

A photograph of a theater stage. The stage is lit with warm, golden light. The curtains are red with a gold valance. Several spotlights are visible on the ceiling. The foreground shows the backs of several rows of theater seats.

Theater of the Absurd

The NLRB Takes on the Employee Handbook



U.S. CHAMBER OF COMMERCE

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I. INTRODUCTION

When Congress passed the National Labor Relations Act (NLRA or the Act) in 1935 to promote stability in labor relations, it created a quasi-judicial agency, the National Labor Relations Board (NLRB or the Board), and charged it with implementing the law. In subsequent decades, the NLRB functioned reasonably well with appointees from both political parties. Notwithstanding policy differences arising from different ideological perspectives, the NLRB served as the rational arbiter Congress seemed to have in mind. Indeed, many NLRB precedents have stood for years, if not decades, because of the Board's efforts to balance the rights of employers, unions, and workers alike.

Unfortunately, in recent years the NLRB has changed. Rather than serving as an impartial referee, it has become dominated by a decidedly pro-union majority. These activist Board members have disregarded the overarching objectives of the NLRA and disrupted the careful balance that the Board has traditionally



sought. Instead, this majority, along with the Board's appointed General Counsel, have pursued a one-sided agenda at the expense of employers and workers.

One particular way the NLRB's majority has transformed the agency is through adopting a wildly expansive reading of the NLRA's protections in

order to undermine sensible and widespread workplace policies. Through a series of decisions and official guidance, the NLRB has undertaken a campaign to outlaw heretofore uncontroversial rules found in employee handbooks and in employers' social media policies—rules that employers maintain for a variety of legitimate business reasons. This study highlights several decisions in which the NLRB has found commonsense employee handbook policies to be in violation of the law. While it is not meant to be a comprehensive review of NLRB cases in this area of labor law, it offers a number of examples to illustrate how many of the Board's decisions of late seem to run counter to any balanced reading of the NLRA and to simply fly in the face of common sense. In so doing, the report is intended to educate the business community, the media, and the broader public about the sweeping impact of the NLRB's increasingly biased, and some would say irrational, policy agenda.

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II. PRELUDE

The Board's efforts cover several aspects of the workplace, including policies dealing with confidentiality, respectful behavior, foul language, proprietary information, at-will employment, solicitation in the workplace, and dress codes. The NLRB's campaign against these policies centers on the Board's reading of Section 7 of the NLRA, which says that employees have the right to engage in "concerted activity" for "mutual aid or protection."

According to the NLRB, protected concerted activity "generally... requires two or more employees acting together to improve wages or working conditions."¹ That could include discussing the possibility of seeking union representation, handing out pamphlets to co-workers in the parking lot after work, joining together to request changes in the workplace, and similar activity. Employers may not interfere with such actions, but they may and do maintain policies to ensure that a place of business is well managed. The legality of those policies generally has not been in question, provided that they do not cross a certain threshold when it comes to Section 7 rights.

That threshold is set by the 2004 case *Lutheran Heritage*.² In it, the NLRB ruled that an employer's policy or rule will be found unlawful if it bars otherwise protected activity. Moreover, even if a rule does not expressly prohibit protected activity, the NLRB declared it will be found unlawful under three scenarios: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict Section 7 activity."

However, the current Board seems to have adopted a new definition of the word "reasonably." Indeed, it is one that few reasonable people

would recognize. The NLRB has gone to outlandish lengths to find commonsense workplace policies unlawful for violating Section 7 rights, even scouring employee handbooks to find purported violations in cases where the handbook has nothing to do with the underlying charge.

By interpreting the NLRA's Section 7 protections so broadly, the NLRB has increasingly interfered with employers' ability to manage their own workplaces, often to the detriment of employees themselves. The result has become a theater of the absurd, in which Board decisions issued by bureaucrats specializing in increasingly abstract theories of labor law run counter to the real-world experiences and necessities of the modern workplace. As a result, the Board's irrational interpretations of the law have created a serious headache for employers and employees looking for stability and common sense in labor relations.

Not only does the NLRB's interpretation of Section 7 rights frustrate employers seeking to manage their workplaces, but in some instances the Board's views run counter to guidance provided by other enforcement agencies, such as the Equal Employment Opportunity Commission (EEOC). That agency addresses issues like workplace harassment and explicitly states that "an anti-harassment policy and complaint procedure should contain, at a minimum ... [a]ssurance that the employer will protect the confidentiality of harassment complaints to the extent possible," among other things.³

Moreover, employers are required to prevent a hostile work environment, which includes conduct "that a reasonable person would consider intimidating, hostile, or abusive,"⁴ such as making threats or intimidating co-workers. Yet the NLRB has ruled that policies ensuring confidentiality for employees in workplace investigations and prohibiting harassment somehow interfere with Section 7 rights. To say the least, the Board's

actions have put businesses in what baseball players call a “pickle,” where a base runner is stranded between two bases and very likely to be tagged out by the opposing team. In this case, it’s two powerful government agencies doing the tagging.

The question that stands out is this: What is the rationale for the NLRB’s fervor when it comes to policing the employee handbook? While the answer to that question may be difficult to pinpoint, a few possibilities exist. For one thing, in the last 10 years the number of representation petitions the NLRB receives has dropped by nearly 50% (4,022 in fiscal year 2005 vs. 2,053 in 2014) while the number of elections held has declined nearly 40% (2,227 in fiscal year 2005 vs. 1,407 in 2014).⁵ At the same time, the NLRB’s budget has changed little when adjusted for inflation, so it could be that the Board does not have enough to do and is simply searching for ways to keep busy.⁶

Given the current majority’s leanings, however, another more disturbing possibility is that the Board is using its decisions to assist with future union organizing drives. By charging an otherwise law-abiding employer with unfair labor practices related to the employee handbook, the Board can establish a history of supposed “anti-union animus.” In the event of an organizing campaign down the road, the NLRB could use that purported animus to impose restrictions on employer conduct or perhaps even overturn the results of a representation election if the union loses.⁷ Whatever the explanation, the Board’s handbook decisions defy common sense and leave employers exasperated.

By charging an otherwise law-abiding employer with unfair labor practices related to the employee handbook, the Board can establish a history of supposed “anti-union animus.”

