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FAST BREAK: LABOR ISSUES IN THE HEALTHCARE INDUSTRY

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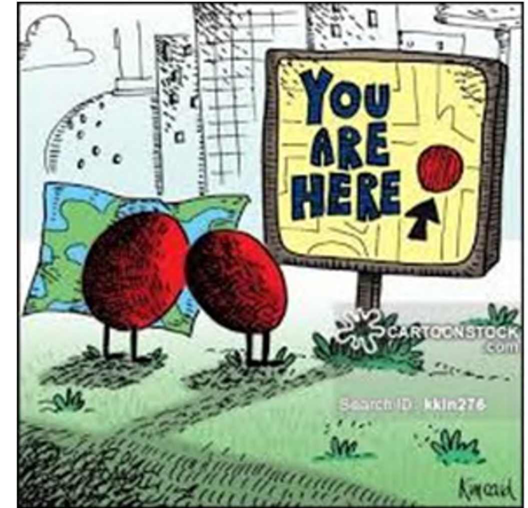
Overview

Recent developments in…

- New Election Rules
- Management rights clauses
- Dues checkoff rules
- Nonemployee access on employer property
- Past practice as a defense to unilateral changes
- Confidentiality during workplace investigations
- Use of employer email for non work-related communications (e.g., union communications)
- New Joint Employer Rule



2020 NLRB Election Procedure Changes - Timeline

- All time periods applicable to the new election rule are calculated based on **business days** as opposed to **calendar days**, and **102.2(a)** defines how business days are calculated (computation method depends on length of time afforded; only **federal** holidays are excluded from certain time period calculations).

Event	Under 2014 Rule	Under 2020 Rule
(a) Employer Must Post and Distribute Notice of Petition	Within **2 business days** of service	Within **5 business days** after service
(b) Pre-Election Hearing Scheduled to Take Place	Generally **8 calendar days** from Notice of Hearing, with RD discretion to postpone 2 business days for "special circumstances" and 2 more business days for "extraordinary circumstances"	Generally **14 business days** from Notice of Hearing, with RD discretion to postpone for good cause (for a period of time also in their discretion)
(c) Non-petitioner's Position Statement	**1 day before pre-election hearing** (typically 7 days after service of the Notice of Hearing)	**8 business days after Notice of Hearing served**, with RD discretion to grant extension for good cause
(d) Petitioner's Position Statement	N/A, not provided for in most cases	**Noon, 3 business days before hearing**
(e) Post-Hearing Briefs	Only permitted by special permission of RD (or Hearing Officer in the case of post-election hearings)	Permitted as a matter of right, within 5 business days, with RD/Hearing Officer discretion to grant up to 10-day extension for good cause
(f) Election Scheduled to Take Place	Scheduled for the earliest date practicable on a case-by-case basis	Earliest date practicable, but absent waiver or agreement by the parties, **normally not scheduled before the 20th business day after Direction of Election**
(g) Employer Must Furnish Voting List	Within **2 business days** following Direction of Election	Within **5 business days** following Direction of Election
(h) Post-Election Hearing	Opens **21 calendar days** from the preparation of the tally of ballots	Open **15 business days** from the preparation of the tally of ballots

Management Rights Clauses –
MV Transportation, 368 NLRB No. 66 (Sep. 10, 2019)

MV Transportation, Inc. *and* Amalgamated Transit Union Local #1637, AFL–CIO, CLC. Case 28–CA–173726

September 10, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN AND EMANUEL

In this case, we once again visit an issue that has repeatedly sown division among the members of the National Labor Relations Board and between the Board and reviewing courts of appeals. That issue is whether a "clear and unmistakable waiver" standard or a "contract coverage" standard should apply when considering whether an employer's unilateral action is permitted by a collective-bargaining agreement. When the full Board last visited this issue in *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), a majority reaffirmed adherence to the "clear and unmistakable waiver" standard. Today, for reasons that follow, we overrule *Provena St. Joseph* and adopt the "contract coverage" standard.

