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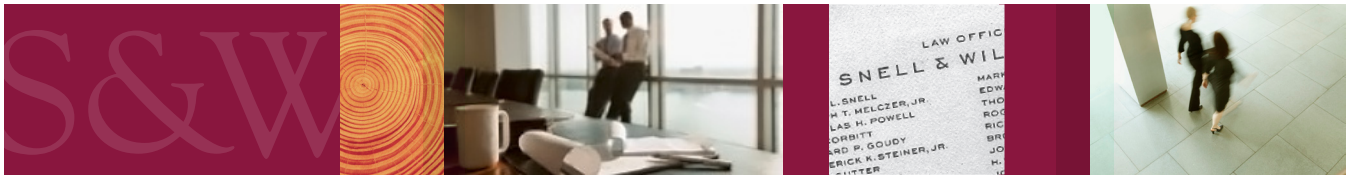


# LABOR LAW

## THE BASICS

By Gerard Morales © 2013

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## I. THE NLRA AND THE NLRB

The National Labor Relations Board ("NLRB" or "Board") is an independent federal agency charged by Congress with enforcing and administering the National Labor Relations Act ("NLRA" or "the Act"). 29 U.S.C. § 151 et. seq. The Act encompasses the basic labor-management relations policy of the United States. Its goal is to mitigate and eliminate obstructions to the free flow of commerce arising out of industrial strife.

The Board consists of five members appointed by the President with the approval of the Senate for five-year staggered terms. *New Process Steel v. NLRB,* 1380 S.Ct. 2635 (2010); *Noel Canning v. NLRB,* ___ F.3d ___ No. 12-1115, 2013 W.L. 276024 (D.C. Cir. 1/25/13).

The NLRA also established the Office of General Counsel of the NLRB ("GC"), whose basic function is to investigate charges alleging violations of the Act and on the basis of such investigations, decide whether to issue and prosecute complaints alleging violations of the Act (NLRA Section 3).

The NLRB has exclusive jurisdiction with respect to allegations of violations of Section 8 (unfair labor practices). In order to carry out its mission of administering and enforcing the NLRA, the NLRB combines the functions of investigation, prosecution and adjudication.

In essence, the Act seeks its goals through two methods—the encouragement of collective bargaining, and the protection of workers' exercise of full freedom of association, self-organization and designation of representatives.[1]

## II. NLRB REGIONAL OFFICES

The NLRB has delegated authority with respect to the protections of workers right to designate representatives (the representation area) to its Regional Directors ("RDs"). The GC investigates charged allegations and prosecutes complaints through the RDs and the Regions' staff. RDs are the chief officers in each of the 32 regions in which the country is divided for purposes of administering the Act.

Each region has an office with a staff, which, in addition to the RD, includes regional attorneys, field examiners and field attorneys. RDs and their staff bear the primary responsibility for the administration and enforcement of representation procedures, including the proper conduct of the secret ballot elections, for the investigation of charged allegations and for the prosecution of complaints.

## III. UNIONS AND ELECTIONS

In order to protect the workers' right to designate a representative of their own choosing for the purpose of collective bargaining with their employers, the Act and the rules and regulations issued by the NLRB set forth detailed procedures, which employees may use to exercise their right to select or reject a collective bargaining representative.

The heart of the NLRB representation procedures is the election by secret ballot. Under the Act, the NLRB controls the procedural conduct of elections and the substantive contents of the campaigns, typically conducted by employers and labor unions, which precede such elections.[2]

It is well established that the NLRB has very broad discretion in establishing and enforcing the procedures necessary to ensure the fair and free choice of bargaining representatives by employees.[3]

## IV. EMPLOYEES DESIGNATE REPRESENTATIVES BY "APPROPRIATE UNITS" OR GROUPINGS THAT SHARE COMMUNITY OF INTERESTS

Section 9(b) of the Act provides that "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Accordingly, the Board and the Courts have developed a body of law on the issue of what constitutes an "appropriate unit" for purposes of collective bargaining.

The Board does not need to determine the only appropriate or the most appropriate unit. It is sufficient that the unit be "an appropriate unit." If the petitioner seeks a unit

1 How to Take a Case Before the NLRB, 7th Ed. ABA Section of Labor and Employment Law.

2 Id. at 245.

3 NLRB v. A.J. Tower Company, 329 U.S. 324 (1946).

which the Board finds appropriate, alternative proposals will not be considered. *P. J. Dick Contracting*, 290 NLRB 150 (1988).

