BASIC LABOR LAW

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TABLE OF CONTENTS

I. FEDERAL LABOR LAWS AND PROPOSED LEGISLATION 5

II. THE NLRB 1

A. NLRB Jurisdiction 2

B. Discretionary Jurisdiction 2

C. Religious Organizations 3

D. Health Care Organizations 4

E. Non-profit Organizations 4

III. SECTION 7 RIGHTS FOR UNION AND NON-UNION "EMPLOYEES" 5

A. Section 7 Rights: "Employees" 5

B. Section 7 Rights: "Concerted Activities" 5

C. Section 7 Rights: Non-Union Employees 6

IV. UNFAIR LABOR PRACTICES 7

A. ULP Charges 7

B. Filing ULP Charges 8

C. Investigation and Settlement 8

D. Issuance of a Complaint 9

E. ULP Hearing 9

F. ALJ's Decision 9

V. FINAL NLRB ORDERS AND REMEDIES 10

A. NLRB Remedies: Cease & Desist Orders and Notice Postings 10

B. NLRB Remedies: Reinstatement and Back Pay 10

C. NLRB Remedies: Successor Liability 11

VI. STRIKER REINSTATEMENT AND BACK PAY 11

A. ULP Strikers 11

B. Economic Strikers 12

VII. INJUNCTIVE RELIEF 12

VIII. ENFORCEMENT OF NLRB ORDERS 13

IX. NLRB REPRESENTATION PROCEDURES AND ELECTIONS 13

A. Neutrality Agreements 13

B. Voluntary Recognition 14

C. Card Check Agreement 15

D. Employer Polling 15

X. PETITIONING THE NLRB FOR A REPRESENTATION ELECTION 15

A. Union Filing Requirements 16

B. Employer Filing Requirements 16

XI. TIMELINESS OF THE PETITION 17

A. Election Bar Rule 17

B. Contract Bar Rule 18

C. Expiration of CBA: Open Period 18

D. Expiration of CBA: Insulated Period 18

E. Expiration of CBA: After the Terminal Date 18

F. Health Care Industry: Open and Insulated Periods 19

XII. APPROPRIATE BARGAINING UNITS 19

A. Statutory Limitations on the NLRB 19

B. NLRB Appropriate Unit Criteria 20

C. Community of Interest" Test 20

D. Other Unit Factors 20

E. Professional Employees 21

F. Guards 21

G. Craft Units 21

H. Health Care Units 22

XIII. TYPES OF REPRESENTATION ELECTIONS 23

A. Consent Election 23

B. Directed Election 23

C. Expedited Elections 23

XIV. VOTER ELIGIBILITY 23

A. *Excelsior* List 23

B. Eligible Employees 24

C. Ineligible Employees 24

XV. THE NLRB REPRESENTATION ELECTION 25

A. Notice of Election 25

B. Observers 25

C. Ballots and Voting 25

D. Marking the Ballots 26

E. Challenging a Voter 26

XVI. OBJECTIONS TO THE ELECTION 27

A. Conduct Affecting the Election 27

B. Laboratory Conditions Standard 27

C. Critical Period 27

D. Unlawful Assistance 28

XVII. OBJECTIONS TO ELECTION CONDUCT 28

A. Opportunity to Vote 28

B. Conduct In and Around Polling Area 29

C. Ballots and Ballot Box Integrity 29

D. Resolution of the Objections 29

E. Runoff and Rerun Elections 29

F. NLRB Certification 30

G. Union Decertification 30

XVIII. MAINTAINING A NON-UNION WORKFORCE 30

A. Union Organizing Campaign Warning Signs 30

B. Reasons Employees Organize 31

C. Strategies To Avoid Unionization 31

D. No-Solicitation/No Distribution Rules..... 31

I. FEDERAL LABOR LAWS AND PROPOSED LEGISLATION

The following is an overview of the basic federal labor relations law (collectively, the "Act") for private sector businesses that affect interstate commerce:

- The National Labor Relations Act of 1935 ("NLRA"), also referred to as the Wagner Act, sought to provide employees with enforceable rights to organize, bargain collectively, and engage in concerted activities and established the National Labor Relations NLRB ("NLRB"), 29 U.S.C. §§ 151 to 169.

- The Labor Management Relations Act of 1947 ("LMRA"), also referred to as the Taft-Hartley Act, shifted existing law under the NLRA from only protecting employee rights to a more balanced statutory scheme by adding 6 union unfair labor practices ("ULPs") to the 5 employer ULPs prohibited by the NLRA, 29 U.S.C. §§ 141 *et seq*.

- The Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), also referred to as the Landrum-Griffin Act, provides standards for the reporting and disclosure of certain financial transactions and administrative practices of labor organizations and employers; the protection of union funds and assets; the administration of trusteeships by labor organizations; and the election of officers of labor organizations. The LMDRA also guarantees certain rights to all union members.

- The Non-Profit Hospital Amendments of 1974, also referred to as the Healthcare Amendments of 1974 ("1974 Healthcare Amendments"), extended the coverage of the Act to employees of all "healthcare institutions" and for such institutions resulted in the establishment of special rules in the areas of appropriate bargaining units, recognitional and organizational bargaining, and no-solicitation/no-distribution rules.

- Employee Free Choice Act ("EFCA"), proposed 2009 legislation would change current law as follows: (1) would allow the NLRB to certify a union as the bargaining representative without directing a secret ballot election if a majority of employees signed union authorization cards; (2) would remove an employer's current right to decide whether to voluntarily recognize a union based only on the card-check process or to hold a secret-ballot election among employees in a

particular bargaining unit; and (3) would require employers to allow unions to be certified through the card-check process.

In cases where at least 30% of the employees in a bargaining unit want to have a secret-ballot election, they would still be allowed to petition the NLRB for such an election but an employer would no longer be allowed to request an election. The proposed EFCA legislation would also establish stricter penalties for employers who violate provisions of the NLRA when workers seek to form a union, and set in place new mediation and arbitration procedures for resolving certain collective bargaining disputes. More specifically, the EFCA would add a penalty of up to $20,000 per violation, to be assessed against any employer that willfully or repeatedly commits an unfair labor practice during the period between the onset of an organizing campaign and the execution of the first collective bargaining agreement. This monetary penalty is in addition to any "make whole" remedy ordered.

II. THE NLRB

The National Labor Relations NLRB is an independent federal agency created by Congress in 1935 to administer the NLRA. The Act charges the NLRB with overseeing the representation process, which includes conducting secret-ballot elections and preventing and remedying ULPs committed by employers, unions, and their respective agents. The NLRB also is empowered to make rules and regulations for implementing the Act.

The NLRB itself has 5 Members and primarily acts as a quasi-judicial body in deciding cases on the basis of formal records in administrative proceedings. NLRB Members are appointed by the President to 5-year terms, with Senate consent, the term of one Member expiring each year. The current Members are Chairman Wilma B. Liebman and Peter C. Schaumber. (There are three vacancies on the NLRB.)

The General Counsel, appointed by the President to a 4-year term with Senate consent, is independent from the NLRB and is responsible for the investigation and prosecution of ULP cases and for the general supervision of the NLRB field offices in the processing of cases. The current General Counsel is Ronald Meisburg. Each Regional Office is headed by a Regional Director who is responsible for making the initial determination in cases arising within the geographical area served by the region.

The NLRB's Rules and Regulations are codified at 29 C.F.R., Volume 2, Parts 100 to 499, and are available for review on the NLRB's website at www.nlrb.gov.

A. NLRB Jurisdiction

The Act grants the NLRB jurisdiction over representation proceedings and ULP cases which affect interstate commerce. 29 U.S.C. §§ 159(c), 160(a). Therefore, the following three factors are necessary for the NLRB to have jurisdiction:

- First, there must be a labor dispute. The LMRA defines a labor dispute as "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing , or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." *Id*. § 152(9).

