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What to Look for from the New NLRB
U.S. House Committee on Education and the Workforce Subcommittee on Health, Employment, Labor, and Pensions

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Mr. Chairman, Members of the Subcommittee, I am delighted to appear before you today. My name is Ronald Meisburg. I practice law as a partner at Proskauer Rose LLP. I am co-chair of the firm's Labor Management Relations practice group. My testimony is solely my own and I do not represent my firm, its clients or any other person or organization.

I began my legal career in 1974 in the Office of the Solicitor of Labor. For six years, I served in the Division of Employee Benefits and then in the Division of Mine Safety and Health. While I was there, I was a member of a litigation team that won the Secretary of Labor's Distinguished Achievement Award. I moved to private practice in 1980 and for the next 23 years spent most of my time representing management in various aspects of labor relations, including collective bargaining, contract administration, grievance and arbitration proceedings, and cases before the NLRB and the federal courts.

In late 2003, President George W. Bush selected me as his nominee for a seat on the National Labor Relations Board, and I served a recess appointment as a Board Member from January through December, 2004. I next served as a Special Assistant to NLRB General Counsel Arthur Rosenfeld during 2005, and in January, 2006, I received my second recess appointment – this one to the post of NLRB General Counsel. While serving as a recess appointee, I was confirmed by the Senate in August, 2006, and served until June, 2010, as a confirmed General Counsel.

Following my service at the NLRB I returned to the private practice of labor law.

I have been asked to testify regarding what I see as areas of law and legal issues that will most likely be addressed by the Board in the upcoming months. While the Board's agenda is set partly by what cases are brought to the Board, it is also a function of what issues in those cases the Board and the General Counsel want to emphasize, either by refining, broadening, narrowing or overruling prior precedent. Also, recently the Board has turned to rule making to flesh out its agenda in areas not as easily addressed in the cases.

Representation Election Regulations: I expect that the Board will want to take some action to get its effort to revise its representation election rules back on track. The Board issued a notice of proposed rulemaking in June, 2011. 76 FR 36812 (June 22, 2011). Written and oral testimony was accepted in July and August, and thousands of comments from labor and management representatives and academics were received by the Board. In December, 2011, a portion of the proposed regulations was putatively promulgated, while a portion of them was reserved for future action. 76 FR 80138 (December 22, 2011).

However, a federal district court in the District of Columbia held that only two of the three sitting Board members had participated in the rule's promulgation, and set the regulations aside on that basis. *Chamber of Commerce of the United States of America et al. v. NLRB,* 879 F. Supp. 2d 18 (D.D.C. 2012) *motion to alter or amend den'd* (July 27, 2012). The district court's decision was appealed to the U.S. Court of Appeals for the District of Columbia Circuit, where it is currently pending. *Chamber of Commerce of the United States et al. v. NLRB,* No. 12-5250 (August 7, 2012).

Following the D.C. Circuit's decision in *Noel Canning v. NLRB,* 705 F.3d 490 (D.C. Cir. 2013) (holding the President's January 4, 2012 recess appointments of NLRB Members Block and Griffin were invalid because they did not occur during an inter-session recess of the

Senate, and were not for a vacancy which arose during such inter-session recess), the respondents in the *Chamber of Commerce* case asserted another ground for invalidating the regulations – that one of the two members who had promulgated the rule was himself unlawfully appointed, and therefore the rules were invalidly promulgated by only one Board member. The D.C. Circuit has now ordered this case held in abeyance pending the decision of the Supreme Court in *Noel Canning*.

In the meantime, the Chairman of the Board has indicated that he wishes to move forward with those parts of the proposed rule that were not promulgated in December, 2011. Daily Labor Report 2013 Labor Outlook, "NLRB Determined to Act in Year of Challenges" (at pg. S-23), *found at* http://op.bna.com/dlrcases.nsf/id/smgk-94ns5v/$File/dlr2013laboroutlook.pdf . But that desire seems to assume that the earlier putatively promulgated rules would be in force. Now, because of the D.C. Circuit *Chamber of Commerce* litigation and the pendency of the *Noel Canning* case in the Supreme Court, that supposition is in substantial doubt and it will not likely be resolved for many months. So how does the Board move forward under these circumstances?

