Thinking of the National Labor Relations Act as an *employment law*, rather than as just a *labor law*: An introduction to substance and procedure under the NLRA, for those who are not (yet) "labor lawyers"

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A long-time client calls in a panic. She has just been fired. The stated reason, she tells you, is that management was mad because she had been talking with other employees about how low their wages were. Management says that this was intolerable because it lowered morale and contributed to intra-office gossip. There is no hint that the employer's decision was based on the employee's race, sex, age, or other unlawful classifications such as those. She has no employment contract for anything other than "at will" employment. It is a private-sector employer, so the First Amendment does not provide any conceivable claim. And it is a non-union facility, so there is no collective bargaining agreement.

What do you do? If your answer is, "I suppose I should just help her find another job, because there's nothing I can do for her as a lawyer," then this paper is for you. It is about the federally-protected right of employees to engage in discussion, cooperation, and action to improve their worklife, and their right not to suffer retaliation at the employer's hands because they have exercised that right.

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We are practicing law in an age of employment-law statutes; many aspects of individual employment relationships are subject to statutory mandates that prescribe certain terms and conditions of employment, or prohibit various actions by employers. At the federal level, there are such laws as Title VII of the Civil Rights Act of 1964 (prohibiting discrimination on the basis of race, sex, religion, and national origin); the Age Discrimination in Employment Act; the Americans with Disabilities Act; the Family and Medical Leave Act; the Fair Labor Standards Act (regarding minimum wage and overtime protections); the Employee Retirement Income Security Act (regarding pensions, health care, and the like) and the related "COBRA" legislation; the Workers Adjustment and

Retraining Notification Act (requiring advance notice of plant closings and mass layoffs) … the list goes on. And most states have a variety of similar laws, going farther than the federal laws in many instances (though Alabama is a notable exception, having fewer state-level employee-protection laws than do most states).

Employment laws have become such a substantial part of the legal landscape that traditional "*labor* law" sometimes seems, by comparison, to be a small and antiquated line of study, suitable only for the specialists. One indication of the shrinking public consciousness of traditional labor law, even in the legal profession, is this: that this Term, unlike most, the Supreme Court's oral argument docket did not include a single case arising under the nation's labor laws. By contrast, the employment statutes mentioned above, and other federal employment-related statutes, made up a substantial part of the Court's docket this Term.

Our thesis, however, is that there are certain aspects of the federal labor laws that practically every lawyer should come to understand, at least at a basic level. Understanding these issues will help nearly every lawyer become more helpful to his or her clients – whether they are institutions or individuals – and will also help many lawyers avoid running afoul of the labor laws in their own business matters. And the best way for lawyers to achieve a basic understanding of these widely useful aspects of labor laws, is to think of the federal labor laws not as an entirely distinct field of "labor law" that is relevant only to the specialized practitioner who represents unions or organized employers, but as one more in the long list of federal statutes that confer rights on employees. Think of the National Labor Relations Act as an *employment law* with a certain unique focus, and you will know enough to spot some useful issues as they arise in your practice.

The core concept: "concerted protected activity"

The statute that we will focus on, here, is the National Labor Relations Act, often called the NLRA or Wagner Act, 29 U.S.C. § 151 *et seq*. There are other federal labor laws: the Labor-Management Relations Act of 1947, the Railway Labor Act (applicable to railways, airlines, and related fields), the Federal-Service Labor Management Relations Act (applicable to federal employment), and so forth. Those are even more specialized still than the NLRA, and they will not often be relevant to the practice of a non-expert. That is the reason for the focus on the NLRA here.

The NLRA was enacted in 1935. Its purpose – the stated purpose of the Congress, supported by the President – was to *encourage collective bargaining*, in order to remedy a disparity in bargaining power between employers and employees and thereby to promote the Nation's economic health. *See* 29 U.S.C. § 151. But in order to achieve that goal, the Congress used language that more broadly protects even the rights of employees who have no union (and who are not, for the moment, even seeking to form or to join one). The crucial language is in Section 7 of the NLRA, codified at 29 U.S.C. § 157:

> **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** …

Then, in turn, Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), prohibits an employer from interfering with this right: "It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[1]

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[1] Section 7 also protects the right *not* to do such things – *not* to join a union or to engage in other concerted activity for mutual aid and protection. But the right to *refrain* from standing up to one's employer along with one's colleagues has never seemed to us to be a right that needed much federal protection, as a practical matter; the right to take whatever the employer deigns to give you, or else to take an "every employee for himself" attitude, is vastly over-utilized and over-rated, if you ask us.

