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“Restoring Fairness to the National Labor Relations Board”

I. INTRODUCTION AND EXECUTIVE SUMMARY

The National Labor Relations Board (“Board”) has a long and distinguished history of administering the federal labor laws and regulating the conduct of labor-management relations in the United States. The Board’s primary charges under the National Labor Relations Act (“Act”) are to oversee the formation of collective bargaining units and to investigate and remedy unfair labor practices committed by employers and labor organizations alike. In carrying out these duties, the Board is generally expected to act as a neutral arbiter of facts and cases.

Because the Board is comprised of political appointees, its interpretation and application of the policies underlying the Act, its enforcement priorities, and its case precedents, are prone to occasional shifts depending on which political party holds the majority. As a result, labor practitioners have come to expect at least some policy changes when control of the Board changes hands. Provided the Board’s Members and its General Counsel confine their actions within the bounds of the Act, the system remains workable, albeit sometimes unpredictable.

Unfortunately and in stark contrast to the modest and gradual changes we have seen in previous administrations, the Board over the past eight years has produced some of the most drastic and one-sided policy changes in its history. In virtually every case, these changes have worked decided hardships on the employer community. For example, the Board has:

- Promulgated onerous new election procedures that dramatically reduce the time employers have to respond to union organizing campaigns and which paralyze them with burdensome administrative tasks.
- Established an obtuse new standard for creating collective bargaining units that too easily allows unions to gerrymander bargaining units based only on the extent of their organization, setting up the potential to balkanize an employer’s workforce into multiple bargaining units and paralyze it with endless and competing labor negotiations.

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- Announced a controversial new test for determining whether a business is the joint employer of the employees of another business. This test, which contravenes decades of settled law, allows for a joint employer finding if a business merely retains the right to affect the employment terms of another business' employees. Since announcing this test, the Board has sought to force it on the franchising industry, threatening what is arguably the nation's number one engine for minority and small business growth.
- Waged an all-out assault on an employer's right to maintain common sense workplace policies including confidentiality rules, employer arbitration programs, civility codes and even rules that protect an employer's legal obligation to investigate and remediate complaints of workplace misconduct and harassment.

These highlights only scratch the surface of the many precedents the Board has either unwound or remade over the past eight years. While its efforts to rewrite American labor law have spanned a variety of issues, there is a common theme in most of the Board's actions. In almost every instance in which the Board has changed the law in a manner it contends makes the Act more employee-friendly (some would say more union-friendly), its rationale underlying the change has been tone deaf to the realities of the American workplace and the challenges business owners of all sizes face in today's economic landscape. The Board has given little thought over the last decade to how its policies might hinder an employer's ability to run a business and maintain a productive workplace. This fundamental lack of understanding of how overregulation can interfere with legitimate business interests is reflected in so many of the Board's policy shifts that many have come to believe the Board simply doesn't care whether its policies negatively impact the business community.

While the ability to set the agenda might be the prerogative of those in control of the Board, the agency's actions over the past eight years have left the labor-management relations landscape virtually unrecognizable compared to what it was at the beginning of 2009. The time has come to restore sense to the NLRB and re-examine the many precedents it has turned upside down. Some of that change can happen in Congress. For example, there have been legislative proposals to change certain definitions in the Act and return the joint employer standard to that which existed prior to the Board's recent decisions. Those efforts, if successful, would be a good start.

But the Board itself must undertake some of these changes—or at least take a second look at the controversial decisions issued under the previous administration. This cannot take place, however, until the Board is fully constituted. Only three Members are presently serving terms, leaving two seats open. The Board has a long tradition of not overruling precedent without a three-Member majority. With two Democrats and one Republican currently sitting on the Board, changes are unlikely to happen.

In summary (and as the detailed discussion of the Board's legal precedents below amply demonstrates), it is perhaps more imperative than ever before that Congress and the President reconstitute the Board to its full, five-member capacity so that it can begin to re-examine and, hopefully, restore its precedents to a state that more meaningfully accounts for the realities of the American workplace.