III. SHOWTIME: AREAS OF CONTENTION

The following sections of this report look at specific handbook policies the NLRB has targeted. These are all policies that one would not be surprised to find in an employee handbook. Most Americans, though, would be surprised to find that maintaining these policies could get a business in trouble with the federal government.

Act 1. The Confidentiality Conundrum

Employee handbook rules requiring confidentiality have earned particular scrutiny in recent years, with the Board ruling that such commonplace provisions run afoul of the law in many cases.

In March 2015, the NLRB's Office of General Counsel (OGC) issued a guidance memorandum covering confidentiality policies and other related topics, which stated:

Employees have a Section 7 right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as non-employees, such as union representatives. Thus, an employer's confidentiality policy that either specifically prohibits employee discussion of terms and conditions of employment — such as wages, hours, or workplace complaints — or that employees would reasonably understand to prohibit such discussions, violates the Act.⁸

Since the passage of the NLRA, Congress has enacted numerous laws that address certain employment situations that could directly or indirectly require confidentiality during internal investigations.

Despite the seemingly anodyne statement by the OGC, the NLRB has demonstrated that it views restrictions on confidentiality policies to extend well beyond discussions about wages and hours. It has increasingly focused on sensitive areas such as personnel investigations and allegations of misconduct. Most typical employers understandably wish to avoid gossiping and the spread of inaccurate information, but, unfortunately, policies requiring employees to treat confidential information as, well, confidential are facing increasing scrutiny as the cases discussed in this report illustrate.

Scene I. Banner Health

In the 2012 case *Banner Health*,⁹ the Board took on confidentiality policies involving workplace investigations. The case stemmed from a request by the company's human resources consultant for employees filing complaints to refrain from discussing their allegations until the employer had a chance to investigate them. While this is common practice, it actually resulted in a charge filed by the NLRB.

At first, the company's perfectly reasonable request seemed to pass muster with the agency. The administrative law judge (ALJ) who heard the case thought the policy made sense for the simple reason that it "is for the purpose of protecting the integrity of the investigation" and concluded that the employer had "a legitimate business reason for making this suggestion."¹⁰ Incredibly, the Board then overruled the ALJ saying, "Contrary to the judge, we find that [Banner Health's] generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights."¹¹

As too many employers have had to do in response to the NLRB, Banner Health took its case to federal court to challenge the Board's overreach.

The U.S. Chamber of Commerce and other trade associations offered comments to the court, and they argued that “the Board’s standard fails to accommodate the NLRA to other federal employment laws that require employers to conduct effective workplace investigations.”¹²

As those comments observed, since the passage of the NLRA, Congress has enacted numerous laws that address certain employment situations that could directly or indirectly require confidentiality during internal investigations. Notwithstanding those laws, the NLRB interprets employees’ Section 7 rights so broadly that it essentially ignores them when it comes to workplace investigations. For example, other government agencies, such as the EEOC, *require* employers to ensure confidentiality in certain situations, including workplace investigations and ADA accommodations.¹³ For employers, these apparently contradictory policy diktats from government agencies cause incredible confusion and highlight the absurdity of the NLRB’s position.

After three years, *Banner Health* is once again before the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) and remains unresolved. In June 2015, the NLRB, after being forced by the D.C. Circuit to rehear the case, once again declared the employer’s confidentiality policy unlawful. In a strenuous dissent, Board Member Philip A. Miscimarra pointed out to the majority that its decision flew in the face of the Board’s *own policy*, which allows parties to request and the Board to issue a sequestration order in *every* case. The dissent went on to quote the Board’s own explanation of that rule in one of its cases.

The [sequestration] rule . . . means that *from this point on until the hearing is finally closed, no witness may discuss with other potential witnesses either the testimony that they*

have given or that they intend to give. The best way to avoid any problems is simply *not to discuss the case with any other potential witness until after the hearing is completed.*¹⁴ (emphasis added in the dissent)

In other words, the Board can require confidentiality for its own purposes, but denies that privilege to employers. Member Miscimarra’s dissent continued by saying, “I believe the Board cannot appropriately attach a weight of zero to the substantial justification that exists for a nondisclosure request similar to the one at issue here.”¹⁵ As the Board’s decisions in *Banner Health* make clear, “a weight of zero” seems to be exactly what the NLRB’s activist majority attaches to the legitimate interests of employers in workplace investigations.

Scene II. Boeing

A reasonable confidentiality policy at another company, in this case Boeing, was also found to run afoul of the NLRA.¹⁶ An employee of the company filed a complaint against her supervisor, and following the investigation of her complaint, the employee communicated information about her case to some of her colleagues. Boeing’s policy required employees involved in an investigation to sign a confidentiality agreement, which directed them not to disclose confidential human resources investigations because of their sensitive nature. As a result, the company disciplined the employee upon learning of her disclosures, which led to an unfair labor practice charge (known as a ULP) being filed with the NLRB.



Following the employee’s ULP complaint, Boeing rescinded its disciplinary action and changed its confidentiality notice by replacing the existing language with far softer language: “We recommend that you refrain from discussing this case.”¹⁷ Moreover, it changed language that instructed employees to refer co-workers or managers with questions about an investigation to the human resources department.

This was not good enough for the NLRB, which ruled that both the old and the new confidentiality language violated the Act. Adding insult to injury, the NLRB concluded that the company’s failure to *publicly repudiate* its confidentiality language also constituted a violation.¹⁸

Scene III. Costco

In yet another confidentiality case, the Board ruled against several commonsense policies at Costco Wholesaler Club.¹⁹ Among the offending policies were those that prohibited employees from discussing “private matters” about fellow employees, such as health information, and disclosing sensitive data like Social Security numbers and other personal and financial information.²⁰

The issue, according to the NLRB, was “whether any of the rules in question explicitly restricts Section 7 activity and/or whether the employees would reasonably construe the language to prohibit” protected activity. Shockingly, the NLRB concluded that several of them would indeed cause employees to believe they could not discuss terms and conditions of employment and were unlawful.²¹ As a result, employers’ efforts to protect their workers’ most private information may now put them on the wrong side of the law.

