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## The NLRB as an Überagency for the Evolving Workplace

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# THE NLRB AS AN ÜBERAGENCY FOR THE EVOLVING WORKPLACE

*Michael Z. Green\**

## ABSTRACT

*In addressing legal issues regarding the relationships between employers and employees, one must navigate a complex maze of rights and remedies that govern the workplace. This Essay details several recent and important workplace disputes addressed by the National Labor Relations Board (NLRB) pursuant to Section 7 of the National Labor Relations Act (NLRA). Section 7 protects a worker's right to pursue an activity for mutual aid or protection regarding wages, hours, and other terms and conditions of employment. The NLRB, a unique agency with its ultimate decisions determined by five members who primarily establish rules through adjudication rather than rulemaking, has been asked to offer an initial answer to many pressing workplace questions arising from technological and legal advances.*

*Some of the critical issues that have been or will be addressed by the NLRB include employee use of social media, use of electronic mail communications, immigrant workers' rights and remedies, enforcement of class arbitration waivers in collective wage and hour claims, organizing of college football players, protected worker speech versus employer rights and obligations to*

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\* Professor, Texas A&M University School of Law. This Essay derived from a paper presented at the *National Labor Relations Board After Eighty Years* law review symposium at the Emory University School of Law on April 10, 2015 as part of a panel on the "Opportunities for Improvement in Changing Times." The *Emory Law Journal* staff, and in particular Matthew Hayes and Benjamin Klebanoff, provided thoughtful comments that improved this final paper in immeasurable ways, and I am truly grateful to have engaged in such a valuable editing process. I would like to thank student assistants Ali Crocker, Emily Goodman, Mackenzie Lewis, Hisham Masri, and Chelsea Mikulencak for their diligent research efforts. I am also grateful for the financial support from Texas A&M University School of Law's summer research grant program. This Essay is dedicated to the memory of James E. Jones, Jr., whose passing on November 21, 2014 was a loss for all those who knew and learned from him as a labor law and race scholar. A pioneer as one of the earliest tenured, black law faculty members at the University of Wisconsin, Jones played a key role in affirmative action, labor, and employment discrimination law as a teacher, scholar, and arbitrator. He also founded the nationally recognized Hastie Fellowship in 1973 at Wisconsin Law School. See James E. Jones, Jr., *LL.M. Programs as a Route to Teaching: The Hastie Program at Wisconsin*, 10 ST. LOUIS U. PUB. L. REV. 257, 263 (1991). The Hastie Fellowship has paved the way for more than thirty lawyers of color, including me, to become full-time, tenure-track law professors. See *William H. Hastie Fellowship Program*, U. WIS. L. SCH., [http://www.law.wisc.edu/grad/fellow\\_hastie.html](http://www.law.wisc.edu/grad/fellow_hastie.html) (last visited May 9, 2015).

*limit certain speech, the scope of coverage under joint employer/independent contractor arrangements, and the intersection of labor law with antidiscrimination law concerns in the workplace. The NLRB is encountering these matters at a unique time concerning the number of NLRB members appointed by the President with advice-and-consent approval by the Senate. While in the midst of considering the ramifications of a pending Supreme Court decision regarding challenges to the scope of the President's recess appointment of certain NLRB members, the President and the Senate agreed in August 2013 to a political compromise allowing the NLRB to operate with all five members approved and in place for the first time in ten years. A full complement of NLRB members will remain in place throughout 2015, at the dawn of the NLRB's eightieth anniversary.*

*As a result of having this full complement of NLRB members, this Essay asserts that the NLRB has become the premier administrative agency for addressing workplace matters across a broad spectrum of employee–employer concerns. In this respect, the NLRB represents a super—or über—agency that points a spotlight on important workplace issues that no other administrative agency could or should address. With the five appointed members' outstanding expertise in labor law, as well as in broader workplace concerns under employment discrimination and employment law, these NLRB decisionmakers offer an unusual level of knowledge to operate on the front line in adjudicating perplexing issues that continue to evolve in the workplace.*

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*We respond when parties fail to fulfill their bargaining obligations or when workers experience the personal devastation of layoffs, terminations or denial of employment as a result of unfair labor practices. We are the agency that puts people back to work and we get them paid for the wages they lost.*<sup>1</sup>—Mark Gaston Pearce, Chairman, National Labor Relations Board.

*[T]he [National Labor Relations] Act does not confer authority on the [National Labor Relations] Board to act as an “überagency” without due regard for and proper accommodation of the enforcement processes established by these other laws and agencies.*<sup>2</sup>—Harry I. Johnson, III, Member, National Labor Relations Board.

#### INTRODUCTION: EMPLOYING THE FULL COMPLEMENT OF NLRB EXPERTISE AS AN ÜBERAGENCY FOR TODAY’S WORKPLACE

The introductory quotes from two of the current members of the National Labor Relations Board (NLRB or Board) highlight the important role that the NLRB plays in addressing key workplace concerns and how far the NLRB’s powers may extend. The NLRB has five members, each appointed to five-year terms by the President with the advice and consent of the Senate. Professor Ronald Turner has recently explained the workings of the NLRB in a very succinct fashion:

As a matter of custom, and not law, no more than three of the five NLRB members may belong to the President’s political party. Board members, performing a quasi-judicial function, consider and decide

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<sup>1</sup> See Mark Gaston Pearce, *It Gets Hot in the Kitchen: New Challenges for the NLRB*, in THE CHALLENGE FOR COLLECTIVE BARGAINING: PROCEEDINGS OF THE NEW YORK UNIVERSITY 65TH ANNUAL CONFERENCE ON LABOR 1-1, 1-12 (Michael Z. Green ed., 2013).

<sup>2</sup> Fresh & Easy Neighborhood Mkt., Inc., 361 N.L.R.B. No. 12, 2014 WL 3919910, at \*14 & n.19 (Aug. 11, 2014) (Johnson, Member, concurring in part and dissenting in part). Member Johnson first raised his criticism that the NLRB “is not an ‘überagency’ authorized to ignore those [other] laws in its efforts to protect the legitimate exercise of Section 7 rights in both unrepresented and represented workforces” in a previous case, *Plaza Auto Center, Inc.*, 360 N.L.R.B. No. 117, 2014 WL 2213747, at \*24 (May 28, 2014) (Johnson, Member, dissenting). Member Johnson was not the first person to use the term “über” when criticizing NLRB decisions that addressed broad protections of employees as being too expansive given the existence of other laws and developments in the primarily nonunion, twenty-first-century workplace. See HR POLICY ASS’N, POLICY BRIEF: HOW THE NLRB IS TRYING TO BECOME THE “UBER-REGULATOR” OF THE AMERICAN WORKPLACE (2012), [http://www.hrpolicy.org/downloads/2012/12-85\\_NLRB\\_Nonunion\\_Policy\\_Brief.pdf](http://www.hrpolicy.org/downloads/2012/12-85_NLRB_Nonunion_Policy_Brief.pdf).

cases via a process of case-by-case adjudication. Unlike most agencies, the Board rarely resorts to substantive rulemaking. While the . . . Board [has] the authority to make rules and regulations, the United States Supreme Court has made clear that “the Board is not precluded from announcing new principles in an adjudicative proceeding and . . . the choice between rulemaking and adjudication lies in the first instance within the Board’s discretion.”<sup>3</sup>

Due to technological advancements arising within this digital age and many creative responses aimed at either broadening or narrowing the scope of legal rights and remedies that workers possess, ongoing questions related to these matters have created complex issues for employers and employees. In enforcing the broad strictures of Section 7 of the National Labor Relations Act (NLRA)<sup>4</sup> in both the union and nonunion workplace, the NLRB has been called upon to answer some of the most vexing questions in the emerging digital and legal workplace.<sup>5</sup> This Essay asserts that the NLRB is strategically positioned to handle these questions better than any other agency. Its leadership from five dedicated members with significant expertise in all the various workplace laws, who are appointed by the President with the advice and consent of the Senate,<sup>6</sup> helps the NLRB to successfully operate as an überagency for today’s evolving workplace.

Resort to Congress or the Supreme Court to address these challenging workplace matters in the digital age has represented an unsatisfactory option.<sup>7</sup> Specifically, as antidiscrimination law arose in the workplace over the last fifty years, along with subsequent problems in proving employer liability in the courts and other substantial limitations including the lack of a strong

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<sup>3</sup> Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 714–15 (2006) (second alteration in original) (footnotes omitted) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974)).

<sup>4</sup> 29 U.S.C. § 157 (2012).

<sup>5</sup> See *infra* Part II.

<sup>6</sup> See 29 U.S.C. § 153(a).