This statutory right – the right to "engage in … concerted activities for … mutual aid or protection" – does, as the language of the Act suggests, belong to employees who have no union as well as to those who do. This has been the settled understanding of the statute for decades. This understanding is reflected, for instance, in the U.S. Supreme Court's decision in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). In that case, Washington Aluminum machine shop employees had no union and no collective bargaining agreement. Several of the employees had complained individually to management that the machine shop was too cold; but management did nothing in response. Then, on a particularly cold day, the employees simply walked off their jobs and went home, to protest the lack of heat in the workplace; as one of them later explained, "we had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way." Because this violated an established company rule that forbade employees to leave work without the foreman's permission, they were all immediately terminated. But the Supreme Court unanimously affirmed the order that they be reinstated with back pay, because their behavior was an exercise of section 7 rights and their termination was thus a violation of section 8(a)(1). Justice Black's opinion recognized that employees do not have to have a union representative in order to exercise their section 7 rights in such a manner:

> The seven employees here were part of a small group of employees who were wholly unorganized. They had no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could. … Having no bargaining representative and no established procedure by which they could take full advantage of their unanimity of opinion in negotiations with the company, the men took the most direct course to let the company know that they wanted a warmer place in which to work. So, after talking among themselves, they walked out together in the hope that this action might spotlight their complaint and bring about some improvement in what they considered to be the "miserable" conditions of their employment. This we think was enough to justify the Board's holding that they were … entitled to the protection of § 7.

Washington Aluminum, 370 U.S. at 14-15.

This continues to be the state of the law at present, as exemplified by the recent decision of the National Labor Relations Board in *Odyssey Capital Group*, 337 NLRB. No. 174 (2002) (available at http://www.nlrb.gov/slip337.html). In that case, three maintenance employees at an apartment complex refused to work in a certain apartment because of their concern (correct, as it turned out) that the ceiling contained asbestos. They were fired for their refusal. Citing *Washington Aluminum*, the Board held that the terminations were unlawful under Section 8(a)(1) because the concerted refusal to work in that apartment was a protected activity under Section 7. The Board held, "It is well established that employees who concertedly refuse to work in protest over wages, hours, or other working conditions, including unsafe or unhealthy working conditions, are engaged in 'concerted activities' for 'mutual aid or protection' within the meaning of Section 7 of the Act," and that an employer who discharges employees as a reaction to such a protest has violated section 8(a)(1).

As seen from the language of the statute itself, the key concept here is "concerted" activity. The Act does *not* confer protection on an employee who acts solely and purely for his own isolated benefit; instead, what the Act protects is the coming together of employees in some fashion or another for *mutual* aid or protection. Employees cannot be prohibited from doing that sort of thing, and it is unlawful for an employer to retaliate against them for having done so. While this does not necessarily mean that there must be an existing group effort in order to come within the law's protections – for instance, an employee who *tried* (though with a complete lack of success) to gain the support of her fellow workers for concerted activity would likely be protected from retaliation on account of having done so – still the Act's focus on "concerted" activity must be borne in mind.

Likewise, despite the possibility of an unlimited and literal interpretation of the words of the Act – which would seem to protect every conceivable sort of concerted activity for mutual aid or protection – the real focus is on the more limited class of "concerted *protected* activities". Some conduct that would fall literally within the phrase "concerted activities for mutual aid or protection" has been held *not* to be protected by the Act. The line between what is concerted protected activity, and what is not, can never be drawn with any certainty; that line develops (and sometimes changes) over time, through the process of caselaw decisionmaking by the National Labor Relations Board. In addition to the strike-without-a-union cases such as *Washington Aluminum* and *Odyssey Capital*, however, there are certain patterns in the caselaw. Some of the recurring patterns, and recognized types of "concerted protected activity", will be discussed shortly. Before turning to those, however, we address a significant recent development in this area of law.

Weingarten **and** ***Epilepsy Foundation*** **rights**

One relatively recent development in the law of section 8(a)(1), as applied to the non-union workplace, has received a substantial amount of attention in the labor law world lately. That was the National Labor Relations Board's decision in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000) (available at http://www.nlrb.gov/ bound331.html). It is quite possible that, before much time passes, the Board will overrule *Epilepsy Foundation*; the Board has gone back and forth on the issue presented in *Epilepsy Foundation* over the years, and recent appointments to the Board may well swing the pendulum back in management's favor on this issue again. But for now, at least, the right in *Epilepsy Foundation* is a viable, yet rarely-known and rarely-exercised, federal right for employees with no union representation.

To understand *Epilepsy Foundation*, one must begin with *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975). *Weingarten* involved the rights of employees, in union-represented workforces, who are subjected to investigatory interviews that might lead to discipline or discharge. The Supreme Court, upholding the views of the Board, held that such an employee is entitled to be accompanied by a union representative in such an investigatory interview, if the employee reasonably believes that the interview might result in disciplinary action. The Supreme Court, and the Board, recognized that the expression of a desire for representation and assistance in such a meeting falls squarely within the words of Section 8(a)(1): concerted activity for mutual aid or protection. *Weingarten*, 420 U.S. at 256-57. 260-61 The Court and the Board explained, however, that this right has some limitations. First, it is up to the employee to invoke the right, by requesting that a representative accompany him or her in the interview; and the employer has no obligation to inform employees that they have such a right. Second, the right is limited only to those investigatory interviews that the employee reasonably believes might result in disciplinary action. Third, the employer may – if the employee invokes the *Weingarten* right – decide not to proceed with the interview, but to carry out its investigation in some other fashion; the employer can thus proceed to discipline the employee without ever having heard the employee's side of the story, if the employee decides to stick with his or her invocation of the *Weingarten* right. And finally, the employer does not have to bargain with the employee's representative in the interview. *Weingarten*, 420 U.S. at 256-60.