Scene IV. Stant USA

In the case of *Stant USA Corporation*, the NLRB found several of the company’s confidentiality policies unlawful.²² Among the supposedly offending rules was the following:

You may not share information that is confidential and proprietary about the Company, its associates, customers, contractors or subcontractors, or suppliers. This includes information about trademarks, upcoming product releases, sales, finances, number of products sold, numbers of employees, Company strategy, and any other information that has not been publicly released by the Company.²³

According to the NLRB, this rule violated the law because employees may somehow read it as a prohibition on sharing information about their salaries and other conditions of employment, even though it did not actually speak to either. The NLRB found the reference to sharing the “numbers of employees” to be especially problematic, since that is “crucial information for employees interested in obtaining union representation,” which apparently trumps any rule employers adopt to protect critical information about their business.

Scene V. Piedmont Gardens

In *Piedmont Gardens*, the Board took the issue of confidentiality a step further by overturning yet another long-standing precedent and requiring witness statements to be handed over to a labor union.²⁴

The employer in this case — a continuing care facility — dismissed a certified nursing assistant (CNA) for falling asleep on the job after three

employees submitted statements supporting the accusation. The union representing the CNAs at the facility challenged the fired employee's termination. It asked Piedmont Gardens' human resources department for "[a]ny and all statements that [were used] as part of your investigation" as well as "[t]he names and job title of everyone [who] was involved in the investigation," which the employer naturally refused to do.²⁵

In refusing the union's request, the employer cited the NLRB's holding in the 1978 *Anheuser-Busch* case, which held that unions were not entitled to copies of witness statements.²⁶

The Board, however, sided with the union and dispensed with the nearly 40-year *Anheuser-Busch* precedent, breezily opining that "we find that the rationale of *Anheuser-Busch* is flawed," and "we reject the premise of *Anheuser-Busch* that witness statements are unique and fundamentally different from the types of information" employers must otherwise provide.²⁷

In the words of Member Brian Hayes' dissent, the activist majority's approach "substitutes doubt for certainty, fettering the ability of employers to effectively conduct investigations of workplace misconduct." Indeed, the thought that witness statements will be disclosed to unions makes conducting an effective workplace investigation far more difficult, which perhaps was the objective.

Act 2. Bolstering Bad Behavior

The OGC’s March 2015 memorandum specifically addressed rules covering criticism of employers.²⁸ The memorandum explained that “a rule that prohibits employees from engaging in ‘disrespectful,’ ‘negative,’ ‘inappropriate,’ or ‘rude’ conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful.” Likewise, “employee criticism of an employer will not lose the Act’s protection simply because the criticism is false or defamatory, so a rule that bans false statements will be found unlawfully overbroad unless it specifies that *only maliciously false* statements are prohibited.” (emphasis added) Thus, according to the NLRB, employer policies that attempt to maintain civility between management and employees appear to be verboten.

Scene I. Stant USA, continued

In addition to the confidentiality provision found unlawful in *Stant USA*,²⁹ the NLRB found other provisions of the company’s employee handbook to be unlawful.

Included among the company’s allegedly illegal rules were policies requiring employees to be respectful to co-workers and customers and to avoid making defamatory statements online.

Incredibly, the NLRB acknowledged that “[n]one of the provisions of the Employer’s social media policy explicitly restrict Section 7 activity,” and stated that “there is no suggestion that the Employer promulgated this

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policy in response to union activity or that the policy has been applied to restrict protected activity.”³⁰ One is left to wonder, then, what exactly is the problem with these purportedly unlawful policies?

As the NLRB sees it, asking employees to be respectful or otherwise well behaved violates their rights since such rules “*could* be construed to preclude protected criticism of the employer’s labor policies or treatment of employees.” (emphasis added) Even “the inclusion of the word ‘harassing’... arguably... *could* be construed to preclude protected online content.” (emphasis added) As the advice memorandum observes: “The Board has found rules that prohibit ‘disrespectful conduct,’ ‘negative conversations,’ or ‘improper or unseemingly’ [sic] conduct unlawful because such broad terms would commonly apply to protected criticism of the employer’s labor policies or treatment of employees.”³¹

In the real world, asking people to be respectful to each other is simply called good manners. In the universe that the NLRB inhabits, however, asking employees to be respectful represents an illegal infringement of their rights.

Scene II. Casino San Pablo

A rule prohibiting “insubordination or other disrespectful conduct (including failure to cooperate fully with Security, supervisors and managers),” which seems to be a fairly straightforward and commonsense policy, did not pass muster in a case called *Casino San Pablo*.³² Instead, the NLRB found too much ambiguity in the rule for it to be lawful. Going beyond the existing standard that a rule is invalid if employees would *reasonably* construe the language to prohibit protected activity, the Board expanded its reach by saying that “ambiguous employer rules—rules that reasonably *could* be read to have a coercive meaning—*are construed*

against the employer.”³³ (emphasis added) In other words, if there is some doubt about whether a rule might be unlawful, the NLRB will assume that it is.

In this case, the problematic language was the prohibition against unspecified “other disrespectful conduct.” The two Board members who voted to overturn this workplace policy centered their attention on the supposedly “patent ambiguity” of this phrase, which they interpreted as so expansive that an employee *could* think it restricted his or her ability to engage in protected activity. They even went so far as to attempt to differentiate this rule from a practically identical one that the D.C. Circuit found to be lawful.³⁴

The lone dissenter in *Casino San Pablo* pointed out that, far from being ambiguous, the rule in question actually provided examples of disrespectful behavior to include various types of insubordinate conduct, and he criticized his colleagues for splitting hairs, saying, “[T]his is not real ambiguity at all.”³⁵ What is clearly unambiguous in this case is that as far as the NLRB is concerned, the employer now has a record of violating the NLRA.

Scene III. Care One Management

In *Care One Management*,³⁶ SEIU Local 1199 launched an organizing drive at a facility operated by that company. After an NLRB-supervised election, the SEIU lost by a vote of 58-57. However, a few employees apparently had a hard time letting go of some bad blood over the issue of unionization.

In response to the tensions over the failed campaign, the facility’s administrator posted a memo titled “Teamwork and Dignity and Respect”

accompanied by the company's existing Workplace Violence Prevention Policy. The administrator addressed reports of hostility and even threats of violence by calling on employees to treat each other with "dignity and respect." The administrator made clear that certain behavior would not be tolerated, saying: "I want everyone to be on notice that threats, intimidation, and harassment will not be tolerated at Care One Madison Avenue. We will enforce the Workplace Violence Prevention Policy to keep our workplace free from such improper conduct."³⁷ Most employers would consider prevention of threats, intimidation, and harassment to be a core responsibility to their employees.