<sup>7</sup> See Michael Z. Green, *Reading Ricci and Pyett to Deliver Racial Justice Through Union Arbitration*, 87 IND. L.J. 367, 370 n.12 (2011) (discussing the failed pursuit of an aggressive pro-employee legislative agenda during the Obama presidency and how delays and politics have prevented those pursuits); see also Marcia Coyle, *Ginsburg on Rulings, Race: Justice Says Public Dismay About Congress Spills over to High Court*, NAT’L L.J., Aug. 22, 2014, at 1 (referring to comments from Justice Ruth Bader Ginsburg on how the Supreme Court “was ‘once a leader in the world’ in rooting out racial discrimination” in the workplace through a landmark decision in the 1970s establishing the disparate impact theory and asserting that recent decisions have not “helped” our society in dealing with matters of race while polls show a “declining disregard for the high court” as part of a “spillover effect from the dismay about our dysfunctional Congress” (some internal quotation marks omitted)).

enforcement agency, Congress has failed to make any systematic changes in how to address these complex issues for employers and employees.<sup>8</sup> Nevertheless, the NLRB, and its protection of organized labor and concerted activity even in a nonunion workplace, has continued to offer a supplement to antidiscrimination laws for workers despite failed efforts to make additional legislative improvements.<sup>9</sup>

In Part I, this Essay describes the exceptional expertise of the current full complement of NLRB members in labor law, as well as employment and employment discrimination law.<sup>10</sup> Part I also highlights how that expertise serves the workplace in a remarkable way by having such an extraordinary collection of individuals weigh in on the pressing labor and employment law issues of the day. Part II describes the broad scope of legal protections for employees that may be addressed by the NLRB and the number of growing issues that remain uncertain in the rapidly changing workplace.<sup>11</sup> While the

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<sup>8</sup> See Michael Z. Green, *How the NLRB's Light Still Shines on Anti-discrimination Law Fifty Years After Title VII*, 14 NEV. L.J. 754, 755–56 (2014) (describing failures of Congress, the EEOC, and the courts to address workplace discrimination as the NLRB continues to support and supplement employee rights related to these legal concerns).

<sup>9</sup> See Richard D. Kahlenberg & Moshe Z. Marvit, “*Architects of Democracy*”: *Labor Organizing as a Civil Right*, 9 STAN. J. C.R. & C.L. 213, 221–29, 231–36 (2013) (describing repeated failed efforts to amend labor law from 1965 to 2009 as part of the overall difficulty to pass pro-employee legislation and recognizing how current labor law continues to supplement antidiscrimination law protections for workers).

<sup>10</sup> See *infra* Part I. For purposes of this Essay, I consider “labor law” to cover collective bargaining relationships between unions and employers along with all aspects of the NLRA and the NLRB that apply to both union and nonunion workplaces. In contrast, I consider employment discrimination and “employment law” to cover “a pastiche of statutory and common law protections for the individual employee . . . includ[ing] the statutory prohibitions of race, sex, creed, age, or disability discrimination in employment, as well as judicially-developed restrictions against unfair dismissals” including employee protections for “safety, health, and (to the extent they exist) protections of employee privacy.” Thomas C. Kohler, *The Disintegration of Labor Law: Some Notes for a Comparative Study of Legal Transformation*, 73 NOTRE DAME L. REV. 1311, 1312 n.6 (1998). Although statutory prohibitions on workplace discriminations encompass all of employment discrimination law, I also add wage-and-hour and employee-benefit protections to fall within the term employment law. Further, I consider an attorney who practices or has practiced in labor law to also have knowledge of areas covering individual employee statutory and discrimination prohibitions as well as individual common law employee protections as defined. Understanding all of these workplace legal concerns has become important, especially given the growth of employment discrimination and employment law over the last fifty years in comparison to labor law and the overlapping claims that can arise requiring knowledge of all these areas of the law. See Marion Crain & Pauline T. Kim, *A Holistic Approach to Teaching Work Law*, 58 ST. LOUIS U. L.J. 7, 7–8 (2013) (describing “the ‘holy trinity’ of American work law” as encompassing the three categories of “labor law, employment discrimination, and employment law,” while also acknowledging that “[s]ingle actions by an employer can easily yield multiple claims by workers that cross traditional legal categories”).

<sup>11</sup> See William A. Herbert, *The Electronic Workplace: To Live Outside the Law You Must Be Honest*, 12 EMP. RTS. & EMP. POL'Y J. 49, 50 (2008) (describing the growth of work-related electronic communications).

Supreme Court may be hesitant to address the impact of growing technology in the workplace given its limited knowledge,<sup>12</sup> having a full complement of NLRB members represents an informed perspective on these issues given their familiarity with legal concerns of employers, employees, and unions. Part III argues for the continued employment of a full complement of the five members of the NLRB to address the pending workplace issues of the day. Further, the ability of the President to appoint five members with the advice-and-consent approval by the Senate provides the appropriate political balance to have truly thoughtful analysis on these issues. This Essay concludes that the quality of the opinions being authored by both majority and dissenting NLRB members who are now operating on the front line in addressing these matters is helping to identify important concerns that ultimate policymakers and other decisionmakers can consider as future workplace issues develop.

### I. NLRB MEMBER EXPERTISE ON THE FRONT LINE: WORKPLACE KNOWLEDGE AND ADJUDICATION LIKE NO OTHER AGENCY

With all the pressing issues that the NLRB must address, one might ask whether the current Board, appointed by Democratic President Barack Obama, has the expertise to weigh in on these subjects. At the time of its creation by the NLRA in 1935, the makeup of the NLRB was expected to be “staffed solely by ‘three impartial Government members.’”<sup>13</sup> Historically, appointments to the Board had focused on seeking persons with “neutral or government” backgrounds. Dwight D. Eisenhower, the first Republican president after the

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<sup>12</sup> See *City of Ontario v. Quon*, 560 U.S. 746, 759 (2010) (“The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the . . . implications of emerging technology before its role in society has become clear. . . . Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.”); see also *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) (suggesting that the Court may eventually need to reconsider its current approach to expectations of privacy as “ill suited to the digital age”).

<sup>13</sup> See Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L.J. 1361, 1364 & n.12 (2000) (quoting STAFF OF S. COMM. ON EDUC. & LABOR, 74TH CONG., COMPARISON OF S. 2926 (73D CONG.) AND S. 1958 (74TH CONG.) § 3 (Comm. Print 1935)); see also Zev J. Eigen & Sandro Garofalo, *Less Is More: Structural Reform of the National Labor Relations Board*, 98 MINN. L. REV. 1879, 1886–87 (2014) (describing the history of NLRB member appointments); Turner, *supra* note 3, at 709–11 (discussing the potential political partisanship that may affect NLRB members’ votes). A full description of the history of NLRB member appointments is also provided in a chart and listing of members on the Board’s website. See *Members of the NLRB Since 1935*, NLRB, <http://www.nlr.gov/who-we-are/board/members-nlr-1935> (last visited May 9, 2015); *Board Members Since 1935*, NLRB, <http://www.nlr.gov/who-we-are/board/board-members-1935> (last visited May 9, 2015).

passage of the NLRA, changed that tradition and appointed individuals with management backgrounds.<sup>14</sup> As a result, the practice of appointing partisan members to the Board has occurred repeatedly.<sup>15</sup> Unlike twenty years ago when the last Democratic President, William J. Clinton, was in office and the Board consisted of two partisan members for each side and a neutral or government chair,<sup>16</sup> the current Board consists of all partisan members.

Specifically, the current sitting members of the Board are (1) Mark Gaston Pearce (Chairman); (2) Kent Y. Hirozawa; (3) Philip A. Miscimarra; (4) Harry I. Johnson, III; and (5) Lauren McFerran.<sup>17</sup> While one may find it important that Pearce, Hirozawa, and McFerran are the three Democrats and Miscimarra and Johnson are the two Republicans,<sup>18</sup> what is probably more important is the significant experience in labor and employment law that each member possesses.

Chairman Pearce, with an undergraduate degree from Cornell and a law degree from the University at Buffalo Law School, was the founding partner of a Buffalo, New York law firm “where he practiced union and plaintiff side labor and employment law” and also served as “an attorney and District Trial Specialist in the Buffalo . . . Regional Office of the NLRB.”<sup>19</sup> Chairman Pearce is also a member of the College of Labor and Employment Lawyers,<sup>20</sup> an organization “honoring the leading lawyers nationwide in the practice of Labor and Employment Law.”<sup>21</sup>

Member Hirozawa, with an undergraduate degree from Yale University and a law degree from New York University, served as a field attorney for Region Two of the Board after clerking for the U.S. Court of Appeals for the Second Circuit.<sup>22</sup> Before joining the Board, Member Hirozawa represented

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<sup>14</sup> See Eigen & Garofalo, *supra* note 13, at 1886–87; Flynn, *supra* note 13, at 1368–69; William B. Gould IV, *Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board*, 82 IND. L.J. 461, 463 (2007).