- Secondly, the dispute must involve employers, employees, and/or labor organizations as defined by the LMRA. *Id*. § 152(2), (3) & (5).

- Thirdly, the employer's operations affect interstate commerce. Commerce under the LMRA has been interpreted as interstate commerce in the constitutional sense. A dispute "affects commerce" if it is "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." *Id*. § 152(7).

B. Discretionary Jurisdiction

The NLRB generally will only assert jurisdiction over labor disputes that have a substantial effect on interstate commerce and the NLRB has legal authority to determine what labor disputes have a substantial effect on interstate commerce. 29 U.S.C. § 164(c)(1).

The NLRB has imposed discretionary standards for asserting jurisdiction over cases based on the industry of the employer. However, the NLRB is free to disregard those standards because they are self-imposed and not statutorily required. As long as the case affects interstate commerce, courts will not intervene in the application of the discretionary jurisdictional standards unless extraordinary circumstances exist or the NLRB has abused its discretionary authority. *NLRB v. Erlich's 814, Inc.*, 577 F.2d 68 (8th Cir. 1978).

The NLRB's discretionary jurisdictional standards are typically stated in terms of volume of business and vary based on the type of enterprise involved. The standards measure volume with direct and indirect inflows and outflows. Direct outflows refer to goods or services furnished directly to customers outside of the state. Indirect outflows are goods and services furnished to customers within the state who themselves meet a jurisdictional standard other than indirect outflow. Direct inflows are those goods and services

furnished directly to the employer from outside of the state. Indirect inflows refer to indirect purchases with an out-of-state origin.

Following are some of the NLRB's standards for asserting jurisdiction:

• Non-retail: direct or indirect inflow or outflow of at least $50,000 per year;

• Retail business: at least $500,000 per year in gross volume of business;

• Retail/non-retail combined: non-retail standard applies unless the non-retail portion is *de minimis;*

• Condominiums: housing cooperatives and condominiums with gross annual revenues of at least $500,000;

• Hospitals: at least $250,000 gross annual revenue;

• Hotels, motels, and apartment houses: at least $500,000 total annual volume of business;

• Restaurants and country clubs: retail standard applies;

When a state agency or court has a proceeding pending before it over which the NLRB could assert jurisdiction, the agency or court may petition the NLRB for an advisory opinion as to whether the NLRB would decline jurisdiction. The NLRB bases the advisory opinion on an evaluation of the employer's commerce operations and not on the merits of the claims. 29 C.F.R. §§ 102.98, 102.103.

C. Religious Organizations

In general, the NLRB will not assert jurisdiction over nonprofit religious organizations. *St. Edmund's Roman Catholic Church*, 337 N.L.R.B. 1260 (2002).

Questions have been raised over whether the NLRB may assert jurisdiction over lay workers at religious schools. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979).The NLRB has interpreted applicable court precedent ruling as precluding the NLRB from asserting jurisdiction over teachers in schools where the "purpose and function in substantial part are to propagate a religious faith." *Jewish Day School, Inc.*, 283 N.L.R.B. 757 (1987).

The NLRB may assert jurisdiction over a school, which although affiliated or created by a church, engages in commercial activity with a secular purpose. *Casa Italiana Language*

School, 326 N.L.R.B. 40 (1998)(Italian language school). The NLRB has also found it has jurisdiction over:

• hospitals operated by religious organizations *Bon Secours Hosp. Inc.*, 248 N.L.R.B. 115 (1980);

• homes for abused children operated by religious organizations, *RB v. St. Louis Christian Home,* 663 F.2d. 60 (8th Cir. 1981); and

• commercial operations of nonprofit religious organizations, *NLRB v. World Evangelism Inc.*, 656 F.2d 1349 (9th Cir. 1981).

D. Health Care Organizations

Under the 1974 Healthcare Amendments, NLRB jurisdiction was extended to non-profit health care organizations which include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institutions devoted to the care of sick, infirm, or aged persons. 29 U.S.C. § 152(14). The NLRB has interpreted this definition as extending its jurisdiction over the entire patient-oriented health care industry. *Beverly Farm Found. Inc.*, 218 N.L.R.B. 1275 (1975).

The NLRB has defined the phrase "other institutions" to include:

• group homes that provide educational and health care services;

• dental clinics;

• drug and alcohol abuse rehabilitation centers;

• outpatient medical facilities; and

• medical schools that are integrated with the functions and administration of an affiliated hospital.

E. Non-profit Organizations

Prior to the 1974 Healthcare Amendments, the NLRB declined to assert jurisdiction over non-profit organizations whose activities were primarily noncommercial and intimately connected to its charitable purpose. The NLRB concluded that the removal of the exemption for non-profit health care organizations eliminated its basis for declining jurisdiction over other nonprofit institutions. *Rhode Island Catholic Orphan Asylum*, 224 N.L.R.B. 1344 (1976).

III. SECTION 7 RIGHTS FOR UNION AND NON-UNION "EMPLOYEES"

A. Section 7 Rights: "Employees"

Section 7 of the NLRA provides in relevant part:

> "Employees shall have the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ." (29 U.S.C. § 157).

An "employee" is defined under the NLRA to include any individual working for an employer, unless specifically excluded from the definition. The Act excludes the following individuals: agricultural laborers; domestic servants of any family or person at his or her home; individuals employed by their parents or spouse; independent contractors; supervisors; or employees working for employers subject to the Railway Labor Act. 29 U.S.C. § 152(3).

The NLRB applies common law agency principles to distinguish between statutory employees and independent contractors. One test that the NLRB has used to determine an individual's status is called the "right-of-control" test. *Roadway Package Sys.*, Inc., 326 N.L.R.B. 842 (1998).

Managerial employees, like supervisors, are excluded from the LMRA so that they are not forced to divide their loyalties between a union and the employer. *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980). The NLRB defines managerial employees as "those who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy." *General Dynamics Corp.*, 213 N.L.R.B. 851 (1974).

B. Section 7 Rights: "Concerted Activities"

Section 7 gives covered employees the right to engage in concerted activities even though no union activity is involved and even though no collective bargaining is contemplated by the employees involved. *NLRB v. Phoenix Mutual Life Insurance Co.*, 167 F.2d 983 (7th Cir.), *cert. denied*, 335 US 845 (1948).

The definition of "concerted activity" encompasses those circumstances where individual employees seek to initiate, induce, or prepare for group action as well as actions by

individual employees bringing truly group complaints to the attention of management for the employees' "mutual aid or protection." . An employee's conduct is not "concerted" unless it is engaged in with or on authority of other employees. *Meyers Industries*, 281 N.L.R.B. 882 (1986).

If an employee is engaged in protected concerted activity, an employer may violate the NLRA if, in addition: (1) the employer knew of the concerted nature of the employee's activity; (2) the concerted activity was protected by the Act; and (3) the adverse employment action at issue (e.g., discharge, discipline, etc.) was motivated by the employee's protected concerted activity.

C. Section 7 Rights: Non-Union Employees

The NLRB has found concerted activities in non-union workforces thereby prohibiting non-union employers from: (1) limiting employee discussions regarding salary, benefits or job conditions; (2) disciplining employees for sending e-mails critical of specific managers or company policies; or (3) terminating employees for walking off the job as part of a "concerted activity." Accordingly, even in a non-union worksite, employers may not restrain employees from joining together for their "mutual aid or protection" to improve their working conditions (*i.e.*, exercising their "Section 7 rights.").

Non-union employees, however, are no longer entitled to have a co-worker present during investigatory interviews. The U.S. Supreme Court in *NLRB v. J. Weingarten Inc.*, 420 U.S. 251 (1975), established the requirement that employers grant union employee requests for a union representative to attend an investigatory interview that might lead to discipline of the employee. If a union employee has a reasonable belief that discipline or other adverse employment consequences may result from what he/she says at an investigatory interview, the employee has the right to request union representation. Management is not required to inform the employee of his/her *Weingarten* rights; it is the employee's responsibility to know and exercise his/her *Weingarten* rights.