"Weingarten rights," as they are now known among union stewards, human resources personnel, and lawyers, have become an accepted part of the labor-management relationship in the decades since that decision. But one question has proven much more divisive over the years: does this right or a similar right also belong to employees in workplaces where there is no union? Because the right was declared as an interpretation of

the "other concerted activities for mutual aid or protection" aspect of § 8(a)(1) – and because that aspect of § 8(a)(1) applies in non-union workplaces as well as organized ones – it seemed logical to conclude that the right would not be limited to employees who had union representation.

Even in *Weingarten* itself, the dissent argued that the decision would logically be applicable to non-union settings as well. *See Weingarten*, 420 U.S. at 270, n.1 (Powell, J., dissenting) ("it must be assumed that the § 7 right today recognized, affording employees the right to act 'in concert' in employer interviews, also exists in the absence of a recognized union. *Cf. NLRB v. Washington Aluminum Co.*"). But the Board has, over the decades, gone back and forth on that question. In *Materials Research Corp.*, 262 NLRB 1010 (1982), the Board held that employees in a non-union setting did have such a right. However, the Board later overruled *Materials Research* in *Sears, Roebuck*, 274 NLRB 230 (1985) and *DuPont*, 289 NLRB 626 (1988), holding that the *Weingarten* right existed only in union-represented workplaces. But those cases, in turn, were overturned in *Epilepsy Foundation*.

The Board's current rule, set forth in *Epilepsy Foundation*, is that an employee in a non-union setting *does* have the right to have a co-worker accompany her to an investigatory interview, so long as she reasonably believes that the interview may result in disciplinary action. As with *Weingarten* itself, an employer does not have to inform its employees of the existence of this right. The right exists, so to speak, only when the employee invokes it; and very few employees in non-union settings know that they have this option. Furthermore, as with *Weingarten*, an employer is free to decide, when faced with the invocation of the *Epilepsy Foundation* right, that it will not proceed with the interview but will go ahead and make its disciplinary decision based on other information. But still, it would be unlawful to discipline or discharge the employee for having invoked

the *Epilepsy Foundation* right; and an employer cannot discipline or discharge the employee for refusing to attend such an investigatory interview without a colleague.

The Board's decision in *Epilepsy Foundation* was upheld by the U.S. Court of Appeals for the D.C. Circuit (though that Court held that the decision could apply prospectively only), *see Epilepsy Foundation v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001), and the U.S. Supreme Court denied certiorari. There is, however, a concerted push by management advocates to have *Epilepsy Foundation* overruled by the newly-constituted Board; and so the last chapter in the back-and-forth on *Weingarten* in the non-union workplace has surely not yet been written.

Other employee conduct protected by § 7,
and employer conduct prohibited by § 8(a)(1),
with emphasis on the non-organized workplace

The Board's caselaw also reflects, and protects, various recurring types of concerted protected activity that is often seen in non-organized workplaces. Some of the main types of such behavior are discussed below. This is by no means an exhaustive list, so one should not hesitate to seek a remedy under the NLRA whenever an employee suffers some adverse employment action in retaliation for having taken part in some other sort of concerted activity among employees.

* Talking with other employees about the terms and conditions of employment is protected activity under Section 7; and an employer violates Section 8(a)(1) by purporting to prohibit such discussions, or by disciplining employees for having had such discussions. *See*, *e.g.*, *Westside Community Health Center*, 327 NLRB No. 125 (1999) (employees have the right under Section 7 to discuss employer discipline with each other); *Niles Co.*, 328 NLRB No. 58 (1999) (employees have the right under section 7 to discuss their respective salaries with each other).

* The logical (though not exclusive) next step, after discussion of working conditions with other employees, would be the communication of employees' displeasure to the employer. And this, too, is concerted protected activity. Now, if an employee were speaking only on her own behalf, without having discussed the matter with other employees and without any indication that her outspokenness was an effort to sway other employees to join in the cause – that might not constitute protected activity, because the element of "concert" would be missing. But in the more usual situation – where an employee who speaks up is often doing so with the approval and support of at least some others – the element of "concert" is present and the activity is the exercise of a statutory right. *See*, *e.g.*, *CKS Tool and Engineering*, 332 NLRB No. 162 (2000). In particular, where the employee speaks up at a group meeting called by the employer to discuss terms and conditions of employment – and where the employee is speaking about conditions that are applicable to others as well as to herself – the Board has traditionally found that the element of "concert" is met and thus that the activity is protected. *E.g.*, *Caval Tool Div. of Chromalloy Gas Turbine Corp.*, 331 NLRB No. 101 (2000).

