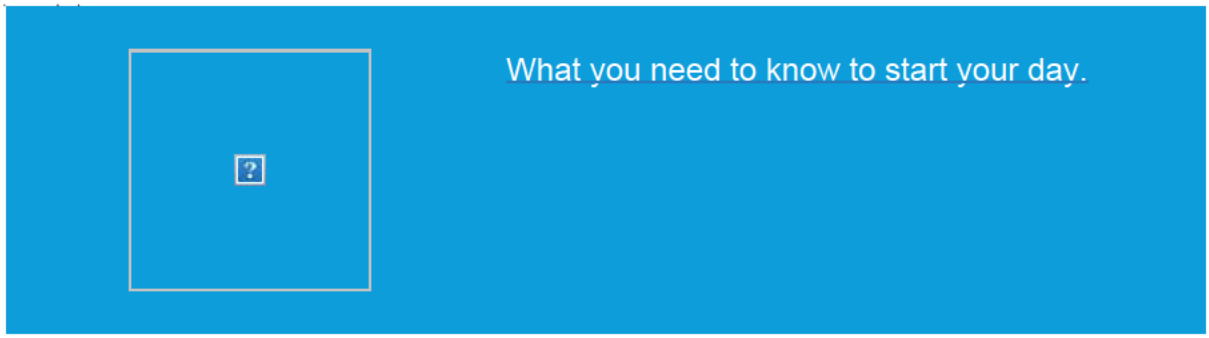

Labor Secretary Faces Epstein, Ethics Questions from Democrats

By Patricio Chile

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Photographer: Al Drago/Getty Images

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IN CASE YOU MISSED IT

Discrimination

D.C. Dorm Manager Inches Forward in Job Bias, Negligence Suit
A dormitory manager in Washington can go forward with some, but not all, of his retaliations claims against his employer, his alleged harasser, and his harasser's employer, a federal judge ruled.

Wilmington Capital Securities Hit With Race Discrimination Suit
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Harassment & Retaliation

Arizona Prison Guard to Get Trial on Some Harassment Claims
The state of Arizona must defend at trial claims by a Mexican-American corrections officer that he was harassed based on his national origin, a federal judge ruled.

State & Local Laws

Wisconsin Could Be First State to Exempt Tipped Income
Wisconsin could be the first state in the country to provide an income tax

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Labor Relations

Apprenticeship Laws Survive Suit by Non-Union Group
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From: Thales
To: Ring, John
Subject: John F., your invitation to next week"s Data Security Summit
Date: Monday, April 29, 2019 9:45:25 AM

Hello John F.,

The **2019 Data Security Summit** hosted by Thales is taking place this week, so I wanted to personally answer some frequently asked questions about the event!

- **Date:**Wednesday, May 1, 2019
- **Time:** 8:30 AM - 12:00 PM
- **Location:** Spire, 750 First St NE, Washington, DC 20002
- **Metro Stop:** Union Station - Red Line
- **Speakers:** We'll host speakers from U.S. Air Force, National Geospatial Agency, Defense Health Agency, and more!
- **Cost:** This event is completely free to attendees, however, spaces are limited so **reserve your seat now**
- **Meal:** A complimentary breakfast will be served from 8:30 - 9:00 AM
- **Bringing Colleagues:** We welcome you to invite your colleagues to attend this event with you! Please have them register ahead of time to ensure their spot. We will also be able to take on-site registrations.

Don't miss out on the opportunity to hear from these cybersecurity experts! **Register now** to ensure your place. More information can be found on our **event site**

I hope to see you at the **Data Security Summit** on May 1! If you have any questions in the meantime, please contact me directly at lspinelli@gemgstudio2g.com

All the best,

Leah Spinelli
Studio 2G

Image

WASHINGTON, DC | MAY 1 | 8:30 AM - 12:00 PM | REGISTER

In modernization efforts across government, agencies are doing more than replacing or updating legacy systems. They are leveraging the cloud and related technologies to make the IT enterprise more efficient, adaptable, and scalable.

The **Data Security Summit** will bring together leaders from across government to learn more about the survey results presented in the Federal Edition of the 2019 Thales Data Threat Report.

Join us on May 1 to join this discussion managing security in the modern enterprise and laying a foundation for transformation efforts in the years ahead.

View the speaker lineup, agenda, and more on our **event site**.

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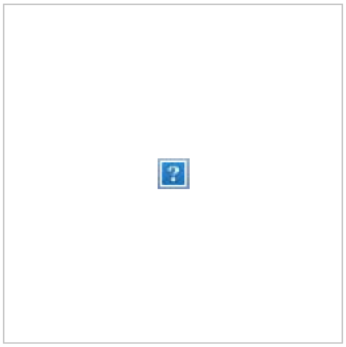
Featured Speakers:



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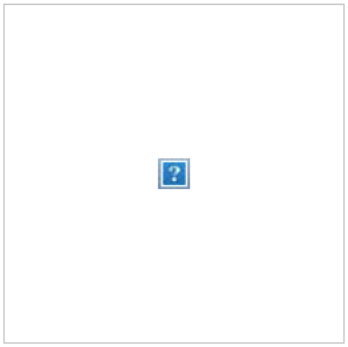

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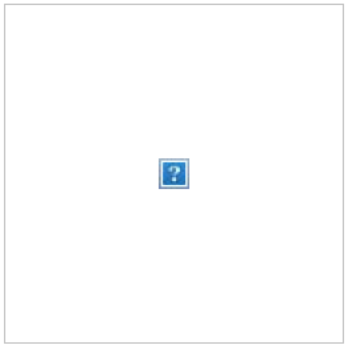

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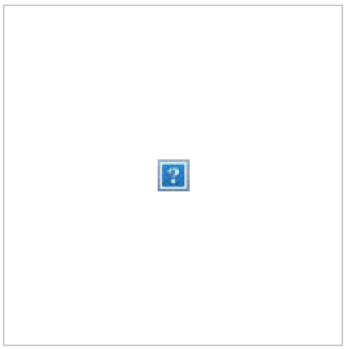

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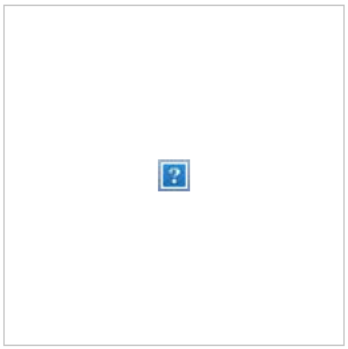

Adrian Monza
Chief, Cyber Defense Branch, U.S. Citizenship and Immigration Services

Questions about the event? Contact Leah at lspinelli@gemgstudio2g.com.

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From:	Morning Shift
To:	Ring, John
Subject:	POLITICO"s Morning Shift: Growing GDP… and inequality — The Hill Biden may die on — Fingerprinting foreigners
Date:	Monday, April 29, 2019 10:02:23 AM

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2018 Newsletter Logo: Morning Shift

04/29/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

With help from Stephanie Beasley

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click

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QUICK FIX

— Economic growth is approaching its levels during the late 1990s — but its distribution is more unequal.

— Former Vice President Joe Biden's treatment of Anita Hill back in 1991 isn't helping his campaign.

— Customs and Border Patrol bought 5,000 fingerprint scanners to collect biometric data from foreign nationals.

GOOD MORNING! It's Monday, April 29, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

GROWING GDP... AND INEQUALITY: The Commerce Department's first-quarter growth estimate showed the economy "expanded at a strong 3.2 percent rate in the first three months of the year, much better than expected for a period marked by an ugly government shutdown," POLITICO's Ben White and Victoria Guida report.

The Washington Post's Heather Long reports that some are comparing current growth to the late-1990's boom. But while Gallup polling recently found that half of Americans rated the economy as "excellent" or "good" (some of the highest confidence levels since 2001), there are still significant differences from those tech boom years. "Inequality is higher now, and the government is far more constricted in its ability to act if a downturn hits," Long writes. More from Long here.

2020 WATCH

THE HILL BIDEN MAY DIE ON: Before former Vice President Joe Biden announced last week, he called Anita Hill, the law professor who in 1991 accused then-Supreme Court nominee Clarence Thomas of sexually harassing her when he was her boss at the EEOC, to "express his his regret for what she endured" during the hearings, according to his campaign. Biden, who was chairman of the Senate

Judiciary Committee at the time, did not apologize, because "I'm not sorry in the sense that I think I did anything that was intentionally designed to do anything wrong or be inappropriate," he explain ed Friday. On Saturday The New Yorker's Jane Mayer, who co-authored *Strange Justice*, the definitive account of the 1991 episode, noted that Biden's "half-hearted condolence call to Hill, and his subsequent statements ... have reignited rather than quelled the controversy."

"Hill was transformed into a symbol and catalyst for the #MeToo movement in support of sexual-harassment victims, decades before it had a name," Mayer writes. Biden "set many of 'the rules' that damaged Hill and determined the overall fairness of the process." Most notably, Biden barred testimony from corroborating witnesses (including a woman named Angela Wright who had complaints similar to Hill's), instead releasing copies of their depositions in the wee hours. Hill told the New York Times last week that she didn't consider Biden's conduct disqualifying, but that she won't support his bid for president unless he takes greater responsibility for his actions, which, she said, "set the stage" for the treatment of Christine Blasey Ford during last year's confirmation hearings for Supreme Court Justice Brett Kavanaugh. More from the Mayer here and the New York Times here.

Related read:

— "Moulton urges Biden to apologize to Anita Hill," from POLITICO

IMMIGRATION

FINGERPRINTING FOREIGNERS: Customs and Border Protection has purchased from Integrated Biometrics 5,000 new mobile fingerprint scanners which will be deployed at all domestic points of entry in the coming months. CBP already is using the scanners at several major airports, including Hartsfield-Jackson Atlanta, Chicago O'Hare, Dulles, and Miami International.

Why it matters: As POLITICO recently reported, the Office of Management and Budget is reviewing a rule that would allow CBP to broadly implement a system to collect biometric data from foreign nationals traveling to and from the United States to better police visa overstays.

UNIONS

DEMS WORK UNION VOTERS: In a second major union event attended by a large portion of the 2020 Democratic field, Sen. K amala Harris told a labor audience in Las Vegas Saturday that she'd be willing call up the CEO of McDonald's to demand better wages, The Washington Post's Annie Linskey reports. "You can't go around talking about the golden arches as a symbol of the best of America when you are not conducting yourself in the best way in terms of supporting the best of America," she said. McDonald's recently announced that it would no longer fight minimum-wage increases at the federal, state, or local level.

Six Democratic presidential candidates showcased their policy platforms at the National Forum on Wages and Working People, convened by the SEIU and the Center for American Progress Action Fund. Sen. Elizabeth Warren, who discussed her proposal to allow workers to elect 40 percent of large corporate boards, won the event's only standing ovation, according to Linskey. Warren was also a crowd pleaser at the NABTU legislative conference earlier this month. POLITICO's Ian Kullgren reported "The crowd of mostly white, older construction workers cheered louder for her than most of the white male candidates." More from the Post here.

ON THE HILL

THE EQUAL RIGHTS AMENDMENT IS BACK: A House judiciary panel will tomorrow hold its first hearing in 36 years on the Equal Rights Amendment, a constitutional amendment that would guarantee legal equality to all Americans regardless of gender. Congress passed the amendment back in 1972, but constitutional amendments must be ratified by three-quarters of the states, and only 35 of the necessary 38 greenlit the ERA before its 1982 ratification deadline. The hearing tomorrow will consider Rep. Carolyn Maloney (D-N.Y.)'s bill to restart the ratification process, H.J.Res.35, and Rep. Jackie Speier (D-Calif.)'s legislation to revoke the 1982 deadline, H.J.Res.38. In March, 2020 Democratic contender Sen. Kirsten Gillibrand (D-N.Y.) reintroduced the ERA in the Senate. More on the hearing here.

ENERGY INDUSTRY FACES MISCONDUCT: In one of "the first public allegations of sexual misconduct in the #MeToo era involving the energy industry," Whiting Petroleum says it's standing by its chief executive Brad Holly, who was accused of sexual misconduct and harassment at his previous employer, Anadarko Petroleum, Christopher Matthews reports for The Wall Street Journal. Tina Tchen, the head of law firm Buckley LLP's Chicago office, told the Journal that the #MeToo era has "elevated companies' handling of accusations of sexual

misconduct to an enterprise risk." How, she asks, do you perform "proper due diligence as you're hiring an employee, and what kind of information can a former employer that's conducted an investigation give?" More here.

HAPPENING THIS WEEK

A BUSY WEEK ON THE HILL: There's a lot going on this week. Here's what you need to know:

Appropriations: On Tuesday , 9 a.m. in 2359 Rayburn, the House appropriations subcommittee on homeland security will review DHS' budget proposal for FY 2020. Kevin McAleenan, acting secretary, and Chip Fulghum, acting undersecretary for management, will testify. At 4 p.m. Tuesday in 2358-C Rayburn the House labor appropriations panel will mark up the Labor Department's FY 2020 budget.

On Thursday at 10 a.m. in SD-124 one Senate appropriations panel will review DOL's FY 2020 budget for DOL while another Senate appropriations panel in SD-138 examines DHS' FY 2020 budget. Find more info on that here.

House Homeland Security Committee: On Tuesday, at 10 a.m., in 310 Cannon, the panel will hold a hearing on the impact of the Trump administration's immigration policies on border communities. O n Wednesday at 10 a.m., in 310 Cannon, it will examine the recent exodus of top officials from DHS. Gene Dodaro of GAO and John Roth, the former DHS IG will testify.

House Education and Labor: Labor Secretary Alexander Acosta will testify May 1 at a hearing about DOL's "policies and priorities." More here.

Census: At 10 a.m. Tuesday, a House appropriations panel will hold a hearing on preparation of the 2020 census. Expect lawmakers to grill government witnesses on the Trump administration's attempt to include a question about citizenship. The Supreme Court last week heard arguments on the matter. More on the hearing here.

COFFEE BREAK

— "Google worker activists accuse company of retaliation at 'town hall'" from The Guardian

— "Biden Says He's the Workers' Can didate, But He Has Worked To Cut Medicare and Social Security," In These Times

— "After layoffs, BuzzFeed CEO focuses on growing revenue, diversifying," from The Los Angeles Times

— Opinion: "Two women led a protest at Google. Is Google retaliating against them now?" from The Washington Post

— "Women Did Everything Right. Then Work Got 'Greedy.'" from The New York Times

— "Trump on border: 'It's like Disneyland now'" from POLITICO

— "Stung by Trump's Trade Wars, Wisconsin's Milk Farmers Face Extinction," from The New York Times

THAT'S ALL FOR MORNING SHIFT!

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Date: Monday, April 29, 2019 10:32:08 AM

Yes...

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To: Kaplan, Marvin E.
Subject: FW: First Move: Labor Secretary Faces Epstein, Ethics Questions from Democrats

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What you need to know to start your day.

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Photographer: Al Drago/Getty Images

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Local ordinances favoring government contractors that participate in apprenticeship programs are valid under the U.S. Constitution and the Employee Retirement Income Security Act, a federal judge in Pennsylvania ruled.

FedEx Freight Workers in California Vote to Keep Union
The International Brotherhood of Teamsters will maintain a foothold at FedEx Corp. after drivers at a FedEx Freight facility in Stockton, Calif., voted to continue membership in the union.