In July 2000, the NLRB extended *Weingarten* rights to non-union employees by ruling that non-union employees could request the presence of a co-worker at an investigatory interview. *Epilepsy Foundation of Northeast Ohio*, 331 N.L.R.B. 676 (2000), enforced, 268 F3d 1095 (D.C. Cir. 2001), cert denied, 536 U.S. 904 (2002). In June 2004, the NLRB reversed its position on *Weingarten* rights for non-union employees by holding "that the *Weingarten* right does not extend to a workplace where . . . the employees are not represented by a union." According to the NLRB's 3-2 decision, "*the right of an employee to a co-worker's presence in the absence of a union is outweighed by an employer's right to conduct prompt, efficient, thorough and confidential workplace investigations.*" *IBM Corporation*, 341 N.L.R.B. 1288 (2004).

IV. UNFAIR LABOR PRACTICES

Part I of the NLRB's Casehandling Manual provides procedural and operational guidance for the Agency's Regional Directors and their staffs when making decisions as to ULP proceedings under the NLRA. A copy of this Manual is available on the NLRB's website at www. nlrb.gov.

A. ULP Charges

The NLRA provides that the following types of employer conduct constitutes a ULP:

- Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, 29 U.S.C. § 158(a)(1).
- Dominating or interfering with the formation or administration of any labor organization, or contributing financial or other support to it. *Id*. § 158(a)(2).
- Discriminating in regard to hiring or tenure of employment or any term or condition of employment so as to encourage or discourage membership in any labor organization. *Id*. § 158(a)(3).
- Discharging or otherwise discriminating against employees because they file charges or give testimony under the Act. *Id*. § 158(a)(4).
- Refusing to bargain collectively with the duly chosen representative of employees. *Id*. § 158(a)(5).

The Act similarly bars unions from:

- Restraining or coercing employees in the exercise of their rights or an employer in the choice of its bargaining representative, 29 U.S.C. § 158(b)(1).
- Causing an employer to discriminate against an employee. *Id*. § 158(b)(2).
- Refusing to bargain in good faith with the employer of the employees it represents. *Id*. § 158(b)(3).
- Engaging in certain types of secondary boycotts. *Id*. § 158(b)(4).
- Requiring excessive dues from bargaining unit members. *Id*. § 158(b)(5).
- Engaging in featherbedding (requiring an employer to pay for unneeded workers). *Id*. § 158(b)(6).

- Picketing for recognition for more than 30 days without petitioning for an election. *Id.* § 158(b)(7)(C).
- Entering into "hot cargo" agreements (refusing to handle goods from an anti-union employer). *Id.* § 158(e).
- Striking or picketing healthcare facilities without giving the required notice. *Id.* § 158(g).

B. Filing ULP Charges

Section 10(b) authorizes the NLRB, 29 U.S.C. § 160(b), to issue and serve a complaint upon a person charged with committing an ULP. The complaint must state the charge and contain a notice of hearing.

The charging party is responsible for timely and proper service of a copy of the charge to the opposing party.

There is 6-month statute of limitations for filing an ULP charge. The 6-month time bar is an affirmative defense and is waived if not timely raised. *NLRB v. Vitronic Div. of Penn Corp.*, 630 F.2d 561 (8th Cir. 1979).

The time period begins to run when the charging party has clear and unequivocal notice of the ULP. Notice may be either actual or constructive. Constructive notice occurs when the charging party would have discovered the ULP in the exercise of reasonable diligence. *CAB Assocs.*, 340 N.L.R.B. 1391 (2003).

The date of the alleged unlawful act is the trigger for the statute of limitations, not the date when the actions become effective. *U.S. Postal Serv. Marina Mail Processing Ctr.*, 271 N.L.R.B. 397 (1984).

C. Investigation and Settlement

The Regional Offices of the NLRB conduct investigations into ULP charges. If the Regional Director finds no violation or a lack of evidence to substantiate the charge, he or she may ask the charging party to withdraw the charge. If the charging party agrees, the opposing party is immediately notified of the withdrawal. If the charging party refuses to withdraw the charge, the Regional Director will dismiss the charge. The charging party has the right to appeal the decision to the General Counsel. 29 C.F.R. §§ 101.5, 101.6, 102.19.

The parties may settle claims both before and after a complaint has been issued by the Regional Director. Before a complaint is issued, any settlement must be submitted to the Regional Director for approval. 29 C.F.R. §§ 101.7, 101.9.

The parties may agree to a settlement after the complaint has been issued, however, such settlements are subject to NLRB approval. Additionally, the parties must waive their rights to a hearing and agree that the NLRB may order the respondent to take action appropriate to the terms of the settlement. If a hearing has already begun, the settlement must be submitted to the ALJ for approval. 29 C.F.R. § 101.9.

D. Issuance of a Complaint

If the charges appear to have merit and a settlement has not been reached, the Regional Director will institute formal action through the issuance of a complaint and a notice of hearing. If the charge involved novel or complex issues, the Regional Director must submit the case to the General Counsel for advice before issuing the complaint. 29 C.F.R. § 101.8.

The complaint is served on both parties. It sets forth the facts upon which the NLRB has based its jurisdiction and the facts relating to the alleged violation of the Act, as asserted by the charging party. 29 C.F.R. § 102.20.

E. ULP Hearing

Administrative law judges conduct ULP hearings. The hearings are public unless otherwise ordered by the NLRB or the ALJ. 29 C.F.R. § 102.34.

The parties may agree to waive a hearing and decision by the ALJ and submit the case directly to the NLRB. A stipulation of facts must be submitted, which includes a statement of the facts and a short statement by each party of its position on the issues. 29 C.F.R. § 102.35(a)(9).

F. ALJ's Decision

The ALJ's decision must contain findings of fact, conclusions, and the reasons and basis for the conclusions. The decision must also contain a recommended order of affirmative actions that the respondent should take if the ALJ finds that ULPs have occurred. The findings in the decision must be based on the record. 29 C.F.R. § 102.45.

Any party may file an exception to the ALJ's decision. The exception must be filed with the NLRB within 28 days of the date of service of the decision. Each exception must state specifically the determination of fact, law, or procedure to which exception is taken. 29 C.F.R. § 102.46.

The NLRB will adopt an ALJ's decision if there are no exceptions. If any exceptions are filed, the NLRB may base its decision on the record, oral arguments, or further evidence

received after the record is reopened. When a party excepts to the ALJ's finding of fact, the NLRB will review the finding to determine if it is contrary to the preponderance of the evidence. 29 C.F.R. § 102.48.

V. FINAL NLRB ORDERS AND REMEDIES

A. NLRB Remedies: Cease & Desist Orders and Notice Postings

A cease and desist order is generally confined to the specific action found to be a violation in the case and to the specific location of the violation. 29 U.S.C. § 160(c). If an employer has committed multiple violations at multiple locations, the order may be company-wide.

An employer found to have committed egregious, widespread, or repeated offenses may be subjected to an order requiring the respondent to cease and desist from violating the Act "in any other manner." *Hickmott Foods Inc.*, 242 N.L.R.B. 1357 (1979).

An employer will usually be required to post a notice to inform the employees of the employer's obligation under the NLRB's order. The NLRB will order the notice to be posted in a conspicuous location where notices are customarily posted. The employer may be required to post the notice in multiple locations, even if the behavior occurred at one location, in order to avoid similar violations that are the result of a company-wide policy. Additionally, the employer may be required to mail the notice to former employees.

Affirmative remedies tend to take the form of reinstatement and back pay orders.

In the case of a union that commits flagrant violations, the NLRB may, among other things, revoke a collective bargaining relationship, void contracts, and order the repayment of improperly collected initiation fees and dues. *Teamsters Local 705*, 210 N.L.R.B. 210 (1974).