In essence, the Board uses the concept of "community of interest" to determine what constitutes "an appropriate unit." The following factors are considered in determining the appropriateness of a unit:

- Similarities in duties, skills, wages, fringe benefits, hours, working rules and conditions.
- Interchange among employees.
- Employer's organizational structure.
- Integration of the work flow and interrelationship of the production process.
- Bargaining history.
- Extent of organization.
- Desires of petitioner.

## A. Appropriate Units—Basic Statutory Exclusions

Certain workers are excluded from the Act's coverage:

1. Section 2(3). **Agricultural Employees**—employees who work primarily in connection with the agricultural operation. *Holly Farms Corp. v. NLRB,*___ U.S. ___, 152 LRRM 2001.

2. Section 2(3). **Independent Contractors**. The basic test that has been traditionally applied by the Board and the courts to determine the status of a worker as employee or independent contractor is the "right to control" test. Simply stated, if it is shown that the employer controls the manner and means by which the result is to be accomplished, the relationship is one of employment. If, however, the right to control is exercised only with respect to the result sought, the relationship is more likely to be that of an independent contractor. The Board considers a number of factors in order to determine whether the employer controls the manner and means or merely the result. The resolution of this question depends on the facts of each case and no one factor is determinative. Those factors have also been generally used by the courts in wrongful discharge and third party damage actions. The principal factors, which the Board considers in applying the right to control test are:

   a. The amount of supervision over the manner and means of performance, the equipment used, and the worker's hours of work.

   b. Whether the worker depends on this work for regular income and/or has other sources of income; whether the worker can simultaneously perform work for more than on principal.

   c. Who pays the expenses incurred in connection with the work; who purchased and owns the facilities and equipment used in the work; who carries the property insurance; who pays license fees and taxes.

   d. What records are submitted by the "independent contractor" and who keeps those records.

3. Section 2(3). **Individuals Employed by a Parent or Spouse**. *International Meat Products Co.,* 107 NLRB 65, 66-67 (1953).

4. Section 2(3). **Domestics**. *NLRB v. Imperial House*, 831 F.2d, 999 (11th Cir. 1987).

5. Section 2-(2). **Employees of non-employers**, i.e., employees of the United States or any wholly-owned Government corporation, any federal reserve bank, or any state or political subdivision thereof, or persons subject to the Railway Labor Act.

6. Section 2(11). **Supervisors**. The supervisory status of an individual under the Act depends on whether the individual possesses authority to act in the employer's interest in both the matters and manner specified in Section 2(11). Office of the General Counsel NLRB, An Outline of Law and Procedure in Representation Cases. Section 2(11) defines the term "supervisor" as:

   > …[a]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively direct them in such action, if in connection with the forego-

> ing, the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment. (emphasis added.)

Congress enacted Section 2(11) to allow employers to ensure the undivided loyalty of their supervisors. *Laborers and Hod Carriers Local No. 341 v. NLRB*, 564 F.2d 834,.837 (9th Cir. 1977). It is well established that Section 2(11) is interpreted in the disjunctive and the existence of any one of the indicia listed is sufficient to support a finding that an individual is a supervisor. *Laborers and Hod Carriers Local*, *supra*; *NLRB v. Corral Sportswear Company*, 383 F.2d 961, 963 (10th Cir. 1967), cert. denied 390 U.S. 995 (1968).

## B. Board Policy Affects the "Community of Interest" of Certain Classifications of Employees

The Board has developed policies that affect the "community of interest" analysis of certain classifications.

1. **Confidential Employees**. Those employees who are closely related to management and whose work involves labor relations. *See e.g., NLRB v. Hendricks County Rural Electric Membership Corporation*, 454 U.S. 170 (1981).

2. **Managerial Employees**. Although the Act does not specifically refer to managerial employees, the courts and the Board have created an exclusion from bargaining units for "managerial employees." *NLRB v. Yeshiva University,* rrr U.S. 672, 682. This exclusion is predicated on the same rationale as the supervisory exclusion: "that an employer is entitled to the undivided loyalty of its representative." *Id.* In order to achieve this objective, the courts and the Board exclude from bargaining units "employees who exercise discretionary authority on behalf of the employer" so that they "will not divide their loyalty between employer and union." *Id.* at 687-688.

   In *Yeshiva*, the United States Supreme Court concluded:

   > "Managerial employees are defined as those who "formulate and effectuate management policies by expressing and making operative decisions of the employer. … Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management." (emphasis added.)

   *Id.* at 682-683. (Quoting *NLRB v. Bell Aerospace Company*, 416 U.S. 267, 281-282 (1974)). An employee may be excluded as "managerial" if the employee "represents management's interest by taking or recommending discretionary actions that effectively control or implement employer policy." *Id*. at 683. (emphasis added.) An employee qualifies as managerial if he has authority to formulate, determine, or effectuate employer policies concerning employee relations matters, or whom other employees could reasonably believe to have such authority. Office of the General Counsel, NLRB, An Outline of Law and Procedure in Representation Cases; *Simplex Industries*, 101 LRRM 1466, 1467 (1979).