WORKFLOWS

Sheppard, Mullin, Richter & Hampton has closed its Beijing office, consolidating its China practice in Shanghai | **Butler Snow's** new office in Charleston, SC will be joined by Kenyatta Gardner, Stephen Groves and Bradish Waring, who arrive from Nexsen Pruet | **Bryan Cave Leighton Paisner** added William Campbell, Eugene Balshem and Justin Steinmark as partners in the Real Estate Department; Campbell will reside in New York while Balshem and Steinmark will reside in Miami | **McCarter & English** promoted five attorneys to partnership in April | **Frost Brown Todd** added nine new attorneys to the Columbus, Indianapolis, Cincinnati, Louisville, Lexington and Pittsburgh offices

For all of today's Bloomberg Law headlines, visit Daily Labor Report

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From:	Bashford, Jo Ann
To:	Ring, John; Lucy, Christine B.
Subject:	FW: Invitation to Speak on May 10 and to Reception on May 9
Date:	Monday, April 29, 2019 11:33:00 AM
Attachments:	Topics for NLRB Speakers.docx image001.png

The attached is for May 10th.

Jo Ann Bashford
Confidential Assistant,
Legal Administrative Specialist
Office of the Chairman
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-0837
joann.bashford@nlrb.gov

From: Denise Gold <goldd@agc.org>
Sent: Monday, April 29, 2019 11:30 AM
To: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Subject: RE: Invitation to Speak on May 10 and to Reception on May 9

Good morning,

We're very much looking forward to seeing Chairman Ring at our program next Friday. We have now set the lunch session to begin at 12:20 and end at 1:30 p.m. (10 minutes earlier than previously stated). We will begin with the meal. Once the meal is winding down, hopefully around 12:45, we'll turn to the Chairman's remarks, followed by some time for Q&A. Please let me know if there are any concerns with that schedule.

To help the Chairman prepare, we have gathered some questions and topics of interest from the audience in advance. A copy of the list is attached for you to please pass along. While we don't necessarily expect him to address all everything on the list or only those topics listed, we hope that the Chairman will find this to be useful guidance. Please note that the list was created for both the Chairman and Alice Stock of the General Counsel's office, who is scheduled to speak earlier during an earlier session in our program (and will not be present during the lunch session), so some of the questions might be more geared toward the GC's office rather than to the Board chairman.

Thank you again for your assistance.

Denise

Denise Gold
Associate General Counsel
The Associated General Contractors of America
2300 Wilson Blvd., Suite 300
Arlington, VA 22201
Phone: (703) 837-5326

Topics/Questions for NLRB Guest Speakers

- Following the withdrawal of charges in *Loshaw Thermal Technology*, will there be another opportunity for the GC or Board to address the *Staunton Fuel* issue on whether specific language in an 8(f) prehire agreement is sufficient to confer 9(a) status?

- Is the GC or Board revisiting the adoption of contract theory, which at one time, following Deklewa, the Board said would not apply to 8(f) contracts? That was reversed in *ESP Concrete*. Further, if you have an 8(f) contract that has been timely terminated by an employer seeking to negotiate a successor agreement, will maintaining the status quo be turned against the employer under the adoption of contract theory since there is no obligation to do so? Does the employer violate the Act by maintaining the check-off of dues? It would not be a violation if the contract were 9(a).

- What can you tell us about the timeline for rulemaking on joint employer (final rule), RC election procedures, and off-duty access to property?

- Should we expect any new developments on joint employment and successorship?

- How about an update on the Alan Ritchey line of cases?

- Is the Board considering any significant cases involving project labor agreements? Note, e.g., the issues raised in the AGC of Washington ULP charge filed in Region 19 and the Dragados Flatiron ULP charge dismissed by Region 32.

- Any developments coming in regards to whether hiring hall registrants/referrals are "employees" for purposes of the Act, thereby requiring employers to bargain over terms and conditions that could apply to them (such as pre-employment drug testing)? While "applicants" are not employees under the Act, a 2005 GC Advisory Memo (*Cardi Corp., 37 NLRB AMR 21*) and some ALJ decisions say hiring hire registrants should be treated as "employees" under the Act, particularly under certain circumstances. So far, the Board itself has not addressed it.

- Any developments coming in regards to restrictions on an employer's economic weapons during a labor dispute, i.e., defensive vs. offensive lockouts following a ULP strike and/or while ULPs against the employer are pending?

- Will the Board revisit its bannering/inflatable rat/messaging cases? We hear that the GC is apparently sending these cases to Advice now. What are they looking to do with them? What are the ripe circumstances that will get the Board to move on bannering/inflatable messaging as coercive within the meaning of 8(b)(4)?

- A situation has arisen in the past where a construction company signs 9(a) agreement and, when it comes time to renegotiate, the union threatens to disclaim interest unless their terms are accepted. Disclaiming interest would probably trigger pension fund withdrawal liability, and the union knows it but claims that that was not their intent. Thoughts on developing guidelines for such a scenario?

- Multiemployer bargaining: Specifically, whether the bargaining unit work performed by some employers within the multiemployer unit can be attributed to other employers within the multiemployer unit who do not perform (or have the capacity to perform) that type of work for purposes of a union's "work preservation." Arguably, it should not because each employer's employees should be viewed in isolation, but there are GC Memos that suggest work by one employer could be attributed to others within the multiemployer unit.

- Additionally, whether the current Board/General Counsel agree with the Obama Board's decision in *Carr Finishing, 358 NLRB No. 165*, where the Board held that a union can enforce a multiemployer association's bylaws against an employer who did not timely submit a withdraw from multiemployer bargaining under the bylaws, but the notice would have been timely under the CBA. If they believe the decision was wrongly decided, is this something the General Counsel has directed the Regions to target in order to "correct" the law?

Email: goldd@agc.org

From: Denise Gold
Sent: Wednesday, March 6, 2019 9:04 AM
To: 'Bashford, Jo Ann' <JoAnn.Bashford@nlrb.gov>
Subject: RE: Invitation to Speak on May 10 and to Reception on May 9

Jo Ann,

Thank you very much for your assistance and to the Chairman for his acceptance and flexibility.

Best,
Denise Gold

From: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Sent: Wednesday, March 6, 2019 7:59 AM
To: Denise Gold <goldd@agc.org>
Subject: RE: Invitation to Speak on May 10 and to Reception on May 9

Good morning, Denise. This is to confirm that the Chairman has received full approval to speak at the symposium on May 10th and that he is happy to switch his presentation to the lunch slot at 12:30 to 1:30 pm.

If you have any questions for need any additional information, please let me know.

With best regards,

Jo Ann

Jo Ann Bashford
Confidential Assistant,
Legal Administrative Specialist
Office of the Chairman
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-0837
joann.bashford@nlrb.gov

From: Denise Gold <goldd@agc.org>

Sent: Tuesday, March 5, 2019 4:46 PM
To: Ring, John <John.Ring@nlrb.gov>
Cc: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Subject: RE: Invitation to Speak on May 10 and to Reception on May 9

John,

I just wanted to confirm with you that you received full approval to speak at our symposium on May 10. I sure hope there isn't any problem, as presentations from NLRB members have been a tradition for decades at this annual event, and we are very much looking forward to receiving a presentation from you!

Assuming you can confirm, I also wanted to ask if you would be able to switch your time slot. We currently have your session scheduled for 9:00-9:50 a.m. as noted in my original email below, but would like to move it to the lunch slot, which goes from 12:30 to 1:30 p.m., including lunch. If that's not feasible, though, we can certainly keep it at 9:00.

Again, thank you very much.

Denise

Denise S. Gold
Associate General Counsel
Associated General Contractors of America
2300 Wilson Blvd., Suite 300
Arlington, VA 22201-3308
Direct: (703) 837-5326
Fax: (703) 837-5401
goldd@agc.org
Quality People. Quality Projects.

From: Denise Gold
Sent: Monday, November 19, 2018 9:53 AM
To: Ring, John <John.Ring@nlrb.gov>
Cc: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Subject: RE: Invitation to Speak on May 10 and to Reception on May 9

That's excellent news. I thank you and look forward to hearing back from you. Have a happy Thanksgiving!

Denise S. Gold
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Cc: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Subject: RE: Invitation to Speak on May 10 and to Reception on May 9

Denise,
Thank you for the invitation. I would welcome the opportunity to speak to the AGC Labor and Employment Law Council in May. I am running this invitation through our normal approval process, although I don't anticipate any issues. We will let you know definitively once I have full approval. Thanks.

Regards,
John

John F. Ring
Chairman
National Labor Relations Board
1015 Half Street SE Washington, DC 20570
john.ring@nlrb.gov | 202-273-2722

From: Denise Gold [mailto:goldd@agc.org]
Sent: Thursday, November 15, 2018 10:25 AM
To: Ring, John <John.Ring@nlrb.gov>
Subject: Invitation to Speak on May 10 and to Reception on May 9

Dear John,

I'm reaching out to you again on behalf of the Associated General Contractors (AGC) Labor and Employment Law Council, this time to invite you to speak at the Council's 35th Annual Construction Labor Law Symposium. The symposium will take place on Friday, May 10, 2019, at The Fairmont Hotel, 2401 M St NW, Washington, DC. Presentations by NLRB members and general counsels have been a valuable part of our program for many years, and we would be honored if you would help us carry on that tradition.

We invite you to talk about substantive issues facing the NLRB that have relevance in the construction industry. The audience will be a sophisticated one, predominantly comprised of experienced labor lawyers along with some non-attorney labor relations professionals. We expect about 40-60 attendees. This far out, we have set only a preliminary schedule for the program, with your session tentatively scheduled for 9:00 to 9:50 a.m., but we can certainly change the session time to accommodate your availability. The session timeframe includes time for your remarks plus some time for questions and answers.

For background, let me remind you that the Council is a group of distinguished labor and

employment lawyers who represent AGC-member companies across the country and that AGC is the nation's leading trade association in the commercial construction industry, representing both open-shop and union employers in all sectors of the industry.

In addition, we again invite you to join us at a reception for symposium participants, government representatives, and other guests on the evening preceding the symposium, Thursday, May 9, from 5:30 to 7:00 p.m., also at The Fairmont.

I look forward to hearing from you and sincerely hope that we will have the privilege of your participation in our program. I can be reached by telephone at (703) 837-5326 or by e-mail at goldd@agc.org.

Thank you very much for considering this invitation.

Denise S. Gold
Associate General Counsel
Associated General Contractors of America
2300 Wilson Blvd., Suite 300
Arlington, VA 22201-3308
Direct: (703) 837-5326
Fax: (703) 837-5401
goldd@agc.org
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From: Hilton San Francisco Union Square
To: Ring, John
Subject: Stay With Us In San Francisco For A Unique Alcatraz Experience
Date: Monday, April 29, 2019 12:30:43 PM

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From:	Roberts, Tracey
To:	Ring, John; Lucy, Christine B.
Subject:	RE: Admin staff reorg
Date:	Monday, April 29, 2019 1:30:07 PM

Thank you.

Tracey Roberts
Office of Congressional and Public Affairs
National Labor Relations Board
202-273-0187

From: Ring, John
Sent: Monday, April 29, 2019 1:29 PM
To: Roberts, Tracey <Tracey.Roberts@nlrb.gov>; Lucy, Christine B. <Christine.Lucy@nlrb.gov>
Subject: RE: Admin staff reorg

No comment from our side.

From: Roberts, Tracey
Sent: Monday, April 29, 2019 1:20 PM
To: Ring, John <John.Ring@nlrb.gov>; Lucy, Christine B. <Christine.Lucy@nlrb.gov>
Subject: FW: Admin staff reorg

Hi John and Christine,

We just received the below e-mail from Hassan.

I have forwarded the inquiry to Peter as well.

Tracey Roberts
Office of Congressional and Public Affairs
National Labor Relations Board
202-273-0187

From: Kanu, Hassan <hkanu@bloomberglaw.com>
Sent: Monday, April 29, 2019 1:14 PM
To: Roberts, Tracey <Tracey.Roberts@nlrb.gov>; Witkin, Cynthia <Cynthia.Witkin@nlrb.gov>
Cc: SM-Publicinfo <Publicinfo@nlrb.gov>
Subject: re: Admin staff reorg

Hi all,

I’ve talked with some sources about and obtained an email from the union which discusses the agency’s plans to restructure all administrative professional staff at regional offices nationwide.

I'm currently working on an article based on those conversations/email that will report that: (1) the Agency intends to place all administrative professionals occupying positions other than Compliance Assistant into the position of 'Program Support Assistant' at the GS 6 Grade, including demoting all GS7's nationwide; (2) all of those employees will retain their pay rates permanently; (3) the union has contested the agency's legal authority to take that step, and management/leadership's position on that end is that it has the authority to do so because it's a 'restructuring'.

The article will note agency leaders' previous indications about wanting to restructure the agency due to declining caseloads and low budget appropriations; and the various other steps the board's already taken to do so.

Please do let me know if the agency can confirm/deny any of the above, or has general comment on any of that information. And if the Chairman or General Counsel have any comment on the alleged plans.

Thanks!

: : : : : : : : : : : : : : : : :

Hassan Kanu
Legal Editor/Reporter
Bloomberg Law
Desk 703.341.3953
Cell 240.643.7506
Twitter: @hassankanu

From:	Lucy, Christine B.
To:	Ring, John; Roberts, Tracey
Subject:	RE: Admin staff reorg
Date:	Monday, April 29, 2019 1:33:15 PM

Tracey – I think you know this but you'll just want to ensure you include Alice in sending this to Peter given his being out (b) (6) [redacted]. She's out today too (which you probably know) but she's responded to a few emails and is due back in the office tomorrow.

Christine B. Lucy
Chief of Staff and Special Counsel to the Chairman
National Labor Relations Board
1015 Half Street SE, Office 5100, Washington, DC 20570
christine.lucy@nlrb.gov | 202-273-3914
(m) 202.701.4804

From: Ring, John
Sent: Monday, April 29, 2019 1:29 PM
To: Roberts, Tracey <Tracey.Roberts@nlrb.gov>; Lucy, Christine B. <Christine.Lucy@nlrb.gov>
Subject: RE: Admin staff reorg

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202-273-0187

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Hassan Kanu
Legal Editor/Reporter
Bloomberg Law
Desk 703.341.3953
Cell 240.643.7506
Twitter: @hassankanu

From:	Ring, John
To:	Bashford, Jo Ann; Lucy, Christine B.
Subject:	RE: Invitation to Speak on May 10 and to Reception on May 9
Date:	Monday, April 29, 2019 2:44:00 PM
Attachments:	image001.png

Could you include in the event file. Thx.

From: Bashford, Jo Ann
Sent: Monday, April 29, 2019 11:33 AM
To: Ring, John <John.Ring@nlrb.gov>; Lucy, Christine B. <Christine.Lucy@nlrb.gov>
Subject: FW: Invitation to Speak on May 10 and to Reception on May 9

The attached is for May 10th.

Jo Ann Bashford
Confidential Assistant,
Legal Administrative Specialist
Office of the Chairman
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-0837
joann.bashford@nlrb.gov

From: Denise Gold <goldd@agc.org>
Sent: Monday, April 29, 2019 11:30 AM
To: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Subject: RE: Invitation to Speak on May 10 and to Reception on May 9

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Thank you again for your assistance.

Denise

Denise Gold
Associate General Counsel
The Associated General Contractors of America
2300 Wilson Blvd., Suite 300
Arlington, VA 22201
Phone: (703) 837-5326
Email: goldd@agc.org

From: Denise Gold
Sent: Wednesday, March 6, 2019 9:04 AM
To: 'Bashford, Jo Ann' <JoAnn.Bashford@nlrb.gov>
Subject: RE: Invitation to Speak on May 10 and to Reception on May 9

Jo Ann,

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Best,
Denise Gold

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Jo Ann

Jo Ann Bashford
Confidential Assistant,
Legal Administrative Specialist
Office of the Chairman
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-0837

joann.bashford@nlrb.gov

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Sent: Tuesday, March 5, 2019 4:46 PM
To: Ring, John <John.Ring@nlrb.gov>
Cc: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Subject: RE: Invitation to Speak on May 10 and to Reception on May 9

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Again, thank you very much.