B. NLRB Remedies: Reinstatement and Back Pay

Two remedies that the NLRB uses to enforce the policies of the LMRA are reinstatement and back pay. Reinstatement is the restoration of an employee to his or her former position, generally without loss of seniority or other benefits, after a discharge, layoff, leave of absence, or strike. Back pay is a remedy used by the NLRB to make an employee whole for any loss of pay resulting from a discharge, layoff, refusal to reinstate, or other change in employment status.

The NLRB is constrained by its statutory authority when creating remedies. It cannot compel agreement to contract terms, nor can it order punitive damages. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

Typically, the NLRB will issue a cease and desist order tailored to the specific action that is found to be a violation and require the union to post a notice of the violation. Affirmative remedies may also be ordered, such as rescinding an improperly imposed fine against a member. *Local One, Int'l Union of Elevator Constructors*, 339 N.L.R.B. 977 (2003).

C. NLRB Remedies: Successor Liability

A bona fide purchaser of a business, who has knowledge of the predecessor's ULPs, may be ordered by the NLRB to remedy the unlawful practices. The U.S. Supreme Court reasoned that imposing liability on a successor was not an unfair burden because it only applies where the successor has notice of the violations prior to the purchase. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

VI. STRIKER REINSTATEMENT AND BACK PAY

There are two types of strikes – ULP and economic (*i.e.* strikes over wages, hours, or other conditions of employment). The rules governing the rights and obligations of the employer and the employees differ depending on the type of strike.

Both ULP strikers and economic strikers have reinstatement rights. For those reinstatement rights to take effect, "the striker must somehow advise the employer that he is now ready to cease withholding labor and is ready to return to work." his notification usually takes the form of an unconditional offer to return to work.

A. ULP Strikers

ULP strikers are entitled to immediate reinstatement to their former jobs upon making an unconditional offer to return to work. An employer violates § 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1) & (3), if the strikers are not offered immediate reinstatement after making such an offer. *Dilling Mech. Contractors v. NLRB*, 107 F.3d 521 (7th Cir. 1997).

Although the employer may hire temporary replacement workers during an ULP strike, they must be discharged to allow the striking workers to return to work at the end of the strike or upon a striker's unconditional offer to return to work. The returning strikers must be allowed to return to work on the terms and conditions that would have existed but for the employer's ULP. *NLRB v. My Store, Inc.*, 345 F.2d 494 (7th Cir. 1965).

B. Economic Strikers

An employer must reinstate economic strikers upon an unconditional offer to return to work unless the employer can show there is a legitimate and substantial business justification for refusing reinstatement. *NLRB v. Mackay Radio & Tel.*, 304 U.S. 333 (1938). An employer is not, however, obligated to discharge those hired to work in place of the economic strikers if the replacements were told that their hiring was "permanent." However, the employer bears the burden of proving that it hired permanent replacements. *Jones Plastic & Eng'g Co.*, 351 N.L.R.B. 61 (2007).

An economic striker remains an employee, as defined by Section 2(3) of the Act, 29 U.S.C. § 152(3), until obtaining regular and substantially equivalent work. Therefore, an employer may be obligated to reinstate an economic striker to future positions for which that employee is qualified. *NLRB v. Fleetwood Trailer Co. Inc.*, 389 U.S. 375 (1967).

An economic striker is not entitled to reinstatement to any open position which the striker may be qualified to perform. An employer's duty to reinstate "former economic strikers extends only to vacancies created by the departure of replacements from the strikers' former jobs and substantially equivalent jobs." *Rose Printing Co.*, 304 N.L.R.B. 1076 (1991). For all other job openings, the former strikers are entitled to nondiscriminatory consideration.

An employer is not required to offer reinstatement to a striker who has abandoned the employment as demonstrated by unequivocal evidence of the striker's intent to permanently sever the employment relationship. *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467 (7th Cir. 1992).

Strikers who engage in misconduct that has a tendency to coerce other employees in the exercise of their protected rights are not protected by the LMRA. *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467 (7th Cir. 1992).Therefore, an employer is under no obligation to reinstate striking employees who are guilty of such misconduct.

However, an employer may not refuse to reinstate strikers who engaged in misconduct while tolerating equivalent or worse behavior by non-striking employees. *Cook Family Foods Inc.*, 323 N.L.R.B. 413 (1997).

VII. INJUNCTIVE RELIEF

One of the NLRB's primary functions is to prevent the commission of ULPs. Therefore, after the issuance of a complaint, the NLRB may seek in federal district court appropriate temporary relief or a restraining order if that is necessary to prevent harm. 29 U.S.C. § 160(j).

If the ULP alleged in the complaint involves secondary activity, hot-cargo agreements, or recognitional or organizational picketing, then the NLRB is required to seek an injunction pending final adjudication of the complaint. The NLRB may also seek temporary relief while its decision is being reviewed by a federal court of appeals. 29 U.S.C. § 160(l).

VIII. ENFORCEMENT OF NLRB ORDERS

Following the final order from the NLRB, the Director of the Regional Office where the charge originated is responsible for ensuring and obtaining compliance with the order. 29 C.F.R. § 101.13.

The NLRB's orders are not self-enforcing. If a party refuses to comply with an order, the NLRB may seek enforcement through the federal courts of appeals. Additionally, any party aggrieved by the NLRB's final order may petition the circuit courts to review and set aside the order. The court may enforce, modify, or set aside an order in whole or in part. 29 C.F.R. § 101.15.

Only final orders from the NLRB are reviewable by the courts. 29 U.S.C. § 160(e)-(f).

IX. NLRB REPRESENTATION PROCEDURES AND ELECTIONS

Section 9 of the Act provides the NLRB with the authority to conduct representation elections that give employees the opportunity to select a union as their certified, exclusive representative for the purposes of collective bargaining with the employer. 29 U.S.C. § 159. An NLRB-conducted election is the only way for a union to become the *certified* bargaining agent of a bargaining unit. Alternatively, an employer may voluntarily recognize a union which has demonstrated, usually through authorization cards, that a majority of the employees has selected it as their bargaining representative.

The NLRB becomes involved when any person or labor organization files a petition for an election with a regional office. If the Regional Director determines that a question concerning representation exists, a secret-ballot election will be ordered.

Part II of the NLRB's Casehandling Manual provides procedural and operational guidance for the Agency's Regional Directors and their staffs when making decisions as to representation matters under the NLRA. A copy of this Manual is available on the NLRB's website at www.nlrb.gov.

A. Neutrality Agreements

A neutrality agreement is a contract between an employer and a union in which the employer agrees to remain neutral during the union's organizational campaign. The employer and the union may negotiate the terms of the agreement and may require that

any disputes arising from the agreement be resolved through arbitration. *AK Steel Corp. v. United Steel Workers of Am.,* 163 F.3d 403 (6th Cir. 1998). Because it is a contract controlling terms and conditions of employment, a neutrality agreement is enforceable in federal district court under Section 301 of the LMRA, 29 U.S.C. § 185. *Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993).

B. Voluntary Recognition

An employer may voluntarily recognize a union without an official secret ballot election so long as the union does, in fact, have the support of the majority of employees in the appropriate bargaining unit. "It is a long-established NLRB policy to promote voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor-management relations." *MGM Grand Hotel Inc.*, 329 N.L.R.B. 464 (1999).

An employer does not commit an ULP by revoking a voluntary recognition agreement because the manner in which a union achieves recognition is not a mandatory bargaining subject. *Pall Corp. v. NLRB*, 275 F.3d 116 (D.C. Cir. 2002).

A union that has been voluntarily recognized may file a petition for an election at any time. An election is the only way to become certified by the NLRB. *General Box Co.*, 82 N.L.R.B. 678 (1949).

A voluntary recognition agreement may be either oral or in writing. *Mojave Elec. Coop. Inc.*, 210 N.L.R.B. 88 (1974).