<sup>15</sup> Eigen & Garofalo, *supra* note 13, at 1887.

<sup>16</sup> See Flynn, *supra* note 13, at 1452 & n.351.

<sup>17</sup> See *The Board*, NLRB, <http://www.nlr.gov/who-we-are/board> (last visited May 9, 2015).

<sup>18</sup> See *Members of the NLRB Since 1935*, *supra* note 13 (identifying the dates of appointment for each NLRB member since 1935 including the current members along with their political party affiliations).

<sup>19</sup> See *Mark Gaston Pearce*, NLRB, <http://www.nlr.gov/who-we-are/board/mark-gaston-pearce> (last visited May 9, 2015).

<sup>20</sup> *Id.*

<sup>21</sup> See *About the College*, C. LAB. & EMP. LAW., <http://www.laborandemploymentcollege.org/products/About%20the%20College.aspx> (last visited May 9, 2015).

<sup>22</sup> See *Kent Y. Hirozawa*, NLRB, <http://www.nlr.gov/who-we-are/board/kent-y-hirozawa> (last visited May 9, 2015).



unions, workers, and employee benefit funds for more than twenty years at a New York law firm.<sup>23</sup>

Member McFerran, the third Democrat and newest appointee who joined the Board in December 2014, has an undergraduate degree from Rice University and a law degree from Yale.<sup>24</sup> Member McFerran clerked for the U.S. Court of Appeals for the Fifth Circuit and practiced law for a union-side law firm in Washington, D.C. before becoming Senior Labor Counsel for United States Senator Edward Kennedy and United States Senator Tom Harkin for five years.<sup>25</sup> She has also served four years as Chief Labor Counsel for the Senate Committee on Health, Education, Labor, and Pensions.<sup>26</sup>

The two Republican members have outstanding labor and employment law expertise as well. Member Miscimarra, with an undergraduate degree from Duquesne, an MBA from Wharton Business School, and a law degree from the University of Pennsylvania, has represented employers while working for several top law firms in Chicago, Illinois for more than thirty years.<sup>27</sup> Member Miscimarra has also authored or coauthored several books involving labor law issues.<sup>28</sup> Before being appointed to the NLRB, Member Johnson, with an undergraduate degree from Johns Hopkins University, a master's degree from Tufts University, and a law degree from Harvard, had worked nearly twenty years as an attorney representing employers in labor and employment law at two top law firms in Los Angeles, California.<sup>29</sup> Member Johnson was also recognized by the Daily Journal in 2011 and 2013 as one of the "Top Labor & Employment Attorneys in California."<sup>30</sup>

The current members of the NLRB have tremendous knowledge of labor law as well as backgrounds representing employers and employees in

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<sup>23</sup> *Id.*

<sup>24</sup> See *Lauren McFerran*, NLRB, <http://www.nlr.gov/who-we-are/board/lauren-mcferran> (last visited May 9, 2015).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See *Philip A. Miscimarra*, NLRB, <http://www.nlr.gov/who-we-are/board/philip-miscimarra> (last visited May 9, 2015).

<sup>28</sup> *Id.*

<sup>29</sup> See *Harry I. Johnson, III*, NLRB, <http://www.nlr.gov/who-we-are/board/harry-i-johnson-iii> (last visited May 9, 2015).

<sup>30</sup> *Id.*

employment law.<sup>31</sup> This significant experience establishes that the NLRB has prominent experts in the field deciding these challenging workplace questions at the front line. Unlike judges who may not know or appreciate the significance of the underlying disputes, the full complement of currently sitting NLRB members has vast legal knowledge obtained through many years of representing employees, unions, and employers in both labor law and employment law claims. As a result, these NLRB members can bring their insider's knowledge of their past clients' concerns to the table in weighing in on these new issues arising from legal and technological advancements in the workplace. While partisan concerns may be involved, there is certainly some degree of collegiality and concern about providing stable guidance to employers, employees, and unions that can guide these NLRB decisions.

## II. SECTION 7 PROTECTIONS AND NEW NLRB ENFORCEMENT AFTER TECHNOLOGICAL AND LEGAL ADVANCES IN THE WORKPLACE

Section 7 of the NLRA provides as follows: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>32</sup> Also, Section 8(a)(1) of the NLRA creates an unfair labor practice that can be prosecuted by the NLRB if an employer acts to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7].”<sup>33</sup> Section 7 of the NLRA applies whether there is a union involved or in a workplace with no union.<sup>34</sup>

As technology has advanced, especially with respect to social media and electronic mail communications, the NLRB has been asked to consider the implications of those communications in conjunction with the right to mutual

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<sup>31</sup> See *supra* text accompanying notes 13–30 (describing the backgrounds of the current NLRB members); see also *supra* note 10 (describing the difference between “labor law” and “employment law” in this Essay).

<sup>32</sup> 29 U.S.C. § 157 (2012).

<sup>33</sup> *Id.* § 158(a)(1).

<sup>34</sup> See Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2024 (2009) (“Section 7 could be read as providing general antiretaliation protection for all forms of worker activism, so long as the activism is ‘concerted’ and for ‘mutual aid or protection.’”). An employer may not retaliate against an employee for exercising the right to engage in protected concerted activity. *Triangle Elec. Co.*, 335 N.L.R.B. 1037, 1038 (2001); *Meyers Indus., Inc.*, 268 N.L.R.B. 493, 497 (1984).

aid and protection under Section 7.<sup>35</sup> The digital workplace differs significantly from the typical watercooler communications made by employees that the NLRB has been asked to address for most of its eighty years of existence.<sup>36</sup> As a result, the NLRB's actions in addressing these new forms of digital-age communications (through social media and electronic mail) in the context of Section 7 protections represent important developments for all those concerned about workplace matters.

In addition to the technology questions, important legal questions have arisen in other areas of the law that have started to create concerns under the NLRA. With employers obtaining key victories in front of the Supreme Court regarding various workplace concerns such as immigration, arbitration, speech, and harassment, the impact of those cases has now generated concerns regarding Section 7 rights.<sup>37</sup> Also, as businesses have faced increasing economic problems and desired to limit potential liability to their employees while also controlling outputs aimed at maximizing financial results, they have pursued business arrangements that have made it increasingly difficult to identify who may be defined as an "employee" or which business may be defined as an "employer."<sup>38</sup> In unique settings involving college football

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<sup>35</sup> See Christine Neylon O'Brien, *The Top Ten NLRB Cases on Facebook Firings and Employer Social Media Policies*, 92 OR. L. REV. 337 (2013) (identifying ten NLRB cases involving social media communications). Because a great number of the issues regarding employer actions that conflict with Section 7 rights arise in disputes regarding policies in an employee handbook, NLRB General Counsel, Richard Griffin, recently published a memorandum aimed at "help[ing] employers to review their handbooks and other rules, and conform them, if necessary, to ensure they are lawful." Memorandum from Richard F. Griffin, Jr., General Counsel, NLRB, to All Regional Directors, Officers-in-Charge, and Resident Officers, Report of the General Counsel Concerning Employer Rules 2 (Mar. 18, 2015), available at <http://www.nlr.gov/reports-guidance/general-counsel-memos> (click on "Report of the General Counsel Concerning Employer Rules"). That memorandum addresses Board policy regarding "rules that are frequently at issue . . . such as confidentiality rules, professionalism rules, anti-harassment rules, trademark rules, photography/recording rules, and media contact rules." *Id.* at 2. This memorandum also discusses a specific case that the NLRB settled after identifying several rules found "facially unlawful" in interfering with Section 7 rights and provides a helpful framework for employers to address these matters by identifying and explaining why several rules were found unlawful along with describing how a number of rules modified pursuant to the settlement now comply with the Act. *Id.* at 2-3.

<sup>36</sup> See Natalie J. Ferrall, *Concerted Activity and Social Media: Why Facebook is Nothing Like the Proverbial Water Cooler*, 40 PEPP. L. REV. 1001, 1033-34 (2013) (discussing the protections provide by Section 7 for protected speech made on social media). Although beyond the scope of this Essay, the amazing growth of social media outlets such as Facebook, Twitter, YouTube, and Google+ with millions, and in some instances billions, of subscribers appears to be feeding "a voracious appetite" with "no signs of slowing down" anytime soon. *Id.* at 1002.