Denise

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Sent: Monday, November 19, 2018 9:53 AM
To: Ring, John <John.Ring@nlrb.gov>
Cc: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Subject: RE: Invitation to Speak on May 10 and to Reception on May 9

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Arlington, VA 22201-3308
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Sent: Sunday, November 18, 2018 5:21 PM
To: Denise Gold <goldd@agc.org>
Cc: Bashford, Jo Ann <JoAnn.Bashford@nlrb.gov>
Subject: RE: Invitation to Speak on May 10 and to Reception on May 9

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Regards,
John

John F. Ring
Chairman
National Labor Relations Board
1015 Half Street SE Washington, DC 20570
john.ring@nlrb.gov | 202-273-2722

From: Denise Gold [mailto:goldd@agc.org]
Sent: Thursday, November 15, 2018 10:25 AM
To: Ring, John <John.Ring@nlrb.gov>
Subject: Invitation to Speak on May 10 and to Reception on May 9

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I look forward to hearing from you and sincerely hope that we will have the privilege of your participation in our program. I can be reached by telephone at (703) 837-5326 or by e-mail at goldd@agc.org.

Thank you very much for considering this invitation.

Denise S. Gold
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Arlington, VA 22201-3308
Direct: (703) 837-5326
Fax: (703) 837-5401
goldd@agc.org
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From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: Daily Labor Report Highlights
Date: Monday, April 29, 2019 4:35:31 PM

Bloomberg Law

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Highlights

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By Patrick Dorrian, Jay-Anne B. Casuga and Paige Smith

Frontier Communications must face trial on a call center manager's claims that he was passed over for promotion because he is East Indian and because of his gender, a divided Ninth Circuit ruled April 29.

'Physician Job Placement' Expert Can Testify at Job Bias Trial

By Patrick Dorrian

A radiologist who alleges a Louisiana medical center violated her job-leave rights after she was diagnosed with breast cancer may have a harder time recovering on her claims.

Colorado House Passes Gender Equity Pay Legislation

By Tripp Baltz

The Colorado House passed a bill aimed at closing the gender wage gap in the state.

Gig Workers Are Contractors, DOL Says in Latest Letter (1)

By Jaclyn Diaz and Porter Wells

Workers for an unnamed company operating in the "sharing" economy can't be considered "employees" under the Fair Labor Standards Act, the Labor Department found in its latest opinion letter, issued April 29.

DISCRIMINATION

Charlotte Must Pay Male Officer Additional $1.7M for Sex Bias (1)

By Patrick Dorrian and Genevieve Douglas

A former Charlotte, N.C., police officer is entitled to roughly $1.7 million in equitable remedies on top of the $125,000 a jury awarded for sex discrimination, a federal judge ruled.

Fired EXL Service General Counsel Seeks $20M for Gender Bias

By Erin Mulvaney

The former top attorney for data analytics company EXL Service Holdings Inc. was fired in retaliation for complaining of sexist comments, curtailed responsibilities, and disrespect she faced as the only woman on the company's executive leadership committee, she alleged in a lawsuit April 29.

HARASSMENT & RETALIATION

Honeywell Gets Win in Worker's Disability Retaliation Appeal

By Porter Wells

Honeywell International didn't violate federal disability law when it terminated a depressed machine operator and assembler, the First Circuit said April 26.

WAGE & HOUR

Wyndham Timeshare Sales Employees' $5M OT Award to Be Reweighed

By Porter Wells

A $5 million award to a set of Wyndham Vacation Resorts Inc. workers who weren't paid for their overtime hours has to be recalculated at the trial court, the Sixth Circuit said April 29.

STATE & LOCAL LAWS

Minneapolis Sick Leave Ordinance OK'd by State Appeals Court

By Patrick Dorrian

State sick leave law doesn't preempt a city of Minneapolis ordinance requiring employers to provide qualifying employees with up to 48 hours of sick-and-safe-leave, the Minnesota Court of Appeals ruled April 29.

LABOR RELATIONS

American Airlines Labor Talks Not Aided by Mediators, Union Says

By Louis C. LaBrecque

Mediators from the National Mediation Board are taking an “unorthodox approach” to resolving a labor dispute between American Airlines and a union that represents about 31,000 aircraft mechanics and fleet service employees, according to the union.

Striking Chicago Orchestra Musicians Ratify Five-Year Pact

By Michael J. Bologna

Classical musicians and the Chicago Symphony Orchestra are finally in harmony, settling a seven-week strike and resuming the 2019-2020 concert series.

UPS National Agreement Takes Effect After Final Teamsters Vote

By Andrew Wallender

About 243,000 United Parcel Service Inc. workers will begin to see higher

wages and other changes on the job after a new five-year contract took effect April 29.

Sonoma County Workers Approve Four-Year Labor Pact

By Joyce E. Cutler

The largest employee union in Sonoma County, Calif., ratified a labor contract that would give workers up to 14 percent pay increases over the four-year term of the agreement.

NLRB

NLRB Weekly Summary of Cases, Dated April 15-19, 2019

Summary of NLRB decisions for week of April 15-19, 2019.

SUPREME COURT

High Court Won't Review Whether Unions Can Represent Nonmembers

By Robert Iafolla

The U.S. Supreme Court announced April 29 it won't consider whether a Minnesota faculty union can represent a public university professor who isn't a union member, saving organized labor from another high-stakes legal battle.

IMMIGRATION

Canadian Commuters May Be Able to Skirt New Border Policy

By Laura D. Francis

Skilled Canadian workers who commute to work in the U.S. and/or who stay in the U.S. less than six months out of the year can continue to renew their temporary immigration status at the border.

HEALTH CARE & BENEFITS

Pfizer Exec Wants SCOTUS to Expand Court Choice in Benefit Suits

By Jacklyn Wille

A former Pfizer Inc. executive who sued the company over his retirement package asked the U.S. Supreme Court to decide whether companies can unilaterally limit the courts in which benefit lawsuits can be filed.

SAFETY & HEALTH

Crane Collapse in Seattle Casts Pall Over City's Rapid Growth

By Noah Buhayar and Dina Bass

The crane collapse in the heart of Seattle's tech hub April 27 ended four lives, cast a pall on the city's rapid expansion and may lead to tens in millions of dollars of costs for a building that Alphabet Inc.'s Google is set to occupy.

LEGAL PROFESSION

General Counsel Request More Funding for Legal Services Corp.

By Melissa Heelan Stanzione

General counsel from 262 companies including Amazon, Eli Lilly and Company, and the Walt Disney Company, are urging Congress to increase funding for Legal Services Corporation, a little more than a month after the Trump administration proposed defunding the group.

New Challenge Filed Appealing Dismissal of Kavanaugh Complaint

By Kimberly Strawbridge Robinson

A judicial misconduct complaint against U.S. Supreme Court Justice Brett Kavanaugh, filed over his emotional response to sex assault allegations at his Senate confirmation hearing, now moves to the policy-making arm of the federal judiciary.

ALSO IN THE NEWS

Missed Ethics Deadline, Epstein, Overtime on Dems' Hearing Agenda

By Tyrone Richardson and Jaclyn Diaz

The Labor Department missed an April 1 deadline to respond to questions about a former official's alleged ethics violations, and Democrats on the committee that oversees the agency will get a chance to find out why during a hearing next week.

Yext to Hire 500 People for New NYC Headquarters Next to Google (1)

By Lily Katz

Brand-management firm Yext Inc. is doubling down on New York City with a shiny new headquarters in Manhattan's Meatpacking District and plans to hire hundreds more employees.

Spending, Infrastructure Top Agenda: Spring Hill Watch (Correct)

By Nancy Ognanovich

The House and Senate face a packed summer agenda that includes work on must-do spending bills, infrastructure proposals, new trade deals, drug pricing plans, and more.

LATEST CASES

Case: Wage & Hour/Overtime (6th Cir.)

A court's finding that a Tennessee timeshare company failed to pay its sales employees overtime premiums was supported by sufficient evidence, because 30 percent of the employees who opted in to the litigation testified that they were required to work 50 to 80 hours per week due to mandatory meetings, special events, and other off-the-clock work, an administrative manager testified that upper management instructed that sales employees' time records must show no more than 40 hours per week, and several emails among managers referenced the no-overtime policy. The case is Pierce v. Wyndham Vacation Resorts, Inc., 2019 BL 151738, 6th Cir., 18-5258/5298, 4/29/19.

Case: Discrimination/Reinstatement (W.D.N.C.)

A federal district court ruled that reinstatement was not an appropriate remedy after a jury found that the city of Charlotte, North Carolina, discriminated against a male fired police officer on the basis of sex. Despite contention that the city sent a letter offering reinstatement to the officer, it was conditioned upon a vague requirement that he complete "any state mandated training requirements" and didn't seem to be made in good faith because the city waited until after an equitable remedies hearing to offer reinstatement; additionally, reinstatement wouldn't be practical given that many people who held leadership positions at the time of the officer's discharge are still employed by the city. The case is Tinsley v. City of Charlotte, 2019 BL 150281, W.D.N.C., No. 3:16-CV-00656-GCM, 4/26/19.

Case: Disability Discrimination/`Disability' (D.D.C.)

A diagnosis of transient global amnesia--short-term memory loss--may allow a U.S. Capitol police officer to show that she had a qualifying disability for purposes of her discrimination claim after she was fired for lying about not being warned against free commuting to work as an Amtrak courtesy rider. Beyond her inability to remember the first of two incidents on Amtrak, she alleges that her TGA substantially limited her ability to engage in major life activities on more than one occasion and the fact that she satisfactorily worked for over a year after the Amtrak incidents may enable her to show that she could perform essential job functions, the court found. The case is Niles v. U.S. Capitol Police, D.D.C., 16-cv-1209 (TSC), 4/25/19.

Case: Discrimination/Retaliation (D.D.C.)

A black Securities and Exchange Commission employee isn't entitled to a trial on her retaliation claim alleging that she was permanently transferred from the SEC Office of Inspector General to the Office of Human Resources after she contacted the agency EEO office to complain about her supervisor. The transfer occurred one year after her EEO activity, the OIG was unable to find her a suitable position during her detail to OHR that preceded her permanent transfer, and her own contemporaneous accounts and emails show---contrary to her litigation positions---that she was the one who originally requested a transfer from the OIG office and that she didn't want to return to it, the court

said. The case is .

Case: Disability Discrimination/Inconsistent Statements (1st Cir.)

A machine operator at a Honeywell manufacturing facility in Rhode Island was properly barred from moving forward with her disability bias claims after she rejected her rotation assignment to a department that exacerbated her depressive disorder and was fired for job abandonment. She then applied for Social Security disability benefits saying that she was totally disabled due to a somatoform disorder--a mental illness that causes physical symptoms--but didn't adequately explain the inconsistency with her claim that she was a qualified individual for purposes of her disability bias claims, the court ruled. The case is Pena v. Honeywell Int'l, Inc., 2019 BL 149855, 1st Cir., No. 18-1164, 4/26/19.

Case: Wage & Hour/Estoppel (2d Cir.)

A water filter company didn't show that two workers were judicially or equitably estopped from arguing that they were employees, rather than overtime-exempt independent contractors, by statements they made on their tax returns, because tax returns don't involve an adjudicative proceeding, and the company didn't show that it relied on the workers' statements. The case is Leevson v. Aqualife USA Inc., 2019 BL 149161, 2d Cir., No. 17-3868 (XAP), unpublished 4/26/19.

Case: Wage & Hour/Collective Certification (N.D.N.Y.)

Retail store operators for a New York Verizon Wireless dealer didn't establish that the dealer exercised a similar degree of control over each of them for purposes of their proposed collective action claiming that they were misclassified as independent contractors exempt from overtime requirements, because the way the operators reported their employment on tax forms varied, they differ in the extent of their investments in store equipment, supplies, and advertising, some of the operators hired their own employees while others didn't, and their testimony reflects differences in their ability to control their work schedules. The case is Holick v. Cellular Sales of N.Y., LLC, 2019 BL 149463, N.D.N.Y., No. 1:12-CV-584 (NAM/DJS), 4/26/19.

Case: FMLA/Retaliation (W.D. Pa.)

A nutritionist can ask a jury to decide whether a Pennsylvania hospital gave her poor marks in a performance review and referred her to counseling through the employee assistance program in retaliation for twice taking Family and Medical Leave Act leave for depression and spinal stenosis, because the negative performance review explicitly mentioned her FMLA leave as the reason for her low mark and the referral soon after she complained about the review allegedly changed the conditions of her employment. She can't, however, go ahead with an FMLA retaliation claim based on her selection for discharge in a reduction in force, because a different supervisor fired her over two years after she took FMLA leave, so the nutritionist was unable to establish a causal link. The case is Sabo v. Altoona, 2019 BL 149381, W.D. Pa., No. 3:17-cv-135, 4/25/19.

Case: Discrimination/Hostile Work Environment (W.D. Pa.)

A fired female executive director may not proceed with her claim that Hampton Township Emergency Medical Services in Pennsylvania subjected her to a hostile work environment on the basis of sex. She didn't show that the alleged behavior, including a male co-worker repeatedly calling her a derogatory sexually-charged term behind her back and witnessing male co-workers viewing pornographic material in the workplace on one occasion, contaminated the workplace to a degree that it negatively changed the terms and conditions of her employment or materially interfered with her work performance. The case is Kline v. Hampton Twp. Emergency Med. Servs., Inc., 2019 BL 149824, W.D. Pa., No. 2:16cv1726, 4/26/19.

Case: FMLA/Expert Witness (W.D. La.)

An expert in "physician job placement" can testify at trial for the defense that a radiologist didn't mitigate her damages after she was fired following Family and Medical Leave Act leave for the treatment of breast cancer, even though the expert doesn't have a college degree and has never worked as a vocational expert, qualified as an expert witness, or published any articles about physician recruitment. There are many different types of experts, including non-scientific ones, and the medical center's expert has 25 years of professional experience as a physician recruiter with a sufficient basis for opining that the radiologist didn't use the industry leading job boards to get

another job, the court found. The case is Rideau v. Lafayette Health Ventures, Inc., 2019 BL 149655, W.D. La., No. 6:18-CV-00473, 4/26/19.

Case: Individual Employment Rights/Whistleblowing (E.D. Mich.)

A federal court won't reconsider the Michigan Whistleblower Protection Act claim of a former custodial employee for the Bay County, Michigan sheriff's department, who resigned after he was placed on administrative leave because he may have disclosed sensitive information about a potential criminal investigation, when he told an officer that his trash was being searched. The custodian contended that the county failed to prove his actions created problems within the sheriff's office. The county argued that he was placed on leave because he could not be trusted to refrain from disclosing sensitive county information, which wasn't an adverse employment action, the court said. The case is Papin v. County of Bay, 2019 BL 148364, E.D. Mich., No. 17-13999, 4/25/19.

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To: Ring, John
Subject: College of Labor and Employment Lawyers Newsletter - April2019
Date: Monday, April 29, 2019 9:04:22 PM

This newsletter contains graphics, so if you don't see them, view it in your browser

April 2019

LEADERSHIP FOR GREATER PURPOSE

In This Issue

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- 24th Annual Induction Dinner
- Strategic Plan Ignites Regional Activity
- Upcoming Regional Meetings
- 2019 Law Student Writing Competition
- Spotlight on Fellows
- In Memoriam – Robert Connerton, Hal Coxson and Bill Saxton

The President's Perspective

John R. Runyan Jr.

From time to time, I get asked why I belong to the College of Labor and Employment Lawyers. As a union-side labor lawyer, my answer is probably not the same as for many of you. Unlike management attorneys, my clients don't particularly care whether or not I am a member of the College. The marketing value which many management lawyers find in College membership largely does not exist for union-side attorneys.