368 NLRB No. 66

Management Rights Clauses – MV Transportation

Previously, when looking at whether contract language allowed an employer to make a unilateral change, the Board applied a **“clear and unmistakable waiver”** standard.

Under this standard, broad management rights clauses, for example, **<u>were not</u>** sufficient to allow employers to take unilateral action, as these were found to not specifically address the unilateral action.

The Board has now rejected the “clear and unmistakable waiver” standard and adopted the **“contract coverage”** standard.

"I've never seen a management contract proposal so full of vague language. Well done, Higgins!"

Management Rights Clauses – MV Transportation

Under the "contract coverage standard" …

- the Board will give effect to the **plain meaning** of the relevant contractual language, applying ordinary principles of contract interpretation,
- the Board will find that the agreement permits the challenged unilateral act if it **falls within the compass or scope of contract language**; and
- the Board will not require that the agreement **specifically mention,** refer to, or address the particular employer decision at issue.
- BUT, if the agreement is ambiguous, there has to be clear union waiver or past practice.

Dues Checkoff Rules –
Valley Hospital Medical Center, 368 NLRB No. 139 (Dec. 16, 2019)

Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center *and* Local Joint Executive Board of Las Vegas.
Case 28–CA–213783

December 16, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

The issue in this case is whether the Respondent unlawfully ceased checking off and remitting employees' union dues after its contract with the Charging Party Union expired. [1] For over half a century, this unilateral action would have been lawful under Board precedent beginning with *Bethlehem Steel*, 136 NLRB 1500 (1962), remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964). The Board there held that an employer's statutory obligation to check off union dues ends when its collective-bargaining agreement containing a checkoff provision expires.

368 NLRB No. 139

Dues Checkoff Provisions –
Valley Hospital

- Board held that was **no obligation** to continue deducting union dues from employee paychecks pursuant to a dues checkoff provision in a collective bargaining agreement **after the agreement expires**.
- Reversed an Obama-era case holding that dues checkof clauses survive contract expiration.

Dues Checkoff Provisions – *Valley Hospital*

- The Board acknowledged that its decision allows an employer, upon contract expiration, "to use dues checkoff cessation as an economic weapon in bargaining without interference from the Board."

- **Caution:**
  - Avoid CBA language suggesting checkoff will survive CBA expiration.
  - Avoid agreements to resume payroll deductions and remittance of dues post expiration. This can create a "new status quo" requiring the employer to continue checkoff.
  - Opinion does not address validity and/or withdrawal of employee authorization forms.

Nonemployee Access on Employer Property - *UPMC Presbyterian Shadyside*, 368 NLRB No. 2 (June 14, 2019)

UPMC and its Subsidiary, UPMC Presbyterian Shadyside, single employer d/b/a UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital and SEIU Healthcare Pennsylvania CTW, CLC.

June 14, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN AND EMANUEL

On November 14, 2014, Administrative Law Judge Mark Carissimi issued a decision in this proceeding. The Respondents, UPMC and UPMC Presbyterian Shadyside, each filed exceptions and supporting briefs.

Nonemployee Access on Employer Property - *UPMC Presbyterian Shadyside*, 368 NLRB No. 2 (June 14, 2019)

- In the past, employers sometimes had to allow union organizers in **public spaces**, so long as the activity was not disruptive.
- "Public spaces," were a gray area because such spaces are employer property that are sometimes open to the public (e.g. employee cafeterias or snack bars).
- In *UPMC*, the Board held that the hospital **lawfully removed** two union organizers from its cafeteria for engaging in solicitation and distribution **even though the space was generally open to the public.**

Nonemployee Access on Employer Property - *UPMC*

- Now, employers **do not** have to allow non-employees to use their cafeterias or similar public spaces for promotional or organizational activities.
- To retain the right to prohibit union organizers from the public spaces, employers must maintain a policy or practice of prohibiting distribution or solicitation on their property, and **enforce** the policy or practice **non-discriminatorily**.