<sup>37</sup> See *infra* Part II.C, D, G, H.

<sup>38</sup> See *infra* Part II.F.

players<sup>39</sup> and franchise workers,<sup>40</sup> the question of what defines an employee or an employer has expanded beyond various worker-related statutes and the common law to become an important legal consideration as well under Section 7 of the NLRA.<sup>41</sup>

With broad workplace protections under Section 7 and the NLRB's enforcement responsibility to prosecute Section 8(a)(1) unfair labor practices, the Board has started to address several hot-button workplace issues. As identified, those issues include employee protections related to social media policies, electronic mail communications, immigrant worker rights, class arbitration waivers, college football unions, joint employer/independent contractor coverage, workplace speech limits, and the overall role of the NLRB in accommodating other workplace-related laws such as employment discrimination laws banning harassment. All of these important workplace issues have now reached the front line for adjudication by the NLRB in its enforcement of the NLRA. This Part will now discuss each of these issues in turn.

#### A. *Social Media: Costco & Triple-Play Sports*

In *Costco Wholesale Corp.*,<sup>42</sup> the Board found multiple employee handbook policies were unlawful under Section 8(a)(1) of the NLRA and in particular Costco's policy of "prohibiting employees from electronically posting statements that 'damage the Company . . . or damage any person's reputation.'"<sup>43</sup> In analyzing the validity of the electronic posting and social media policy, the Board looked to see if the employees would reasonably construe this rule to prohibit Section 7 activity.<sup>44</sup> Although the policy did not explicitly refer to Section 7 activity, the broad prohibitions within the policy clearly encompassed concerted communications protesting Costco's treatment of its employees. Further, nothing in the rule excluded protected communications from its prohibitions.<sup>45</sup> As a result, cases involving rules that address malicious, abusive, or unlawful behavior reasonably associated with actions that fall outside the Act's protection did not apply to the behavior being

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<sup>39</sup> See *infra* Part II.E.

<sup>40</sup> See *infra* Part II.F.

<sup>41</sup> See *infra* Part II.E–F.

<sup>42</sup> 358 N.L.R.B. No. 106, 2012 WL 3903806 (Sept. 7, 2012).

<sup>43</sup> *Id.* at \*1 (alteration in original).

<sup>44</sup> *Id.* at \*2.

<sup>45</sup> *Id.*

prohibited in Costco because there was no accompanying language that would tend to restrict its application to those actions.<sup>46</sup>

In *Three D, L.L.C. (Triple Play Sports)*,<sup>47</sup> the Board addressed Facebook communications made by restaurant employees Jillian Sanzone, a waitress and bartender, and Vincent Spinella, a cook. Sanzone and at least one other employee discovered that they owed more in state income taxes than had been communicated by their employer.<sup>48</sup> Sanzone, Spinella, and a former employee, Jamie LaFrance, participated in a Facebook conversation. LaFrance stated, “Maybe someone should do the owners . . . a favor and buy it from them. They can’t even do the tax paper work correctly!!! Now I OWE money. . . Wtf!!!”<sup>49</sup> Sanzone also commented and said, “I owe too. Such an asshole.”<sup>50</sup> Spinella selected the “like” feature indicating his support for the Facebook communications. The supervisor terminated Spinella for selecting the “like” feature.<sup>51</sup> The Board found that the Facebook communications were concerted activity concerning workplace tax liability.<sup>52</sup> Further, the Board found that the comments from the employees were not sufficiently disloyal as to lose protection under the NLRA.<sup>53</sup> With the expansion of social networks and electronic communications by employees, how the NLRB decides these social media cases may continue to have a big impact on the workplace.<sup>54</sup>

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<sup>46</sup> *Id.* at \*3.

<sup>47</sup> 361 N.L.R.B. No. 31, 2014 WL 4182705 (Aug. 22, 2014).

<sup>48</sup> *Id.* at \*1.

<sup>49</sup> *Id.* at \*2 (alterations in original).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at \*3.

<sup>52</sup> *Id.* at \*3, \*6.

<sup>53</sup> *Id.* at \*7.

<sup>54</sup> See William A. Herbert, *Can't Escape from the Memory: Social Media and Public Sector Labor Law*, 40 N. KY. L. REV. 427, 471–73 (2013); Christine Neylon O'Brien, *The First Facebook Firing Case Under Section 7 of the National Labor Relations Act: Exploring the Limits of Labor Law Protection for Concerted Communication on Social Media*, 45 SUFFOLK U. L. REV. 29, 32–33 (2011); see also David L. Bayer, *Employers Are Not Friends with Facebook: How the NLRB is Protecting Employees' Social Media Activity*, 7 BROOK. J. CORP. FIN. & COM. L. 169, 175 (2012) (describing how social media makes it easier for employees to bring workplace issues home with them and to implicate Section 7 rights); Ariana C. Green, *Using Social Networking to Discuss Work: NLRB Protection for Derogatory Employee Speech and Concerted Activity*, 27 BERKELEY TECH. L.J. 837, 853 (2012). The Board has continued to find Section 7 rights implicated when using social media. See, e.g., *United Hispanics of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 2012 WL 6800769 (Dec. 14, 2012) (finding that comments made from personal computers as part of Facebook posts by four off-duty employees responding to another employee's allegations that the four workers' performance was substandard received protection under Section 7 of the Act). Although the employer fired the four workers after finding that their “remarks constituted ‘bullying and harassment’ of a coworker” in violation of the employer's “‘zero tolerance’ policy prohibiting such conduct,” the Board found that the four employees' Facebook communications, which generally objected to the comments about their work performance being

### B. *Electronic Mail: Register-Guard & Purple Communications*

In *Purple Communications, Inc.*, the Board recently found that “employee use of e-mail for statutorily protected communications on nonworking time must presumptively be permitted by employers that grant their employees access to e-mail at work.”<sup>55</sup> The Board’s decision in *Purple Communications* rejected the Board’s prior decision in *Register-Guard*,<sup>56</sup> where the Board had held that “employees have no statutory right to use” an employer’s e-mail to pursue organizing activity pursuant to the exercise of rights under Section 7. In *Purple Communications*, the Board, in a three-to-two decision with Members Miscimarra and Johnson dissenting, found that *Register-Guard* “was clearly incorrect” as it had failed by placing “too much [weight] on employers’ property rights” instead of considering the importance of “employees’ core Section 7 right to communicate in the workplace about their terms and conditions of employment.”<sup>57</sup>

### C. *Immigrant Workers: Mezonos & Flaum*

In *Hoffman Plastic Compounds, Inc. v. NLRB*, the Supreme Court decided in 2002 that workers unlawfully working in the country by not having proper documentation as required by the Immigration Reform and Control Act of 1986 (IRCA)<sup>58</sup> were unable to obtain backpay and other relief under the NLRA.<sup>59</sup> As the specter of immigration has continued to become a national topic,<sup>60</sup> the Supreme Court’s limitation on the ability of immigrant workers to seek statutory relief even after *Hoffman Plastic* has continued to represent a

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poor, were part of concerted activity seeking to respond to those allegations and were therefore protected by Section 7. *Id.* at \*2.

<sup>55</sup> 361 N.L.R.B. No. 126, 2014 WL 6989135, at \*1 (Dec. 11, 2014) (overruling prior decision in *Register-Guard* and holding that employee use of e-mail for statutorily protected communications on nonworking time must be permitted by employers who give employees access to their e-mail systems).

<sup>56</sup> *Guard Publ’g Co. (Register-Guard)*, 351 N.L.R.B. 1110, 1110 (2007) (holding that employees have no statutory right to use the employer’s e-mail system for Section 7 purposes and therefore the policy prohibiting employees use of the system for non-job-related solicitations did not violate Section 8(a)(1)).

<sup>57</sup> 2014 WL 6989135, at \*1, \*5.

<sup>58</sup> Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in various sections of title 8 of the United States Code). IRCA specifically mandates that it is unlawful to hire an undocumented alien worker. 8 U.S.C. § 1324a (2012).

<sup>59</sup> 535 U.S. 137, 150 (2002) (finding that an award of “backpay in a case like this not only trivializes the immigration laws, it also condones future violations”).