I have asked my fellow officers – **David Borgen**, **Alan Symonette** and **Arlene Steinfield** – each of whom comes from a different constituency – to join with me in telling you why we belong to the College. Over the next several months, their thoughts on the subject will appear in this space. In this issue, it is my turn to tell you why a seventy-one-year-old Union lawyer from Detroit – inducted into the College fourteen years ago in 2005 – still belongs to the College of Labor and Employment Lawyers.

pres perspec

Let me start with the two reasons pictured above – **Ted St. Antoine** and **Kendall Williams** – one of whom most of you probably know and the other of whom, most do not. Most of you know Ted St. Antoine as the *James E. and Sarah A. Degan Professor of Law Emeritus* at the University of Michigan Law School or as a respected labor arbitrator. He is also an Emeritus Fellow of the College. Those of you who know him well also know that Ted is emblematic of a College Fellow: he is not only a model of civility but to call him "civil" does him a grave injustice. Ted is the epitome of what every College Fellow should be, one whose reputation is built on his elegance, equanimity and good manners, as well as his remarkable intellect.

Let me turn to my good friend, **Kendall Williams**, whom most of you do not know. For three years in the late 70's, Kendall and I practiced together at a small, Union-side firm representing affiliates of the Michigan Education Association. As a result of that early, formative experience, Kendall and I developed the kind of bond that only those of you who remember your days as an associate in the bowels of a busy, private practice can appreciate. Unfortunately for me--fortunately for Kendall--he returned to his hometown of Flint, Michigan in 1980, switched sides, and over the course of the last forty years, has developed the most successful management-side labor firm in that city, or its environs. He has also done so with the kind of quiet dignity and aplomb that would make his old law school professor proud. Last year, Kendall was inducted into the College of Labor and Employment Lawyers and I was proud to be one of his nominators.

It is the opportunity to spend time with labor lawyers like these which drew me to the College in 2005 and keeps me here today. But they are not the only ones: **David Borgen**, **Nancy Bornn**, **Norman Brand**, **Tom Brooks**, **David Cashdan**, **Barb D'Aquila**, **Homer Deakins**, **Lynn Deitch**, **Lori Ecker**, **Alan Epstein**, **Jean Kamp**, **William Kilberg**, **Katharine Kores**, **Martin Malin**, **Debra Millenson**, **Lisa Moss**, **Cynthia Nance**, **Luella Nelson**, **Michael Posner**, **Jon Rosen**, **John Sands**, **Donald Sapir**, **Bernie Siebert**, **Donald Slesnick**, **Arlene Steinfield**, **Alan Symonette**, **Gwynne Wilcox**, **Pete Zinober** and **Pearl Zuchlewski**. These are the past and present Governors of the College with whom I have had the privilege of serving over the past eight years.

When I am asked why I belong to the College of Labor and Employment Lawyers, I think of Ted and Kendall and the Governors whom I met through the College and with whom I have served. I also think of the late **Dick Mittenthal** with whom I was inducted in 2005, he as an Honorary Fellow. I think of all those with whom I served over the years on the Sixth Circuit Credentials Committee, including my good friend, **Kathy Bogas** and our Immediate Past President, **Lynne Deitch**. I think of Susan Wan and Jen Motley – our incredible staff – who like many of you, labor behind the scenes to make the College an organization in which we can all take pride. That's why I belong to the College of Labor and Employment Lawyers.

John R. Runyan, Jr.
President

24th Annual Induction Dinner

2019 Induction Dinner email header

We are so fortunate to be returning to the National WWII Museum in New Orleans to celebrate with the Class of 2019 and join with Fellows, their guests and our newest inductees at the 24th Annual Induction Dinner on Saturday November 9, 2019.

Since our last visit in 2013, the Museum has continued its development and expansion on the second and third floors of the Louisiana Memorial Pavilion with the Arsenal of Democracy exhibit and the revamped D-Day Invasion Galleries. The awe-inspiring displays in the US Freedom Pavilion, of WWII aircraft and war machines, will be the backdrop once again for our dinner and Induction ceremony. In addition, we will welcome back the Victory Bells for another outstanding performance.

One final exciting twist and announcement, The National WWII Museum now boasts a beautiful brand-new hotel located just across the street. The Higgins Hotel will open to the public in October of 2019 and we have secured a room block for our guests.

A link to a map of the museum campus can be accessed here, and the link to the College's room block at the Higgins Hotel will be available in the next six weeks. Additional hotel choices, including the ABA Section host hotel, will be listed there as well as soon as we have this information.

Formal invitations to the Induction Dinner will be mailed the end of August. Please contact Jen Motley at 410-972-4712 or jmotley@laborandemploymentcollege.org with any questions.

Strategic Plan Ignites Regional Activity

As discussed in February's newsletter, the Board approved the Strategic Plan and has started implementing some of the initiatives therein. All four pillars of the plan, Promotion of the College, Civility, Education, and New Directions, touch on regional activity and the promotion of activity at the regional level. The first step of the Board Regional Activity Committee (BRAC) was to identify the regions and then to appoint Fellows to serve on those committees. Board members serving on the BRAC will work with the various regions to establish programs where there are none now, and assist regions that are already active with their ongoing efforts.

The consensus was to continue using the Federal Court structure as the format for regional activity and involvement, similar to the way we manage the Circuit Credentials Committees. Those committees have now been formed and are starting to work on regional events. We expect there will be programming in all circuits within the next twelve months. Since some circuits have a high concentration of Fellows and some do not, all regions have been encouraged to work as they are comfortable, either within their state, with a close by state, with the whole circuit, or with another circuit.

Two overriding principles of the Plan were to promote collaboration among constituencies and to provide opportunities for our Fellows to benefit from increased personal involvement in the College. There are a number of opportunities for Fellows to do this on a more local level. Whether through panel discussions and CLE programs, law student mentoring programs or

ethics programs for government attorneys or simply gathering to socialize and discuss current events in your area, there are many ways to be involved and to experience the value of membership. In addition to the upcoming events in the next month (mentioned below), there are multiple programs being planned, including the annual 7th Circuit Law Student Program, the 7th Circuit Ethics Program for Government Attorneys, a newly organized 1st Circuit Law Student Program and a panel discussion and dinner in Los Angeles.

The Strategic Plan provides numerous and diverse opportunities for our Fellows to become more involved in the College in meaningful ways. Active participation from as many of our Fellows as possible is important if this effort is to truly succeed. We urge you to consider what areas fit with your particular interests and notify either Susan Wan or a member of the Board so you can get involved. The Strategic Plan can be found on the website **here**.

Upcoming Regional Events

2nd Circuit Regional Meeting (with Northern New Jersey): May 14, 2019 from 5:30 to 8:30 pm. Dinner and panel discussion on sexual harassment, the #MeToo Movement and recent State and City mandates for workplace sexual harassment training. Information on the exact location (in midtown Manhattan) for this event, as well as the speakers, will be shared soon. Mark your calendars now!

CLEL and National Academy of Arbitrators will co-sponsor a program just prior to the start of this year's NAA's Annual Meeting entitled **Wage and Hour Disputes: What Arbitrators and Mediators Need to Know** on May 29, 2019 from 1:30 to 4:30 pm at the Loews Philadelphia Hotel. Please see attached flyer for registration information.

9th Circuit North Regional Meeting: May 30, 2019 starting at 5:30. Reception and panel discussion will take place in San Francisco at the offices of Ogletree Deakins, One Market Square, Steuart Tower, Suite 1300, followed by dinner at Perry's Restaurant. Details can be found on the attached program announcement here. Please contact Jen Motley to rsvp.

Law Student Writing Competition

Papers for the CLEL/ABA Section of Labor & Employment Law's 2018-2019 Writing Competition for Law Students are now being accepted. Fellows who are adjunct professors at accredited law schools are encouraged to distribute, discuss, and promote this wonderful opportunity with their students. View the complete announcement and rules for this year's competition, which can be found on the CLEL website, **here**.

Entries should address aspects of public or private sector labor and/or employment law relevant to the American labor and employment bar. Prizes awarded by the College of Labor and Employment Lawyers include: **First Place: $3000**, Second Place: $1000, Third Place: $500. The first-place article will also be considered for publication in the *ABA Journal of Labor & Employment Law*, and its author will be a guest at the annual CLE program of the ABA Section of Labor and Employment Law and honored at the Annual Induction Dinner of the College of Labor and Employment Lawyers. **Deadline for papers is June 15, 2019**. Please contact Susan Wan if you have any questions.

Spotlight on Fellows

Fellows

Fellows

The College, along with the New Jersey State Bar Association's Labor and Employment Law Section, jointly sponsored a program for Newark Rutgers and Seton Hall law students on April 8th. Forty students attended this inaugural event making for a wonderful evening! Students enjoyed a thought-provoking discussion between three Superior Court Judges - Hon. **Melvin Gelade**, an Honorary Fellow of the College, Hon. Sheree Pitchford, and Hon. Marysol Roseles (pictured above) - who spoke on ethics, professionalism and civility. Fellows **Susan Sangillo Bellifemine**, **Maureen Binetti**, and **Rosemary Gousman** addressed the impact of #MeToo and Black Lives Matter on their practices and the development of law. Fellow **Lisa Manshel** introduced that panel and welcomed everyone on behalf of the NJSBA Labor and Employment Law Section. A big thank you to Fellows **John Sands**, former CLEL President, and **David Lopez** (seen in the second photo), the Rutgers Newark Law School Dean, for their help in organizing the event and to Fellow **Ian Meklinsky** whose firm, Fox Rothschild, supported the catered dinner offered to students after the program. Thanks also to Fellows **David Leach** and **J.J. Pearson** for showing their support and attending the program.

Angelo-Genova

- Fellow **Angelo Genova** (*pictured left*) was named to the New Jersey 2019 *Super Lawyers* list of Top 10 Lawyers and Top 100 Lawyers.

Charles-Thompson

- Fellow **Charles Thompson** (*pictured right*) has joined the San Francisco office of Greenberg Traurig as a Shareholder in the firm's Labor & Employment practice. He will continue to focus his practice on employment litigation and counseling clients through all phases of class actions and single-plaintiff cases. He has also been appointed to serve on the Executive Committee of the Justice & Diversity Center of The Bar Association of San Francisco.

In Memoriam

The College mourns the recent passing of Fellows **Robert Connerton**, **Hal Coxson** and **William Saxton**.

Robert-Connerton

Fellow **Robert J. Connerton**, a member of the inaugural Class of 1996, passed away on March 18, 2019 at the age of 92. A graduate of George Washington University Law School (1952), Mr. Connerton began his legal career in the Solicitor's Office of the US Department of Labor, which ultimately led to a career as a union attorney that spanned over 50 years. In 1953, he joined the labor movement as Assistant General Counsel for Laborers' International Union of North America (LIUNA), and in 1964, he was named LIUNA General Counsel, serving in that capacity until 1995. He also held many positions with the ABA's Labor & Employment Law Section, including serving as its Chairman for the 1980-81 term. Mr. Connerton is survived by his wife, and Fellow, **Phillis Payne** (inducted in 1999), three daughters, four grandchildren and one great grandchild. Remembrances in his honor may be made to the Terence J. O'Sullivan LIUNA Charitable Foundation, 905 16th Street, NW, Washington DC 20006; the Labor Heritage Foundation (laborheritage.org) or the Sibley Hospital Foundation (Club Memory), 5255 Loughboro Road, NW, Washington, DC 20016. His obituary can be read here.

Hal-Coxson

Fellow **Harold (Hal) Coxson, Jr.**, inducted in the Class of 2007, passed away on April 19th at the age of 71. Hal was an enthusiastic member of the College who participated in and helped organize a number of regional programming events in Washington, DC and as part of the 11th Circuit Regional Program in Coral Gables, FL. A highly respected leader in the labor and employment law community for more than forty years, he started the governmental affairs practice at Ogletree Deakins, and worked tirelessly on behalf of employers' interests since that time. He was a true Washington insider, and his depth of knowledge and relationships on the Hill and at agencies were a great asset to his firm and clients. Hal was respected by those on both sides of the aisle. He was kind and thoughtful and will be greatly missed by all who knew him. *A memorial will take place at 3:00 pm on Saturday, May 11th at The Little Sanctuary, St. Albans School, 3101 Wisconsin Avenue, NW, Washington, DC. A reception will follow at St. Albans in the Cafritz Refectory.*

William-Saxton

Emeritus Fellow **William Saxton** passed away on April 15th at the age of 92. All who were fortunate enough to be his colleague or his "worthy friend" will remember Bill's warm and genuine smile, his sense of humor, and his no-nonsense approach to law and to life. Bill spent his entire legal career at Butzel Long in Detroit, Michigan, leading the firm as it grew to prominence as Managing Partner, Director, Chairman and CEO. A lion of Michigan's Labor and Employment Law bar, Bill was the second recipient (and first management-side recipient) to receive the State Bar of Michigan Labor Section's Distinguished Service Award.

Inducted into the College in 1996, he was also an elected Fellow of the College of American Trial Lawyers, a Life Member of the Michigan Bar Foundation, and a member of the American Law Institute. As an arbitrator, mediator, trial lawyer, and appellate advocate, he helped to develop labor and employment law in all of those roles during a career that spanned more than fifty years. His obituary can be read here.

Members of the College strive to promote achievement, advancement and excellence in the practice of labor and employment law. These Fellows distinguished themselves as leaders in the field, and the College was proud to have been able to call them Fellows.

College Logo Is a Sign of Distinction

Fellows are encouraged to include the College logo on their website or as part of their email signature block. Two different formats are available for download - .jpg or .eps. Please contact Susan Wan if you would like a logo file in a different format.

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Tuesday, April 30, 2019

TOP NEWS

DOL Guidance Shows Narrowed Take On Who's An Employee

The U.S. Department of Labor on Monday unveiled its first Trump-era guidance on the hot-button issue of employee-versus-independent contractor classification, saying workers for an unnamed gig economy platform that connects service providers with clients are contractors.

Read full article »

High Court Won't Revisit Public Union Ba rgaining Rights

The U.S. Supreme Court on Monday declined to consider whether public unions' exclusive representation rights are constitutional following its landmark Janus decision, rejecting a Minnesota college professor's request that it take up the issue.

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Drinker Biddle Partner Says Ex-Firm Dentons Ow es $390K

The former chairwoman of Dentons' U.S. and global government contracts practice lodged a suit in Washington, D.C., court on Monday alleging the BigLaw powerhouse is withholding hundreds of thousands of dollars from her following her departure last year.

Read full article »

Morgan Stanley Settles Adviser Expense Suit Fo r $10.2M

Morgan Stanley has agreed to pay over $10 million to settle a proposed class action alleging it routinely stiffed its financial advisers by refusing to pay for work-related expenses such as travel and client entertainment, according to a proposed settlement filed Monday in California federal court.

Read full article »

6th Circ. Gives Wyndham Redo On Workers' $5M OT Wi n

Wyndham Vacation Resorts Inc. won't have to pay more than $5 million for a judge's finding that the timeshare company had a policy of not paying its sales force overtime after a split Sixth Circuit ruled Monday that the lower court wrongly included certain workers in the collective action.

Read full article »

9th Circ. Partly Revives Ex-Frontier Wor ker's Bias Suit

The Ninth Circuit on Monday revived part of a former Frontier Communications worker's race and sex bias suit, telling a lower court to take another look at his claim he wasn't promoted to a permanent call center director position because he is a man of East-Indian descent.

Read full article »

DISCRIMINATION

Female GC Told To Serve Men Cake, $20M Bias Su it Says

A veteran attorney who recently served as ExlService Holdings Inc.'s general

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counsel was asked to serve male subordinates cake and ultimately ousted for complaining about gender bias, she alleged in a $20 million lawsuit filed Monday.