At the outset, it should be noted that in general the employer community did not see and does not see the need for the Board to move forward with these regulations. The existing election procedures work well. At the time of the rulemaking, the Board's statistics showed that all Board elections were held within 38 median days from the filing of an election petition. And 95% of all elections were held within 56 days.

Further, the proposed rules contain substantive changes that are ill conceived. For example, there is an effective seven day deadline following the filing of a petition for holding a representation hearing. This was coupled with a requirement that the employer produce a pre-hearing position statement on or before the hearing date. Failure to raise an issue in the position

statement would be deemed a waiver of the issue. This was seen as an unfair denial of rights and highly prejudicial to businesses, particularly small businesses that may not have the ability to engage legal counsel and prepare a proper and thorough position statement.

These and many other issues of concern to employers were addressed in comments that I helped prepare for the U.S. Chamber of Commerce. These comments were submitted to the Board and can be found at http://www.regulations.gov/#!documentDetail;D=NLRB-2011-0002-51430.

Assuming the Board moves forward, it will have to deal with the part of the regulation it attempted to promulgate but which is hung up in litigation in the D.C. Circuit. Should the Board wish to proceed, it will have to determine whether to proceed piecemeal with the remaining proposed regulations that were not previously promulgated; or to withdraw the previously promulgated rules and seek dismissal of the D.C. Circuit appeal. Following the latter course would allow the Board to start the entire process over, and perhaps the rulemaking would be more focused, for example, on the causes of delay in outlier cases, which appear to represent 5% or less of the Board's election case load.

If undertaken, this new start could include doing something suggested by many commentators, and that is, issuance of an advanced notice of proposed rulemaking that could be informally evaluated by interested parties. The Board is fortunate in that it gets lots of opportunities for informal feedback from its various constituencies, whether through the ABA Committee meetings that it regularly attends, or on the speaking circuit where Board members typically address groups of employment and union lawyers before various local bar groups. If a pre-proposal draft were shared with the public, and sufficient time were given for study of that draft, this informal process could allow the Board to receive valuable input that could be taken

into account in any formally proposed rule, and, indeed, in deciding whether any proposed rule were necessary.

Protected Concerted Activity: I also expect the Board to continue to expand what constitutes protected concerted activity. It is difficult to understate the reaction of employers to the series of cases in which the Board has broken new ground in defining what constitutes protected concerted activity. Many of the cases involve new and evolving technology and new ways of organizing work. For example, the Board's efforts to protect social media posts that meet the test for concerted activity came as a big surprise to many employers. The Acting General Counsel has been quoted as saying that conversations on social media are no different than those around a water cooler. It may be true in some cases that comments on social media may have replaced, or augmented, protected water cooler conversations. And to that extent, they may be protected.

But the Board may not appreciate the extent to which these social media postings and conversations on the internet have the potential to cause much unjustified harm to an employer. Many of them take place outside the work environment, which is to be expected given the ubiquity of home computers and the portability of smart phones and other mobile devices which can provide access to the internet almost anywhere. For that reason, employee comments may sometimes be less measured and perhaps more careless than they might be if made face to face in the presence of co-workers. But whatever the reason, these comments can be very sharply and perhaps unfairly critical of employers and supervisors and managers. Worse, unlike the water cooler conversations, they are published to perhaps millions of people, most or all of whom are not co-workers, in effectively a permanent form with unlimited distribution.

So I would hope to see the NLRB take this into account when evaluating and deciding these cases. The Board has developed standards for when employee statements may lose the protection of the Act. Just as the Board is updating the meaning of protected activity to account for new technologies, it should also update the standards for when employee comments may lose the protection of the Act when made on social media, taking into account the difference between statements made on the internet and statements made around the water cooler.