II. THE BOARD'S NEW REPRESENTATION CASE RULES AND BARGAINING UNIT PRECEDENT PLACE UNDUE LEGAL AND PROCEDURAL BURDENS ON EMPLOYERS

It is no secret that union membership in the United States has been on the decline. A recent report from the U.S. Bureau of Labor Statistics confirms that the union membership rate among private-sector employers has dropped from 16.8 percent in 1983 to 6.4 percent through 2016.² Over the past eight years, the Board has attempted to reverse that trend through a series of legal and procedural overreaches. Its actions have unjustifiably tilted the playing field in favor of unionization and created substantial legal and procedural burdens for employers.

The Board's overreach is most evident in its new representation case rules (labeled the "ambush election rules" by some) which became effective in April 2015. The rules—which artificially shorten the time period between the filing of a petition and the holding of an election and sideline the resolution of key legal challenges until after the election—depart drastically from prior procedure and all but eliminate an employer's ability to respond effectively to union election petitions. The rules saddle employers with onerous new administrative requirements that in many cases monopolize their attention during the now-shortened election time period. They force employers into rushed and ineffective campaign communications with employees, who no longer have time to hear both sides of the debate. Even more troubling, the rules compel employers to address the question of unionization with employees before a petition is filed—sometimes, before any union is even on the horizon—lest they lose the opportunity to do so effectively during a truncated election period.

The Board's one-sided new election rules compounded an already-problematic landscape for employers. In 2011, the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*³ upended years of long-standing precedent and redefined the standard for determining the appropriate bargaining unit. In *Specialty Healthcare*, the Board introduced a test that too easily allows unions to draw bargaining units based on the apex of their organizational strength. This practice is inimical to the concept of majority rule enshrined in our nation's labor laws. Indeed, Congress passed the Taft-Hartley amendments to the National Labor Relations Act in 1947 to insure that the extent of a union's organizational efforts never controls the outcome of a bargaining unit determination. *Specialty Healthcare* turns a blind eye to that mandate.

Together, the Board's burdensome new rules and union-friendly bargaining unit standard place enormous administrative and legal burdens on employers and facilitate rushed elections in gerrymandered bargaining units that do not meaningfully relate to the reality of an employer's workplace or to the desires of its employees—including those who may have been intentionally segregated from the voting group under *Specialty Healthcare*.

Ironically, there was little reason for the Board to pile these burdens on employers. While the rate of unionized workers in the United States has most certainly dropped in recent decades, the rate that unions prevail at the ballot box has remained consistently high—well over

² See "Union Members Summary," U.S. Bureau of Labor Statistics (Jan. 26, 2017).

³ 357 NLRB 934 (2011).

65% since 2010. There simply was no need for the Board to change a system that already produced results favorable to organized labor. A return to the Board's common-sense rules and bargaining unit standards that existed before these recent changes is unlikely to have a negative effect on unions. On the other hand, a continuation of the Board's "ambush" and *Specialty Healthcare* rules will have a substantial negative effect on employers as well as employees, whose rights are ultimately at stake in election proceedings.

A. The "Ambush" Election Rules Are Designed To Facilitate Union Victories

The Board's expedited election rules fundamentally restructured the representation election process. Taking effect on April 14, 2015, the rules ushered in comprehensive changes to the election process by, among other things:

- Eliminating the 25-day waiting period between the date an election is ordered and the date it is held, stating now that the election should be held "as soon as practical";
- Requiring the employer to file a burdensome Statement of Position within seven days of the date the election petition is filed;
- Limiting the issues that may be litigated in a pre-election hearing to whether a "question of representation" exists in the proposed bargaining unit;
- Requiring that the pre-election hearing (if there is one) must be held within eight days of the date the election petition is filed and barring continuances of longer than two days except in "extraordinary circumstances";
- Allowing Regional Directors to limit employers to "offers of proof" during pre-election hearings and deny them an opportunity to introduce evidence based on cursory "review" of those offers of proof; and
- Requiring the employer to provide the union with private employee information, including their home addresses, home and cellular phone numbers, and personal e-mail addresses, all on pain of invalidating the election results if the employer fails to provide any such information that is reasonably available.

Viewed as a whole, these modifications artificially shorten the pre-election period, burden employers with administrative obligations, and interfere with formal consideration of issues integral to the conduct of the election, such as voter eligibility and appropriate inclusion in the proposed unit.