* The concerted pursuit by employees of judicial or administrative remedies, to improve the terms and conditions of their employment, is also concerted activity and protected under Section 7; thus employees are protected by Section 8(a)(1) from retalation for having engaged in such activities. This includes, for instance, lawsuits and complaints to administrative agencies. *See*, *e.g.*, *Mohave Electrical Coop. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) ("the Supreme Court has confirmed that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums."), *citing Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). However, as with other sorts of activities, this must be *concerted* in order to be protected. The action of one employee alone, for his or her

own sake, is not the exercise of a Section 7 right. But if one employee takes the action *on behalf of* a group, or upon the approval of fellow employees, then the "concert" element should be satisfied. *Mohave Elec.*, 206 F.3d at 1189 n.6.

* As reflected in *Washington Aluminum* and other cases discussed above, a work stoppage to protest working conditions or other employment policies is concerted protected activity; employees cannot be terminated for engaging in that activity, nor can the employer refuse to let the employees return to work when they desire to do so. *See*, *e.g.*, *Odyssey Capital Group*, 337 NLRB. No. 174 (2002). (The traditional term for such a work stoppage, of course – particularly in the context of a union-represented workforce – is a "strike".) But a word of caution is in order, especially if you are considering giving any client the advice that a work stoppage is a good idea from a legal perspective: in general, *partial* and *intermittent* strikes are *not* protected by Section 7, and can result in discharge. A "partial" strike is a concerted refusal to perform some *portion* of the work assigned by an employer, or a slowdown, or something else short of saying in effect "we are withholding our labor in protest." *See*, *e.g.*, *Yale University*, 330 NLRB No. 28 (1999) (university teaching fellows' concerted activity in withholding grades was a partial strike and therefore unprotected); *Vencare Ancillary Services*, 334 NLRB No. 119 (2001) ("Partial strikes, where employees continue working on their own terms, are not protected by Section 7 of the Act. … Thus, employees lose their statutory protection when they perform only part of their job functions while accepting their pay and avoiding the risks of a total strike."). While a refusal to perform *voluntary* overtime may be protected, a refusal to perform *mandatory* overtime generally is not. One may wonder how the Board's refusal to protect partial strikes can be the governing legal rule, given the plain statutory mandate that protects concerted activities without drawing such a distinction – but that is the state of the law, and is generally considered beyond question.

The breadth of concerted protected activity in non-organized workplaces is also reflected in long strings of citations in footnotes 15 and 16 of the Board's decision in *Materials Research*, 262 NLRB 1010 (1982), mentioning many Board and court precedents upholding the exercise of Section 7 rights outside the union-organizing context:

> n 15 See *Red Ball Motor Freight, Inc.*, 253 NLRB 871 (1980) (employee complaint about order of recalling employees and requirement that employees use vacation time during forced layoff protected); *Go-Lightly Footwear, Inc.*, 251 NLRB 42 (1980) (walkout by employees in support of discharged employee, and picketing with placards referring to unkept employer promises, scab labor, and unfairness to minorities protected); *Savin Business Machine Corporation*, 243 NLRB 92 (1979) (discussions among employees about loss of commissions on rental renewals protected); *Steere Dairy, Inc.*, 237 NLRB 1350 (1978) (employee attempt to convince other employees to join in walkout to protest pay rate change protected); *Hansen Chevrolet*, 237 NLRB 584 (1978) (employee inquiry about wage system protected); *American Arbitration Association, Inc.,* 233 NLRB 71 (1979) (employee assistance to other employees in resisting dress code protected); *Fairmont Hotel Company*, 230 NLRB 874 (1977) (employees' inquiries and complaints about tip policy protected); *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975) (employee filing complaint with OSHA about working conditions protected); and *Carbet Corporation*, 191 NLRB 892 (1971) (employee acting as spokesmen for employee concerning grievances prior to onset of organization driver protected).
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> n16 See *Vic Tanny International, Inc. v. N.L.R.B.*, 622 F.2d 237 (6th Cir. 1980) (employee walkout to protest unfair job assignments protected); *N.L.R.B. v. Empire Gas, Inc.*, 566 F.2d 681 (10th Cir. 1977) (individual employee's action soliciting support for collective refusal to work protected); *United Merchants and Manufacturers, Inc. v. N.L.R.B.*, 554 F.2d 1276 (4th Cir. 1977) (work stoppage by unrepresented employees to protest discharges protected); *United Packinghouse, Food and Allied Workers International Union, AFL--CIO v. N.L.R.B.*, 416 F.2d 1126 (D.C. Cir. 1969), cert. denied 396 U.S. 903 (1969) (workers acting to establish racially integrated employment conditions protected); and *N.L.R.B. v. Puerto Rico Rayon Mills Inc.*, 293 F.2d 941 (1st Cir. 1961) (seeking reinstatement of discharged employee protected).

For further reference on these topics and other sorts of protected activity, again the ABA's "Developing Labor Law" Treatise is a valuable resource. The bottom line is this: whenever you see an instance of employees suffering any retaliation for having banded together in some way to improve their wages, benefits, or working conditions, then you have a potential issue under § 8(a)(1) that may well be worth pursuing under the NLRA.

You should ask yourself, as reflected in the following discussion about jurisdiction and procedure, whether the employer and the employees are covered by the NLRA or whether they fall within one of its exclusions; and you should consider taking advantage of the charge-filing process that is described below.