<sup>60</sup> See Andrew Dugan, *Passing New Immigration Laws Is Important to Americans*, GALLUP (July 11, 2013), <http://www.gallup.com/poll/163475/passing-new-immigration-laws-important-americans.aspx> (describing poll of Americans indicating that 71% find it important that the country address laws concerning how immigrants enter into the country and how to address those immigrants already in the country illegally).

broad workplace concern.<sup>61</sup> In *Mezonos Maven Bakery, Inc.*, the Board found that the Supreme Court had made it clear in *Hoffman Plastic* that undocumented workers may not be awarded backpay under the NLRA.<sup>62</sup> However, the Supreme Court did not address the situation with respect to whether an employee who had not acted improperly and could rectify any undocumented status should be able to recover under the NLRA. The Board found that it does not matter which party (the employer or the employee) violates IRCA because awarding backpay to undocumented workers lies beyond the scope of the Board's authority.<sup>63</sup> The Board further explained, in *Flaum Appetizing Corp.*,<sup>64</sup> that an employer's failure to mention any undocumented status claims under IRCA as a clear basis for an affirmative defense to the unfair labor practice charges should prohibit the issuance of subpoenas or discovery into the employees' documented status.<sup>65</sup>

#### D. Class Arbitration Waivers: D.R. Horton & Murphy's Oil

Court enforcement of arbitration agreements, while also allowing employers to ban class arbitration claims, has prevented employees from bringing collective and class actions for their mutual aid and protection,

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<sup>61</sup> See Christine N. Cimini, *Undocumented Workers and Concepts of Fault: Are Courts Engaged in Legitimate Decisionmaking?*, 65 VAND. L. REV. 389 (2012); see also Michael H. LeRoy, *Overruling Precedent: "A Derelict in the Stream of Law,"* 66 SMU L. REV. 711, 717 (2013) (predicting from statistical analysis that the *Hoffman Plastic* Supreme Court decision finding that undocumented workers are not eligible for backpay under the NLRA will eventually be overruled and noting that "most lower courts disregard" the decision). The General Counsel of the NLRB recently issued a memorandum stating, "The law is well-settled that the National Labor Relations Act protects all statutory employees, regardless of their immigration status. . . . [A]n individual's immigration status is not relevant to the investigation of whether the Act has been violated." Memorandum from Richard F. Griffin, Jr., General Counsel, NLRB, to All Regional Directors, Officers-in-Charge, and Resident Officers, Updated Procedures in Addressing Immigration Status Issues that Arise During Unfair Labor Practice Proceedings 1 (Feb. 27, 2015), available at <http://www.nlr.gov/reports-guidance/general-counsel-memos> (click on "Updated Procedures in Addressing Immigration Status Issues that Arise During ULP Proceedings"). Furthermore, the NLRB General Counsel concluded that even if a backpay remedy is not possible due to a worker's undocumented status, "the Board may utilize the federal courts' power of contempt to ensure compliance and to deter future violations." *Id.* at 3–4.

<sup>62</sup> 357 N.L.R.B. No. 47, 2011 WL 3488558, at \*1 (Aug. 9, 2011) (holding that the Supreme Court decision in *Hoffman Plastic* forecloses the Board from awarding backpay to undocumented workers where the employer, not the employees, violated IRCA).

<sup>63</sup> *Id.* at \*4. But see Recent Case, *Palma v. NLRB*, 723 F.3d 176 (2d Cir. 2013), 127 HARV. L. REV. 1236, 1239–42 (2014) (referring to argument that *Hoffman Plastic* was limited by the employee's misdeeds and did not address a situation where lack of proper documentation could not be attributed to any misdeed by the employee).

<sup>64</sup> 357 N.L.R.B. No. 162, 2011 WL 7052269 (Dec. 30, 2011) (granting partial summary judgment as to the backpay period, formula, and amounts because the Respondent's answer was insufficient in establishing the affirmative defense of lack of authorization to work under IRCA and the NLRA).

<sup>65</sup> *Id.* at \*6.

especially for wage and hour violations.<sup>66</sup> The Board previously addressed the effect of arbitration agreements with class action waivers in its landmark decision, *D.R. Horton, Inc.*<sup>67</sup> I recently discussed the importance of *D.R. Horton* as follows:

The NLRB made a splash into the mandatory arbitration debate in 2012 when it issued its decision in *D.R. Horton*. In that case, the Board found that employer efforts to compel individual arbitration and prevent class arbitration hampered employees' abilities to exercise their rights to concerted activity under section 7 of the NLRA. The arbitration agreement, signed by non-union employees, required individual arbitration and expressly waived the right of employees to seek class arbitration. Furthermore, the arbitration agreement provided that an arbitrator may not consolidate employees' claims or otherwise award relief to a "group" or "class" of employees in a single arbitration proceeding.<sup>68</sup>

In *D.R. Horton*, the NLRB specifically concluded that the class-waiver language "would lead employees reasonably to believe that they were prohibited from filing unfair charges with the Board" and thereby chill

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<sup>66</sup> See Julius Getman & Dan Getman, *Winning the FLSA Battle: How Corporations Use Arbitration Clauses to Avoid Judges, Juries, Plaintiffs, and Laws*, 86 ST. JOHN'S L. REV. 447, 447–48, 453–54 (2012) (referring to how the increasing use of arbitration to prevent class actions has allowed "employers supported by Congress, and the Courts . . . to chip away at the policies" of the two primary statutes that regulate labor relations, the NLRA and the Fair Labor Standards Act (FLSA), which establishes a minimum wage and overtime hours payment premium, and asserting that, because the effectiveness of wage-and-hour FLSA claims is tied to bringing collective or class actions, enforcement of the FLSA is being jeopardized by Supreme Court decisions allowing arbitration clauses to prevent class claims).

<sup>67</sup> 357 N.L.R.B. No. 184, 2012 WL 36274, at \*1 (Jan. 3, 2012) (finding that requiring employees to sign an agreement that precludes them from filing joint, class, or collective claims addressing wages, hours, or other working conditions against the employer in any forum unlawfully restricts employees' Section 7 right to engage in concerted action), *enforcement granted in part, rev'd in part sub nom.* *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

<sup>68</sup> Michael Z. Green, *Retaliatory Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 201, 226 (2014) (footnotes omitted). Other scholars have also highlighted the importance of the *D.R. Horton* decision. See, e.g., Craig Becker, David E. Feller Memorial Labor Law Lecture, *The Continuity of Collective Action and the Isolation of Collective Bargaining: Enforcing Federal Labor Law in the Obama Administration*, 33 BERKELEY J. EMP. & LAB. L. 401, 405–10 (2012) (referring to how the *D.R. Horton* decision illustrates five important components of the NLRA); Getman & Getman, *supra* note 66, at 461 (referring to a "strong argument" that an employer's attempt to pursue a class waiver through arbitration involves committing an unfair labor practice pursuant to *D.R. Horton*); Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013 (2013) (supporting the *D.R. Horton* decision and asserting that the decision should be affirmed as within the broad powers given to the NLRB to protect employees involved in concerted activity under the NLRA).



employees' exercise of their statutory collective rights and, moreover, that this conclusion did not conflict with the FAA.<sup>69</sup>

More recently, in *Murphy Oil USA, Inc.*, the Board reaffirmed its position from *D.R. Horton* to hold that the employer "violated Section 8(a)(1) of the" NLRA "by requiring its employees to agree to resolve all employment-related claims through individual arbitration, and by taking steps to enforce the unlawful agreements in federal district court when the Charging Party and three other employees filed a collective claim against the Respondent under the Fair Labor Standards Act."<sup>70</sup> Whatever doubts that may have existed about the continued viability of *D.R. Horton* after court decisions criticized or rejected the Board's reasoning in *D.R. Horton* have now been obliterated by the decision in *Murphy Oil* to continue to apply its analysis from *D.R. Horton*. Until the Supreme Court rejects the analysis employed by the Board in *D.R. Horton*, and now in *Murphy Oil* as well, or the make-up of the Board changes, employers must comply with *D.R. Horton*.

#### *E. College Football Unions: Northwestern University*

As the financial scope of primetime athletics has increased significantly, concerns about a private university's control over these athletes is now spilling over into issues about the scope of Section 7 rights.<sup>71</sup> In a decision by the Regional Director of the NLRB at its Chicago office, Northwestern University college football players were found to be employees and eligible to select a union to represent their interests regarding wages, hours, and other terms and conditions of employment.<sup>72</sup> The Regional Director specifically found that players receiving scholarships from the University were "employees" under Section 2(3) of the NLRA and that a union election should be conducted for all football players receiving a football grant-in-aid scholarship.<sup>73</sup> The Regional Director determined that because the players received scholarships to

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<sup>69</sup> 2012 WL 36274, at \*1-2.

<sup>70</sup> 361 N.L.R.B. No. 72, 2014 WL 5465454, at \*3 (Oct. 28, 2014) (finding that Respondent violated Section 8(a)(1) by requiring employees to agree to resolve all employment-related claims through individual arbitration).