3. **Relatives of Management**. Does a special status or relationship to management preclude community of interest? *Blue Star Concrete Corp*., 305 NLRB No. 45 (1991); *M.C. Decorating*, 306 NLRB No. 176; *Cumberland Farms*, 272 NLRB 336 (1980).

4. **Plant Clericals and Office Clericals**. Plant clericals are customarily included in P&M units because they share substantial community of interests with P&M employees. Office clericals are excluded from P&M units. Absent agreement of the parties, office clericals and plant clericals are not joined in a single unit, e.g., *Kroger Co*., 204 NLRB 1055 (1973).

5. **Technical Employees**. Highly skilled employees that do not meet statutory test for professional employees are frequently placed in a separate bargaining unit, based on community of interest principles, *Sheffield Corp*., 134 NLRB 1101 (1961). Their work must be of a technical nature involving the use of independent judgment and requiring exercise of specialized training. However, the Board does not automatically exclude technical employees from P&M units. The character of the relationship between the work of the technical and P&M employees determines their com-

munity of interest. *Virginia Manufacturing Co.*, 311 NLRB 992 (1993); *Livingston College*, 290 NLRB 304 (1988); *Power Incorporated v. NLRB*, 147 LRRM 2833 (D.C. Cir. 1994).

## C. Appropriate Units—Basic Statutory Limitations

1. **Professional Units**. Sections 9(b)(1) and 2(12).

The term professional employee means (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical process; or (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

2. **Guard Units**. Section 9(b) (3). A guard is one who enforces rules to protect (i) the property of the employer; or (ii) the safety of persons on the employer's premises. *Wells Fargo Armored Services*, 118 LRRM 2613; *Elite Protective Services*, 300 NLRB 832 (1990).

3. **Craft/Departmental Units**. Section 9(b) (2). Distinct and homogeneous group, functionally distinct department. *See, Mallinckrodt Chemical Works*, 162 NLRB 387 (1966). The same community of interest analytical framework is used to determine whether a P&M subgroup enjoys community of interest separate from other P&M subgroups and, therefore, constitutes a separate appropriate unit. *NLRB v. J. C. Penney*, 237 NLRB 794, enfd., 620 F.2d 718 (9th Cir. 1980).

## D. Appropriate Units—Other Frequent Issues

1. **Multi-plant Units**. There is a presumption in favor of a single-plant unit. *See, e.g., Gitano Group*, 308 NLRB 1172 (1992). To rebut the presumption, look at factors such as (1) central control of daily operations and labor relations; (2) interchange of employees; (3) similarity of skills and job classifications; (4) commonality of working conditions, fringe benefits and supervision; (5) geographical separation; (6) plant and production integration, and (7) bargaining history. *See e.g. Mercy Health Services*, 311 NLRB No. 38 (1993)

2. **Multi-employer Units**. Units consisting of employees of distinct employers are permissible only when all parties consent to such a unit. *Oakwood Care,* 743 NLRB 659 (2004). Withdrawal from a multi-employer unit must be unequivocal and in writing to all parties prior to commencement of negotiations. Once negotiations have commenced, withdrawal only by express consent of all parties. *Retail Associates, Inc.,* 120 NLRB 388 (1958).

3. **Units by Rulemakinq**. The Board has promulgated a rule that defines bargaining units for acute care facilities (excluding psychiatric hospitals and nursing homes). 52 Federal Register 3920-27.

4. **Extent of Organization**. Section 9(c)(1) provides:

> In determining whether a unit is appropriate for the purposes specified in subsection (b), the extent to which the employees have organized shall not be controlling.

*See, e.g., Metropolitan Life Ins. Co. v. NLRB*, 380 U.S. 438 (1965), on remand, 156 NLRB 1408 (1966).

# V. THE NLRA PROTECTS EMPLOYEES' RIGHT TO ENGAGE IN CONCERTED ACTIVITIES FOR MUTUAL AID AND PROTECTION

Section 7 of the Act provides employees with the right to self-organize, to form, join, or assist labor organizations, [and] 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. Section 7 therefore protects employees' right to engage in concerted activities, distinct from union activities, for the purpose of mutual aid or protection. 29 U.S.C. §157.

Section 8 of the Act states "(a) It shall be an unfair labor practice for an employer - (1) to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 …."