However, this call for dignity and respect apparently was too much for the NLRB. It ruled that the employer's posting of the memo with the Workplace Violence Prevention Policy constituted retaliation against legitimate union activity protected under the NLRA and found that employees reading the memo calling on workers to refrain from violence, intimidation, and harassment and to treat each other with dignity and respect would "reasonably" interpret it as prohibiting union organizing. Left unstated was whether the NLRB considers violence, intimidation, and harassment an integral part of an organizing effort.

Scene IV. Hooters

A Hooters franchise in Ontario, California, found itself in hot water with the NLRB for its allegedly unlawful rules against bad behavior in the workplace.³⁸ The case started, oddly enough, with a dispute over a bikini contest involving the franchise's waitresses. One of the participants in the contest, a marketing coordinator for the Hooters franchise, had organized the event, and her best friend apparently served as one of the judges, which did not sit well with some of the other participants given the prizes at stake.

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At the competition, the marketing coordinator in question received the first-place prize. Afterward, one of the other contestants allegedly approached the marketing coordinator and unleashed a profanity-laden tirade worthy of the saltiest of sailors. The franchise's human resources department terminated the foul-mouthed instigator and a second employee who was present for the altercation and later allegedly issued social media posts offensive to the company.

Both employees appealed their dismissal to the NLRB, which rejected the first employee's appeal. However, the NLRB then ordered the second of the two employees rehired with back pay and overturned multiple provisions of the employee handbook. Because this employee had complained about the allegedly rigged competition to other employees and management even before the event, the NLRB concluded that she had engaged in concerted activity and that the company had fired her illegally.

Perhaps of more concern to employers, though, the NLRB went on to examine the Hooters employee handbook and declared unlawful several provisions, including rules against insubordination, disrespectful behavior, failure to cooperate, profanity, and disclosure of proprietary information, such as the company's recipes, all of which were totally irrelevant to the case. For businesses seeking sanity, if not fairness, from the NLRB, this is one more example where neither is to be found.

Act 3. Defending Defamation

Scene I. Pier Sixty

The NLRB’s protection of bad behavior also extends into the realm of policies proscribing the use of profanity. For example, in *Pier Sixty, LLC*, the employer in question, a catering company, was the subject of a union organizing campaign.³⁹ In the days leading up to the representation election, one employee became frustrated at his manager’s treatment of him and posted the following vile statement on his own Facebook page:

“Bob is such a NASTY MOTHER ***** don’t know how to talk to people!!!!!! **** his mother and his entire ***** family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!!!” (profanity redacted)⁴⁰

The employer terminated the employee after the company’s human resources department learned about the post since it seemed to fall well into the category of “teasing or other similar verbal, written or physical conduct directed towards an individual” that the company did not allow. The fired employee then brought an unfair labor practice charge before the NLRB.

The NLRB sided with the employee since his post related to his working conditions and the upcoming union election. Incredibly, it determined that the Facebook post was protected, concerted activity under the NLRA, finding that none of the employee’s comments “were so egregious as to take them outside the protection of the [Act].”⁴¹



Member Harry I. Johnson III dissented, saying, “Employers are entitled to expect that employees will coexist treating each other with some minimum level of common decency.... It serves no discernible purpose for the Board to stretch beyond reason to protect beyond-the-pale behavior that happens to overlap with protected activity. It certainly does not serve the goal of labor peace.”⁴²

Scene II. Costco, continued

In the same *Costco* case discussed earlier,⁴³ the Board took up another issue, specifically Costco’s rule against communications that would “damage the Company ... or damage any person’s reputation.” Citing the dissent in *Lutheran Heritage*, the NLRB argued that this policy was unlawful because an employee *could* interpret the Costco rule as prohibiting speech protected under the NLRA.

In an initial hearing, an ALJ ruled in favor of Costco, saying employees would not necessarily construe rules that are intended to foster “a civil and decent workplace” as banning protected activity.⁴⁴

Shockingly, the Board reversed the ALJ’s decision, ruling that employers may not enforce a policy against “making statements that ‘damage the Company, defame any individual or damage any person’s reputation’” even if the rule does not explicitly reference protected activity. The mere supposition that a

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hypothetical employee could theoretically think it would restrict his or her rights was enough to render the policy illegal.

Scene III. Dish Network

The telecommunications company Dish Network also ran afoul of the NLRB's handbook crusade following the dismissal of an employee at one of its locations for violating safety standards.⁴⁵ The NLRB concluded that the firing was done as part of a broader enforcement of safety regulations, notwithstanding the employee's involvement in union activity that otherwise would be protected. That might have been the end of the matter, but the NLRB then perused Dish Network's employee handbook and found three provisions unlawful, provisions that had nothing to do with the underlying case.

The allegedly illegal social media policies included the company's prohibition against defaming the company. As many employers understandably do, Dish Network prohibited its employees from making disparaging and defamatory comments not only against the company, but also against its vendors and customers.⁴⁶ The policy also stipulated that employees may not engage in these activities using company resources or while on company time. This was found to be unlawful.

The NLRB also ruled against Dish Network's policy prohibiting unauthorized persons from speaking to the media about the company and its business activities without approval from the communications department. It similarly ruled against the policy requiring employees to report inquiries from government officials to the company's general counsel. Thus, the NLRB has decided that policies many companies adopt to protect their brand name now violate the Act.

Scene IV. McKesson

The large pharmaceutical company McKesson Corporation issued a low performance rating to an employee and put her on a personal improvement plan (PIP) after receiving information about a negative post the employee had made on Facebook. After evaluating all the surrounding facts, the NLRB concluded that the employee would have received the lower rating and PIP anyway, and as a result found no violation of the law. However, it went on to find that several of the company's unrelated social media policies were unlawful.⁴⁷

In particular, the NLRB took issue with McKesson's directive to use a friendly and professional tone and not to pick fights online. As one might expect, McKesson encouraged its employees to do this in order to facilitate conversations that reflected the company's values of consideration and courtesy, and the rule specifically prohibited ethnic slurs, personal insults, and obscenity, as well as defamatory comments about the company, its customers, and even its competitors. In addition, the company encouraged its employees to resolve concerns by speaking directly with their colleagues, rather than on social media.⁴⁸

The NLRB found these rules unlawful, even though they mention nothing about unions or labor disputes and actually encourage people to talk to their co-workers about workplace issues. The first rule did not pass muster because "discussions about working conditions or unionism have the potential to become just as heated or controversial as discussions about politics and religion."⁴⁹ The NLRB nixed the second rule despite acknowledging that an "employer may reasonably suggest that employees attempt to work out through internal procedures any concerns they may have over working conditions."⁵⁰ While that may be legal, the NLRB determined that asking employees not to air their grievances online took things a step too far.