Section 102.63(a), for example, requires employers to post a notice of election within 2 business days after service of the notice of hearing and prior to any determination by the Board that the petition has sufficient merit to justify an election.⁴ It also severely abbreviates the time between the filing of the union petition and the first day of a hearing, except in limited cases

⁴ See 29 C.F.R. §102.63(a).

shown to be sufficiently “complex” to warrant delay for a limited additional time period or under undefined “special circumstances” and/or “extraordinary circumstances.”⁵

The rules also require employers, during the critical initial days following the filing of a petition for election, to prepare and file a written “Statement of Position” addressing the basis for any employer contention that the petitioned-for unit is inappropriate, the basis for any employer contention that certain employees should be excluded from the petitioned-for unit, and the basis for all other issues the employer intends to raise at the hearing, upon risk of waiving employers’ statutory rights to contest any omitted issues.⁶

Section 102.63(b) further requires employers to prepare and include with the Statement of Position a list of all employees in the petitioned-for unit, including their work location, shifts, and job classifications, a second list (together with the above described additional information) of all individuals in any alternative unit sought by the employer, and a third list (together with the above described additional information) of any individuals who the employer contends should be excluded from the petitioned-for unit.⁷

Section 102.64(a) contemplates that the pre-election hearing required under Section 9(c) of the Act be conducted solely “to determine if a question of representation exists” and provides that “disputes concerning individuals’ eligibility to vote or inclusion in an appropriate unit,” which have traditionally been deemed necessary and appropriate issues for pre-election consideration, “ordinarily need not be litigated or resolved before an election is conducted.”⁸ Relatedly, the rule arbitrarily restricts the right to introduce evidence at the hearing solely to that which is “relevant to the existence of a question of representation.”⁹

Practically, this means that if an employer believes an employee in the proposed unit is a statutory supervisor, it cannot obtain a determination whether the individual should be excluded from the bargaining unit until after the election. This presents an obvious conundrum for the employer: it can treat the employee as a supervisor during the campaign, and risk unfair labor practice liability for doing so, or it can back off, and lose the ability to campaign through an individual who may well not even be eligible to vote.

The rules also require parties to prepare and present “offers of proof” at the outset of the hearing, and authorize Regional Directors to bar employers from entering evidence into the

⁵ *Id.* The author can state based on practical experience that the filing of a petition three business days before the Christmas weekend—making the employer’s Statement of Position due two business days after Christmas Day and calling for a pre-election hearing three business days after Christmas Day—does not, in the Board’s view, constitute “extraordinary circumstances” justifying any more than a two-day extension of time. The challenges such a scenario presents to an employer’s ability to analyze the petition and the proposed bargaining unit, marshal evidence, complete the Statement of Position, and be prepared to present evidence at a pre-election hearing, all over a nationally recognized holiday weekend, are too obvious and numerous to list.

⁶ See 29 C.F.R. §§102.63(b); 102.66(d).

⁷ See 29 C.F.R. § 102.63(b).

⁸ See 29 C.F.R. §102.64(a).

⁹ See 29 C.F.R. §102.66(a).

record if—in the subjective view of the Regional Director—the employer’s offer of proof is insufficient to warrant conducting the hearing. Employers are further precluded from introducing evidence on issues not previously addressed in the newly required Statement of Position.¹⁰ Regional Directors have used these rules to stifle employer attempts to introduce evidence supporting bargaining unit challenges, and in some cases have even refused to allow employers to make testimonial proffers that would allow the employer to preserve for appeal a contention that barring the evidence violated its right to a fair hearing.

It goes on. Section 102.66(h) precludes employers from presenting post-hearing briefs and from reviewing a record transcript prior to stating their post-hearing positions, except upon special permission from, and addressing only subjects permitted by, the Regional Director. Practically, this means that if an employer somehow raises issues suitable for a hearing and is then permitted to present evidence on those issues, it may be limited to an oral summation at the close of that hearing which in some cases has been required to be made mere minutes after the last witness has testified.¹¹

Once a Decision and Direction of Election is issued, the rules require employers to disclose unprecedented personal and private employee information, including home addresses, home and cellular telephone numbers and personal email addresses.¹² The rules drastically shorten the time within which such information must be released by employers and require such personal disclosures even as to employees whose eligibility to vote has been contested and not yet determined. Moreover, the rules provide that a failure to disclose all such information that is reasonably available is grounds for setting aside the results of the election.