<sup>71</sup> See Tim Dahlberg, *NCAA Could Actually Be Forced to Share Money with Players After Northwestern Union Battle*, HUFFINGTON POST (May 27, 2014, 5:59 AM EDT), [http://www.huffingtonpost.com/2014/03/27/ncaa-union-pay-players-northwestern\\_n\\_5039768.html](http://www.huffingtonpost.com/2014/03/27/ncaa-union-pay-players-northwestern_n_5039768.html); Ryan Osborne, *Players Unionization Talks Concern TCU's Del Conte*, STAR-TELEGRAM (June 9, 2014, 7:08 PM), <http://www.star-telegram.com/sports/college/article3861301.html>.

<sup>72</sup> See *Northwestern Univ. Emp'r*, 2014-2015 NLRB Dec. (CCH) ¶ 15,781, 2014 WL 1246914, at \*1 (Mar. 26, 2014).

<sup>73</sup> *Id.*

perform football-related services for the University under a contract for hire in return for compensation, they were subject to the University's control and were therefore employees within the meaning of the Act.<sup>74</sup> The Board has granted Northwestern University's request to review the Regional Director's decision and invited the filing of amicus briefs to assist the NLRB members in deciding whether to affirm that decision.<sup>75</sup>

#### F. *Joint Employers/Independent Contractors: McDonalds*

As the nature of work has transformed from the industrial age to more service-oriented professions,<sup>76</sup> the identification of what is an employer and an employee has become increasingly difficult to ascertain. This dilemma has resulted in a wide range of confusing tests, factors, and methods being employed under various statutes and the common law.<sup>77</sup> As employers strategically decide to avoid statutory and common law protections for employees through franchise and independent-contractor arrangements, reconciling the numerous approaches to identify a coherent legal paradigm for defining employer–employee relations has become an important workplace concern. As a result, the question of whether franchises or various contractor arrangements may shield entities from coverage under the NLRA must now be clearly addressed by the NLRB. The Board has agreed to hear the issue of what represents the appropriate standard to determine whether a joint-employer relationship exists in a pending case, *Browning-Ferris*.<sup>78</sup> In further support of

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<sup>74</sup> *Id.* at \*12.

<sup>75</sup> See *Northwestern Univ. Emp'r*, N.L.R.B. Case No. 13-RC-121539, 2014 WL 1653118 (Apr. 24, 2014) (order granting review).

<sup>76</sup> See Ferrall, *supra* note 36, at 1020–25 (describing four Facebook-communications NLRB cases with employees working in different service settings: a social services organization, a collections agency, a car dealership, and a sports bar).

<sup>77</sup> See Lisa J. Bernt, *Suppressing the Mischief: New Work, Old Problems*, 6 NE. U. L.J. 311, 313–21 (2014) (describing various tests aimed at determining whether employer–employee relationships exist, including the control test and economic realities test and variations thereof, for various workplace and common law analyses); Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291, 303–07 (2003) (describing difficulties under wage-and-hour and immigration law in protecting workers due to joint employer analysis); Emily A. Spieler, *Employment Law and the Evolving Organization of Work – A Commentary*, 6 NE. U. L.J. 287, 291–99 (2014) (describing the difficulties in defining the employer–employee relationship under various workplace laws).

<sup>78</sup> Notice and Invitation to File Briefs at 1–2, *Browning-Ferris Indus. of Cal., Inc.*, Case No. 32-RC-109684 (May 12, 2014), available at <http://www.nlr.gov/case/32-RC-109684> (inviting briefs on the following subjects: “(1) Under the Board’s current joint-employer standard, as articulated in” *TLL, Inc.*, 271 N.L.R.B. 798 (1984), *enforced mem.* 772 F.2d 894 (3d Cir. 1985), “and *Laerco Transportation*, 269 N.L.R.B. 324 (1984), is Leadpoint Business Services the sole employer of the petitioned-for employees? (2) Should the Board should adhere to its existing joint-employer standard or adopt a new standard? What

the NLRB's efforts to clarify these questions, the General Counsel of the NLRB has decided to bring several unfair labor practice charges against McDonald's Corporation asserting liability as a joint employer with its numerous franchisees.<sup>79</sup> Meanwhile, Congress may seek to preempt the NLRB from taking any substantive position on these joint employer/independent contractor issues.<sup>80</sup>

In *CNN America, Inc.*, the Board addressed the broad implications of what joint-employer status could mean when it agreed with the administrative law judge's finding that CNN had unlawfully replaced its union contractor, TVS, with an in-house, nonunion:

CNN and TVS were joint employers, and . . . CNN violated the [NLRA] by: (1) terminating the subcontracts with TVS out of antiunion animus and thereby causing the discharge of TVS employees; (2) failing to bargain with the Union about the decision to terminate the subcontracts and the effects of that decision; (3) making coercive statements; (4) implementing a hiring plan designed to limit the number of discharged TVS employees it hired to staff its in-house operations in order to avoid a successorship bargaining obligation; and (5) as a successor, failing to recognize and bargain with the Union and unilaterally changing the employees' terms and conditions of employment.<sup>81</sup>

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considerations should influence the Board's decision in this regard? (3) If the Board adopts a new standard for determining joint-employer status, what should that standard be? If it involves the application of a multifactor test, what factors should be examined? What should be the basis or rationale for such a standard?").

<sup>79</sup> See Mark Brandau, *NLRB: McDonald's Considered 'Joint Employer' with Franchisees*, NATION'S RESTAURANT NEWS (July 29, 2014), <http://nrn.com/mcdonalds/nlr-mcdonald-s-considered-joint-employer-franchisees>; Press Release, NLRB Office of Pub. Affairs, NLRB Office of the General Counsel Authorizes Complaints Against McDonald's Franchisee and Determines McDonald's, USA, LLC is a Joint Employer (July 29, 2014), available at <http://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-authorizes-complaints-against-mcdonalds>.

<sup>80</sup> See Catherine Ruckelshaus & Mike Munoz, *Who's the Boss? Why Republicans Are Missing the Point on Joint Employer*, HUFFINGTON POST (Feb. 6, 2015, 5:59 PM EST), [http://www.huffingtonpost.com/catherine-ruckelshaus/joint-employment\\_b\\_6633602.html](http://www.huffingtonpost.com/catherine-ruckelshaus/joint-employment_b_6633602.html) (discussing how the Republican-led Senate committee on Health, Education, Labor, and Pensions is preparing to address the joint employer issue being considered by the NLRB).

<sup>81</sup> CNN Am., Inc., 361 N.L.R.B. No. 47, 2014 WL 4545618, at \*1, \*21 (Sept. 15, 2014) (finding that CNN and TVS are joint employers and that "CNN violated Section 8(a)(5) and (1) by canceling the [Electronic News Gathering Service Agreements] with TVS to avoid its obligation under the collective-bargaining agreements, failing to bargain with the Unions over the termination of the ENGAs . . . and by making unilateral changes in the terms and conditions of employment when it operated with a new work force").

### G. *Workplace Speech Limits: Plaza Auto*

To what extent employee speech is protected under the NLRA has represented a highly debated issue for many years, with employers arguing that employee outbursts aimed at concerted activity has crossed the line and entered into insubordinate and harassing conduct no longer protected.<sup>82</sup> In *Plaza Auto Center, Inc.*, the question of balancing workplace speech under Section 7 with employer policies to ban harassment or offensive or insubordinate speech was addressed.<sup>83</sup> This case came before the Board on remand from the Ninth Circuit Court of Appeals “to reapply the four-factor *Atlantic Steel* test for determining when an employee’s outburst during protected activity costs the employee the protection of the Act.”<sup>84</sup> Specifically, “[t]he Court agreed with the Board that three of the four *Atlantic Steel* factors—the place of the discussion, the subject matter of the discussion, and employer provocation by unfair labor practices—supported the Board’s conclusion that [the] outburst did not cost” the employee protection under the NLRA.<sup>85</sup> Nevertheless, the Court remanded to the Board to assess whether the fourth factor, the nature of the outburst, resulted in a loss of protection.

The specific outburst came from an employee, Nick Aguirre, who worked as a salesman for his employer, Tony Plaza, a used car salesman. After complaining to other employees about his concerns regarding minimum wages, bathroom breaks, vehicle costs, and commissions, among other items, Plaza and other managers called Aguirre into their office and told him to stop “talking a lot of negative stuff” and to follow policies and procedures.<sup>86</sup> Aguirre admitted “that he had questions about vehicle costs, commissions, and minimum wage” but did not start his outburst until after Plaza told him he could not complain about pay and “twice told Aguirre that if he did not trust

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<sup>82</sup> See generally Kerri Lynn Stone, *Floor to Ceiling: How Setbacks and Challenges to the Anti-Bullying Movement Pose Challenges to Employers Who Wish to Ban Bullying*, 22 TEMP. POL. & CIV. RTS. L. REV. 355, 373–76 (2013) (describing NLRB decisions presenting a high standard of opprobrious conduct so that even “the employee’s cursing and derogating” characterized as “belligerent, menacing, and at least physically aggressive if not menacing” outbursts was still protected by Section 7 (quoting *Plaza Auto Ctr., Inc.*, 355 N.L.R.B. 493, 495 (2010)) (internal quotation marks omitted)).