Nondiscriminatory Property Access - *Kroger*, 368 NLRB No. 64 (Sept. 6, 2019)

Kroger Limited Partnership I Mid-Atlantic *and* United Food and Commercial Workers Union Local 400.
Case 05–CA–155160

September 6, 2019

DECISION AND ORDER BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

The issue before us is whether the National Labor Relations Act required the Respondent to grant a nonemployee union agent access to its property to solicit its customers to boycott its store. The Respondent undisputedly had a property right to exclude the union agent from its premises. See *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 673 (1999) ("The hallmark of a protected property interest is

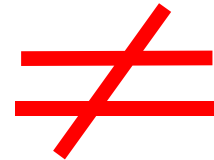
Nondiscriminatory Property Access - *Kroger*, 368 NLRB No. 64 (Sept. 6, 2019)

- Union agents were soliciting customers in Kroger’s parking lot, and Kroger had the police order them to leave based on a provision in the lease prohibiting solicitation.
- ALJ found that Kroger violated the Act because Kroger allowed non-employees such as the Salvation Army and the Girl Scouts to solicit on the premises for weeks at a time.

Nondiscriminatory Property Access – *Kroger*

- The Board held an employer may **eject non-employees** from its property for **handbilling/picketing** if the employer does not allow other non-employees to engage in similar **protest activities** on its premises.

- The Board held that an employer only discriminates when it treats nonemployee activities that are similar in nature disparately, and protest and boycott activities are not similar in nature to charitable, civic, or commercial activities (such as the Girl Scouts).



Past Practice –
Mike-Sell's Potato Chip Co. 368 NLRB No. 145 (Dec. 16, 2019)

Mike-Sell's Potato Chip Company and Teamsters Local Union No. 957. Case 09–CA–184215

December 16, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

The main issue presented in this case is whether the Respondent violated Section 8(a)(5) of the Act by unilaterally selling four sales routes that were assigned to bargaining-unit drivers to nonemployee independent distributors in 2016. [W]e … find that the Respondent's sales of the four routes constituted a continuation of the status quo because the sales were consistent with a longstanding past practice. Therefore, we … find that the Respondent was not obligated to bargain with the Union about its decision to sell those routes. Consequently, we also reverse the judge's related finding that the Respondent violated Section 8(a)(5) by failing to provide information related to the sale of the routes that the Union requested in order to bargain about the sales decisions.

368 NLRB No. 145

Past Practice –
Mike-Sell's Potato Chip

This case makes it easier for employers to make unilateral changes when the changes are consistent with "long-standing past practice."

The change at issue involved the sale of truck routes to independent distributors in 2016.

The employer argued that it had a past practice of selling truck routes to independent distributors because over the past 17 years, it had sold 51 driver routes.

The ALJ rejected the employer's past practice defense on two grounds:

(1) the number of route sales differed from year to year; and
(2) the route sales in 2016 differed "in kind and degree" from prior years because the prior routes were sold on the basis of unprofitability, unlike the 2016 route sales. *Id.*

Past Practice –
Mike-Sell's Potato Chip

The Board majority rejected the ALJ's reasoning and found the employer acted consistent with past practice.

- the sale of 51 driver routes over the span of 17 years is sufficient to establish past practice; **does not matter** that the past sales did not take place at the **same time**, in the **same number**, or in **the same intervals**.
- "to establish conformity with an established past practice, a party need not show that the underlying reason for is action is exactly the same or that it relied on consistent criteria to make the decision."

Confidential Workplace Investigations – *Apogee Retail LLC d/b/a Unique Thrift Store, 368 NLRB No. 144* (Dec. 16, 2019)

Apogee Retail LLC d/b/a Unique Thrift Store and Kathy Johnson. Cases 27–CA–191574 and 27–CA–198058

December 16, 2019

DECISION AND ORDER REMANDING

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

The issue in this case is whether the Respondent lawfully maintained two written rules, one requiring employees to "maintain confidentiality" regarding workplace investigations into "illegal or unethical behavior" and the other prohibiting "unauthorized discussion" of investigations or interviews "with other team members." We overrule the Board's approach to investigative confidentiality rules set forth in *Banner Estrella Medical Center*, 362 NLRB 1108 (2015), enf. denied on other grounds 851 F.3d 35 (D.C. Cir. 2017), which demands a case-by-case determination of whether confidentiality can be required in a specific investigation.