Act 4. Proprietary Poppycock

Scene I. Boeing

The NLRB's stance on protected concerted activity even extends to rules through which employers seek to prevent the unauthorized disclosure of intellectual property. In a case involving Boeing, the NLRB ruled against just such a workplace policy, in this case Boeing's rule requiring permission to use cameras within its facilities, which it maintains to protect information about its manufacturing processes from improper dissemination.⁵¹

The Society of Professional Engineering Employees in Aerospace (SPEEA) filed unfair labor practice charges against the company in 2012 following a series of workplace protests at its facilities in Washington state and Oregon. SPEEA alleged that Boeing's rule requiring permission to photograph inside its facilities violated Section 7.

Boeing defended its policy restricting the use of cameras and camera-equipped phones, a ubiquitous rule in the high-stakes world of manufacturing. In fact, Boeing has maintained photography restrictions for at least 45 years. The reason for such rules is simple: Manufacturers wish to safeguard their internal processes from broad dissemination to keep competitors from gaining valuable, proprietary information about their operations.

The NLRB's stance on protected concerted activity even extends to rules through which employers seek to prevent the unauthorized disclosure of intellectual property.

But the NLRB determined that Boeing’s justification for having the rule was “non-credible.” It dismissed Boeing’s assertion that it had a business need to protect information about its manufacturing process, saying: “Its argument ... that the rule is needed to protect [its] competitive advantage and as a security matter is a mere smokescreen.”⁵² Instead, applying the broad assumption that supposedly ambiguous rules should be construed against the employer, the NLRB decreed that the policy was unlawful on its face, regardless of whether Boeing had actually sought to curtail any employees’ rights. Boeing has appealed this decision.

Scene II. Giant Food

The supermarket chain Giant Food adopted seemingly commonsense social media rules that included restrictions on the use of the company’s logo, trademark, and graphics. It also prohibited photographs and video of the company’s stores, operations, and processes.⁵³ However, the NLRB found these rules unlawful.

The NLRB discounted Giant’s legitimate interest in protecting its intellectual property, such as trademarks, saying: “Although the Employer has a proprietary interest in its trademarks, including its logo if trademarked, employees’ use of its name, logo, or other trademark while engaging in Section 7 activity would not infringe on that interest.”⁵⁴ That is to say, the entire point of trademark law (to protect a brand’s reputation) is apparently irrelevant to the NLRB.

Act 5. At-Will Won't Do

Scene 1. American Red Cross Arizona

The widespread practice of maintaining at-will employment policies has come under fire from the NLRB, which has, in some cases, taken the amazing step of deeming them illegal.

At-will employment policies are so common that they are almost taken for granted. They simply mean that one's employment at a business is, as the name suggests, at-will. In other words, either the employee or the employer is free to terminate the employment relationship at any time, provided that it is not for a discriminatory or otherwise unlawful reason.

Despite the ubiquity of at-will policies, the NLRB does not seem to like them. In *American Red Cross Arizona*, it found unlawful an at-will policy that required employees to sign a statement including the following provision: "The at-will employment relationship cannot be amended, modified or altered in any way."⁵⁵

The widespread practice of maintaining at-will employment policies has come under fire from the NLRB, which has, in some cases, taken the amazing step of deeming them illegal.

Surprisingly, the NLRB stated that: "it is somewhat questionable as to whether that language expressly restricts Section 7 activity. After all, the phrase in question does not mention unions or protected concerted activity, or even the raising of complaints involving employees' wages, hours and working conditions."⁵⁶ Despite this acknowledgement, the NLRB found the at-will provision unlawful under the reasoning that "the

clause in question premises employment on an employee's agreement not to enter into any contract, to make any efforts, or to engage in conduct that could result in union representation and in a collective-bargaining agreement, which would amend, modify, or alter the at-will relationship."⁵⁷ This "logic" was used even though there was no union involved in the underlying case.

Scene II. Hyatt Hotels

In the wake of *American Red Cross Arizona*, the NLRB took the issue of at-will employment policies one step further in another case involving Hyatt Hotels. Hyatt required employees to sign an acknowledgement statement upon receiving the employee handbook. That statement included the following provision: "I acknowledge that no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and either Hyatt's Executive VP/Chief Operation Officer or Hyatt's President."⁵⁸

The NLRB argued that this type of restriction denied employees the right to alter their at-will status. However, before legal proceedings reached a conclusion, the parties settled the case. As part of that settlement, Hyatt agreed to rescind the sections of its employment agreement that allegedly constituted unfair labor practices, including the at-will provision. The NLRB then announced that policies requiring the approval of a senior company executive to modify at-will status would henceforth be deemed illegal.⁵⁹

Act 6. Winning Isn't Everything

Target

Another example of the NLRB's expansive efforts to scrutinize employee handbook provisions that are completely irrelevant to a case before it includes the retail company Target.⁶⁰ At one of its stores in New York, the United Food and Commercial Workers (UFCW) sought to organize the store's employees, but it lost the representation election by a decisive 137-85 vote. Naturally, the UFCW complained to the NLRB and asked for a new election.

In the course of investigating the election, the Board decided to go through Target's employee handbook looking for supposedly unlawful policies, as it seems wont to do. In its review, the Board faulted Target's policy that limited solicitation on its own property when it involved personal endeavors, commercial purposes, or charities that Target did not include in its community outreach program.⁶¹

While the seemingly straightforward policy says nothing about unions, the NLRB went about dissecting the use of the phrase "for commercial purposes" and decided that employees might somehow construe those words to mean that they couldn't engage in union-related activities. "Whether the Respondent actually intended this interpretation *is beside the point*," the Board declared.⁶² (emphasis added)

With these two charges in hand, the Board concluded that Target's allegedly unlawful rules were sufficient by themselves to set aside the election results. Thus, even when employers win union elections, they could actually see the Board overturn the results based purely on an expansive reading of innocuous handbook provisions.