The NLRB recently modified its voluntary recognition bar doctrine as follows:

"There will be no bar to an election following a grant of voluntary recognition unless (a) affected unit employees receive adequate notice of the recognition and of their opportunity to file a Board election petition within 45 days, and (b) 45 days pass from the date of notice without the filing of a validly-supported petition. These rules apply notwithstanding the execution of a collective-bargaining agreement following voluntary recognition. In other words, if the notice and window-period requirements have not been met, any post-recognition contract will not bar an election."

Dana Corp., 351 N.L.R.B. 434 (2007).

Where two or more unions are actively engaged in organizational activities, an employer may voluntarily recognize the labor organization that represents an uncoerced, unassisted majority of employees unless another union has filed a representation petition. "Once notified of a valid petition, an employer must refrain from recognizing any of the rival

unions" to avoid violating Section 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2). *Grossman dba Bruckner Nursing Home*, 262 N.L.R.B. 955 (1982).

C. Card Check Agreement

An employer must have proof that the union has the support of a majority of the employees before extending recognition. This is often done through a card check agreement in which the union demonstrates its majority support through signed union authorization cards.

However, "an employer is under no obligation to accept a card count as proof of majority status, absent a clear agreement to do so." *Jefferson Smurfit Corp.*, 331 N.L.R.B. 809 (2000).

There must be a clear, express, and unequivocal statement by the employer that it intends to enter into the agreement. Absent such an agreement, an employer may refuse to recognize the union and demand an NLRB-conducted election, without violating its duty to bargain.

D. Employer Polling

An employer may poll its employees for the purpose of determining if a union does in fact represent a majority of the employees. Typically, an employer violates Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by polling employees regarding their support of a union because it has the tendency to be coercive.

However, if the employer observes the following safeguards, the NLRB will find the polling is lawful:

- the sole purpose of the poll is to determine the truth of the union's claim of support;
- the employer communicates this purpose to the employees;
- the employees are given assurances against reprisal;
- the employees are polled by secret ballot; and
- the employer has not engaged in ULPs or other activities that create a coercive atmosphere.

Struksnes Constr. Co., 165 N.L.R.B. 1062 (1967).

X. PETITIONING THE NLRB FOR A REPRESENTATION ELECTION

The NLRB's election mechanism is activated when one party petitions for an election, in accordance with Section 9(c) of the LMRA, 29 U.S.C. § 159(c). A representation petition may be filed with the NLRB by any person or labor organization acting on behalf of at

30% of the employees that it seeks to represent in an "appropriate bargaining unit" or by an employer after a labor organization has presented it with a claim to be recognized. The NLRB's regulations require that the representation petition is filed with the NLRB's Regional Director for the region in which the proposed or actual bargaining unit exists. 29 C.F.R. § 101.17.

Once filed with the NLRB, the Regional Director investigates the petition. If the Regional Director determines that a "question concerning representation" exists, a secret ballot election with be directed. In the investigation into the petition, the Regional Director will examine:

- whether the employer's business affects commerce within the meaning of the Act;

- the appropriateness of the bargaining unit;

- whether an election would effectuate the policies of the Act; and

- whether there is sufficient probability that the employees have selected the union in question to represent them.

29 C.F.R. § 101.18.

A. Union Filing Requirements

Section 9(c)(1)(A) of the Act, 29 U.S.C. § 159(c)(1)(A), allows an employee, group of employees, an individual, or labor organization to petition the NLRB by alleging that it represents a substantial number of the employees.

A "substantial number" of employees is demonstrated by evidence that at least 30 percent of the employees have selected the union to represent them. 29 C.F.R. § 101.18. The evidence is generally in the form of signed and dated authorization cards. Undated authorization cards may be accepted if they are supported by a signed affidavit which establishes the dates of the signatures. NLRB Casehandling Manual, § 11027.3.

B. Employer Filing Requirements

Section 9(c)(1)(B) allows an employer to file a petition for a representation election once it is presented with a claim by a union for recognition as the exclusive bargaining representative of the employees. Without such a claim by a union, the NLRB has no jurisdiction over the employer's petition.

Nothing in § 9(c)(1)(B) requires the employer to file a petition for an election. It merely gives the employer the option to petition the NLRB. An employer is not obligated to

accept a union's proof of majority support, nor is the employer required to petition for an election because it refuses to voluntarily recognize the union. “Unless an employer has engaged in an ULP that impairs the electoral process, a union with authorization cards purporting to represent a majority of the employees, which is refused recognition, has the burden of taking the next step in invoking the NLRB's election procedure.” *Linden Lumber Div. v. NLRB*, 419 U.S. 301 (1974).

XI. TIMELINESS OF THE PETITION

A. Election Bar Rule

Section 9(c)(3) of the LMRA states that “no election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.” Therefore, any election petition filed during this period will be dismissed as untimely.

The election bar rule only applies to valid elections. Therefore, it does not prohibit runoff elections where the results of the first election were inconclusive. *Napa of N.Y. Warehouse Inc.*, 76 N.L.R.B. 840 (1948).

A second election within a 12-month period is prohibited in the same bargaining unit or a subdivision thereof. “Section 9(c)(3) does not preclude for a 12-month period the holding of an election in a larger union, such as a plant-wide unit, where there has been a previous election in a smaller unit.” *Vickers Inc.*, 124 N.L.R.B. 1051 (1959).Therefore, employees included in the first election may vote in a new election, held within a 12-month period, as long as it is for a larger unit. *Robertson Bros. Dep't Store*, 95 N.L.R.B. 271 (1951).

Where no union was certified in an election, the one-year prohibition on a new election begins to run on the dates of the balloting, regardless of any post election challenges or objections. *Bendix Corp.*, 179 N.L.R.B. 140 (1969).

Petitions for a new election filed within 60 days or less prior to the anniversary date of the previous election will be accepted by the NLRB but any petition filed more than 60 days before the anniversary date will be dismissed as untimely. *Vickers Inc.*, 124 N.L.R.B. 1051 (1959).

A union cannot circumvent Section 9(c)(3) by withdrawing its petition after the completion of an election. The election will still act as a bar for a period of 12 months. *E. Ctr.*, 337 N.L.R.B. 983 (2002).

B. Contract Bar Rule

One of the purposes of the Act is to promote a stable union-management relationship. To achieve this, the NLRB has established the "contract bar" rule under which a current and valid contract will generally cause the NLRB to dismiss any election petition filed for the reasonable duration of the contract generally considered to be no longer than three years.

There is no statutory source for the contract bar rule. It is applied or waived at the discretion of the NLRB "as the facts of a given case may demand in the interest of stability and fairness in collective bargaining agreements." *Local 1545 Union Bhd. of Carpenters*, 286 F.2d 127 (2d Cir. 1960). The party asserting that a contract is a bar to an election petition has the burden of proving that the contract was fully executed, signed, and dated prior to the filing of the election petition. *Roosevelt Mem'l Park Inc.*, 187 N.L.R.B. 517 (1970).

C. Expiration of CBA: Open Period

The NLRB has created an "open period" during which the current contract ceases to operate as a bar and a rival union may file an election petition. The purpose of the open period is to provide employees with an opportunity for choosing their bargaining representatives at a reasonable and predictable interval.

Any petition filed more than 60 days, but not more than 90 days prior to the terminal date on the existing contract will be timely. The terminal date is the expiration date of the contract or, if the contract term exceeds 3 years, the last day of the third year. *Leonard Wholesale Meats Inc.*, 136 N.L.R.B. 1000 (1962).

D. Expiration of CBA: Insulated Period

At the end of the open period, the parties to the current collective bargaining agreement enter into an insulated period. The NLRB will not accept any election petitions in order to allow the parties to the current contract to negotiate a new agreement without threat of interruption. The insulated period runs from 60 days prior to the terminal date through the terminal date. *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958).

E. Expiration of CBA: After the Terminal Date

After the terminal date of the collective bargaining agreement, the NLRB will accept representation election petitions if they are filed before the execution date or effective date on a new contract. *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958).