Procedure under the Act, and the types of employers and employees covered by the Act

The enforcement of the National Labor Relations Act rests primarily with the National Labor Relations Board. The statutory scheme does not (with narrow exceptions) provide for a private right of action in court; instead, enforcement takes place through an administrative decisionmaking process. At the top of this process is the five-member Board itself, the body entrusted by the Congress with the task of interpreting the broad language of the Act and defining the Nation's labor laws in light of the Board's understanding of the appropriate policy concerns. *NLRB v. Curtin Matheson Scientific*, 494 U.S. 775, 786 (1990).

Board procedures are, for the most part, divided into two types of cases: (1) unfair labor practice cases (known colloquially as "C" cases, because their case numbers begin with "C") and (2) representation cases (known as "R" cases).

Coverage of the Act: the scope of "employer" and "employee"

Common to both sorts of cases are some limitations as to the categories of employers covered by the Act, and the categories of employees who enjoy rights under the Act. Under the Act's definition of "employer" in § 2(2), 29 U.S.C. § 152(2), public-sector employers – including the federal government, federal-government-owned corporations, states and their political subdivisions – are *not* covered by the Act. Also excluded are those employers covered by the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, which generally means railroads and airlines and certain other employers associated with those industries. The Board has also developed, through caselaw, certain other categorical exclusions of employers; for

details on this, see for instance Chapter 27 of the ABA's invaluable resource, "The Developing Labor Law" (now in its Fourth Edition). Furthermore, the Board has the statutory authority under 29 U.S.C. § 164(c)(1) to decline to exercise jurisdiction over a class of employers if the Board deems that class of employers to have too little effect on commerce to warrant an exercise of its jurisdiction. That is why practically every decision of the Board includes the recitation that the employer derives gross revenues, or purchases goods or services, in excess of $50,000 yearly from points outside the state in which the employer is located. (Different monetary standards for jurisdiction are sometimes applied to certain categories of employers; again, see "The Developing Labor Law" for details when necessary.)

The Act also limits the categories of "employees" who enjoy the rights conferred by the Act. Thus, in § 2(3), 29 U.S.C. § 152(3), the Act excludes (a) agricultural workers (who are covered by state labor laws in some states, such as California, but are not protected by federal labor law); (b) persons employed as domestic workers in a home; (c) anyone employed by his or her parent or spouse; (d) independent contractors; (e) supervisors; and (f) persons employed by an employer that is subject to the Railway Labor Act or that is otherwise excluded from the Act's definition of "employer". Of these excluded categories, the one most often litigated is "supervisor." Litigation as to who is a supervisor, and who is not, arises in a variety of contexts, such as whether the person is eligible to vote in a representation election, or whether the employer can insist that the person support its anti-unionization position, or whether the employer is liable for acts committed by the person that would constitute an unfair labor practice. The Act defines "supervisor" in § 2(11), 29 U.S.C. § 152(11), to include anyone who has the authority, in the interest of the employer and in the exercise of independent judgment (rather than in a routine or clerical fashion) to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline

other employees, or to effectively recommend such actions. The caselaw interpreting that definition is voluminous, and has repeatedly resulted in decisions of the Supreme Court and the Courts of Appeals as well as Board decisions. *See,* e.g.*, NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).

Procedure in Unfair Labor Practice Cases

As noted above, unfair labor practices and representation cases have different procedural tracks. Unfair labor practice, or "ULP," cases are those in which a respondent – usually an employer, but sometimes a labor organization – is alleged to have violated one or more of the sub-parts of Section 8 of the Act, 29 U.S.C. § 158. Section 8(a) – including the catch-all provision of § 8(a)(1), which has been discussed above – prohibits certain practices by employers, while section 8(b) prohibits certain actions by labor organizations. The other portions of Section 8(a), besides 8(a)(1), are: § 8(a)(2), prohibiting an employer from dominating or assisting a labor organization (primarily, but not solely, a prohibition of the "company union," a pseudo-union that is actually in the employer's pocket and provides the mere appearance of collective bargaining, so as to dissuade employees from forming a real union of their own); § 8(a)(3), prohibiting discrimination against an employee because she has, or has not, joined the union (with a complex proviso relating to "union security" provisions in states that do not have "right to work" laws); § 8(a)(4), prohibiting discrimination against an employee because she has filed a charge with, or has given testimony before, the NLRB; and § 8(a)(5), requiring employers to bargain in good faith with unions.[2]

[2] Each of these sections has given rise to a great deal of complicated caselaw, primarily in the context of union-organized employers. For instance, the Section 8(a)(5) duty to bargain in good faith is the foundation for a large and complex body of rules about the collective bargaining process. Those topics are too large even to summarize effectively in this paper. Each of them is addressed in detail in sources such as the ABA's multi-volume treatise "The Developing Labor Law".