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In addition, the Board found Target’s policy against disclosing confidential information (i.e., “all Target information that is not public”) to be unlawful. With these two charges in hand, the Board concluded that Target’s allegedly unlawful rules were sufficient by themselves to set aside the election results. Thus, even when employers win union elections, they could actually see the Board overturn the results based purely on an expansive reading of innocuous handbook provisions. Apparently, “the point” is to help unions by whatever flimsy logic necessary.

Act 7. Dressing Down Dress Codes

Scene I. Boch Imports

A Massachusetts car dealership, Boch Imports, maintained handbook policies that invited scrutiny from the NLRB after a union filed a complaint against the company.⁶³ In particular, its 2010 handbook included several policies that were found to violate the Board’s interpretation of Section 7.

One of the allegedly unlawful rules included a prohibition on wearing “pins, insignias, or other message clothing” by employees who interact with customers, including service personnel. According to the company, the rule was maintained in part to avoid the possibility that service technicians who work on vehicles could accidentally damage an engine or car interior. It argued that a pin or button falling into an engine could severely damage the engine and cost the dealership significant sums to repair, and that a pin or button could rip fabric inside the car. Dismissing that seemingly reasonable explanation, the NLRB threw out the rule and found the employer guilty of violating the Act.



The added irony of this case was that Boch Imports actually *worked with an NLRB regional office* to revise its handbook policies, including the dress code, to make sure it was compliant with the Board’s constantly evolving interpretations of the law. In 2013, Boch Imports replaced its old employee handbook with the revisions it thought would keep it out of hot water with

the NLRB, given their collaboration. Notwithstanding those efforts, a Board panel voted 2-1 that Boch Imports was still liable for labor law violations.

The lone dissenter, Member Johnson, chided his colleagues for their heavy-handedness. In particular, he criticized them for punishing an employer even after it sought to work with the agency to comply with the law. He observed: “We should recognize that the best, quickest way to achieve universal handbook legal compliance with Section 7 standards is to encourage employers to involve the Agency in redrafting problematic provisions rather than to effectively punish them.”⁶⁴ Unfortunately, this sort of common sense no longer applies at the NLRB.

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Scene II. Alma Products

Most objective observers would consider as reasonable a policy that prohibits employees from wearing the following: “clothing displaying vulgar/obscene phrases, remarks or images which may be racially, sexually or otherwise offensive and clothing displaying words or images derogatory to the Company.” Yet Alma Products found out the hard way what the NLRB considers to be “reasonable.”⁶⁵

Alma Products created the above-mentioned policy after the new company president saw an employee wearing a shirt with the word “slave” and a ball and chain depicted on it, which he found personally offensive and insensitive to African-American employees and visitors. After promulgating

the new policy, an employee wore the “slave” shirt again and was advised to remove it or turn it inside out. After refusing to do so, the employee in question was sent home without pay, consequently prompting a complaint to the NLRB.

The NLRB not only found the prohibition of the slave shirt unlawful, it went on to state that “while an employer may lawfully discipline an employee engaged in protected activity for statements that threaten others with, for example, physical harm, it may not discipline an employee for making statements that simply make others annoyed or uncomfortable, or which are viewed as ‘harassment’ by employees[.]”⁶⁶

Of course, other enforcement agencies, such as the EEOC, take a different approach to discrimination and harassment that causes a hostile work environment. The NLRB, however, seems uninterested in the fact that it has instituted a policy that, if complied with, would threaten an employer with prosecution by another federal agency.

IV. THE CHARACTERS SPEAK: NOT-SO-HELPFUL GUIDANCE

Given the amount of confusion generated by seemingly arbitrary and constantly expanding interpretations of Section 7 protections, the NLRB's General Counsel in March 2015 issued a guidance memorandum to help employers draft compliant handbooks. The memorandum focused on eight categories of policies, most of which have been discussed in this report, that regulate employees' conduct in the workplace:

- Confidentiality
- Conduct toward supervisors
- Conduct toward fellow employees
- Interaction with the media and other third parties
- Use of company logos, copyrights, and trademarks
- Photography and recording
- Departing work
- Conflicts of interest

In the real world of business, policies are developed to ensure a stable and well-functioning workplace and to provide a safe, non-hostile work environment as required under the law.

The memo explains that when the NLRB considers whether a policy or rule unlawfully interferes with employees' rights under the NLRA, it evaluates whether employees would "reasonably construe" the policy or rule to prohibit protected activity. It goes on to provide examples of lawful and unlawful employer policies. Unfortunately, many of the examples provided confuse matters even more given the similarities between that which is legal and that which allegedly is not.⁶⁷

Some of those examples include the following:

Illegal Handbook Policy:

“You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer’s] associates was obtained in violation of law or lawful Company policy).”

Legal Handbook Policy:

“Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination.”

Illegal Handbook Policy:

“[Be] respectful to the company, other employees, customers, partners, and competitors.”

Legal Handbook Policy:

“Each employee is expected to work in a cooperative manner with management/supervision, co-workers, customers and vendors.”

Illegal Handbook Policy:

Do not make “insulting, embarrassing, hurtful or abusive comments about other company employees online,” and “avoid the use of offensive, derogatory, or prejudicial comments.”

Legal Handbook Policy:

No “use of racial slurs, derogatory comments, or insults.”⁶⁸

In the real world of business, policies are developed to ensure a stable and well-functioning workplace and to provide a safe, non-hostile work

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environment as required under the law. The NLRB seems to operate in a different world, where minute dissections of indistinguishable verbiage pass as policy guidance, and unfortunately, the General Counsel's memo provides little certainty about what will, or will not, pass muster before this Board. Any practical difference between lawful and unlawful policies, as evidenced by the previous examples, are difficult to discern, and it is unlikely that the average employee would "reasonably" consider any of them to interfere with Section 7 rights.

V. EPILOGUE

The NLRB has a long history of trying to balance the rights of workers, employers, and labor unions. Until recent years, this has generally worked reasonably well. Since 2009, however, balance has all but disappeared, replaced by a decidedly pro-union, anti-employer agenda. The illogical and irrational focus on employee handbook rules is one manifestation of this unfortunate trend.