A petition filed on the day that a contract is executed is generally not timely, unless the employer had been informed of the rival union's petition in a timely fashion before the execution of the new contract. *Rappahannock Sportswear Co.*, 163 N.L.R.B. 703 (1967).

F. Health Care Industry: Open and Insulated Periods

The NLRB has altered the timeline for the operation of the contract bar within the health care industry because of the notice requirements that the LMRA places on the collective bargaining agreements for health care employees.

The open period runs from 120 days to 91 days before the terminal date. The insulated period begins 90 days before the terminal date and ends on the terminal date. *Trinity Lutheran Hosp.*, 218 N.L.R.B. 199 (1975).

XII. APPROPRIATE BARGAINING UNITS

The determination of what constitutes an "appropriate bargaining unit" – a group of employees aggregated for the purpose of asserting organizational rights or for collective bargaining – is important for unions and employers.

The Act confers on the NLRB the authority to determine in each case what constitutes an "appropriate bargaining unit." 29 U.S.C. § 159(b). The NLRB will generally respect an agreement between the parties on an appropriate unit, so long as it is in compliance with the law. If the parties cannot agree on the unit, the NLRB will determine whether the unit for which the petitioner seeks an election is appropriate.

A. Statutory Limitations on the NLRB

Although the Act does not prescribe detailed criteria for determining appropriate bargaining units, thus leaving NLRB with broad discretion in this area, the Act does impose some limitations on the NLRB's authority providing the NLRB cannot:

> • include professional employees in a unit with nonprofessional employees, unless a majority of the professional employees vote for inclusion;
> • include guards in a unit with other employees who are not guards; or
> • decide that a craft unit is inappropriate solely on the grounds that a bargaining unit to represent them already exists

29 U.S.C. § 159(b).

The Act also states that in determining appropriate units, "the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). Statutory provisions concerning healthcare units are discussed below.

B. NLRB Appropriate Unit Criteria

In determining whether a unit is appropriate for bargaining, the NLRB is guided by the fundamental concept that only employees having a substantial community of interest in wages, hours, and working conditions can be grouped appropriately in a single unit. However, the Act requires only that the unit be an appropriate one; it need not be "the *only* appropriate unit, or the *ultimate* appropriate unit, or the *most* appropriate unit; the act requires only that the unit be 'appropriate.' " *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409 (1950).

The NLRB has emphasized that the Act does not compel unions to seek representation in the most comprehensive grouping of employees unless such grouping constitutes the only appropriate unit. *Federal Elec. Corp.*, 157 N.L.R.B. 1130 (1966).

C. "Community of Interest" Test

As stated above, community of interest is the fundamental factor the NLRB uses in determining an appropriate bargaining unit. There is no precise definition of "community of interest" and the NLRB makes determinations on a case-by-case basis. In general, the NLRB determines if a community of interest exists by examining the similarity of duties, skills, wages, and working conditions of the employees involved. These factors might include whether employees are covered by the same personnel policies, have the same supervisors, perform integrated work functions, or work in a location separate from others at a facility.

D. Other Unit Factors

In addition to the community of interest test, other factors NLRB examines in bargaining-unit determination are:

- The pertinent collective bargaining history, if any, among the employees involved.

- The extent and type of union organization involved, although this cannot be the controlling factor.

- The employees' own wishes in the matter.

- The appropriateness of the proposed unit in relation to the organizational structure of the company.

E. Professional Employees

Under the Act, the NLRB cannot decide that any unit is appropriate "if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." 29 U.S.C. § 159(b)(1).

The Act provides a detailed definition of professional employees, two essential characteristics of which are advanced training and work of a professional nature. 29 U.S.C. § 152(12). However, a worker with an advanced degree is a professional only if the job performed is of professional caliber—that is, involves the exercise of discretion and is predominantly intellectual and varied in character. *Twin City Hosp.*, 304 N.L.R.B. 173 (1991), enforced without opinion, 9 F.3d 108 (6th Cir. 1993).

All professional employees do not have to be placed in one unit; the Act merely limits the NLRB's power to create a mixed unit without the consent of the professional employees. *Westinghouse Elec. Corp. v. NLRB*, 236 F.2d 939 (3d Cir. 1956).

F. Guards

The Act prohibits the NLRB from deciding that a unit is appropriate "if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." Further, the Act prohibits a non-guard union from being certified as the representative of a unit of guards. 29 U.S.C. § 159(b)(3).

The Act treats guards differently "to insure to an employer that during strikes or labor unrest among his other employees he would have a core of plant-protection employees who would enforce the employer's rules for the protection of his property and persons thereon without being confronted with a division of loyalty between the employer and dissatisfied fellow union members." *McDonnell Aircraft Corp.*, 109 N.L.R.B. 967 (1954).

G. Craft Units

Craft units typically are composed of workers defined by NLRB as individuals possessing a kind and degree of skill which normally is acquired only through a substantial period of apprenticeship or comparable training.

Each request for severance is decided on a case-by-case basis. Factors NLRB uses in determining whether a craft unit should be severed from a larger unit include:

- whether the proposed unit is a distinct and homogeneous group of skilled craft workers or employees in a functionally distinct department for which a tradition of separate representation exists;

- the bargaining history at the plant and in the industry involved;

- the extent to which craft workers have maintained a separate identity;

- the degree of integration of the disputed employees in the employer's production process; and

- the qualifications of the union seeking to carve out a separate unit, including the union's experience in representing similar craft workers.

Mallinckrodt Chem. Works, 162 N.L.R.B. 387 (1966).

H. Health Care Units

In the health care industry, NLRB has exercised its rulemaking authority to define appropriate bargaining units instead of deciding appropriate units on a case-by-case basis. Specifically, NLRB has defined appropriate units for acute-care hospitals—that is, short-term care hospitals in which the length of patient stay averages less than 30 days, or in which more than 50 percent of all patients are admitted to units with such averages.

With three exceptions, NLRB recognizes only the following 8 units as appropriate bargaining units in acute-care hospitals:

- registered nurses,

- physicians,

- other professional employees,

- technical employees,

- skilled maintenance workers,

- business office clericals,

- guards, and

- other nonprofessional employees.

The three exceptions are for cases that present extraordinary circumstances, cases in which nonconforming units already exist, and cases in which labor organizations seek to combine two or more of the eight specified units. The extraordinary circumstances exception automatically applies to hospitals in which the eight-unit rule produces a unit of five or fewer employees.

In all other health care institutions, NLRB determines appropriate units on a case-by-case basis.

XIII. TYPES OF REPRESENTATION ELECTIONS

A. Consent Election

A consent election occurs when the employer and the union can agree to the details of the election and can proceed with the election without the need for a hearing before the Regional Director. The NLRB's regulations allow the parties to enter into an agreement that stipulates that any disputes that arise from the election will be decided by the Regional Director or the NLRB. 29 C.F.R. § 102.62.

B. Directed Election

If the parties cannot agree on the details of the election, the Regional Director will conduct a hearing to determine if a question concerning representation exists and to determine the appropriate bargaining unit. The Regional Director will issue a direction of election if there is a question concerning representation. 29 C.F.R. §§ 102.63, 102.64, 102.67.

C. Expedited Elections

A union commits an ULP when it pickets an employer for more than 30 days without filing an election petition with the object of "forcing or requiring the employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer" to accept the union as their bargaining representative. 29 U.S.C. § 158(b)(7).

When a petition is filed under such circumstances, the NLRB will direct an immediate election without the necessary showing of interest by the union.

XIV. VOTER ELIGIBILITY

A. *Excelsior* List

Within 7 days of the approval of a consent agreement or a direction of election, an employer must give to the Regional Director an *Excelsior* list containing the names and

addresses of all eligible voters. The Regional Director will then make the list available to the other parties. Failure to provide the *Excelsior* list is grounds for setting aside the election. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966).