ULP cases are commenced by the filing of a *charge*. The concept of the "charge" is mentioned in the statute, 29 U.S.C. § 160(b), and more information on the procedures associated with charge-filing can be found in Section 101 of the Board's Rules and Regulations (available at http://www.nlrb.gov/rr/rr2.htm) as well as Section 102 thereof (http://www.nlrb.gov/rr/rr1.htm#SubpartB). There is no filing fee or other cost associated with filing a charge. It is merely necessary to file the charge with the nearest Regional Office of the Board, setting forth the allegation in at least general terms (such as, for instance, "On or about June 1, 2003, the above-named employer violated Section 8(a)(1) of the Act by terminating Jane Smith because she had exercised her right under Section 7 of the Act to discuss workplace conditions with other employees"). A list of Regional Offices, with their addresses and telephone numbers and a map showing the geographic jurisdiction of each office, is available at http://www.nlrb.gov/map/map01.html. A charge is generally made by filling out the official charge form, which is available through the Regional Offices. The person or entity filing the charge is therafter known as the "charging party."

The charge is then served on the employer (or union) that is alleged to have committed the unfair labor practice. Though the Regional Office often serves the charge, it is also wise for the charging party to serve the charge (for instance, by hand or certified mail) if there is any question as to whether the respondent will receive the charge in a timely fashion. Timeliness is important in this matter, because § 10(b) of the Act, 29 U.S.C. § 160(b), sets forth a short limitations period: a charge must be filed *and served* within six months after the commission of the unfair labor practice.

Filing a ULP charge is *not* like filing a lawsuit. It is instead a request to the General Counsel of the NLRB – through his agents, the Regional Directors and Regional Office field staff – to issue an administrative Complaint against the respondent (again, usually the employer) charging a violation of § 8. In order to determine whether to issue a

complaint, the Regional Office will conduct an investigation of the charge. This usually begins with an interview of the charging party, and the taking of an affidavit from the charging party and from any witnesses that he or she can provide. The charging party should also provide any documentary evidence that supports the charge. It is absolutely essential that the charging party cooperate with the Board staff in this investigatory process; after all, the Board staff are the ones who decide whether the case will even be pursued, so it is unwise to frustrate them. The Board staff will also seek information from the respondent, in furtherance of the investigation.

The Regional Office then makes a decision whether to issue a Complaint. The Charging Party can, and should, submit a "position letter" arguing why a Complaint should issue, addressing both the facts and the relevant legal standard that emerges from the Board's caselaw on the particular sort of violation at issue. The respondent will usually submit a position letter arguing that no Complaint should issue. Settlement is a possibility even at this early stage of the matter, and remains a possibility throughout the proceedings, however far they go. *See* Sections 101.7 and 101.9 of the Rules and Regulations.

If the Regional Office decides not to issue a Complaint, the Charging Party can appeal to the General Counsel's Office of Appeals within 14 days. *See* Section 101.6 of the Rules and Regulations. If the General Counsel affirms the decision not to issue a Complaint, then that is unfortunately the end of the matter; the General Counsel's decision not to issue is *not* subject to judicial review. *See*, *e.g.*, *Vaca v. Sipes*. 386 U.S. 171, 182 (1967).

If the General Counsel does issue a Complaint, then the matter goes to a hearing before an Administrative Law Judge. An attorney from the Regional Office – "counsel for the General Counsel," in Board parlance – prosecutes the case, calling the witnesses,

presenting the documentary evidence, and so forth. The charging party can be represented by counsel, who can also examine and cross-examine witnesses and can introduce other evidence; but in many cases the charging party leaves the prosecution of the case entirely up to the Board's attorney. The Respondent defends itself; in general, the conduct of the hearing is much like a bench trial in federal court, and the Federal Rules of Evidence generally apply. *See* Section 101.10 of the Rules and Regulations.

In some relatively straightforward cases, the Administrative Law Judge may orally issue a bench decision at the conclusion of the case, and this decision is transcribed by the court reporter. More often, the parties avail themselves of the opportunity to file post-hearing briefs, and the ALJ issues a written decision some weeks later. After receiving the ALJ's decision, any party – counsel for the General Counsel, charging party, or respondent – can "appeal" the ALJ's decision by filing "exceptions" to it, with the Board itself. Again, the timing and format for such exceptions are set forth in the Rules and Regulations, which are available online as noted above. Although a party can file exceptions to an ALJ's findings of fact, the Board's general practice is not to overrule credibility determinations by the ALJ unless the clear preponderance of all the record evidence convinces the Board that the ALJ's credibility determinations were incorrect. *See Standard Dry Wall Products*, 91 NLRB 544 (1950). The Board does, however, review the ALJ's legal conclusions *de novo* if a party files exceptions to them. Those aspects of the ALJ's decision that are not the subject of exceptions are generally adopted by the Board without alteration.

The Board itself consists of five members, who are appointed by the President (and confirmed by the Senate) for six-year terms. The Board is usually split between members who are Democrats and those who are Republicans, with three members coming from the President's party. In most cases, a decision of the Board is issued by a panel made up of three of the five members; in important cases, all five members decide the case.