Contrary to the theoretical machinations of the NLRB, businesses adopt workplace rules for good reasons, which perhaps explains the ubiquity of provisions like workplace courtesy and confidentiality. Employers operate in environments where they must balance not just the need for discipline in the workplace but also the obligation to follow legal and/or regulatory requirements from multiple enforcement agencies. Employees themselves benefit from well-managed workplaces that are free of harassment, discourteous behavior, and conduct that could undermine the profitability of their employer. Employee handbooks are reflective of these facts.

Employees themselves benefit from well-managed workplaces that are free of harassment, discourteous behavior, and conduct that could undermine the profitability of their employer.

Thus, the policies and rules those handbooks put into place are best read in that light, rather than through the narrow and distorted lens used by the NLRB. While the NLRA undeniably protects the right of employees to engage in concerted activity, the NLRB's expansive interpretation of the law has created a morass of confusion that leaves employers wondering

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just how they are to exercise effective control over their workplaces. With the audience now lost, it is time for the curtain to come down on this theater of the absurd.

ENDNOTES

- 1 National Labor Relations Board, Protected Concerted Activity; available at <http://www.nlr.gov/rights-we-protect/protected-concerted-activity>; last accessed June 15, 2015.
- 2 *Lutheran Heritage Village-Livonia*, 343 NLRB No. 646, 176 LRRM 1044 (2004).
- 3 Equal Employment Opportunity Commission, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors; available at <http://www.eeoc.gov/policy/docs/harassment.html>, last accessed June 17, 2015.
- 4 Equal Employment Opportunity Commission, Harassment; available at <http://www.eeoc.gov/laws/types/harassment.cfm>; last accessed June 17, 2015.
- 5 See National Labor Relations Board, Representation Petitions—RC; available at <http://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc>; last accessed June 9, 2015.
- 6 See National Labor Relations Board, Performance and Accountability Report for FY 2005 available at https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1674/nlr_2005_par.pdf and for FY 2014 available at <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1674/13682%20NLRB%202014%20PAR%20v5%20-%200508.pdf>, last accessed August 3, 2015.

See also Sean P. Redmond, “NLRB Performance,” *Workforce Freedom Initiative* blog, January 25, 2013; available at <http://www.workforcefreedom.com/blog/nlr-performance>, last accessed August 4, 2015.
- 7 See *Target Corporation*, Case Number 29-CA-030804, discussed below at p. 29.
- 8 National Labor Relations Board, Office of General Counsel, Memorandum GC 15-04, March 18, 2015.
- 9 *Banner Health System d/b/a Banner Estrella Medical Center*, Case Number 28-CA-023438.
- 10 *Ibid.*
- 11 *Ibid.*
- 12 *Banner Health System d/b/a Banner Estrella Medical Center, Petitioner/Cross-Respondent, vs. National Labor Relations Board, Respondent/Cross-Petitioner*;

U.S. Court of Appeals for the District of Columbia Circuit, Case #12-1359; Joint *amici curiae* brief in support of Petitioner by American Hotel & Lodging Association, Associated Builders and Contractors, Chamber of Commerce of the United States of America, Coalition for a Democratic Workplace, College and University Professional Association for Human Resources, Council on Labor Law Equality, HR Policy Association, International Foodservice Distributors Association, National Association of Manufacturers, National Association of Wholesaler-Distributors, National Federation of Independent Business, and Society for Human Resource Management.

See <http://www.chamberlitigation.com/sites/default/files/cases/files/2013/NCLC%20amicus%20brief%20--%20Banner%20Health%20v.%20NLRB%20%28D.C.%20Circuit%29.pdf>; last accessed May 19, 2015.

- 13 See <http://www.eeoc.gov/policy/docs/harassment.html> and <http://www.eeoc.gov/eeoc/publications/fs-ada.cfm>.
- 14 *Banner Health System d/b/a Banner Estrella Medical Center*, Case Number 28-CA-023438, *supra* note 9, citing *Greyhound Lines*, 319 NLRB No. 554 (1995) (emphasis added in Miscimarra’s dissent).
- 15 *Ibid.*
- 16 *The Boeing Company*, Case Number 19-CA-089374.
- 17 *Ibid.*, quoting Boeing confidentiality notice.
- 18 *Ibid.*, 362 NLRB No. 195, (August 27, 2015).
- 19 *Costco Wholesale Club*, Case Number 34-CA-012421.
- 20 *Ibid.*, quoting “Costco’s Employee Agreement.” The rules involved included the following: “All Costco employees shall refrain from discussing private matters of members and other employees. This includes topics such as, but not limited to, sick calls, leaves of absence, FMLA callouts, ADA accommodations, workers’ compensation injuries, personal health information, etc.
“Sensitive information such as membership, payroll, confidential financial, credit card numbers, social security [sic] number or employee personal health information may not be shared, transmitted, or stored for personal or public use without prior management approval. Additionally, unauthorized removal of confidential material from Company premises is prohibited.
“In the course of our business, we collect from our members and employees a substantial amount of personal information (such as name, address, phone number, e-mail address, social security number, membership numbers and credit card numbers). All of this information must be held strictly confidential

and cannot be disclosed to any third party for any reason, unless (1) we have the person’s prior consent or (2) a special exception is allowed that has been approved by the legal department.”

21 *Ibid.*

22 *Stant USA Corporation*, Case Number 26-CA-24098, Advice Memorandum dated October 13, 2011.

23 *Ibid.*, quoting Stant USA “Associate Handbook.”

24 *American Baptist Homes of the West d/b/a Piedmont Gardens*, Case Number 32-CA-063475; 359 NLRB No. 46 (December 15, 2012) and 362 NLRB No. 139 (June 26, 2015); hereinafter *Piedmont Gardens*.

25 *Ibid.*, June 26, 2015, Board decision, quoting union representative Donna Mapp.

26 *Anheuser-Busch*, Case Number 31-CA-006636, 237 NLRB No. 982 (1978).

27 *Piedmont Gardens*, 362 NLRB No. 139 (June 26, 2015), *supra* note 24.