The NLRB established this requirement because knowledge of employee names and addresses increases the likelihood of an informed employee choice for or against representation and a list of names and addresses is extremely difficult if not impossible to obtain in the absence of employer disclosure.

The employer must supply the employees' full names in order to be in substantial compliance with the *Excelsior* rule.

B. Eligible Employees

Eligible employees must be hired and working during the payroll period immediately preceding the date of the direction of election or approval of the consent agreement and on the day of the election. *Vultee Aircraft Inc.*, 24 N.L.R.B. 1184 (1940).

The NLRB in various decisions has declared the following persons as eligible voters:

- employees participating in mandatory training;
- regular part-time employees;
- laid-off employees who have a reasonable expectation, at the time of the election, of being recalled;
- probationary employees who have a reasonable expectation of permanent employment;
- employees on temporary sick leave;
- employees who have been temporarily transferred out of the bargaining unit in which the election is being held;
- employees who have been unlawfully discharged;
- employees who have announced their intention to quit or retire, as long as they are still on the payroll on the election date.

C. Ineligible Employees

The NLRB in other decisions has found that the following are not eligible to vote in an election:

• employees who have quit or been discharged for cause before the election;

• temporary employees with a reasonably certain term of employment.

XV. THE NLRB REPRESENTATION ELECTION

A. Notice of Election

The employer is required to post the NLRB's notice of election in conspicuous locations at least three full working days in advance of the election. The notice must remain posted until the end of the election. The NLRB strictly enforces the rules for posting the notice of election. 29 C.F.R. § 103.20(a).

B. Observers

Each party involved in the election may be represented by an equal number of observers of the party's choosing, subject to any restriction prescribed by the Regional Director. 29 C.F.R. § 102.69(a).

During the election, the observers represent the parties. In addition, they assist in the conducting of the election by identifying and checking off voters against the voter eligibility list as the employees vote. The observers may keep a list of the voters they have challenged, but they may not keep a list of all employees who vote.

No party to the election may use statutory supervisors as election observers. *Family Serv. Agency*, 331 N.L.R.B. 850 (2000). An employer may not use an employee who is closely identified or aligned with management as an observer. *Bosart Co.*, 314 N.L.R.B. 245 (1994).

C. Ballots and Voting

The NLRB furnishes the ballots for representation elections. "Before, during, and after an election, no one should be permitted to handle any ballot except a NLRB agent and the individual who votes that ballot." NLRB Casehandling Manual, § 11306.1.

The question on the ballot is phrased in accordance with the consent election agreement or the direction of election. *Id.* § 11306.2.

The polling is always conducted and supervised by NLRB agents. The voter must mark the ballot in secret, in a voting booth. 29 C.F.R. § 101.19(a)(2).

D. Marking the Ballots

In determining the winner of an election, only validly cast votes will be counted. *Woodmark Indus. Inc.*, 80 N.L.R.B. 1105 (1948).

The policy behind requiring secret ballot elections is to protect the employee from coercion from either the union or the employer as a result of the employee's vote. Therefore, a ballot is invalid if it contains the employee's signature or any other identifying marks.

The secrecy of the ballot is not merely for the personal protection of the employee. It is also a matter of public concern and not subject to waiver by the employee. If an employee shows his or her marked ballot to others, it is void. The employee will not be given another opportunity to cast a valid ballot. *Gen. Photo Prods. Div.*, 242 N.L.R.B. 1371 (1979).

The NLRB will not count a ballot without markings in any of the selection boxes or a ballot with more than one box marked, especially, in the later case, when the voter has made no attempt to clarify the selection. Where a ballot contains marks outside the selection boxes, the NLRB will not speculate as to the meaning of those markings. Instead, it will count the ballot if there is a clear preference indicated in the selection boxes. *Daimler-Chrysler Corp.*, 338 N.L.R.B. 982 (2003).

E. Challenging a Voter

The NLRB's regulations permit election observers and the NLRB agent to challenge a voter for good cause. The NLRB agent must challenge any voter whose name does not appear on the *Excelsior* list. 29 C.F.R. § 101.19(a)(2).

Challenges to an employee's eligibility must be made before the employee casts the ballot. Once a ballot is cast, its identity is lost and the vote is final. However, the Supreme Court created a narrow exception to the prohibition on post-election challenges "where the NLRB's agent or the parties benefiting from the NLRB's refusal to entertain the issue know of the voter's ineligibility and suppress the facts. *NLRB v. A.J. Towers Co.*, 329 U.S. 324 (1946).

The NLRB's agent is not obligated to challenge a voter unless the agency has actual knowledge of the voter's ineligibility. The "parties to an election bear the primary responsibility for challenging voter eligibility." *Solvent Servs. Inc.*, 313 N.L.R.B. 645 (1994).

NLRB regulations require that the challenged ballots must be separated from the other ballots cast in the election. When the election has concluded, the unchallenged ballots will be counted and the results given to the parties. 29 C.F.R. § 102.69(a).

If the challenged ballots are insufficient in number to change the outcome of the election, they will not be opened. 29 C.F.R. § 102.69(b). If the challenged ballots are sufficient to be determinative, then the Regional Director will investigate the challenges and issue a report containing recommendations for resolving the challenges.

If the election followed a direction of election, rather than a consent agreement, the Regional Director may exercise the authority to issue a decision regarding the challenges. 29 C.F.R. § 102.69(c)(1)-(3). Both the recommendations and the decision regarding the challenges may be appealed to the NLRB.

XVI. OBJECTIONS TO THE ELECTION

The Regional Director is responsible for ensuring that all parties conduct themselves properly prior to and during the election. 29 C.F.R. § 102.69(a).

A. Conduct Affecting the Election

Parties may object to conduct affecting the election within 7 days after the tally of the ballots. This objection refers to any alleged misconduct by a party during the campaign leading up to the election. 29 C.F.R. § 102.69(a).

B. Laboratory Conditions Standard

"In election proceedings, it is the NLRB's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." When the conduct of any of the parties "creates an atmosphere which renders improbable a free choice," then the NLRB will invalidate the election. *General Shoe Corp.*, 77 N.L.R.B. 124 (1948).

Misconduct that violates Section 8(a)(1) or Section 8(b)(1) of the Act because it interferes with, restrains, or coerces employees during, or leading up to an election will almost always destroy the laboratory conditions as well. *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782 (1962). However, the conduct need not be an ULP to cause the election to be set aside for destruction of the laboratory conditions. The NLRB has set more stringent requirements on the standards of conduct that can affect the outcome of an election in order to protect the employees' free choice. *General Shoe Corp.*, 77 N.L.R.B. 124 (1948).

C. Critical Period

The period of time during which conduct may affect the election, and therefore during which laboratory conditions must be maintained, is referred to as the critical period. For both consent elections and contested elections, the "critical period" begins with the filing

of the petition and ends with the conduct of the election. *Goodyear Tire & Rubber Co.*, 138 N.L.R.B. 453 (1962).

Post election conduct is not part of the critical period and, therefore, has no effect on the election. *Mountaineer Bolt Inc.*, 300 N.L.R.B. 667 (1990).

D. Unlawful Assistance

If an employer recognizes a union as the exclusive bargaining representative when that union, in fact, does not have majority support of the employees, the employer violates Section 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2), by giving unlawful assistance to a minority union. *Mar-Jam Supply Co.*, 337 N.L.R.B. 337 (2001). A union violates § 8(b)(1), 29 U.S.C. § 158(b)(1), by accepting recognition as the employees' exclusive bargaining representative when it does not represent an uncoerced majority of the employees. *Alliant Foodservice, Inc.*, 335 N.L.R.B. 695 (2001).

The employer's good faith belief that the union is the majority representative is not a defense to an unlawful assistance charge under Section 8(a)(2) of the Act. *Alliant Foodservice, Inc.*, 335 N.L.R.B. 695 (2001).