Read full article »

NJ Agency Ducks Disability Bias Suit From Ex-Wor ker

A New Jersey social services worker who said a state agency refused her a reasonable accommodation at work was denied a new trial Monday by a New Jersey appeals panel.

Read full article »

Ex-Ford Worker Denies Harassment C laims In Firing Dispute

A 50-year-old African American man who claims Ford Motor Co. fired him because of his age and race is pushing back on the automaker's assertion that he was terminated for allegedly touching his female co-workers inappropriately.

Read full article »

WAGE & HOUR

FedEx Pays $3.1M To End Driver Misclassification Suit

FedEx Ground has agreed to pay $3.1 million to settle claims that it misclassified drivers as independent contractors and made deductions to their pay that violated New York labor law.

Read full article »

LABOR

Justices Urged To Tackle NLRB Say Over Triba l Casinos

A California tribal casino pressed the U.S. Supreme Court on Friday to take up its bid to upend a decision that it can't stop workers from handing out union materials in guest areas, saying the National Labor Relations Board lacks jurisdiction over the casino and the case raises a key question for the arbitration of labor practice claims.

Read full article »

Fiat Chrysler Asks 6th Circ. To Nix Union Collusion Suit

Fiat Chrysler told the Sixth Circuit on Monday that union workers don't have the right to privately sue the company and the United Automobile Workers for allegedly colluding to sacrifice workers' interests during collective bargaining because they haven't alleged any breach of their union contract.

Read full article »

NONCOMPETES

Drilling Support Co. Accuses Rival Of Employee Poaching

A Texas oilfield services company has accused a rival business that once considered acquiring the company of trying to poach its employees, in violation of a confidentiality agreement that was signed during acquisition talks.

Read full article »

BANKRUPTCY

CRS Trustee Settles Wells Fargo Clawback Sui t For $5M

Wells Fargo has agreed to pay $5 million to the trustee for bankrupt human resources contractor Corporate Resource Services to settle claims that the bank repeatedly charged unfair fees during CRS' slide into insolvency.

Read full article »

PEOPLE

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GOVERNMENT AGENCIES

Federal Bureau of Investigation
Internal Revenue Service
National Labor Relations Board
Social Security Administration
U.S. Army

GrayRobinson Absorbs 9-Atty Employme nt Defense Boutique

GrayRobinson PA said Monday it has acquired Tampa, Florida-based employment defense boutique Thompson Sizemore Gonzalez & Hearing PA, bolstering the firm's labor and employment practice in the public and private sectors.

Read full article »

EXPERT ANALYSIS

Prepping For New Mass. Paid Family And M edical Leave Law

Although employees will not be entitled to take leave under Massachusetts' new paid family and medical leave law until 2021, employers face upcoming 2019 deadlines for compliance with key aspects, say attorneys with Goodwin.

Read full article »

Q&A

A Chat With Cleary Chief Talent Officer Hy Pomer ance

In this monthly series, legal recruiting experts from Major Lindsey & Africa interview management from top law firms about the increasingly competitive business environment. Here, Amanda Brady and Dustin Laws talk with Hy Pomerance, chief talent officer of Cleary.

Read full article »

LEGAL INDUSTRY

Longest-Serving Black Federal Judge Dies At 96

Sixth Circuit Judge Damon Keith, the longest-serving black jurist on the federal bench and a civil rights icon, died Sunday at 96. His passing drew an outpouring of tributes from Michigan officials and civil rights groups praising his five decades of service and his legacy.

Read full article »

Law Grads Hired At Best Rate Since 2008 Crash, ABA Says

Law school graduates who entered the job market in 2018 have seen the highest employment rate since the 2008 recession, according to new data unveiled Monday by the American Bar Association.

Read full article »

Justices Decline Posner And Boies-Backed Pr o Se Suit

The U.S. Supreme Court declined on Monday to hear a case backed by Boies Schiller Flexner LLP chair David Boies and retired Seventh Circuit Judge Richard Posner that challenged the way a lower court handles pro se litigants.

Read full article »

Analysis

Aggressive ICE Tactics Set Up Heavywe ight Clash In Mass.

The Trump administration's zealous approach to immigration enforcement at courthouses has resulted in a showdown between the federal government and progressive state prosecutors in Massachusetts, reaching a boiling point in recent days with the indictment of a sitting judge and a first-of-its-kind lawsuit by two district attorneys.

Read full article »

Interview

15 Minutes With Hershey's General Counsel

Damien Atkins was not only drawn to The Hershey Co. because it makes his favorite candy, Reese's Peanut Butter Cups, but also because of its mission to help underprivileged children. Here, the GC shares the top challenges facing Hershey and the ways he is committed to diversifying the legal industry.

Read full article »

U.S. Department of Justice

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U.S. Immigration and Customs Enforcement

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From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: First Move: Intern Workplace Rights Could Get Labor Board Review
Date: Tuesday, April 30, 2019 7:06:43 AM

What you need to know to start your day.

Intern Workplace Rights Could Get Labor Board Review

By Patricio Chile

Amnesty International USA's appeal of a labor case involving its interns gives the National Labor Relations Board a chance to weigh in on unpaid interns' workplace rights. The issue has broad implications well beyond the non-profit sector—one research firm found that undergrads hold half a million unpaid internships yearly.

Cue to Businesses: A new policy on the legal 'employment' status of interns, or what they can do to organize and change working conditions, could provide cues to businesses and worker advocates as to what classifications and actions are lawful going forward.

Changing Status: One central question is whether interns can obtain legal employee status—which comes with certain wage and organizing rights—by petitioning to make their position paid, Hassan Kanu reports.

Job seekers wait in line during a career fair in Los Angeles on March 8, 2018. A case involving Amnesty International USA's interns gives the NLRB a chance to weigh in on unpaid interns' workplace rights.
Photographer: Patrick T. Fallon/Bloomberg via Getty Images

TOP STORIES

Labor Department Budget Gets Big Boost in House Proposal

The House appropriations committee proposed a massive bill April 29 that would increase funds for the Labor Department—soundly rejecting the Trump administration's attempt to slash the agency's funding by 10 percent for fiscal year 2020.

New Challenge Filed Appealing Dismissal of Kavanaugh Complaint

A Judicial misconduct complaint against U.S. Supreme Court Justice Brett Kavanaugh, filed over his emotional response to sex assault allegations at his Senate confirmation hearing, now moves to the policy-making arm of the

federal judiciary.

Gig Workers Are Contractors, DOL Says in Latest Letter
Certain workers for a company operating in the “sharing” economy can’t be determined to be employees under the Fair Labor Standards Act, the Labor Department found in its latest opinion letter.

Choosing When, Why, and How to Hire an Outside Attorney
When in-house counsel need to outsource legal work, they usually call a relationship firm, but Greg Hoover, in-house counsel to a small division of a Fortune 100 company, says contract attorneys are a good option as well. Hoover discusses how to include contract attorneys on your outside legal team.

DAILY RUNDOWN

Discrimination

Frontier Worker Can Use Alleged Bias Admission by Former Boss
Frontier Communications must face trial on a call center manager’s claims that he was passed over for promotion because he is East Indian and because of his gender, a divided Ninth Circuit ruled.

‘Physician Job Placement’ Expert Can Testify at Job Bias Trial
A radiologist who alleges a Louisiana medical center violated her job-leave rights after she was diagnosed with breast cancer may have a harder time recovering on her claims.

Charlotte Must Pay Male Officer Additional $1.7M for Sex Bias
A former Charlotte, N.C., police officer is entitled to roughly $1.7 million in equitable remedies on top of the $125,000 a jury awarded for sex discrimination, a federal judge ruled.

State & Local Laws

Minneapolis Sick Leave Ordinance OK’d by State Appeals Court
State sick leave law doesn’t preempt a city of Minneapolis ordinance requiring employers to provide qualifying employees with up to 48 hours of sick-and-safe-leave, the Minnesota Court of Appeals ruled.

Colorado House Passes Gender Equity Pay Legislation
The Colorado House passed a bill aimed at closing the gender wage gap in the

state.

Labor Relations

Striking Chicago Orchestra Musicians Ratify Five-Year Pact
Classical musicians and the Chicago Symphony Orchestra are finally in harmony, settling a seven-week strike and resuming the 2019-2020 concert series.

UPS National Agreement Takes Effect After Final Teamsters Vote
About 243,000 United Parcel Service Inc. workers will begin to see higher wages and other changes on the job after a new five-year contract took effect April 29.

Supreme Court

High Court Won't Review Whether Unions Can Represent Nonmembers
The U.S. Supreme Court announced it won't consider whether a Minnesota faculty union can represent a public university professor who isn't a union member, saving organized labor from another high-stakes legal battle.

Immigration

Canadian Commuters May Be Able to Skirt New Border Policy
Skilled Canadian workers who commute to work in the U.S. and/or who stay in the U.S. less than six months out of the year can continue to renew their temporary immigration status at the border.

Legal Profession

General Counsel Request More Funding for Legal Services Corp.
General counsel from 262 companies, including Amazon and the Walt Disney Company, are urging Congress to increase funding for Legal Services Corporation, the nation's single largest sponsor of civil legal aid.

WORKFLOWS

Lathrop Gage added Eric Swan, formerly of the Missouri Attorney General's office, as of counsel in the Toxic and Mass Tort and Environmental Law group in Kansas City, MO; and Kurt W. Greve as counsel in the Toxic and Mass Tort

and Product Liability and Personal Injury team in Dallas | **Morgan Lewis** added Joel Seow as a partner and director of the Singapore office | **Baker Donelson** has named Jennifer G. Cooper as chair of the Firm's Product Liability and Mass Tort Group, and Lance N. Rea as the Firm's Chief Information Officer | **Davis Wright Tremaine** added William R. Schuerman as a partner in the technology transactions group in Washington from Morrison & Foerster | **Snell & Wilmer** said that Alexix G. Terríquez has joined as an associate in the product liability litigation group in Phoenix from Jones, Skelton & Hochuli | **Dinsmore & Shohl** hired partner Mark S. Franklin from Stoll Keenon Ogden | **Kelley Drye & Warren** added David R. Clonts and Kevin E. Cadwell to its Intellectual Property and Litigation practices in Houston from Akin Gump Strauss Hauer & Feld

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From:	Lassiter, Marjorie
To:	Robb, Peter; Lesesne, Katherine; McFerran, Lauren; Colwell, John F.; Krafts, Andrew J.; Waters-Burnett, Yolanda C.; Giannasi, Robert (ALJ); Meyers, Mary; Zick, Lara S.; Merberg, Elinor; Vazquez, Laura T.; Sophir, Jayme; Carlton, Peter J.; Murphy, James R.; Lennie, Rachel G.; Kaplan, Marvin E.; Emanuel, William; Free, Douglas; Kraus, Grant; Ring, John; Stock, Alice B.; Platt, Nancy; Lucy, Christine B.; Rothschild, Roxanne L.; Barham, Jeffrey; Rappaport, Steve; Jacob, Fred; Coleman, Jocelyn; Lambert, Malissa; Watts, Elicia
Cc:	Habenstreit, David
Subject:	FW: 18-1187 Kitsap Tenant, Judgment fld.pdf
Date:	Tuesday, April 30, 2019 7:59:46 AM
Attachments:	18-1187 Kitsap Tenant, Judgment fld.pdf

The DC Circuit issued the attached decision today. The Court was reviewing the Board's decision and order in Kitsap Tenant, 366 NLRB 98 (2018) (Ring, Pearce, McFerran).

Marjorie Lassiter
Legal Assistant
NLRB Enforcement Litigation
(202)273-3855

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1187 **September Term, 2018**

FILED ON: APRIL 30, 2019

KITSAP TENANT SUPPORT SERVICES, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 18-1217

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: GARLAND, *Chief Judge*, HENDERSON, *Circuit Judge*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

This petition for review and cross-application for enforcement were considered on the record from the National Labor Relations Board and on the briefs of the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the petition for review be denied and the NLRB's cross-application for enforcement be granted.

On May 31, 2018, the Board found that petitioner Kitsap Tenant Support Services had unlawfully disciplined four employees and violated its statutory duty to bargain during and after its caregiving employees' successful unionization campaign. The Board's remedy required Kitsap to bargain with the union for fifteen hours per week and to submit periodic progress reports, and to reinstate the disciplined employees with backpay. We conclude that all of Kitsap's challenges in its petition for review lack merit.

First, the Board correctly applied its *Wright Line* test to all four disciplined employees, and its findings are supported by substantial evidence.

(a) *Bonnie Minor*. The Board reasonably concluded that substantial evidence supports the prima facie case, relying on Minor's membership in the union's organizing committee, her extremely strong annual performance review just one week before her discharge, her lack of any previous discipline, her termination the same day she spoke at Kitsap's mandatory meeting regarding unionization, and Kitsap's other actions demonstrating anti-union animus. J.A. 117-19; *see Inova Health Sys. v. NLRB*, 795 F.3d 68, 82 (D.C. Cir. 2015). Kitsap failed to meet its burden in rebuttal because Program Manager Alan Frey never mentioned forthcoming discipline when reprimanding Minor for canceling a client Christmas party and engaging in "triangulation" with clients; Kitsap did not identify any other employee ever discharged for "counter-therapeutic" conduct; and the Board showed that Kitsap tolerated worse conduct by other employees. J.A. 119-20, S.A. 1-3.

(b) *Alicia Sale and Hannah Gates*. The General Counsel met his initial burden by showing that Kitsap knew Sale and Gates were members of the union-organizing committee, placed Sale and Gates on administrative leave two days after receiving notice that the union campaign had been successful enough to support an election petition, and disciplined Sale and Gates more harshly than other employees who intentionally harmed clients. J.A. 121, S.A. 1-3. Kitsap's argument in rebuttal, that it had a good-faith belief that Sale and Gates engaged in misconduct, fails because Kitsap did not "parcel[] out discipline as it normally would when confronted with the same kind of employee misconduct that its managers reasonably believed had occurred." *Ozburn-Hessey Logistics v. NLRB*, 833 F.3d 210, 221 (D.C. Cir. 2016) (citation omitted).

(c) *Lisa Hennings*. Finally, the Board reasonably concluded that Hennings' demotion was unlawful because Kitsap was aware of Hennings' union membership and issued several pretextual letters of discipline against her, including for tardiness (though the General Counsel demonstrated that other tardy employees were not so disciplined), for scheduling beyond the scope of her role (though Frey admitted that such scheduling was routine), and for failing to complete client narratives (though Kitsap so disciplined no other employees in Hennings' house). *See* J.A. 124-27; S.A. 4-7; *Ozburn-Hessey*, 833 F.3d at 219-20.

Second, substantial evidence supports the Board's conclusion that Kitsap violated § 158(a)(3) of the Act by increasing its enforcement of disciplinary rules due to its employees' union support. Kitsap does not dispute that a deviation from prior practice coincided with the union election, and its purported concern about a potential state audit was pretextual. *See* J.A. 127-29; *Jennie-O Foods*, 301 N.L.R.B. 305, 311 (1991).

Third, we find that the Board adequately supported its conclusion that Kitsap did not "meet at reasonable times" and bargained in bad faith. 29 U.S.C. § 158(d); *see id.* § 158(a)(5) (recognizing "refus[al] to bargain collectively" as an unfair labor practice). Kitsap's negotiator repeatedly failed to respond to union scheduling requests and canceled or cut short several meetings. J.A. 109-12. Kitsap also engaged in regressive tactics by accepting and then rescinding an agreement to include heads of household in the bargaining unit. J.A. 115. Kitsap further violated its duty to bargain by failing to turn over information relevant to evaluating its proposal with respect to wages. *See KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 556-57 (D.C. Cir. 2012). Given that the "drawing of inferences

as to good or bad faith in the bargaining process is largely a matter for the Board's expertise," the Board has adequately supported its conclusion in this case. *Int'l Woodworkers of Am. v. NLRB*, 458 F.2d 852, 854 (D.C. Cir. 1972) (citation omitted).