## A. What Are Concerted Activities

Employees are engaged in protected concerted activities when they act in concert with other employees to improve their working conditions. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1982); *NLRB v. Washington Aluminum*, 370 U.S. 9, 14 (1962).

An employer that terminates or takes any adverse employment action against an employee for engaging in protected concerted activity commits an unfair labor practice and must reinstate, pay back pay and post/e-mail an appropriate notice to employees. *Triangle Electric Co*., 335 NLRB 1097 (2001); *Rinker Pontiac*, 216 NLRB 239 (1975).

## B. No Single Definition of "Concerted Activities"

A single definition of what constitutes protected, concerted activities does not exist. Several factors, however, must be present.

First, the activity is concerted if it is undertaken by two or more employees, or by a single employee acting on behalf of other employees or at least with the objective of inducing or preparing for group action. *Cibao Meat Products*, 338 NLRB 934 enfd., 174 LRRM 2224 (2nd Cir. 2004); *Bowling Transportation, Inc. v. NLRB*, 352 F.3d 274, 280 (6th Cir. 2003); *Meyers Industries*, 281 NLRB 882 (1986), affirmed 835 F.2d 1481 (D.C. Cir. 1987).

Second, the activity must be undertaken for the mutual aid or protection of employees, regarding terms and conditions of employment. *Holling Press, Inc*., 343 NLRB #45 (2004); *NLRB v. City Disposal*, 465 U.S. 822, 831 (1984) (the lone employee who intends to induce group activity).

Third, the activity must be pursued in a manner which would not "pull it from the protective umbrella of Section 7." *Canyon Ranch, Inc*., 321 NLRB 937 (1996). (Employees have no right to wrongfully obtain information from employers); *Uniforms Rental Service*, 161 NLRB 187 (1966).

## C. Losing the Act's Protection

Employees engaged in concerted activity may lose the protection of the NLRA for improper conduct during otherwise protected activity. *Atlantic Steel Co*., 245 NLRB 814 (1979); *Starbucks Coffee Co*., 354 NLRB No. 99 (2009); *Plaza Auto Center v. NLRB*, 664 F.3d 286 (9th Cir. 2011); *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

The *Atlantic Steel* analysis is applied when employee makes public outburst against specific supervisors or against the Employer in general.

Four factors are examined:

1. The place of the activity (public vs. private)
2. The subject matter (terms & conditions)
3. The nature of the employee alleged misconduct (loud words, disruption of business, physical restraint, gestures)
4. Whether the employee misconduct was provoked by the Employer unfair labor practices (threats, discharge, etc.)

The *Jefferson Standard* analysis is applied when the employee activity is related to ongoing labor disputes and issue is whether it was "so" disloyal, reckless, or maliciously untrue to lose the Act's protection – (generally, disparagement of company's product). *Mastec Advanced Tech*., 357 NLRB No. 17 (7/21/11)

## D. Concerted Activities—Areas of Concern

Four areas where concerted protected issues are frequently confronted:

1. Handbook/Oral Rules and Policies restricting the language employees may use to communicate

2. Handbook/Oral Rules and Policies on use of communication equipment

3. Evaluations/Disciplinary meetings

4. Social Media

Handbook rules and policies are unlawful if expressly restrains Section 7 activity: e.g., "Employees shall not discuss their wages or other terms of employment except with Management." *Lutheran Heritage*, 343 NLRB 646 (2008).

If not expressed, they may be unlawful if:

1. Employees would "reasonably" construe the language to prohibit Section 7 activity. *Lafayette Park Hotel*, 326 NLRB 824 (1998); enf'd, 203 F.3d 52 (D.C. Cir. 1999), e.g., "Do not discuss matters related to your work with outsiders or others that do not have a right to know."

2. Rule promulgated in response to union activity. *Northeastern Land*, 352 NLRB 744 (2009); or

3. Applied to restrict exercise of Section 7 rights, i.e., Disparate Treatment. EXAMPLE: "e-mail to be used only for business of company." *Lutheran Heritage*, 343 NLRB 646 (2004).

### E. Social Media—Avoiding NLRB Scrutiny

Dangerous social media policies:

1. Policies prohibiting "[t]he use of electronic communication and/or social media in a manner that may target, offend, disparage, or harm customers, passengers, or employees; or in a manner that violates any other company policy."

2. Policies prohibiting "[n]egative conversations about associates and/or managers …"

3. Policies expressly prohibiting the use of social media to discuss wages, hours and working conditions

4. Policies that prohibit employees from discussing the company or its employees—even if the comments are disparaging!

5. Policies that prohibit employees from posting pictures of themselves online, which depict the employer in any way

6. Policies that prohibit employees from using social media in a way that "may violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of that person."