<sup>83</sup> *Plaza Auto Ctr., Inc.*, 360 N.L.R.B. No. 117, 2014 WL 2213747, at \*13 (May 28, 2014) (holding that the employee retained the protection of the Act despite his outburst because of his right to engage in Section 7 activity without unduly impairing the Respondent’s legitimate interest in maintaining order and discipline in the workplace).

<sup>84</sup> *Id.* at \*1 (footnote omitted).

<sup>85</sup> *Id.* at \*3.

<sup>86</sup> *Id.* at \*2 (internal quotation marks omitted).

[the employer], he need not work there.”<sup>87</sup> At that point, Aguirre “lost his temper.”<sup>88</sup> His outburst included “berating Plaza, calling him a ‘fucking mother fucking,’ a ‘fucking crook,’ and an ‘asshole,’” and Aguirre stood up and “pushed his chair aside, and told Plaza that if Plaza fired him, Plaza would regret it.”<sup>89</sup>

The Board assessed the nature of this outburst by asking “whether it solely involved obscene remarks that constituted insubordination, or whether it also was menacing, physically aggressive, or belligerent.”<sup>90</sup> The Board found that the employee did not engage in menacing, physically aggressive, or belligerent conduct from an objective standpoint in that his conduct “was not a threat of physical harm” and the employee had no history of threatening or harmful behavior.<sup>91</sup> As a result, and in balancing all of the *Atlantic Steel* factors, the Board found that the outburst was protected. Member Johnson dissented.<sup>92</sup>

#### *H. Accommodating Employment Discrimination Law: Fresh & Easy*

Addressing harassment continues to be an important workplace issue.<sup>93</sup> Further, as the scope of statutory discrimination based on employee harassment claims has expanded and the Supreme Court has defined the parameters of employer defenses to those claims pursuant to anti-harassment policies, employers have had to accommodate Section 7 rights of employees while also navigating discrimination laws.<sup>94</sup> The NLRB has also long been concerned with the proper balance between workplace anti-harassment enforcement and Section 7 concerns.<sup>95</sup> While concerns about wage discrimination may be a

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at \*4.

<sup>91</sup> *Id.* at \*7.

<sup>92</sup> *Id.* at \*19 (Johnson, Member, dissenting). Member Johnson’s dissent provides a thorough analysis of the tough questions involved while citing to law review articles and other developed sources to help frame many of the concerns for employers, as the NLRB must balance Section 7 rights of employees with legitimate interests of employers.

<sup>93</sup> The Equal Employment Opportunity Commission, the federal agency charged with eliminating employment discrimination based on race, sex, religion, and national origin, recently called a meeting of experts to discuss ongoing concerns regarding workplace harassment. See Press Release, EEOC, EEOC to Probe Harassment at Jan. 14 Meeting (Jan. 7, 2015), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-7-15.cfm>.

<sup>94</sup> See Recent Adjudication, Fresh & Easy Neighborhood Market, Inc., 361 N.L.R.B. No. 12 (Aug. 11, 2014), 128 HARV. L. REV. 785, 790–92 (2014).

<sup>95</sup> See Martin Luther Mem’l Home, Inc. (*Lutheran Heritage Village-Livonia*), 343 N.L.R.B. 646, 649 (2004) (holding that mere maintenance of rules against verbal abuse, abusive or profane language, or

workplace issue, the NLRB has long made it clear that employers may not prohibit employees from discussing their salaries.<sup>96</sup>

In *Fresh & Easy Neighborhood Market, Inc.*,<sup>97</sup> a case with significant depth of analysis and citations to several law review articles by the majority and the two dissenting NLRB member opinions, the Board addressed how to integrate Section 7 rights with the right to pursue a harassment claim under antidiscrimination law.<sup>98</sup> The issue in this case was “whether an employee was engaged in ‘concerted activity’ for the purpose of ‘mutual aid or protection’ within the meaning of Section 7 of the National Labor Relations Act when she sought assistance from her coworkers in raising a sexual harassment complaint to her employer.”<sup>99</sup> The Board held that “an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint is acting for the purpose of mutual aid or protection.”<sup>100</sup> As a result, employees seeking to advance employment discrimination claims may use their Section 7 rights to join with other employees to pursue discrimination claims while also being protected by the NLRA. These employees will not be limited by pursuing procedures solely established by antidiscrimination statutes. With the expertise of the NLRB members when sitting as a full complement, the Board can effectively accommodate the interests of employees (who want to use their Section 7 protections along with their protections under statutory employment discrimination laws and other employment law protections) with the interests of employers (who want to comply with all employment discrimination law requirements).<sup>101</sup>

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harassment does not violate Section 8(a)(1) and would not reasonably discourage employees from engaging in Section 7 activity for fear of violating those rules).

<sup>96</sup> *First Transit, Inc.*, 360 N.L.R.B. No. 72, 2014 WL 1321108, at \*1, \*4–5 (Apr. 2, 2014) (finding that the Respondent violated Section 8(a)(1) by prohibiting employees from discussing their wages and from meeting with union representatives, and by maintaining overbroad rules in an employee handbook).

<sup>97</sup> 361 N.L.R.B. No. 12, 2014 WL 3919910, at \*1 (Aug. 11, 2014) (finding that an employee was engaged in concerted activity for the purpose of mutual aid or protection when she sought assistance from her coworkers in raising a sexual harassment complaint to her employer).

<sup>98</sup> *Id.* at \*10.

<sup>99</sup> *Id.* at \*1.

<sup>100</sup> *Id.* at \*10 (overruling *Holling Press, Inc.*, 343 N.L.R.B. 301 (2004)).

<sup>101</sup> See Note, *supra* note 94, at 792 (arguing that, despite the dissenters’ concerns in *Fresh & Easy*, employing Section 7 analysis might “undermine employers’ ability to rectify” statutory employment discrimination violations, the Board has instead created “positive value for individuals asserting” statutory employment discrimination rights).

### III. KEEPING THE NLRB FIVE TOGETHER FOR THESE CHANGING TIMES

Numerous challenges and attacks to the Board's existence have been levied with several specific actions occurring within the last couple of years during President Obama's administration.<sup>102</sup> As recently explained,

[i]n 2011 alone, there were a variety of approaches that conservatives took to limit the Board's power, including Republican senators' refusal to confirm President Obama's appointments to the Board, threats by Republican members of the Board to resign in order to strip the Board of a quorum and therefore its ability to adjudicate allegations of unfair labor practices, the introduction of legislation designed to partially or fully defund the Board, and the introduction of legislation to abolish the Board and transfer its functions to the Department of Justice.<sup>103</sup>

The efforts to prevent NLRB appointments by the President have led to two Supreme Court decisions in the last five years. In 2010, in *New Process Steel, L.P. v. NLRB*, the Supreme Court was asked to address whether the NLRB could function with only two members.<sup>104</sup> After four sitting members realized that the Board would lose its quorum of three members when two recess appointments to the Board expired, the four members agreed to delegate all of the Board's remaining powers to a three-member group that would allow a two-member majority to continue to set policy. The total number eventually whittled down to only two members.<sup>105</sup> Those two remaining members, Wilma B. Liebman, a Democrat, and Peter C. Schaumber, a Republican, kept issuing nearly 600 decisions where they both agreed with the result pursuant to that delegation over a twenty-seven-month period from January 2008 until March 2010 as no additional NLRB members were appointed during that time frame.<sup>106</sup> After reviewing the Board's quorum requirements under the NLRA<sup>107</sup> in a challenge to the two-member NLRB decisions, the Supreme Court held in *New Process Steel* that "an interpretation of the delegation

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<sup>102</sup> See Kahlenberg & Marvit, *supra* note 9, at 225 ("Because the NLRB has exclusive jurisdiction over violations of workers' labor rights, it stands as a large target for those that seek to limit these rights. Unlike other forms of discrimination, where opponents must try to amend the law in order to limit rights, labor law can be limited in myriad other ways.")