XVII. OBJECTIONS TO ELECTION CONDUCT

Parties to the election may also file objections to the conduct of the election. These objections involve the actions of the NLRB agents, observers, and the voters during the balloting. A party must file its objections within seven days after the tally of ballots. 29 C.F.R. § 102.69(a).

A. Opportunity to Vote

The NLRB may set aside an election where eligible voters have been deprived of the opportunity to vote due to changes in the election schedule. *B&B Better Baked Foods Inc.*, 208 N.L.R.B. 493 (1974)

An election may be set aside where the NLRB's agent opened the polling late or closed the polling early. However, where no employees were affected by the change in polling times, the election generally will not be set aside. *Krisch Drapery Hardware*, 299 N.L.R.B. 363 (1990).

The NLRB has established a bright-line rule for dealing with employees who attempt to vote either before or after the scheduled voting times. Voters arriving before the election has begun or after it has ended are not entitled to vote, absent extraordinary circumstances or an agreement by the parties allowing them to vote. *Rosewood Care Ctr. Inc.*, 315 N.L.R.B. 746 (1994).

An election will be set aside where the actions of the parties prevented employees from voting, if those votes would have been determinative in the election. *Sahurar Petroleum & Asphalt Co.*, 306 N.L.R.B. 586 (1992).

B. Conduct In and Around Polling Area

Electioneering is prohibited in and near the polling location. Employees waiting in line to vote and those in the actual polling room are entitled to the same safeguards against interference. "The final minutes before an employee casts his vote should be his own, as free from interference as possible." *Milchem Inc.*, 170 N.L.R.B. 362 (1968).

C. Ballots and Ballot Box Integrity

"The NLRB, through its entire history, has gone to great lengths to establish and maintain the highest standard possible to avoid any taint of the balloting process; and where a situation exists, which from its very nature casts a doubt or cloud over the integrity of the ballot box itself, the practice has been, without hesitation, to set aside the election." *Austill Waxed Paper Co.*, 169 N.L.R.B. 1109 (1968).

D. Resolution of the Objections

Objections must be filed within 7 days after the tally of the ballots has been prepared. The objection must contain a short statement explaining the party's reason for the objections. Evidence in support of the objection must be furnished to the Regional Director within 7 days after the filing of the objection. 29 C.F.R. § 102.69(a).

E. Runoff and Rerun Elections

If there are at least three choices on the election ballot and no choice receives a majority of the votes, the Regional Director shall order a runoff election between the two choices that received the largest and second largest number of votes. 29 C.F.R. § 102.70(a), (c).

All employees who are eligible to vote in the first election shall be allowed to vote again, as long as they are still employed on the date of the runoff election. 29 C.F.R. § 102.70(b).

Where a second election is ordered because the first election was set aside due to meritorious objections, the union does not need to present a second showing of interest. *Freund Baking Co.*, 330 N.L.R.B. 17 (1999).

F. NLRB Certification

When the outcome of the election is determinative and there are no timely objections, the Regional Director will issue a certification and the proceedings are closed. 29 C.F.R. § 102.69(b).

If a union receives the majority of votes in an election, the union will be certified as the exclusive bargaining representative of the employees involved in the election after all the challenges and objections are resolved. If the union does not receive a majority of the votes and all the challenges, objections, and other issues have been resolved, the Regional Director will certify that the union lost the election. NLRB Casehandling Manual, § 11470.

A certification order may not be appealed. Therefore, the only way for an employer to obtain judicial review of the certification is to refuse to bargain with the union and assert its objections to the election as its defense during the ULP charges for refusal to bargain with the union. *NLRB v. Superior of Mo. Inc.*, 233 F.3d 547 (8th Cir. 2000).

G. Union Decertification

Just as a petition for an election is filed with NLRB to enable employees to vote for a union to become their certified bargaining representative, employees may file an election petition for the decertification of an existing bargaining representative. Under NLRB regulations, a petition for decertification may be filed by any employee or group of employees, or by any individual or organization acting on their behalf. 29 C.F.R. § 102.60(a).

However, before a decertification election will be conducted by the NLRB, the petitioner(s) must be able to show that at least 30 percent of the bargaining unit support the decertification petition. 29 C.F.R. § 101.18.

XVIII. MAINTAINING A NON-UNION WORKFORCE

Many employers are unaware that union organizational activities have commenced to organize their employees. These campaigns are usually well planned, covert operations commenced from the union's offices or other off-site premises. For this reason, employers must be alert to the early warning signs commonly present in such campaigns. Once a union campaign has begun, employer communications with employees may become restricted so it is essential to reaffirm the company's commitment to its workers and to keep the employer union-free prior receiving notice of any organization campaign.

A. Union Organizing Campaign Warning Signs

- Employees stop meeting in their usual areas

- Employees avoid discussions or other contact with their supervisors
- Uncommon terms are used by the employees, such as "protected concerted activity" and "just cause" and “employee rights.”
- Employees complain to the employer in groups
- Frequency and nature of employee complaints increases

B. Reasons Employees Organize

- Employees feel that they are not treated equally or are not treated fairly
- Employees feel that they lack a "voice," or that the company does not seem to care about or listen to them
- Employees believe that they are not being fairly compensated

C. Strategies To Avoid Unionization

Establishment of effective means of communication with employees to provide them with the opportunity to present their ideas, recommendations and grievances concerning the terms and conditions of their employment:

- Personal communications with employees.
- Promote an issue free workplace.
- Posters, flyers, voice mail, e-mail, newsletters, etc
- Periodic use of group meetings.
- Understand differences between lawful topics of communication both before and once a union organizing campaign begins.

Research the union organizational, compensation and strike history record for comparable businesses in your geographic area through an outside service and your own computer research to ascertain the following facts:

- Financial obligations to the union as disclosed on various financial disclosure forms
- Obtain newspaper and other articles concerning union’s history of organizing efforts, strikes, and criminal activity of union officers.
- Obtain and read a copy of the union's Constitution and By-Laws
- Analyze wage rates, benefit plans and other terms and conditions of unionized workforces in your area.

D. No-Solicitation/No Distribution Rules

Establish lawful, effective no-solicitation and no-distribution rules for all third parties including charities prior to the commencement of a union organizing campaign. Allowing

access to an employer's property for solicitations by charitable organizations and other third parties may provide unions with the same rights once an organizing drive commences. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). In *Lechmere v. NLRB*, 502 U.S. 527 (1992), the U.S. Supreme Court held that the employer's property rights and trespass laws were properly invoked to prohibit the union's access to the parking lot to communicate with employees.

The Act does not prevent employers from enacting reasonable rules that limit organizational solicitation and distribution conducted by employees. The NLRB has established that an employer may enact a rule which prohibits union solicitation of employees during "working time," as long as the rule was not promulgated for a discriminatory purpose.

The NLRB distinguishes between "working time" and "working hours." Working time describes the period when an employee is actually performing his or her job, while working hours implies all the time from the beginning to the end of a shift or work day. A rule prohibiting union solicitations during working hours is presumptively invalid, because it covers an employee's own time, which includes paid breaks.

An employer may promulgate a rule prohibiting employee distribution of union literature both during working time and in working areas, so long as the rule was not enacted for discriminatory purposes. The NLRB has decided that rules governing distribution of literature can be more restrictive because this type of conduct presents issues of littering and other potential dangers in the work place, which do not apply to oral solicitations.

The special nature of the services provided by healthcare facilities necessitates allowing an employer to establish rules that protect patients from situations that could be detrimental to their care. In an effort to prevent disruption to patient care, the NLRB and the courts have allowed employers to prohibit all solicitation and distribution in immediate patient care areas, even during nonworking time. A healthcare facility, however, cannot issue rules that ban employees from soliciting on behalf of the union in other areas of the facility, unless it can prove that such solicitations would disrupt patient care. *NLRB v. Baptist Hosp. Inc.*, 442 U.S. 773 (1979).