7. Policies that prohibit "offensive conduct," "harassment," "defamation," "inappropriate discussions," "rude and discourteous behavior," or other embarrassing posts

8. Policies that prohibit employees from using the Employer's logos or photographs

Safer policies:

1. Policies prohibiting the use of social media to:

   a. Discuss confidential or proprietary information belonging to the company and its clients, including intellectual property such as drawings, designs, pricing information, customer information

   b. Abuse, harass or disparage other employees because of their race, religion, gender, disability, national origin or other protected class

   c. Make explicit sexual references, or engage in any unlawful conduct

   d. Disparage the company's products or services

## VI. INVESTIGATION AND PROSECUTION OF UNFAIR LABOR PRACTICE CHARGE

As stated previously, the GC, through the Regional Office staff investigates and prosecutes charges alleging violations of the Act. The following is an outline of the basic principles that apply to said investigations and prosecutions:

### A. Statute of Limitations

The limitations period provided in the NLRA is six months. "Provided that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge …" NLRA Section 10(b).

## B. Investigations and Prosecutions

Sections 10 and 11 of the NLRA describe the powers of the Board. Pursuant to those sections, and to the Administrative Procedures Act, 5 U.S.C. Section 552 *et seq*. the NLRB has promulgated and adopted Rules, Regulations and Statements of Procedures which supplement those sections of the Act and which describe, in detail, the processes and procedures which are to be followed in the investigation of charges alleging violations of the Act (unfair labor practice charges), and in the prosecution of complaints issued by the General Counsel based on said investigations.

The decisions whether or not to issue complaints are normally made, on behalf of the General Counsel, by the highest officer in the Regional Office (Regional Director), with responsibility for the investigation and prosecution of unfair labor practices in the geographic area wherein the ULPs were allegedly committed. If the Regional Director refuses to issue a complaint, that decision may be appealed to the General Counsel's office in Washington, D.C.

## C. The ULP Hearing

Once a complaint is issued, a public hearing (ULP hearing), is conducted before an Administrative Law Judge (ALJ), who, on behalf of the Board, has the responsibilities to conduct the hearing in an orderly fashion and upon completion of the hearing and submission of the parties' briefs, issue a decision which includes a complete statement of the case, findings of fact, (including credibility resolutions), conclusions of law, and recommended order.

At the ULP hearing, the case is prosecuted by an attorney for the Regional Office, acting on behalf of the General Counsel. The party(ies) who filed the charge(s) alleging that violations of the Act occurred (charging party(ies)), and the respondent(s) may be represented by counsel. All parties are entitled to call, examine and cross-examine witnesses and offer other evidence. A verbatim transcript is taken of the proceeding and all parties may present oral arguments and/or submit written briefs to the ALJ. Section 10(b) of the Act requires that unfair labor practice hearings shall, "so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts."

## D. The Appeal to the NLRB and to the Courts

Any party may file exceptions to the ALJ's decision with the Board, which should be supported by briefs. Answering briefs and cross-exceptions are also permitted. The Board's decision is based on the entire record at the hearing, the ALJ's decision, the exceptions thereto, and supporting briefs. In exceptional cases, the Board will grant permission for oral argument. NLRB decisions are published and are subject to review by the United States judicial system through appeals to the United States Circuit Courts of Appeals and from decisions of those courts to the United States Supreme Court. NLRA Section 10(f).

## E. The Discretion of the NLRB

In connection with the judicial review of NLRB decisions, the general principle is that the courts will not disturb those decisions and orders unless, reviewing the record as a whole, it appears that the Board's factual findings are not supported by substantial evidence or that the Board acted arbitrarily or otherwise erred in applying established law to the facts at issue. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Synergy Gas Corp. v. NLRB*, ___ F.2d ___, 45 LRRM 2855 (D.C. Cir. 1994); *United Food and Commercial Workers v. NLRB*, 880 F.2d 1422, 1429 (D.C. Cir. 1989). The courts will not merely rubber stamp NLRB decisions and must take into account whatever in the record fairly detracts from the weight of the evidence cited by the Board to support its conclusions. *Gold Coast Restaurant v. NLRB*, 995 F.2d 257, 263 (D.C. Cir. 1993).

# VII. CONCLUSION

This paper is designed to highlight and briefly explain some of the basic principles of the fundamental labor law in the United States – the NLRA. Hopefully it provides the reader with a better understanding of the concepts that guide the NLRB and the Courts in the labor law area, thereby assisting in the identification of basic issues. This paper is not a substitute for legal counsel and analysis of the issues that may be present in specific circumstances or cases.