28 National Labor Relations Board, Office of General Counsel, Memorandum GC 15-04, *supra* note 8.

29 *Stant USA Corporation*, Case 26-CA-24098; *supra* note 22. The rules involved included the following: “Be respectful to the Company, other associates, customers, partners, and competitors.

“Honor the privacy rights of other associates by seeking their permission before writing about them or displaying information that might be considered to be a breach of their privacy and confidentiality.

“Do not engage in name calling, unfounded statements, or behavior that will reflect negatively on Stant’s reputation.

“Recognize that you may be legally liable for anything you write or present online. Associates may be disciplined by the Company for commentary, content, or images that are defamatory, pornographic, proprietary, harassing, libelous, or that can create a hostile work environment. You can also be sued by associates, competitors, and any individual or company that views your commentary, content, or images as defamatory, pornographic, proprietary, harassing, libelous, or creating a hostile work environment.

“Do not reference or cite Company associates, [sic] without their express consent.

“Stant logos and trademarks may not be used without the Company’s written consent.”

- 30 *Ibid.*
- 31 *Ibid.*
- 32 *Lytton Rancheria of California d/b/a Casino San Pablo and UNITE HERE Local 2850*. Cases 32–CA–025585, 32–CA–025665, 32–CA–064020, and 32–CA–086359.
- 33 *Ibid.*, citing *Lafayette Park Hotel*, 326 NLRB No. 824 (1998).
- 34 *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003).
- 35 *Lytton Rancheria of California d/b/a Casino San Pablo and UNITE HERE Local 2850*, *supra* note 32.
- 36 *Care One at Madison Avenue, LLC d/b/a Care One at Madison Avenue*. Cases 22–CA–085127 and 22–CA–089333.
- 37 *Ibid.*, quoting Care One administrator George Arezzo.
- 38 *Hoot Winc, LLC and Ontario Wings, LLC d/b/a Hooters of Ontario Mills*, Joint Employers, Case Number 31-CA-104872. The rules involved included the following: “Insubordination to a manager or lack of respect and cooperation with fellow employees or guests....
- “Disrespect to [Hooters] guests, including profanity and negative comments or actions....
- “The unauthorized dispersal of sensitive Company materials to any unauthorized person or party... [including] recipes, policies, procedures, financial information, manuals or any other information in part or in whole as contained in any Company records.
- “Any action or activity which Hooters reasonably believes represents a threat to the smooth operation, goodwill or profitability of business....
- “[Discussing] confidential company business or legal affairs with anyone outside the Company.”
- 39 *Pier Sixty, LLC and Hernan Perez and Evelyn Gonzalez*. Case Numbers 02–CA–068612 and 02–CA–070797.
- 40 *Ibid.*
- 41 *Ibid.*
- 42 *Ibid.*
- 43 *Costco Wholesale Club*, Case Number 34-CA-012421, *supra* note 19.

44 *Ibid.*

45 *DISH Network Corp.* Case Numbers: 16-CA-62433, 66142, and 68261.

46 *Ibid.*, quoting DISH Network’s policy: “You may not make disparaging or defamatory comments about DISH Network, its employees, officers, directors, vendors, customers, partners, affiliates or our, or their, products/services....”

47 *McKesson Corporation*, Case Numbers: 06-CA-066504 & 06-CA-070189.

48 *Ibid.*, quoting McKesson’s policies: “Adopt a friendly tone when engaging online. Don’t pick fights. Social media is about conversations. When engaging with others online, adopt a warm and friendly tone that will encourage others to respond to your postings and join your conversation. Remember to communicate in a professional tone. (For example, is your post written in a way that is appropriate when communicating with a supervisor or customer?) Don’t be afraid to be yourself, but do so in an ICARE [Integrity, Customer first, Accountability, Respect, and Excellence] manner. This includes not only the obvious (no ethnic slurs, personal insults, obscenity, etc.) but also proper consideration of privacy and topics that may be considered objectionable or inflammatory—such as politics and religion. Don’t make any comments about McKesson’s customers, suppliers or competitors that might be considered defamatory.

“You are encouraged to resolve concerns about work by speaking with co-workers, supervisors, or managers. McKesson believes that individuals are more likely to resolve concerns about work by speaking directly with co-workers, supervisors or other management-level personnel than by posting complaints on the Internet. McKesson encourages employees and other contingent resources to consider using available internal resources, rather than social media or other online forums, to resolve these types of concerns.”

49 *Ibid.*

50 *Ibid.*

51 *The Boeing Company*, Case Number 19-CA-090932.

52 *Ibid.*

53 *Giant Food, LLC.*, Case Numbers: 05-CA-064793, 05-CA-065187, and 05-CA-064795. Giant’s Policy Stated, “Do not use any company logo, trademark, or graphics, which are proprietary to the company, or photographs or video of the company’s premises, processes, operations, or products, which includes confidential information owned by the company, unless you have received the company’s prior written approval.”

- 54 *Ibid.*
- 55 *American Red Cross Blood Services, Arizona Region*, Case Number 28-CA-23443, quoting American Red Cross document.
- 56 *Ibid.*
- 57 *Ibid.*
- 58 *Ibid.*, quoting Hyatt document.
- 59 See Rob Seigel, “NLRB General Counsel Addressees “At-Will Employment” Clauses,” The Lowenbaum Partnership, L.L.C., Labor & Employment Blog; June 28, 2012; available at <http://www.lowenbaumlaw.com/blog/nlr-general-counsel-addressees-at-will-employment-clauses/>, last accessed August 7, 2015. See also, David Ritter, “Labor: NLRB finds standard at-will employment provisions unlawful,” *Inside Counsel*; August 6, 2012; available at <http://www.insidecounsel.com/2012/08/06/labor-nlr-b-finds-standard-at-will-employment-provi>, last accessed August 7, 2015.
- 60 *Target Corporation*, Case Number 29-CA-030804.
- 61 *Ibid.*, quoting Target Corporation’s No Solicitation/No Distribution Policy.
- 62 *Ibid.*
- 63 *Boch Imports, Inc. d/b/a Boch Honda*, Case Number 01-CA-083551.
- 64 *Ibid.*
- 65 *Alma Products Company*, Case Number 07-CA-089537.
- 66 *Ibid.*
- 67 NLRB, Office of General Counsel; Memorandum GC 15-04; March 18, 2015, *supra* note 8.
- 68 *Ibid.*



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