A party (respondent or charging party) that is dissatisfied with a final decision of the Board can seek review in one of the U.S. Courts of Appeals. And if the respondent refuses to comply with the decision, but has not itself filed a petition for review, then the Board can file a petition in one of the U.S. Courts of Appeals to *enforce* its order. NLRA § 10(e), 29 U.S.C. § 160(e). A petition for review can be filed in any Circuit where the respondent does business, or in the D.C. Circuit. Section 10(f), 29 U.S.C. § 160(f). This, of course, often leads to forum-shopping by employers, who choose the Court of Appeals that seems most likely to overturn the Board; employers often choose the D.C. Circuit because of its reputation for willingness to overturn the Board. A Court of Appeals is to accept the Board's findings of fact if they are supported by substantial evidence on the record as a whole; this standard is essentially the same as the familiar summary judgment or judgment as a matter of law standard, according to the Supreme Court. *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 366-67 (1998). And a Court is likewise required to defer to the Board's conclusions of law, if they are rational and consistent with the Act. *Id.* at 364. Moreover, an argument must be timely made before the Board (and the ALJ) in order to be preserved for the Court's review. Section 10(e), 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.").

Remedies for unfair labor practices are, sad to say, rather limited and (because of the many steps of review outlined above) can often take a very long time to obtain. In cases not involving actual economic loss to employees, the most common remedy is simply an order requiring the employer not to repeat the unfair labor practice (or similar ones), and a requirement that the employer post a notice informing its employees of that order. *See*, *e.g.*, *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941). In unlawful-discharge cases, and

other cases involving actual economic loss to employees, the general principle is that the Board imposes only *compensatory* remedies, and even then only a limited sort of compensation. Not only does the Board not award punitive damages; it generally does not even award consequential damages, such as compensation for losses or injuries resulting from the unlawful termination. *See BE&K Constr. v. NLRB*, 536 U.S. 516, 122 S.Ct. 2390, 2398 (no punitive remedies); Speech of General Counsel Leonard Page, April 2000, available at <http://www.nlrb.gov/press/ r2388.html> (discussing consequential damages and other issues of relief). In short, reinstatement with backpay and benefits – minus interim earnings – is the traditional remedy, even in the most serious cases of unlawful termination.[3] In some rare cases, where the respondent's position was wholly lacking in merit, the Board will award attorneys' fees to the charging party. *See*, *e.g.*, *Frontier Hotel & Casino*, 318 NLRB No. 60 (1995).

The downside of this procedure is easy to see: obtaining relief under the NLRA is far from assured even in a meritorious case, and requires immense patience on the charging party's part, and results in only limited remedies. These factors cause some employers to scoff at the NLRA. The upside, however, is at least that there is a possibility of relief, and that it requires little or no investment of resources by the charging party or its counsel; indeed, once a Complaint has been issued, in many cases it is appropriate for the charging party and its counsel to let counsel for the General Counsel do all the work necessary to pursue the case to a conclusion.

Procedure in Representation Cases

Representation case procedures are a separate matter, with their own complexities. A brief introduction will suffice, for purposes of this paper's primary intended audience;

[3] The amount of backpay, or other compensatory award, is generally not litigated or even discussed until *after* the Board has made a final decision and *after* that decision is upheld on appeal (if review is sought); the amount of monetary relief is reserved for what is known as "compliance" proceedings.

rarely will a non-specialist ever have the need to delve deeply into the complexities of this field. More information is publicly available from the Board itself, in the publication "An Outline of Law and Procedure in Representation Cases" (available at http://www.nlrb.gov/outline.html) and in the relevant portions of the Board's Casehandling Manual (http://www.nlrb.gov/chm2.html). Furthermore, the Board's Rules and Regulations (http://www.nlrb.gov/rr.html) contain provisions that govern the hearings, filings, and other litigation steps discussed herein.

The Board's R-case jurisdiction has its roots in § 9 of the National Labor Relations Act, 29 U.S.C. § 159. That section gives the Board jurisdiction to decide whether and when to hold elections among groups of employees to determine whether they wish to be represented by a labor organization; and it also gives the Board the power to oversee those elections and to determine their results.

The most common sort of petition is one filed by a union seeking to become the bargaining representative of a group of employees who have no union yet.[4] In general, the Board will process such a petition, and hold an election, only if the Union can demonstrate (usually through signed "authorization cards") that at least 30 percent of employees favor union representation; this is known as a sufficient "showing of interest," and though the Act does explicitly not require it, it is generally understood that as an administrative matter

[4] The Board also processes petitions for "decertification" elections – i.e., requests by union-represented employees, dissatisfied with their union representation, for an election to determine whether a majority of the bargaining unit employees would prefer to abolish their union representation. In addition, there are some circumstances in which an employer can file a petition for an election, to determine whether its employees desire union representation.