368 NLRB No. 144

Confidential Workplace Investigations – *Apogee*

- Board held that employers may lawfully maintain and enforce rules requiring confidentiality for the duration of a workplace investigation.

- Overruled *Banner Estrella Medical Center,* 362 NLRB 1108 (2015), which made it very difficult for an employer to justify enacting a confidentialtiy rule during workplace investigations.

- The Board reasoned that confidentiality rules during workplace investigations are important to:
  - Respond promptly to misconduct.
  - Protect employee privacy.
  - Ensure the integrity of the investigation.

Confidential Workplace Investigations – *Apogee*

- Takeaways:
  - Requesting that interviewees maintain confidentiality throughout the investigation is presumptively lawful.
  - Employers no longer need specific evidence in each case to support an investigative confidentiality rule.
  - However,
    - Requesting confidentiality beyond the end of an investigation falls under *Boeing* Category 2, requiring individualized scrutiny.
    - Confidentiality rules should not extend to non-participants.
    - Confidentiality rules should not extend to discussions about the underlying incident(s) or workplace investigations generally.

Restrictions on Use of Work Email – *Caesars Entertainment, 368 NLRB No. 139 (Dec. 16, 2019)*

Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino *and* International Union of Painters and Allied Trades, District Council 16, Local 159, AFL–CIO. Case 28–CA–060841

December 16, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

The issue before us is whether the National Labor Relations Act requires the Respondent to permit employees to use its email and other information-technology (IT) resources for the purpose of engaging in activities protected by Section 7 of the Act. The Respondent indisputably has a property right to restrict employee use of its equipment, including its IT resources.[2] The question presented here is whether that property right must give way where employees seek to use the Respondent's IT resources for Section 7 activity. In deciding this issue, we are guided by the Supreme Court's admonition that "[o]rganization rights are granted to workers by the same

368 NLRB No. 139

Restrictions on Use of Work Email – *Caesars Entertainment*

- The Board overruled *Purple Communications*, and held that:
  - An employer does not violate the Act by restricting the nonbusiness use of its IT resources absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other, or proof of discrimination.

- Rules set forth in the “General Restrictions” section of the Computer Usage policy were lawful.
  - *However, the Board found that the “Confidentiality” rule was governed by the standard announced in The Boeing Co., 365 NLRB No. 154 (2017), and remanded that part of the case to the ALJ.*

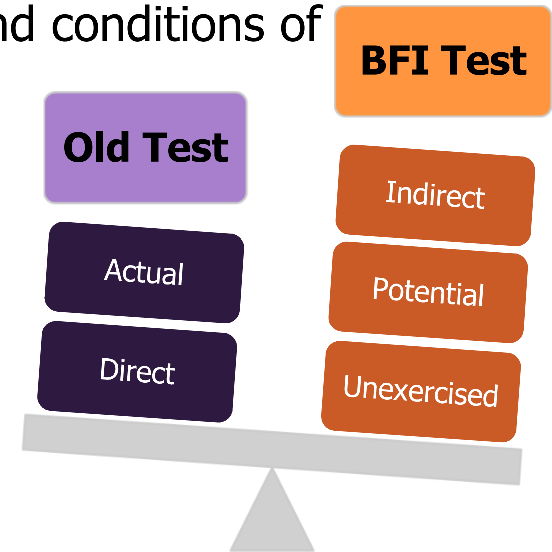
Restrictions on Use of Work Email – *Caesars Entertainment*

- Employers may lawfully restrict employees' use of IT resources, IF
  - *Facially neutral (they cannot discriminate against Section 7 activity)*
  - *Neutral in application (cannot be applied to discriminate against Section 7 activity)*