Fourth, we reject Kitsap's challenges to the Board's remedial order. We lack jurisdiction to consider Kitsap's challenge to the mandated bargaining schedule and status reports because Kitsap did not raise that argument in a motion for reconsideration before the Board. *See* 29 U.S.C. § 160(e). Kitsap also claims that the Board's remedy of reinstatement with backpay for the four employees is punitive. But this is the Board's conventional remedy, *see, e.g.*, *Precoat Metals*, 341 N.L.R.B. 1137, 1138 (2004); Kitsap's suggestion that the employees were disciplined "for cause" conflicts with the Board's settled interpretation of this term, 29 U.S.C. § 160(c); *see Anheuser-Busch, Inc.*, 351 N.L.R.B. 644, 647 (2007); and Kitsap's argument that these employees were "unfit" for reinstatement fails because Kitsap did not deem unfit other employees who engaged in considerably worse misconduct, *cf. NLRB v. W. Clinical Lab., Inc.*, 571 F.2d 457, 460 (9th Cir. 1978).

Finally, we lack jurisdiction to consider Kitsap's claim that the complaint was not properly ratified because that objection was not raised before the Board. *See* 29 U.S.C. § 160(e).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

From: Martin, Andrew
Subject: Legal News FYI 04-30-19
Date: Tuesday, April 30, 2019 8:11:19 AM
Attachments: image001.png

Tuesday, April 30, 2019

NLRB Considering Novel Issue of Unpaid Interns' Workplace Rights

BloombergLaw - Daily Labor Report 30 Apr 2019 06:17

Labor Law • Appeal gives labor board chance to weigh in on interns' workplace rights • Amnesty International USA: labor law should apply differently to nonprofit interns By Hassan A. Kanu A case recently appealed to the federal labor board could give it...

Blog Post: Justices Urged To Tackle NLRB Say Over Tribal Casinos

LexisNexis Legal Newsroom : Workers Compensation Law (Blog) 29 Apr 2019 15:04

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Recent NLRB Decisions Shed New Light on Company Work Rules and Policies

Miller Nash 29 Apr 2019 14:00

Not so long ago, employers needed to be wary of having policies and handbook provisions requiring employees to be courteous, professional, respectful, and he like, for fear that the National Labor Relations Board would find them in viola ion of the...

Appropriations Committee Releases Fiscal Year 2020 Labor-HHS-Education Funding Bill

Congressional Documents & Publications 29 Apr 2019 00:01

April 29, 2019 Contact: Evan Hollander (Appropriations), 202-225-2771 Will Serio (DeLauro), 202-225-3661 Legislation increases discre ionary funding by $11.7 billion from the 2019 level, investing in education, health care, medical research, and job...

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From: Morning Shift
To: Ring, John
Subject: POLITICO"s Morning Shift: Biden scores first union endorsement — Lawmakers propose 10 percent funding increase for DOL — Women don the blue collar
Date: Tuesday, April 30, 2019 10:03:37 AM

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2018 Newsletter Logo: Morning Shift

04/30/2019 10:00 AM EDT

By REBECCA RAINEY (rrainey@politico.com; @RebeccaARainey)

With help from Paul Demko and Ted Hesson

Editor's Note: This edition of Morning Shift is published weekdays at 10 a.m. POLITICO Pro Employment & Immigration subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro's comprehensive policy intelligence coverage, policy tools and services, click

here.

QUICK FIX

— Biden scored the first 2020 presidential endorsement from a major union, prompting Trump to bash organized labor on Twitter.

— House appropriators will mark up a bill today to increase Labor Department funding by 10 percent.

— More women are working in traditionally male-dominated, blue-collar jobs.

GOOD MORNING! It's Tuesday, April 30, and this is Morning Shift, your daily tipsheet on labor and immigration news. Send tips, exclusives and suggestions to rrainey@politico.com, thesson@politico.com, ikullgren@politico.com, and tnoah@politico.com. Follow us on Twitter at @RebeccaARainey, @tedhesson, @IanKullgren, and @TimothyNoah1.

DRIVING THE DAY

BIDEN SCORES UNION ENDORSEMENT: The International Association of Fire Fighters became the first major union to endorse a 2020 presidential candidate Monday by throwing its support behind former Vice President Joe Biden, POLITICO's Ian Kullgren reports . The endorsement represented a potentially significant inroad into President Donald Trump's base. Heavily white and male, IAFF's membership looks "a lot like the other blue-collar voters who surged to Donald Trump" in 2016, Alex Seitz-Wald of NBC News noted in December of that year, making the group "a microcosm of the larger breakup between working-class whites and the Democratic Party." Fifty percent of the union's members voted for Trump in 2016, according to an IAFF poll that Seitz-Wald cited. Only 27 percent went for Hillary Clinton, and 12 percent refused to say who they voted for.

The president didn't appear happy about IAFF's endorsement, tweeting Monday that "The Dues Sucking firefighters leadership will always support Democrats, even though the membership wants me." (In fact, IAFF didn't endorse any presidential candidate in 2016.) This is evolving into a Trump campaign theme**:** Unions bad, union *members* good. Earlier Monday Trump tweeted, "I'll never get the support of Dues Crazy union leadership, those people who rip-off their membership with ridiculously high dues, medical and other expenses while being paid a fortune." (It

wasn't clear what, or whose, medical expenses Trum p was talking about.) Trump added: "But the members love Trump. They look at our record economy, tax & reg cuts, military etc. WIN!" These comments followed Trump's March Twitter lashing of General Motors CEO Mary Barra and the UAW over the closure of a GM plant in Lordstown, Ohio. Speaking in Ohio last month, Trump said he didn't want to meet with union leaders "because the heads of the union are not honest people. They're not honest."

Biden delivered his first speech on the campaign trail Monday from the Teamsters Local 249 banquet hall in Pittsburgh, sticking to an economic message that "praised organized labor and denigrated Wall Street CEOs and companies that used the Trump tax cuts to buy back stocks while laying off workers," POLITICO's Marc Caputo reports. "I make no apologies: I am a union man," Biden said according to the Washington Post's Dave Weigel. The former vice president also promised that he would raise the minimum wage to $15 and bar non-compete clauses from employment contracts.

APPROPRIATIONS

LAWMAKERS PROPOSE 10 PERCENT INCREASE FOR DOL: House appropriators will vote today on a 10 percent increase in discretionary funding for the Labor Department in fiscal year 2020, POLITICO's Ted Hesson reports. Rebuffing the Trump administration's proposed cut to the agency of nearly 10 percent, the draft bill from the Democratic-controlled appropriations committee would provide $13.3 billion for the department, a $1.2 billion increase over enacted levels in fiscal 2019.

The labor appropriations subcommittee will mark up the legislation today at 4 p.m. in the Rayburn House Office Building. More from Hesson here.

IMMIGRATION

ANOTHER TRUMP CRACKDOWN ON ASYLUM: In a memo issued Monday evening, Trump ordered that regulations be developed to strip certain asylum-seekers of work authorizations, impose fees on asylum applications, and impose other measures to discourage northward migration into the U.S., POLITICO's Ted Hesson reports. More here.

JOBS, JOBS, JOBS

WOMEN DON THE BLUE COLLAR: As companies fight for workers in an historically tight labor market, the Wall Street Journal reports that more than 40 percent more women are working in certain blue-collar, male-dominated jobs (such as trucking and warehousing) than they did two decades ago. Companies are "broadening recruiting efforts" and blue-collar training targeted to women. Women have been "driving the comeback in working-age labor-force participation, while participation among men ages 25 to 54. . . has lagged behind."

"Now nearly 9 percent of truck drivers are women, the highest share on record back to 1994," the Journal's Sarah Chaney and Eric Morath write. "The share of delivery drivers, electricians, plumbers and mechanics who are women has also recently touched the highest level in 25 years of records." More here.

UNIONS

LEE ENCOURAGES VW WORKERS 'TO VOTE AGAINST' UNION: During an all-plant meeting Monday at the Chattanooga, Tenn., Volkswagen factory, Tennessee Republican Governor Bill Lee "tried to praise workers while encouraging them to vote against the union," reports Chris Brooks of Labor Notes, who obtained a recording of the speech. Workers at the Chattanooga plant filed a union election petition with the NLRB earlier this month, their third such petition in five years. A 2014 election at the plant over whether to organize with the United Auto Workers became a national story when Republican politicians in the state, including Sen. Bob Corker (R.-Tenn.), tried to talk workers out of voting for the union even as VW management stayed neutral. More from Labor Notes here.

RIDESHARE COMPANIES HALT NYC HIRING: Uber and Lyft stopped hiring new drivers in New York City this month in reaction to the city's new requirement that drivers earn at least $17.22 an hour after expenses, POLITICO's Dana Rubinstein reports. "The move suggests New York City's new driver pay regulations are having some of their desired effect, by restricting the growth of the driver pool and limiting what many driver advocates characterize as an over-saturated market." The rules penalize companies for running too many cars without passengers on city streets, According to once estimate, drivers have earned $56 million more since they went into effect.

Bhairavi Desai of the New York Taxi Workers Alliance noted that the halt coincided with Lyft's IPO and Uber's upcoming public offerings; other advocacy

groups noted recent rate cuts in other parts of the country. Next week , 4,200 members of Rideshare Drivers United- Los Angeles, joined by drivers in San Francisco, San Diego, Chicago, Minneapolis, Philadelphia, and Washington, D.C., plan a multi-hour strike against Uber and Lyft over the recent wage reductions, demanding in part that "both companies guarantee drivers a $28 per hourly minimum rate ($17/hr after expenses), as they do in New York City." More from Rubinstein here.

SMALL TEACHER PAY BUMP: America's teachers brought home a little more pay during the 2017-18 school year, according to a new report from the National Education Association. But POLITICO's Kimberly Hefling notes that the 1.6 percent bump didn't keep pace with 2018's 1.9 percent increase in the Consumer Price Index. A recent report by the left-leaning Economic Policy Institute found that teachers were paid 21.4 percent less than similarly educated and experienced professionals in 2018.

"Teacher labor unrest that started last year with a teacher strike in West Virginia and continues today — often referred to as the #RedforEd movement — has put a spotlight on teacher pay," Hefling writes. "Teachers in North Carolina and South Carolina are expected on Wednesday to rally for more resources for K-12 schools at their respective state capitols, and Oregon teachers have similarly scheduled a protest on May 8." More here.

WASHINGTON STATE SIGNS LAW TO BLUNT JANUS IMPACT: Washington state Governor Jay Inslee will sign legislation today that will allow public employee unions to keep "fair-share" fees collected from nonmembers prior to the Supreme Court's 2018 decision in *Janus v. AFSCME*, which banned them. The legislation, HB 1575, says public workers "cannot get their money back," according to the Chinook Observer.

Conservative groups such as the Freedom Foundation and the National Right to Work Foundation have been filing lawsuits to force retroactive refunds of fair share fees. Last year a Washington federal district judge dismissed a case that sought to compel an AFSCME local to refund union fees, finding that the union "followed the law, and could not reasonably anticipate that a Supreme Court action would create a constitutional challenge to its actions" when it collected agency fees from state workers who had opted not to join.

But Maxford Nelsen, the Freedom Foundation's director of labor policy, says that

the organization plans to challenge the law "at the first possible opportunity." "We won't stand by and allow the unions and the legislature to run roughshod over the constitution," he said in a statement.

HEALTH CARE

DOL: AHPS SHOULD REMAIN IN PLACE DESPITE RULING: The Department of Labor is seeking to reassure companies that offered association health plans to their employees under the Trump administration's new rules - which were tossed out by a federal judge last month - that nothing will change immediately. The administration filed to appeal the ruling on Friday, but DOL said in a statement issued on Monday those plans can remain in place at least through the end of the year and companies will not be punished for actions that were taken in good faith before the court's decision.

COFFEE BREAK

— "DOL signals that gig economy workers are not employees," from POLITICO

— "Ford Workers Question Auto Maker's Path to Turnaround," from The Wall Street Journal

—"Frontier Worker Can Use Alleged Bias Admission by Former Boss," from Bloomberg Law

— "Federal Workers Pivot from Shutdown to Defeat Childcare Cuts," from Labor Notes

— "Democrats' health spending draft takes aim at detention of mi grant children," from POLITICO

— "Foxconn Tore Up a Small Town to Build a Big Factory—Then Retreated," from The Wall Street Journal

THAT'S ALL FOR MORNING SHIFT!

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From:	Shorter, LaDonna
To:	Bashford, Jo Ann; Bridge, Diane L.; Bush, Lynn; Carlton, Peter J.; Colwell, John F.; Dodds, Amy L.; Emanuel, William; Ford, Christina; Free, Douglas; Habenstreit, David; Jacob, Chris W; Jacob, Fred; Kaplan, Marvin E.; Kelly, David A.; Krafts, Andrew J.; Lennie, Rachel G.; Lesesne, Katherine; Lucy, Christine B.; Lussier, Richard; McFerran, Lauren; Merberg, Elinor; Meyers, Mary; Murphy, James R.; Ring, John; Robb, Peter; Rothschild, Roxanne L.; Sophir, Jayme; Stock, Alice B.; Tursell, Beth; Vazquez, Laura T.; Zick, Lara S.; Shorter, LaDonna; Radzin, Dorit; Watson, Timothy
Subject:	GRI Towers Texas, Inc., 16-CA-202872 -Section 10(j) results
Date:	Tuesday, April 30, 2019 4:10:04 PM
Attachments:	ILB.internalresults.16-CA-202872.GRI Towers.docx SET.16-CA-202872.CONFORMED SETTLEMENT AGREEMENT BILATERAL WITH RD INITIALS.pdf

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On April 17, 2019, the Board authorized the institution of Section 10(j) proceedings in these Section 8(a)(1), (3), and (5) cases involving, among other things, the Employer's unlawful encouragement of a decertification petition, unlawful withdrawal of recognition, unilateral changes, and discriminatory discharges. The Region was directed to seek, among other things, an interim order requiring the Employer to recognize and bargain with the Union, rescind unilateral changes, offer interim employment to the discriminatees, and a broad cease and desist notice.

On April 24, 2019, before the Region filed a petition in district court, the Regional Director approved the attached settlement agreement providing for, among other things, recognition of the Union, written offers of instatement, backpay, and reading and posting of the notice.

UNITED STATES GOVERNMENT

memorandum

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

DATE: April 30, 2019

TO: Peter B. Robb
General Counsel

FROM: Jayme L. Sophir
Associate General Counsel

SUBJECT: GRI Towers Texas, Inc.
Cases 16-CA-202872, *et al.*

On April 17, 2019, the Board authorized the institution of Section 10(j) proceedings in these Section 8(a)(1), (3), and (5) cases involving, among other things, the Employer's unlawful encouragement of a decertification petition, unlawful withdrawal of recognition, unilateral changes, and discriminatory discharges. The Region was directed to seek, among other things, an interim order requiring the Employer to recognize and bargain with the Union, rescind unilateral changes, offer interim employment to the discriminatees, and a broad cease and desist notice.

On April 24, 2019, before the Region filed a petition in district court, the Regional Director approved the attached settlement agreement providing for, among other things, recognition of the Union, written offers of instatement, backpay, and reading and posting of the notice.

/s/
J.L.S.

Attachment

cc: The Board
Solicitor's Office
Executive Secretary
Operations Management

H:injlit/10j/ILB.internalresults.16-CA-202872.GRI Towers

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

IN THE MATTER OF
GRI TOWERS TEXAS, INC. f/k/a
GESTAMP WIND STEEL US, INC.