It should also be borne in mind that an employer can voluntarily recognize a union, without forcing a Board-supervised election. In most industries, this requires some showing that the majority of employees desire union representation – for instance, by a "card check" demonstrating that a majority of employees have signed cards indicating that preference. In the construction industry, under § 8(f) of the Act, 29 U.S.C. § 158(f), an employer can recognize and sign a collective bargaining agreement with a union even without such a showing of majority status; construction-industry unions then often operate "hiring halls", referring employees on an as-needed basis to signatory employers.

the Board has the authority to set this as a prerequisite for the holding of an election. The question naturally arises, "30 percent *of what group*?" The answer is that the relevant group of employees is a group that, in the Board's opinion, constitutes an "appropriate bargaining unit". As reflected in § 9(b) of the Act, the Board has the authority to decide what constitutes an appropriate unit; it can be, for instance, all hourly employees at a given facility, or at multiple facilities, or only the production and maintenance employees, or only the office and clerical employees, or any number of more particular permutations. In general, the Board's inquiry is whether a given grouping of employees has a sufficient "community of interest" to warrant placing them together in the same bargaining unit. *See*, *e.g.*, *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000) (referring to, and explaining the application of, "our traditional community of interest test"). If there is a dispute between the petitioning union and the employer over the appropriate boundaries of the unit – or any other dispute that must be resolved by the Board prior to holding an election – then the Board holds a hearing to take evidence and decide the disputed matter. *See* 29 U.S.C. § 159(c).

If the Board decides to hold an election, then usually a secret-ballot election is held at the employer's facility, supervised by an agent of the Board. (In some relatively rare circumstances, the Board will use a mail ballot instead). After the election, the votes are counted; if the majority of the ballots cast were voted in favor of union representation, then the union is certified and the employer becomes obligated under section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), to bargain in good faith towards a collective bargaining agreement.

Sad to say, the election results are quite often only the beginning of the battle from a litigation point of view. A party – union or employer – dissatisfied with the election results can file objections, seeking to have the election results set aside and to have a re-run election. There is a whole body of decades' worth of caselaw, much too voluminous to

recount in any detail here, governing the topic of when such objections will be deemed meritorious. Many types of conduct by employer, or union, or employees, can constitute grounds for setting aside the election results on the theory that the conduct interfered with the conditions necessary for a fair election. Some examples are: that the employer discriminatorily terminated union supporters, in violation of 29 U.S.C. § 158(a)(3), in a way that detracted from the union's support; that the employer committed other acts that created a climate of fear that would lead employees to shy away from supporting the union; that the union did the same; that one party or the other campaigned in an inappropriate fashion; and so on. There can also be litigation about whether certain employees should have been allowed to vote, or whether their votes should not be counted because (for example) they are supervisors, or so forth.

After a hearing officer or administrative law judge hears the evidence on such objections or eligibility issues, and issues a report either upholding the election results or calling for a re-run election, still the matter is not over; then the losing party can file exceptions (under the Rules and Regulations) with the 5-member Board itself. Even if the Board itself upholds the election results and the union has won, still the matter is not over. If the employer wishes to prolong the matter further, and therefore does not begin bargaining, the union must file an unfair labor practice charge, alleging a violation of § 8(a)(5), 29 U.S.C. § 158(a)(5). Such charges – called "test of certification" cases – are usually handled promptly by the Board, resulting in an order requiring the employer to bargain. But, as with all unfair labor practice orders, such rulings can still be challenged by the employer in one of the U.S. Courts of Appeals; and from time to time an appeals court will overturn the Board's decision in such a case, holding that the election should have been set aside on one basis or another. Even if the Court of Appeals upholds the

Board's order, still the process often takes many years between the election and the commencement of bargaining.

Conclusion:
If your clients have an urge to do concerted protected activity, advise them to do it right and join a union

Having perhaps tantalized you with the limitless possibilities for concerted activity in the non-union workplace – or perhaps having scared you, in your capacity as employer, that your employees have the right under federal law to decide together to do any number of disruptive things – let us close by counseling caution. No one in a non-union workplace should *ever* assume that invoking one's rights under Section 7 of the National Labor Relations Act is a walk in the park. And – in the very unlikely event that you are contacted by a client or potential client who is *considering* engaging in activity that might be protected by Section 7, and wants your advice about it – your advice should be tempered with caution.

First of all, most non-union employers are unaware of their obligation to refrain from retaliating against the exercise of those rights, and will therefore not hesitate to take even those actions that are plainly unlawful. (If your clients are employers, you can do them and the public a service by advising them of the broad outlines of their obligation to respect their employees' right to engage in concerted protected activity – and by advising them to seek specific legal advice before doing something that might violate the National Labor Relations Act.).

Second, the prospect of a remedy through the National Labor Relations Board is uncertain, even when the violation of Section 8(a)(1) may seem most blatant to you. In order to obtain a remedy, you must convince *first* the Regional Office, *then* an

Administrative Law Judge, *then* (perhaps) the Board itself, *then* (perhaps) a Court of Appeals, all before obtaining a backpay remedy. The process is often a very lengthy one.

Third, the benefits of concerted protected activity without a union are real, but they are far from overwhelming. The only way that employees can have real sustained collective voice – as opposed to mere periodic opportunities to butt heads with the employer, temporarily satisfying as those episodes can be – is to exercise the most basic Section 7 right of contacting an established labor organization to begin an organizing drive at the workplace.

But meanwhile, the well-advised lawyer who deals with employment matters will always keep the National Labor Relations Act as part of her mental checklist of potential tools, and will not hesitate to file a charge when there is an arguable violation of Section 8(a)(1).