Early results show the rules are having their desired effect. In the first year after the rules became effective, the average time between the filing of a petition and the election decreased from 38 days to 23 days.¹³ Statistics also show that union success rates are up five percent from 2014 and up eight percent from 2013. In 2013, for example, unions won 64.1% of elections, while unions won 72.6% of elections in 2016.¹⁴ Again, unions were winning a clear majority of elections before implementation of the new rules, leading many to question why the Board was trying to fix what was not broken. By any measure, there was no pressing statistical need to saddle employers with these new burdens.

(i) The New Rules Lead To An Uninformed Workforce

For all of the reasons described above, the new rules severely restrict an employer’s rights to a fair hearing and a reasonable opportunity to communicate with its workforce during the pre-election period. These obligations also frustrate the rights of the employees who must

¹⁰ *Id.*

¹¹ *See* 29 C.F.R. §102.66(h).

¹² *See* 29 C.F.R. §102.67(1).

¹³ *See* “Ambush At The NLRB: Data On New Union Election Rule,” Timothy M. Mconville, *Law360* (June 16, 2015).

¹⁴ *See* <https://www.nlr.gov/reports-guidance/reports/election-reports>.

make the decision whether or not to unionize. As Board Members Miscimarra and Johnson noted in their dissent to the final rule: “[T]he inescapable impression created by the Final Rule’s overriding emphasis on speed is to require employees to vote as quickly as possible—at the time determined exclusively by the petitioning union—at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues.”¹⁵

The practical consequence of the rule is that employees hear only one-side of the debate. Unions often organize in secret. They can act at their leisure in soliciting support from a targeted group of employees and delay the filing of a petition until that group has been organized. The prior election procedures provided an employer—even one with no notice of employee organizing efforts—adequate time to meaningfully address the relevant issues with its workforce and to respond to employee questions about subjects such as collective bargaining, union dues, and other issues relevant to the question of unionization. The new rules, however, unreasonably curtail an employer’s opportunity to respond to these inquiries. This ultimately can lead to an election decided by uninformed voters.

Such a result flies in the face of the stated purpose of the Act. By its own terms, Section 7 of the Act provides that: “Employees shall have the right to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities . . . and shall have the right to refrain from any or all of such activities.”¹⁶ The right to refrain is only meaningful when employees have access to information from both sides. The new rules, however, dramatically increase the likelihood that they will not.

(ii) The Board’s Rules Infringe On Employers’ Statutory Right to Communicate With Employees

Section 8(c) of the National Labor Relations Act provides that “[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.”¹⁷ Consistent with this aspect of the statute, “an employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board.”¹⁸ The Board’s new rules, however, infringe on these rights in a number of respects.

First, by reducing the critical period between the filing of a petition and the election itself, the rules deprive employers of adequate time to present their views on unionization in a meaningful fashion. The Board has long considered the pre-election period to be a “critical period . . . during which the representation choice is imminent and speech bearing on that choice takes on heightened importance.”¹⁹ However, the additional administrative obligations with

¹⁵ 79 Fed. Reg. 74,460.

¹⁶ 29 U.S.C. § 157.

¹⁷ 29 U.S.C. §158(c).

¹⁸ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

¹⁹ See 79 Fed. Reg. at 74, 439-40 & n. 591 (Dec. 15, 2015) (dissent)(citations omitted).

which employers are saddled during the pre-election campaign can preoccupy and divert them from exercising their free speech rights during the most important phase of a representation proceeding. Practically, these modifications hamper an employer's lawful communications with employees about campaign issues.

Second, the unfairly shortened critical period, combined with the many ministerial tasks that consume precious time during that period, have compelled some employers to address the subject of unionization with employees before a petition is filed—and quite often before any organizing efforts have even occurred—for fear they will not have adequate time to do so once a petition is filed. The danger is obvious: addressing the issue of unionization before a petition is filed forces employers to bring attention to a situation that might never arise and could easily have the unintended consequence of planting the seed of unionization in the minds of employees.