Cases 16-CA-202872
16-CA-202909
16-CA-204620
16-CA-206518
16-CA-207789
16-CA-215682
16-CA-217202
16-CA-222196
16-CA-226277
16-CA-226515
16-CA-229267
16-CA-229689
16-CA-230780
16-CA-233983
16-CA-232576

Subject to the approval of the Regional Director for the National Labor Relations Board, the Charged Party and the Charging Party **HEREBY AGREE TO SETTLE THE ABOVE MATTER AS FOLLOWS**:

POSTING OF AND MAILING NOTICE — After the Regional Director has approved this Agreement, the Regional Office will send copies of the approved Notice to the Charged Party in English and Spanish. A responsible official of the Charged Party will then sign and date those Notices and immediately post them in prominent places around its facility, including all places where the Charged Party normally posts notices to employees. The Charged Party will keep all Notices posted for 60 consecutive days after the initial posting. The Charged Party will also copy and mail, at its own expense, a copy of the attached Notice to former employees who were employed by the Employer as of February 1, 2017 through the present date. These Notices will be signed by a responsible official of the Charged Party and show the date of mailing. The Charged Party will provide the Regional Director written confirmation of the date of mailing and a list of names and addresses of employees to whom the Notices were mailed.

READING OF NOTICE—The Charged Party will hold a meeting or meetings with all bargaining unit employees, scheduled to ensure the widest possible attendance on each shift, at which (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) will read the Notice in English and Spanish, in the presence of a Board agent and a representative of the Charging Party. The reading will take place at a time when the Charged Party would customarily hold meetings and must be completed prior to the completion of the 60-day Notice posting period. The date and time(s) of the reading must be approved by the Regional Director. The announcement of the meeting will be in the same manner the Charged Party normally announces meetings and must be approved by the Regional Director. The Notice will be read in the following languages: English and Spanish.

COMPLIANCE WITH NOTICE — The Charged Party will comply with all the terms and provisions of said Notice.

(b) (6), (b) (7)(C)

INITIALS (b) (6), (b) (7)(C)

BACKPAY — Within 14 days from approval of this agreement, the Charged Party will make whole the employee(s) named below by payment to each of them of the amount opposite each name. The Charged Party will make appropriate withholdings for each named employee. No withholdings should be made from the interest portion of the backpay. The Charged Party will also file a report with the Regional Director allocating the payment(s) to the appropriate calendar year.

Name of Employee	Backpay	Interest	Interim Expenses	Excess Tax Owed	Total
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	$2,774	$31	$119	0	$2,924
	$6,556	$198	$4,234	$22	$11,010
	$4,597	$112	$500	$12	$5,221
	$5,081	$181	$1,792	$20	$7,074

SCOPE OF THE AGREEMENT — This Agreement settles only the allegations in the above-captioned case(s), including all allegations covered by the attached Notice to Employees made part of this agreement, and does not settle any other case(s) or matters. It does not prevent persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters that happened before this Agreement was approved regardless of whether General Counsel knew of those matters or could have easily found them out. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence. By approving this Agreement the Regional Director withdraws any Complaint(s) and Notice(s) of Hearing previously issued in the above case, and the Charged Party withdraws any answer(s) filed in response.

PARTIES TO THE AGREEMENT — If the Charging Party fails or refuses to become a party to this Agreement and the Regional Director determines that it will promote the policies of the National Labor Relations Act, the Regional Director may approve the settlement agreement and decline to issue or reissue a Complaint in this matter. If that occurs, this Agreement shall be between the Charged Party and the undersigned Regional Director. In that case, a Charging Party may request review of the decision to approve the Agreement. If the General Counsel does not sustain the Regional Director's approval, this Agreement shall be null and void.

AUTHORIZATION TO PROVIDE COMPLIANCE INFORMATION AND NOTICES DIRECTLY TO CHARGED PARTY — Counsel for the Charged Party authorizes the Regional Office to forward the cover letter describing the general expectations and instructions to achieve compliance, a conformed settlement, original notices and a certification of posting directly to the Charged Party. If such authorization is granted, Counsel will be simultaneously served with a courtesy copy of these documents.

(b) (6), (b) (7)(C)

INITIALS (b) (6), (b) (7)(C)

Yes (b) (6), (b) (7)(C) No _____
Initials Initials

PERFORMANCE — Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of notice that no review has been requested or that the General Counsel has sustained the Regional Director. The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will reissue the Complaint that issued on January 29, 2019, in Cases 16-CA-202872, 16-CA-202909, 16-CA-204620 16-CA-206518, 16-CA-207789, 16-CA-215682, 16-CA-217202 16-CA-222196, 16-CA-226277, 16-CA-226515, 16-CA-229267, 16-CA-229689, 16-CA-230780, 16-CA-233983, and 16-CA-232576 covered by the Notice to Employees, as identified above in the Scope of Agreement section, as well as filing and service of the charge(s), commerce facts necessary to establish Board jurisdiction, labor organization status, appropriate bargaining unit (if applicable), and any other allegations the General Counsel would ordinarily plead to establish the unfair labor practices. Thereafter, the General Counsel may file a Motion for Default Judgment with the Board on the allegations of the Complaint. The Charged Party understands and agrees that all of the allegations of the Complaint will be deemed admitted and that it will have waived its right to file an Answer to such Complaint. The only issue that the Charged Party may raise before the Board will be whether it defaulted on the terms of this Settlement Agreement. The General Counsel may seek, and the Board may impose, a full remedy for each unfair labor practice identified in the Notice to Employees. The Board may then, without necessity of trial or any other proceeding, find all allegations of the Complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings. The Board may then issue an Order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board Order ex parte, after service or attempted service upon Charged Party at the last address provided to the General Counsel.

NOTIFICATION OF COMPLIANCE — Each party to this Agreement will notify the Regional Director in writing what steps the Charged Party has taken to comply with the Agreement. This notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. If the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that the Charging Party did not request review or that the General Counsel sustained the Regional Director's approval of this agreement. No further action shall be taken in the above captioned case(s) provided that the Charged Party complies with the terms and conditions of this Settlement Agreement and Notice.

(b) (6), (b) (7)(C)

INITIALS (b) (6), (b) (7)(C)

Charged Party GRI TOWERS TEXAS INC. f/k/a GESTAMP WIND STEEL US, INC. (EMPLOYER)	Charging Party UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPE FITTING INDUSTRY OF THE US, LOCAL 404
By: Name and Title Date (b) (6), (b) (7)(C) [redacted] 04/22/19 Print Name and Title below (b) (6), (b) (7)(C) [redacted]	By: Name and Title Date Print Name and Title below

Recommended By:	Approved By:
Date 4/24/19 MEGAN MCCORMICK Field Attorney	Date 4/24/19 TIMOTHY L. WATSON Regional Director, Region 16

(b) (6), (b) (7)(C) [redacted]

INITIALS (b) (6), (b) (7)(C) [redacted]

	Charging Party (b) (6), (b) (7)(C) [redacted] **AN INDIVIDUAL**
	B (b) (6), (b) (7)(C) [redacted] Date 4-22-2019
	Print Name and Title below

Recommended By: Megan McCormick Date 4/24/19 MEGAN MCCORMICK Field Attorney	Approved By: Timothy L. Watson Date 4/24/19 TIMOTHY L. WATSON Regional Director, Region 16

(b) (6), (b) (7)(C) [redacted]

INITIALS (b) (6), (b) (7)(C) [redacted]

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

IN THE MATTER OF
GRI TOWERS TEXAS, INC. f/k/a
GESTAMP WIND STEEL US, INC.

Cases 16-CA-202872
16-CA-202909
16-CA-204620
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16-CA-232576

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INITIALS KMB

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(b) (6), (b) (7) (C)

INITIALS KAS

Yes _____ No _____
Initials Initials

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(b) (6), (b) (7) (C)

INITIALS ICAD

Charged Party GRI TOWERS TEXAS INC. f/k/a GESTAMP WIND STEEL US, INC. (EMPLOYER)	Charging Party UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPE FITTING INDUSTRY OF THE US, LOCAL 404
By: Name and Title Date	By: Name and Title Date Counsel 4-19-19
Print Name and Title below	Print Name and Title below Keith R. Bolek Counsel

Recommended By: Date	Approved By: Date
Megan McCormick 4/24/19 MEGAN MCCORMICK Field Attorney	4/24/19 TIMOTHY L. WATSON Regional Director, Region 16

(b) (6), (b) (7) (C)

INITIALS KLB

	Charging Party (b) (6), (b) (7)(C) [redacted] **N INDIVIDUAL**
	(b) (6), (b) (7)(C) [redacted] Date 4-22-2019
	Print Name and Title below

Recommended By: Date Megan McCormick 4/24/19 MEGAN MCCORMICK Field Attorney	Approved By: Date 4/24/19 TIMOTHY L. WATSON Regional Director, Region 16

(b) (6), (b) (7)(C) [redacted]

INITIALS (b) (6), (b) (7)(C) [redacted]

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

IN THE MATTER OF
GRI TOWERS TEXAS, INC. f/k/a
GESTAMP WIND STEEL US, INC.

Cases 16-CA-202872
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AUTHORIZATION TO PROVIDE COMPLIANCE INFORMATION AND NOTICES DIRECTLY TO CHARGED PARTY — Counsel for the Charged Party authorizes the Regional Office to forward the cover letter describing the general expectations and instructions to achieve compliance, a conformed settlement, original notices and a certification of posting directly to the Charged Party. If such authorization is granted, Counsel will be simultaneously served with a courtesy copy of these documents.

(b) (6), (b) (7)(C) [redacted]

INITIALS (b) (6), (b) (7)(C) [redacted]

Yes (b) (6), (b) (7)(C) [redacted] No _____
Initials

PERFORMANCE — Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of notice that no review has been requested or that the General Counsel has sustained the Regional Director. The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will reissue the Complaint that issued on January 29, 2019, in Cases 16-CA-202872, 16-CA-202909, 16-CA-204620 16-CA-206518, 16-CA-207789, 16-CA-215682, 16-CA-217202 16-CA-222196, 16-CA-226277, 16-CA-226515, 16-CA-229267, 16-CA-229689, 16-CA-230780, 16-CA-233983, and 16-CA-232576 covered by the Notice to Employees, as identified above in the Scope of Agreement section, as well as filing and service of the charge(s), commerce facts necessary to establish Board jurisdiction, labor organization status, appropriate bargaining unit (if applicable), and any other allegations the General Counsel would ordinarily plead to establish the unfair labor practices. Thereafter, the General Counsel may file a Motion for Default Judgment with the Board on the allegations of the Complaint. The Charged Party understands and agrees that all of the allegations of the Complaint will be deemed admitted and that it will have waived its right to file an Answer to such Complaint. The only issue that the Charged Party may raise before the Board will be whether it defaulted on the terms of this Settlement Agreement. The General Counsel may seek, and the Board may impose, a full remedy for each unfair labor practice identified in the Notice to Employees. The Board may then, without necessity of trial or any other proceeding, find all allegations of the Complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings. The Board may then issue an Order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board Order ex parte, after service or attempted service upon Charged Party at the last address provided to the General Counsel.

NOTIFICATION OF COMPLIANCE — Each party to this Agreement will notify the Regional Director in writing what steps the Charged Party has taken to comply with the Agreement. This notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. If the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that the Charging Party did not request review or that the General Counsel sustained the Regional Director's approval of this agreement. No further action shall be taken in the above captioned case(s) provided that the Charged Party complies with the terms and conditions of this Settlement Agreement and Notice.

(b) (6), (b) (7)(C) [redacted]

INITIALS (b) (6), (b) (7)(C) [redacted]

Charged Party GRI TOWERS TEXAS INC. f/k/a GESTAMP WIND STEEL US, INC. (EMPLOYER)	Charging Party UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPE FITTING INDUSTRY OF THE US, LOCAL 404
By: Name and Title Date	By: Name and Title Date
Print Name and Title below	Print Name and Title below

Recommended By: Date 4/24/10	Approved By: Date
Megan McCormick	
MEGAN MCCORMICK Field Attorney	TIMOTHY L. WATSON Regional Director, Region 16 4/24/10

(b) (6), (b) (7)(C) [redacted]

INITIALS (b) (6), (b) (7)(C) [redacted]

	Charging Party (b) (6), (b) (7)(C) [redacted] **AN INDIVIDUAL**
	[redacted] (b) (6), (b) (7)(C) [redacted] Date 4-22-2019
	Print Name and Title below

Recommended By: Date 4/24/19	Approved By: Date 4/24/19
Megan McCormick	Timothy L. Watson
MEGAN MCCORMICK Field Attorney	TIMOTHY L. WATSON Regional Director, Region 16

[redacted] (b) (6), (b) (7)(C)

INITIALS [redacted] (b) (6), (b) (7)(C)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT
ERRATUM TO BACKPAY

IN THE MATTER OF
GRI TOWERS TEXAS, INC. f/k/a
GESTAMP WIND STEEL US, INC.

Cases 16-CA-202872
16-CA-202909
16-CA-204620
16-CA-206518
16-CA-207789
16-CA-215682
16-CA-217202
16-CA-222196
16-CA-226277
16-CA-226515
16-CA-229267
16-CA-229689
16-CA-230780
16-CA-233983
16-CA-232576

Subject to the approval of the Regional Director for the National Labor Relations Board, the Charged Party and the Charging Party **HEREBY AGREE TO THE FOREGOING SETTLEMENT AGREEMENT ERRATUM TO BACKPAY AS FOLLOWS**:

BACKPAY — Within 14 days from approval of this agreement, the Charged Party will make whole the employee(s) named below by payment to each of them of the amount opposite each name. The Charged Party will make appropriate withholdings for each named employee. No withholdings should be made from the interest portion of the backpay. The Charged Party will also file a report with the Regional Director allocating the payment(s) to the appropriate calendar year.

Name of Employee[1]	Backpay	Interest	Interim Expenses	Excess Tax Owed	Total
(b) (6), (b) (7)(C) [redacted]	$3,190	$192	$4,234	$21	$7,637
[redacted]	$7,599	$168	$500	$19	$8,286

[1] Erratum applies only to (b) (6), (b) (7)(C) [redacted] The "Backpay, Interest, Interim Expenses, Excess Taxes Owed and Total" calculations for all other named employees in the Settlement Agreement remain unchanged.

(b) (6), (b) (7)(C) [redacted]

INITIALS (b) (6), (b) (7)(C) [redacted]

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By: Name and Title Date Print Name and Title below	By: Name and Title Date Print Name and Title below
	Charging Party (b) (6), (b) (7)(C) AN INDIVIDUAL
	(b) (6), (b) (7)(C) tle Date 4-23-19 Print Name and Title below

Recommended By: Date	Approved By: Date
Megan McCormick 4/24/19 MEGAN MCCORMICK Field Attorney	Timothy L. Watson 4/24/19 TIMOTHY L. WATSON Regional Director, Region 16

(b) (6), (b) (7)(C)

INITIALS (b) (6), (b) (7)(C)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT
ERRATUM TO BACKPAY

IN THE MATTER OF
GRI TOWERS TEXAS, INC. f/k/a
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By: Name and Title Date	By: Name and Title Date 4-24-19
Print Name and Title below	Print Name and Title below Kerton R. Bolek, Counsel
	Charging Party (b) (6), (b) (7)(C) [redacted] AN INDIVIDUAL
	By: Name and Title Date
	Print Name and Title below

Recommended By:	Approved By:
Date 4/24/19 MEGAN MCCORMICK Field Attorney	Date 4/24/19 TIMOTHY L. WATSON Regional Director, Region 16

(b) (6), (b) (7)(C) [redacted]

INITIALS KAB

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT
ERRATUM TO BACKPAY

IN THE MATTER OF
GRI TOWERS TEXAS, INC. f/k/a
GESTAMP WIND STEEL US, INC.