We already have in the common law an historical distinction between libel and slander. Libel traditionally has been treated more seriously because of the relative permanence and distributable nature of written libel as opposed to spoken slander. Technological advances have made the distinction less clear, principally because of audio and video recordings of spoken slander have made it more like traditional libel. Perhaps the Board can take a cue from this in developing a coherent body of law which protects, within balanced and reasonable limits, the relatively permanent and highly distributable social media speech on the internet.

Interference, Restraint and Coercion: Another area where the Board will continue to address and expand is what constitutes employer interference, restraint and coercion with respect to such activities. For example, the Board has held that an employer may not give a blanket confidentiality instruction to employees during an investigation into a workplace incident. *E.g.*, *Banner Health System*, 358 NLRB No. 93 (July 30, 2012). The basis for this is that a blanket rule requiring confidentiality may chill the right of an employee to consult with a fellow employee or a third party regarding the investigation.

I am told by my colleagues who do such investigations that confidentiality instructions are routine, and serve the purpose of not only protecting the integrity of the investigation, but also of protecting the identity of complainants who may otherwise be reluctant to come forward,

and the identity of persons who may be wrongfully accused, before the investigation can be completed and appropriate action taken by the employer.

I think it is important to note that these workplace investigations involve all sorts of incidents that do not arise under the NLRA. Typically they will involve whistle blowing, or accusations of harassment, discrimination, theft, vandalism, or other types of work place conduct or incidents. The ability of the employer to fully investigate them is important to carrying out the protections and policies under other federal, state and local laws, where confidentiality is needed. Indeed, I am told by my colleagues who do EEO investigations that the EEOC urges confidentiality in investigations.

To be clear, the NLRB has not outlawed all confidentiality instructions. But it has required the employer to *first* make a determination that failure to give the confidentiality instruction will likely result in the falsification of testimony, the fabrication of evidence, the intimidation of other witnesses, or some similar justification. The problems with this are several-fold. First, what is the process for making such a determination? Second, how can such a determination be made without talking to witnesses on a non-confidential basis, thus potentially rendering any later confidentiality instruction nugatory? And third, will the delays engendered through making the determination delay the investigation and put an accurate outcome at risk?

In a sense, this is an overarching problem with the Board's jurisprudence in this area. While it is possible to look at a rule or at a particular practice and clearly see how it might chill the assertion of protected rights, sometimes the Board delves too far into the theoretical.

The Board's recent decisions on return to work policies for off duty employees serve as an example. *E.g., J. W. Marriot Los Angeles at L.A. Live,* 359 NLRB No. 8 (September 28, 2012). Essentially the Board holds that if a return to work policy allows the employer any

discretion whatsoever in allowing an off duty employee back onto the property, then the rule is unlawful. The basis for this is that if an employee has to ask permission to go back to meet another employee on some union business, or engage in the protected activity of a meeting to discuss work conditions, the employee may be chilled in asking for permission.

But this throws the baby out with the bath water because it also keeps an employee who needs to go back to retrieve some property left in his locker or some other non-labor related reason from having a flexible rule where his employer can say yes. In these types of cases, the Board should be more willing to wait for an actual instance of alleged wrongdoing, rather than preclude a common sense rule that may be fairly and legally administered by an employer.

Access to and Use of Property: Another issue that the Board will be dealing with is non-employee access to an employer's property. In *Roundy's Inc.,* the Board invited *amicus* briefs on the following questions:

> 1. In cases alleging unlawful employer discrimination in nonemployee access, should the Board continue to apply the standard articulated by the Board majority in Sandusky Mall Co., above?
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> 2. If not, what standard should the Board adopt to define discrimination in this context?
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> 3. What bearing, if any, does Register Guard, 351 NLRB 1110 (2007), enf. denied in part 571 F.3d 53 (D.C. Cir. 2009), have on the Board's standard for finding unlawful discrimination in nonemployee access cases?