Moreover, the possibility that an employer may make generic, pre-petition statements concerning unionization, based on general observations at a time when no apparent organizing is taking place, is no substitute for post-petition speech. The benefit of the “critical period” is that it permits an employer to identify and understand the issues involved in a campaign so that it may develop lawful communication responses on those issues.

Ultimately, the First Amendment, which protects “both the right to speak freely and the right to refrain from speaking at all,”²⁰ vouchsafes in an employer the ability to decide when and how to address the issue of unionization with employees, or to refrain from doing so. The employer's right to refrain from such speech is directly, and prejudicially, implicated by the new rules.

(iii) The New Rules Have Turned the Representation Case Proceeding Into An Adversarial Procedure That is Inconsistent With Its Purpose

The many legal and procedural problems created by the new rules would be bad enough on their own. But as a practical matter, the rules have also fostered confrontation and adversarial conflict in a procedure that is supposed to be anything but. The Board's charge in a representation case proceeding is to serve as a neutral investigator and to determine whether the petitioned-for unit is appropriate for purposes of collective bargaining.²¹ In carrying out this charge, the Board's Regional Directors are not supposed to favor one side or the other.

Unfortunately, the rules themselves are so one-sided that they often compel Regional Directors into decisions and rulings that are themselves extraordinarily one-sided. Pressuring employers to stipulate to the appropriateness of proposed bargaining units; forcing employers who decline and insist on challenging unit appropriateness to make unexpected and rushed offers of proof; speeding along pre-election hearings as quickly as possible—sometimes even refusing to allow parties a lunch break so that the hearing might be completed in a single day, and barring employers from preparing post-hearing briefs, are but a few examples of the kinds of rulings that

²⁰ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

²¹ *See generally*, “President Obama's Pro-Union Board: The NLRB's Metamorphosis from Independent Regulator to Dysfunctional union Advocate,” Staff Report U.S. House of Representatives, 112th Congress, Committee on Oversight and Government Reform (Dec. 13, 2012).

are now commonplace in representation case proceedings. When played out in practice, this draconian process has led to a perception in the employer community that the Board's rules are one-sided and unfair. This undermines both the process and the Board's standing as a would-be neutral arbiter of labor-management relations in the United States.

B. The Board's *Specialty Healthcare* Standard Has Insulated Proposed Bargaining Units From Meaningful Review

The Board's efforts to increase union membership did not begin with its "ambush" election rules. In 2011, the Board issued its controversial decision in *Specialty Healthcare*, reversing decades of precedent and establishing a new standard for challenging the appropriateness of a petitioned-for bargaining unit. The new standard, which provides that any collection of employees "readily identifiable as a group" will be found appropriate for bargaining unless the employer shows that some other group of employees has an "overwhelming community of interest" with the proposed group, makes it nearly impossible for an employer to alter the composition of a union's would-be unit. In fact, in every case that has reached the Board level in which the *Specialty Healthcare* standard has been fully applied, the party opposing the proposed unit has failed to alter it.

Specialty Healthcare's convoluted test has had the practical effect of allowing unions to seek bargaining units that reflect little more than the extent to which they have been successful in recruiting employees who support unionization. This approach is inconsistent with the Act's express command in Section 9(c)(5) that the extent of union organization shall not control the Board's determination of whether a proposed bargaining unit is "appropriate" under the Act. A brief review of the history of Taft-Hartley and its contemporaneous legislative history, as well as the well-developed precedent that the Board used to determine the appropriate unit for decades, shows just how far the *Specialty Healthcare* standard has strayed from the norm.

In order to assure employees the "fullest freedom in exercising the rights guaranteed by" the Act, the Board must "decide in each case" whether a petitioned-for unit is "appropriate for the purposes of collective bargaining."²² Congress carefully chose this language to ensure that bargaining unit formation would not frustrate effective bargaining. The Board's role in bargaining unit determinations was part of a larger debate over the wisdom of majority elections and *who* should decide the appropriate unit:

The major problem connected with the majority rule is not the rule itself, but its application . . . Section 9(b) of the Wagner bill provides that *the Board* shall decide the unit appropriate for the purpose of collective bargaining. . . . To lodge the power of determining this question with the employer would invite unlimited abuse and gerrymandering the units would defeat the aims of the statute. If the employees themselves could make the decision without proper consideration of the elements which should constitute the appropriate units they could in any given instance defeat the practical significance of the majority rule; and,

²² 29 U.S.C. § 159(b).