- If an employer's email system furnishes the only reasonable means for employees to communicate with one another, the employer may be required to permit access to its IT systems for Section 7 purposes.
  - *NLRB noted it would be "atypical and rare"*

Joint Employer - Old Test

- ***Browning-Ferris Industries (2015)***
- "[S]hare or codetermine those matters governing the essential terms and conditions of employment."
- "[I]nclusive approach in defining 'essential terms and conditions of employment.'"
- "We will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a 'limited and routine' manner." (emphasis added)



New Joint Employer Rule
Effective April 27, 2020

- Reverts to pre *Browning-Ferris* standard.

- To be a joint employer, new rule will require that an employer both possess and actually exercise substantial direct and immediate control over one or more of the essential terms and conditions of employment of another employer's employees.

- Clarifies that although indirect and even reserved but unexercised control can be considered as part of the joint employer analysis, such control cannot support a joint employer finding without substantial direct and immediate control.

Other Important Cases

- ***Prime Healthcare Paradise Valley, LLC,* 368 NLRB No. 10 (June 18, 2019)** Arbitration agreements that require mandatory arbitration of all claims are unlawful because they interfere with employees' Section 7 right to file ULP charges with the NLRB.
  - Previously, the Supreme Court had held that arbitration agreements prohibiting class actions = not unlawful in *Epic Systems* but did not address whether the Act prohibits overbroad language that interferes with the right of employees to file NLRB charges.
- ***Electrolux Home Products, Inc.,* 368 NLRB No. 34 (Aug. 2, 2019)** Pretextual reason for discharge does not automatically establish that union activity was a motivating factor in the discharge.
  - Previously, evidence of pretext satisfied GC's burden to show union activity = motivating factor.
- ***Bexar County Performing Arts Center Foundation,* 368 NLRB 46 (Aug. 23, 2019)** Can generally exclude off-duty contractor employees from property for engaging in solicitation/picketing.
  - Previously, off-duty employees of a contractor enjoyed the same rights as regular employees

Other Important Cases

- ***General Motors LLC*, 368 NLRB No. 68 (Sep. 5, 2019)** Invitation to file briefs on whether to reconsider standards for determining whether profane outbursts and offensive statements of a racial or sexual nature, made during the course of PCA, lose the protection of the Act.
  - *Currently, such comments during PCA are generally protected.*
- ***Phillips 66*, 369 NLRB No. 13 (Jan. 31, 2020)** Upheld employer's implementation of final offer on impasse. "[B]are assertions of 'flexibility' on open issues and its generalized promises of 'new' proposals do not, without more, demonstrate a significant change in bargaining position."
- ***Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (Dec. 16, 2019)** Restrictions on the size of union insignia are valid based on employer's interests in providing customers with a satisfactory shopping experience and protecting its merchandize from theft.

Thanks!

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Click Here for full bio

As one of the leading class action litigators in the United States, Douglas R. Hart handles nationwide class action litigation and serves as national class action counsel for several Fortune 100 companies. Doug regularly counsels on all types of employment-related class action lawsuits on behalf of employers, including matters related to pay practice and wage and hour, disparate impact and intentional discrimination, and pension plans. He serves clients in diverse industries, including retail, financial services, insurance, healthcare, and construction.

Doug has a successful track record defending some of the largest class action lawsuits filed against employers both in California and nationally, with several of the cases being dismissed outright.

Doug is at the forefront of labor and employment issues, frequently assisting employers with strategies concerning labor-management relations and actively negotiating complex collective bargaining agreements. He has negotiated several groundbreaking contracts that serve as models for their respective industries.

Before joining Morgan Lewis, Doug was a partner in the labor, employment, and immigration practice of another global law firm, resident in Los Angeles.

Join us next month!

Please join us for next month's webinar:

Fast Break: Medicare Suspensions

Featuring Jake Harper

- March 17, 2020 3:00 PM (EST)