Case 30-CA-17185 (Notice and Invitation to File Briefs, November 12, 2010).

The Board's likely purpose in this is to resolve a seeming inconsistency in Board law involving what constitutes discrimination in access to or use of an employer's property by employees and non-employees, some of whom may be engaged in union activity, while others may be engaged in various forms of commercial and noncommercial/charitable activity.

In *Sandusky Mall,* 329 NLRB 618 (1999), *enf. denied sub nom.*, 242 F.3d 682 (6th Cir. 2001), the Board did not draw any such distinctions and held that it was unlawful discrimination to deny access to or use of an employer's property by non-employees engaged in union activities, while allowing other non-employees access to or use of the property, regardless of the commercial or noncommercial nature of the activities of the other employees.

In *Register Guard,* the Board recognized a distinction between allowing commercial as opposed to noncommercial or charitable use of an employer's email system by employees, and held that denial of use of the email for union business was not discriminatory if no other commercial uses were allowed, either.

The outcome of the *Roundy's* case is awaited with great anticipation, as it has been pending at the Board for over two and one-half years since the completion of briefing.

Specialty Healthcare: The Board will continue to apply, and perhaps refine, its test for the determination of bargaining units announced in Specialty Healthcare, both through the administrative process at the regional level as well as in cases coming before the Board**.** Chief among the cases awaiting decision at the Board are *Macy's, Inc.,* Case No. 01-RC-091163, and *The Neiman Marcus Group, Inc., d/b/a Bergdorf Goodman*, Case No. 02-RC-076954, both presenting the issue whether employees of a particular department (cosmetics and women's shoes, respectively) may constitute an appropriate bargaining unit, as a departure from the

Board's prior practice of presuming that "wall to wall" units are appropriate in such retail establishments.

The Specialty Healthcare decision was recently upheld in the U.S. Court of Appeals for the Sixth Circuit, *Kindred Nursing Centers East f/k/a Specialty Healthcare v. NLRB,* __ F.3d __, Nos. 12-1027 and 12-1174 (August 15, 2013). Another federal appellate court was presented with, but specifically did not reach, the validity of *Specialty Healthcare.* Instead, the court denied enforcement to the Board's order on the basis that it was issued by an invalid Board, following the reasoning in the *Noel Canning* decision. *Huntington Ingalls Incorporated v. NLRB,* __ F.3d __, Nos. 12-2000 and 12-2065 (July 17, 2013). *See also Nestle Dryer's Ice Cream Co. v. NLRB,* No. 12-1684 (L) (pending on company's motion for summary decision on the recess appointment issue). The issue is likely to be presented in other cases, however, as the NLRB regional offices continue to apply the *Specialty Healthcare* test.

There are sure to be many other issues that will dot the Board's legal landscape in the coming months and years. Among them will be the continuing fall-out from the Recess Appointment issue in the many cases where that has been raised both with respect to the Board itself and with respect to Regional Directors and other officers appointed by the Board. Added to this, just few weeks ago, there was a decision from a federal district court in Washington state which held the Acting General Counsel's appointment to have been unlawful. So the NLRB and its staff will continue to have these distractions to contend with as well.

Finally, I want to say a few words about the Board as an institution. I regard my service as a Board Member and as General Counsel as the honor of a lifetime. On a daily basis I worked with and got to know well members of the agency's career staff. We met and considered some of the most interesting and sometimes vexing issues that continue to arise under the NLRA.

While there may be sharp differences of opinion on certain issues, those cases are the exception and there is broad consensus on many matters.

The career attorneys serve the appointees like any lawyer should serve his or her client – giving advice, speaking directly, arguing their points – and then, when a decision is made, turning to delivering a draft opinion, or advice memorandum, or brief, or other action as it had been decided by the appointee. And this they did whether they served a Republican appointee or a Democrat appointee. In short, I have great respect for these career employees, both professional and support staff, and I appreciate their efforts. And I hope that they can be kept out of the political crossfire accompanying the occasional disputes between the political appointees they work for.