<sup>103</sup> *Id.* at 225–26 (footnotes omitted); see also William B. Gould IV, *A Century and Half Century of Advance and Retreat: The Ebbs and Flows of Workplace Democracy*, 86 ST. JOHN'S L. REV. 431, 439 (2012) (referring to how all Republican presidential candidates in 2011 seemed to support defunding the NLRB).

<sup>104</sup> 560 U.S. 674, 678 (2010).

<sup>105</sup> *Id.* at 677–78.

<sup>106</sup> *Id.*

<sup>107</sup> See 29 U.S.C. § 153(b) (2006).

clause . . . requires a delegee group to maintain a membership of three.”<sup>108</sup> As a result, the Court invalidated all of the two-member decisions while acknowledging that it was “not insensitive to the Board’s understandable desire to keep its doors open during vacancies.”<sup>109</sup>

After seeing the Board’s total complement fall to two members for nearly two years and essentially resulting in shutting down the Board’s operations for that time pursuant to the ruling in *New Process Steel*, the concern about losing an NLRB member quorum occurred again in January 2012. At that time, President Obama responded to the quorum concern by making three recess appointments to the Board to keep its operations from shutting down.<sup>110</sup> In 2014, a matter related to maintaining the Board’s quorum again went to the Supreme Court in *NLRB v. Noel Canning*.<sup>111</sup> Therein, the constitutionality of President Obama’s recess appointment of the three members to the NLRB in January 2012 was challenged.<sup>112</sup> The Supreme Court found those appointments were unconstitutional pursuant to its interpretation of the Recess Appointments Clause of the Constitution.<sup>113</sup>

In July 2013, while the *Noel Canning* case was pending and as part of a political compromise, the Senate agreed to confirm the nominations of five appointments to the NLRB by President Obama.<sup>114</sup> This compromise returned the NLRB to a point where it had at least three members approved by the Senate for the first time in a year and established a full panel of five members confirmed by the Senate for the first time in ten years.<sup>115</sup> Even as a new Republican-controlled Senate seeks to limit<sup>116</sup> the work of the NLRB starting

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<sup>108</sup> *New Process Steel, L.P.*, 560 U.S. at 683.

<sup>109</sup> *Id.* at 688 & n.7 (“Former Board members have identified turnover and vacancies as a significant impediment to the operations of the Board.”).

<sup>110</sup> *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2557 (2014).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 2566–67, 2574 (finding recess of three days or less was not long enough to give President Obama the constitutional authority to make the appointments being challenged).

<sup>114</sup> See Abigail Rubenstein, *All 5 of Obama’s NLRB Picks Confirmed By Senate*, LAW360 (July 30, 2013, 10:39 PM ET), <http://www.law360.com/articles/461039/all-5-of-obama-s-nlrp-picks-confirmed-by-senate>.

<sup>115</sup> *Id.*

<sup>116</sup> Even before the new Republican Senate took over in January 2015, Republicans were already gearing up with potential legislation to limit the NLRB’s impact. See Press Release, Lamar Alexander, Alexander Introduces “NLRB Reform Act” to Change the National Labor Relations Board from an Advocate to an Umpire (Sep. 16, 2014), available at <http://www.alexander.senate.gov/public/index.cfm/pressreleases?ID=67fce1d6-f3e-4d60-9d26-fe90444aba55> (describing legislation introduced to require that the NLRB have six members instead of five members and require the Board have an equal number of members from each political party while also requiring consensus of four members to agree before a decision could be issued).



in January 2015, Congress should recognize that if it is not broken, why fix it?<sup>117</sup> United States Senator Lamar Alexander, the new Republican chair of the Health, Education, Labor, and Pensions Committee, has argued that the NLRB should become less of “an advocate” and more of “an impartial umpire” to stop the NLRB from being so “partisan” with its decisions “swinging from one side to the other with each new administration.”<sup>118</sup> Some question whether the Board members vote on cases in a solely partisan way.<sup>119</sup> The primary criticism is that the political nature of the Board causes its analysis to transform or flip-flop inappropriately from one presidential administration to the next.<sup>120</sup>

Whether that criticism of partisan voting represents a definitive problem is beyond the scope of this Essay. At a minimum, it is asserted within this Essay that the tremendous expertise of the selected full complement of NLRB members adds value through their thoughtful opinions assessing many of the pressing issues of the workplace that courts and legislatures appear hesitant or unable to tackle. With the *Fresh Markets* case as a key example, those interested in finding the appropriate balance between Section 7 rights and the accommodation of employer concerns about workplace harassment can see how eloquently those issues are addressed by the three-member majority in conjunction with the illuminating dissenting opinions by the other two members. With thoughtful opinions by a full complement of the Board as they

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<sup>117</sup> Senator Alexander’s argument, that the Board should become less partisan and more of an umpire, has received support from academics. See Eigen & Garofalo, *supra* note 13, at 1885–88, 1892 (asserting that due to flip-flop decisions of the Board based on political partisanship, reform should remove any involvement of the NLRB in adjudicating unfair labor practice disputes). However, it is unclear how much of a problem the NLRB’s decisions (however partisan they may be if there are further checks and balances) are really causing for employers and whether the new Congress is merely a hammer searching for an unnecessary nail.

<sup>118</sup> Press Release, *supra* note 116 (internal quotation mark omitted). Although by making this issue a political one, the new Republican-controlled Senate should be careful about what it asks for over the next two years, as their actions may set bad precedents or place limits on the NLRB for the administration of the next Republican President who could be in office as soon as January 2017.

<sup>119</sup> See Turner, *supra* note 3, at 708 (discussing the potential political partisanship that may affect NLRB members’ votes). However, there is some support for the argument that despite their political leanings, NLRB members do not always vote purely in a partisan way out of a sense of collegiality and respect for precedent. See *id.* at 709–11 (discussing Paul Secunda’s study of Board decisions regarding inherently destructive conduct and his “counterintuitive” finding that political composition of the Board did not correlate with its decisions on that topic and may have resulted out of a collegial desire or impulse to get the law correct by basing decisions on legal merit rather than basing decisions solely on political ideology (citing Paul M. Secunda, *Politics Not as Usual: Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board*, 32 FLA. ST. U. L. REV. 51, 53, 102–04 (2004))).

<sup>120</sup> Turner, *supra* note 3, at 762 (discussing the partisan voting of the Board as a cause for key policy decisions that can “fluctuate with presidential elections and resulting changes in the Board’s membership”).

engage in open and collegial debates over the nuances and difficulties presented by the pressing issues of the day, these discussions enlighten and frame the concerns in the best way for the ultimate decisionmakers, be they politicians or courts. This displayed NLRB expertise through thoughtful opinions incorporating in-depth analysis from law reviews and other laws helps us all appreciate the consequences of any particular resolution of the issues at hand. This salutatory result should be countenanced by all involved to consistently support efforts to have a full complement of Board members addressing these matters on the front line of the battles in the workplace over these pressing issues.

### CONCLUSION

Because Section 7 of the NLRA addresses the broad rights of employees to join together for mutual aid or protection regarding terms and conditions of employment, the NLRB has the opportunity to address an expansive number of evolving workplace issues as its eightieth anniversary approaches. Although political forces continue to pursue efforts to emasculate the NLRB, this Essay has asserted that the NLRB plays a vital and major role in the union and nonunion workplace that should continue. Because of the broad expertise of its overall members when a full complement is appointed and the ability to address pressing workplace issues through frontline adjudication, the NLRB is the one agency that workers and employers should call when problems arise. The NLRB sits in a preeminent position to give the initial answer to all the troublesome concerns in the ever-changing workplace that may intersect with other workplace law, agency, or technology concerns.

The NLRB, unlike any other agency, can make important and transformative rulings regarding the brooding questions that now dominate the current workplace. While being uniquely positioned to accommodate, rather than ignore, the important aspects of other laws and technological concerns that govern the workplace, the NLRB has a super capacity, due to its members' expertise and broad responsibility in enforcing Section 7, to be the first to opine on how many of the vexing employer–employee questions of the day should be resolved. In conclusion, the NLRB represents a *mensch*<sup>121</sup> of an agency, i.e., an überagency, in addressing the important and evolving

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<sup>121</sup> See *Mensch*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/mensch> (last visited May 9, 2015) (defining *mensch* as “a person of integrity and honor”); *Mensch*, URBAN DICTIONARY (Nov. 8, 2013), <http://www.urbandictionary.com/define.php?term=mensch> (defining *mensch* as someone who is “upstanding, worthy, honorable”).

workplace concerns of our time. Congress, the courts, other agencies, employers, unions, and employees should embrace the important work being done by the NLRB. As a consequence, all those who care about employer–employee matters must unite to reject any attempts to dismantle the NLRB’s important role in developing workplace law through its frontline adjudication responsibilities.