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By: Name and Title Date (b) (6), (b) (7)(C) [redacted] 04/23/19 Print Name and Title below (b) (6), (b) (7)(C) [redacted]	By: Name and Title Date Print Name and Title below
	Charging Party (b) (6), (b) (7)(C) [redacted] N INDIVIDUAL
	By: Name and Title Date Print Name and Title below

Recommended By:	Approved By:
Date Megan McCormick 4/24/19 MEGAN MCCORMICK Field Attorney	Date 4/24/19 TIMOTHY L. WATSON Regional Director, Region 16

INITIALS (b) (6), (b) (7)(C) [redacted]

From: Bloomberg Law Daily Labor Report
To: Ring, John
Subject: Daily Labor Report Highlights
Date: Tuesday, April 30, 2019 4:35:24 PM

Bloomberg Law

DAILY LABOR REPORT®

Highlights

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TOP STORIES

Intel Worker Can't Change Theory of Retaliation on Appeal

By Patrick Dorrian

A former Intel Corp. employee isn't entitled to have her job retaliation lawsuit reinstated, the Tenth Circuit ruled April 30.

Compass Bank Workers Must Arbitrate Race, Sex Bias Claims (1)

By Patrick Dorrian and Genevieve Douglas

Two contract analysts who allege Compass Bank discriminated against them and other black women in promotions and pay must pursue their claims in arbitration, a federal judge ruled.

Unpaid Intern Workplace Rights Could Get Labor Board Review

By Hassan A. Kanu

A case recently appealed to the federal labor board could give it an opportunity to decide whether unpaid interns can organize for pay and other changes to their working conditions, especially in workplaces that already have a union.

Obama-Era Joint Employer Test Belongs in Dustbin: NLRB Lawyers

By Robert Iafolla

The National Labor Relations Board should scrap the contentious Obama-era test for determining joint employer liability despite a federal appeals court ruling that largely upheld that standard, the agency's lawyers said.

DISCRIMINATION

Worker Accuses TVA of Bias Based on Lawful Marinol Use (1)

By Patrick Dorrian

The Tennessee Valley Authority is accused in a new lawsuit of illegally barring a worker from taking Marinol, which had been prescribed for his depression and other mental health problems.

911 Operators With Bias Claims Against NYC Get Damages Class

By Perry Cooper

Black and Latino operators for New York City's 911 emergency response system won certification of a damages class in their racial bias suit, a federal court ruled April 29.

Dollar General Manager Can't Link Firing to Colon, Liver Cancers

By Patrick Dorrian

Dolgencorp LLC doesn't have to face trial on a former district manager's claims that he was fired because he was twice diagnosed with and treated for cancer, a federal judge ruled.

WAGE & HOUR

Paralegal's Witness Mishap Was Trial Strategy, Not New Evidence

By Porter Wells

A paralegal who claimed to have worked more than 700 hours of unpaid

overtime hours couldn't convince the Eleventh Circuit to overturn the verdict entered in her employer's favor.

HARASSMENT & RETALIATION

New USA Gymnastics Lawsuit Alleges Pervasive Abuse of Athletes

By Steven M. Sellers

Sexual abuse of gymnasts is "rampant" among USA Gymnastics officials, coaches, employees, and volunteers, a new complaint alleges.

LABOR RELATIONS

Washington Public-Sector Unions in Line for Boost

By Paul Shukovsky

Washington Gov. Jay Inslee (D) plans to sign a bill to bolster public employee unions April 30 in the wake of a U.S. Supreme Court decision that said government workers can't be required to pay union fees to cover the cost of collective bargaining.

Elder Care Company Targeted Union Members for Firing, Demotion

By Porter Wells

A Washington state home-care company unlawfully disciplined four of its employees during a unionization push and must now bargain with the union, the D.C. Circuit said April 30.

Massachusetts Hospital Workers Ratify Four-Year Contract

By Aaron Nicodemus

About 2,600 hospital workers at UMass Memorial Medical Center have agreed to a contract that will give them 12 percent raises over the four years of the agreement.

Unions at Work: Dow Lockout, Kaiser Permanente Labor Dispute

By Louis C. LaBrecque

Keep up-to-date with a roundup every Tuesday of union initiatives, bargaining developments, leadership changes, and other labor news.

LEGAL PROFESSION

Former Practice Chair Says Dentons Owes Her Over $390K

By Rebekah Mintzer

The former chair of Dentons government contracts practice group, Jessica Abrahams, has filed a complaint against the firm claiming Dentons owes her more than $390,000, but the firm has fired back, saying it's actually Abrahams who owes the firm almost $2 million in client fees.

HEALTH CARE & BENEFITS

Columbia Says No Trial Needed in Retirement Plan Battle

By Jacklyn Wille

Columbia University wants a class action over its retirement plan resolved before trial, telling a federal judge the case is based on "false, inapposite, and irrelevant" allegations.

Trump Health Plans Dealt Court Loss Now Face Changes Next Year

By Madison Alder

Small business health plans operating under a Trump rule struck down in court are clear to offer coverage they promised their members for the time being.

ALSO IN THE NEWS

Federal Worker Appeals Board May Get Familiar Face as 3rd Member

By Louis C. LaBrecque

B. Chad Bungard, a former general counsel at the board responsible for hearing federal employee appeals of personnel actions, is President Donald Trump's pick to be a member of the panel.

Labor Department Budget Gets Big Boost in House Proposal (1)

By Jaclyn Diaz, Paige Smith and Bruce Rolfsen

The House appropriations committee proposed a massive bill April 29 that would increase funds for the Labor Department—soundly rejecting the Trump administration's attempt to slash the agency's funding by 10 percent for fiscal year 2020.

Trump Likely to Hit 100th Judicial Appointment This Week

By Patrick L. Gregory

Five more of President Donald Trump's federal district court nominees are likely to be confirmed this week, putting him over the century mark for judicial appointments.

U.S. Employment Costs Rise 0.7% in First Quarter, as Forecast

By Katia Dmitrieva

U.S. employment costs held up at a steady pace in the first quarter as wages firmed, signaling some buildup of inflationary pressures that could still spur pickups in otherwise-muted price gauges.

Factory Hiring May Falter Again in April, Glassdoor Data Signal

By Shelly Hagan

Recent weakness in U.S. factory hiring may be more than a blip, according to data from Glassdoor Inc.

UBS Said to Tell Some Managers to Only Hire When Five Leave (1)

By Jan-Henrik Förster and Patrick Winters

UBS Group AG is telling executives in its large wealth management business to be more selective when hiring bankers as it seeks to cut costs following a challenging first quarter, according to people familiar with the matter.

PRACTITIONER INSIGHTS

INSIGHT: Choosing When, Why, and How to Hire an Outside Attorney

When in-house counsel need to outsource legal work, they usually call a relationship firm, but Greg Hoover, in-house counsel to a small division of a Fortune 100 company, says contract attorneys are a good option as well. Hoover discusses how to include contract attorneys on your outside legal team.

LATEST CASES

Case: Individual Employment Rights/Wrongful Discharge (Tex. App., 5th Dist.)

Encore Enterprises Inc. failed to show by a preponderance of the evidence that its former chief financial officer's wrongful discharge lawsuit against it is based on Encore's exercise of one of its rights under the Texas Citizens Participation Act. Encore argued that the CFO's lawsuit addressed his communications to his employer about alleged illegal activities that are matters of public concern. However, the TCPA applies only if the plaintiff's lawsuit is based on or relates to the defendant's exercise of one of the protected rights, the court said. The case is Encore Enters., Inc. v. Shetty, 2019 BL 152952, Tex. App., 5th Dist., No. 05-18-00511-CV, 4/29/19.

Case: Discrimination/Employer Status (S.D.N.Y.)

A female correction officer for the New York State Department of Corrections and Community Supervision may not proceed with her lawsuit against the state of New York alleging that it retaliated against her by denying her training opportunities after she made sexual harassment complaints, because she failed to plausibly allege that New York State was her employer within the meaning of Title VII. While she made a conclusory allegation that the state,

acting through one of its departments, employs her, she failed to assert whether the state hired her, paid her wages, or exercised direct control over her daily activities. The case is Penz v. Al Washer, 2019 BL 153442, S.D.N.Y., 18 CV 4964 (VB), 4/29/19 .

Case: Discrimination/Appeals (10th Cir.)

An employee may not raise on appeal for the first time her allegation that a federal district court applied the wrong standard in assessing whether or not she suffered an adverse action in her state-law claim that Intel Corporation in New Mexico subjected her to a hostile work environment which forced her to resign in retaliation for serving as a witness in a co-worker's internal age discrimination investigation. She didn't present this allegation in district court and failed to properly address it in her opening reply brief which cost Intel an opportunity to respond to the new argument. The case is Provencio v. Intel Corp., 2019 BL 153479, 10th Cir., 18-2090, unpublished 4/30/19.

Case: Wage & Hour/Minimum Wages (S.D.N.Y.)

A food preparer for a New York buffet didn't show that he has a claim for unpaid minimum wages under federal law, because he was paid a flat rate of $2000 per month, and the restaurant didn't dispute that that the salary was only intended to cover 40 hours per week, rather than the 76 that he worked, so his regular hourly rate was over $11 per hour. The case is Marcial v. New Hudson Family Rest. Inc., 2019 BL 151566, S.D.N.Y., No. 7:18-cv-0663(NSR) (JCM), 4/29/19.

Case: Wage & Hour/Collective Certification (W.D. La.)

A health care aide for a Louisiana home health care agency didn't show that she and other aides were similarly situated for purposes of her putative collective action for unpaid overtime compensation, because her statement that she was aware of other aides who were "improperly compensated" doesn't identify whether they were subject to the same violations as she was, and she didn't submit any other evidence to support that there was an overarching policy resulting in the agency's failure to pay overtime premiums. The case is Solomon v. Serenity Square, LLC, 2019 BL 152563, W.D. La., 6:18-CV-1025, 4/29/19.

Case: Individual Employment Rights/Emotional Distress (Wash. Ct. App., Div. 1)

A fired employee of Boeing Co. failed to state a claim against Boeing for intentional infliction of emotional distress or false imprisonment based on an incident that occurred when he parked illegally at a rolling gate to clock in just before his shift. The employee's allegations that a security guard became angry and stood in front of his vehicle and hit its hood with his hands didn't amount to the kind of extreme and outrageous conduct required to support his claim. Although security guards tried to block his vehicle, he continued slowly driving to the employee parking lot, so no actual imprisonment occurred, a court said. The case is Childress v. Boeing Aerospace Operations, Inc., 2019 BL 152206, Wash. Ct. App., Div. 1, No. 78233-9-I, 4/29/19.

Case: Disability Discrimination/Qualified Individual (N.D. Cal.)

A nurse with a genetic condition that left her blind in one eye wasn't a qualified individual for purposes of her state-law disability bias claims against a long-term care facility in California after she was fired while on medical leave, because her 20th request for a leave extension after 14 months of leave during the last 16 months of employment showed that she wasn't able to work. After granting 19 leave extension requests, the facility determined that she was asking for indefinite leave, which it had no duty to provide, and the fact that she hasn't worked in the four years since she was fired further shows that she was unable to perform essential job functions. The case is Rabara v. Heartland Emp't Servs., LLC, N.D. Cal., 17-CV-03770-LHK, 4/26/19.

Case: Discrimination/Constructive Discharge (D. Md.)

A black "healthcare data business analyst" may not proceed with her claim that a health group in Maryland forced her to resign because of her race. Her assertions, including that she felt she was unfairly placed on a "corrective action process" and inconvenienced when her request to work from home was denied, didn't show that her working conditions were so intolerable that she felt compelled to resign. The case is Jones v. UnitedHealth Grp., 2019 BL 152537, D. Md., JKB-17-3500, 4/29/19.

Case: Discrimination/Discharge (N.D. Ala.)

A black Campus Dean of Strayer University's campus in Huntsville, Alabama, will not get a trial on her claim that race, rather than a long string of documented performance issues and misconduct, motivated her discharge. The Dean failed to show that her supervisor didn't honestly believe in her performance assessment, the Dean admitted some of the wrongdoing of which she was accused, and she also mostly failed to dispute the underlying facts---low student ratings for the classes she taught, failing to timely monitor and record education reports, lying when she denied sending a certain text message, failing to follow enrollment procedures, and not being timely aware that at-risk students weren't being advised--upon which her supervisor based her criticisms, the court said. The case is Ducksworth v. Strayer Univ., Inc., 2019 BL 152199, N.D. Ala., No. 2:16-cv-01234-JEO, 4/29/19.

Case: Disability Discrimination/Discharge (N.D. Ind.)

A Dollar General district manager in Indiana can't go ahead with his disability bias claim after he was fired for hiring and wage-payment violations following cancer treatment, because his supervisor's denigrating comments about his cancer diagnosis and threat to watch him work "until he dropped" weren't related to the discharge decision. Further, alleged comparators who weren't fired after violating company policies either didn't engage in similar misconduct or were held to a lesser standard as subordinate employees, so he couldn't show disparate treatment or pretext. The case is Castetter v. Dolgencorp, LLC, 2019 BL 153048, N.D. Ind., 1:17-CV-227-TLS, 4/29/19.

Case: Disability Discrimination/`Disability' (11th Cir.)

A Tyson Farms tray packer didn't show that her back injury and asthma constituted protected disabilities for purposes of her failure-to-accommodate claim, given that she didn't have any back-related work restrictions and she failed to specify any major life activity that her asthma affected. Even if she could establish disability, her accommodation claim was properly dismissed because the company's refusal to guarantee a mat and stand for her exclusive use was reasonable given her lack of work restrictions, and she quit before an accommodation for her asthma could be discussed. The case is Hudson v. Tyson Farms, Inc., 11th Cir., 18-10476 Non-Argument Calendar, unpublished 4/29/19.

Case: Discrimination/Exhaustion of Remedies (N.D. Ala.)

An employee of Gestamp Alabama, LLC failed to exhaust her administrative remedies as to her retaliation claim, even though she checked the retaliation "box" on her EEOC charge form. The narrative in her charge doesn't set forth any facts suggesting she engaged in any protected conduct or that she was subjected to an adverse employment action as a result, and merely checking a box without supporting allegations is insufficient to exhaust administrative remedies for a retaliation claim. The case is Cole v. Gestamp N. Am., Inc., 2019 BL 149588, N.D. Ala., No. 2:19-cv-00056-JHE, 4/26/19.

Case: Discrimination/Statute of Limitations (S.D.N.Y.)

A female waitress for a New York restaurant who alleged that she was discharged three months after informing her employer that she was pregnant won't get a chance to try her case because her attorney didn't timely file her lawsuit. Although her attorney paid the filing fee two days before the statute of limitations ran, he didn't file the complaint until about two weeks after the limitations period, despite receiving an electronic notice from the court the day after he paid the filing fee informing him that he still needed to file the initial pleading, the court said. The case is .

Case: Individual Employment Rights/Defamation (E.D. Pa.)

A former guardian ad litem for the Children,Youth and Families department of Chester County, Pennsylvania, whose annual contract wasn't renewed after he sued the county and its caseworkers on behalf of two brothers who were being abused in foster care, failed to show that the county or its officials violated his procedural due process rights or defamed him. He alleged that the county's statements in letters and emails, describing his conduct of impersonating a county employee in telephone calls as unprofessional and harassing, were damaging to his reputation. A letter placed in the child advocate's personnel file wasn't published beyond relevant supervisory personnel and the secretary who typed it, the court said. The case is Kane v. Chester County, 2019 BL 151288, E.D. Pa., 18-1894, 4/26/19.

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