*by breaking off into small groups, could make it impossible for the employer to run his plant.*²³

Early Board decisions disregarded this guidance and essentially allowed the union to select the bargaining unit.²⁴ To eliminate this practice, Congress passed the Taft-Hartley amendments to the Act in 1947, adding Section 9(c)(5)'s proscription against allowing the extent of organization to control unit determinations. The House Report on Section 9(c)(5) confirms it was a response to the Board's early overreliance on the extent of organization:

Section 9[(c)(5)] strikes at the practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time . . . While the Board may take into consideration the extent to which employees have organized, *this evidence should have little weight, and as section 9 [(c)(5)] provides, is not controlling.*²⁵

Thus, the plain language of the Act and its legislative history reflects Congress's intent that the Board must decide "in each case" the appropriate bargaining unit, and that in fulfilling that obligation it cannot allow the extent of union organizing to control the outcome.

The Board's unit determination precedent remained faithful to Taft-Hartley for decades. Before *Specialty Healthcare*, it never addressed "solely and in isolation" whether a petitioned-for unit shared a community-of-interest to itself.²⁶ Instead, the Board would "necessarily proceed[] to a further determination whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit."²⁷ In making this determination, the Board would examine the interrelatedness of the employees in the proposed unit with those an employer sought to add to the group. Factors considered included the degree to which the employees were organized into separate departments; whether the employees had distinct skills and/or training; the amount of overlap and interchange between the two groups; whether the groups were functionally integrated with other employees; and the overall terms and conditions of employment for each group.²⁸

In *Specialty Healthcare*, however, the Board replaced this standard test with a subterfuge designed to isolate and highlight the commonalities between employees in the proposed group before allowing any analysis of whether they share any interests with employees outside of the group. *Specialty Healthcare* asks whether a proposed unit consists of employees "who are

²³ *Hearings on S. 1958 Before the S. Comm. On Educ. & Lab.*, 74th Cong. 82 (1935) (statement of Francis Biddle), *reprinted in 1935 Legislative History* 1458 (emphases added).

²⁴ *See, e.g., Botany Worsted Mills*, 27 NLRB 687 (1940) (unit of trappers and sorters, a single department in employer's plant, deemed appropriate).

²⁵ 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 328 (1947) (House Report No. 245, April 11, 1947) (internal citations omitted) (emphasis added).

²⁶ *Newton-Wellesley Hospital*, 250 NLRB 409, 411 (1980).

²⁷ *Id.* at 411.

²⁸ *See e.g., United Operations, Inc.*, 338 NLRB 123 (2002).

readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors).”²⁹ If they are, the Board will find that the unit is appropriate unless the employer can demonstrate that other employees “share an overwhelming community of interest with those in the petitioned-for group.”³⁰

This supposed two-part test encourages Regional Directors to rely on job titles, departmental lines, work locations and skills—factors that concern only those in the proposed unit—as a proxy for finding them “readily identifiable as a group.” But virtually any employees who share a job title, or who work in one department, will be “readily identifiable” under this rule. As well, almost any group of employees with the same job title or in the same department will have a community-of-interest among themselves. Thus, the first prong of *Specialty Healthcare* is designed to identify similarities among the employees in the proposed group that by definition constitute distinctions between those employees and any others the employer may seek to add.

While the Board claims it still conducts a “traditional” community of interest analysis—i.e., the one called for in *Newton-Wellesley*—as part of the *Specialty Healthcare* test, doing so only after finding the proposed group “readily identifiable” allows the Board to engage in the very inward-looking analysis against which *Newton-Wellesley* warns. Moreover, the “overwhelming community-of-interest” burden placed on an employer at step-two of the *Specialty Healthcare* test is a standard that is unattainable in practice. In order to meet that standard, the employer must show that the employees it seeks to add to the unit have interests that “overlap almost completely” with those of the employees in the unit.³¹

This is impossible. No employees who are “readily identifiable as a group” and who possess a “community-of-interest” among themselves can simultaneously have interests that “overlap almost completely” with those of other employees. The Board has even admitted as much in a recent decision upholding the *Specialty Healthcare* standard: “The employer failed to demonstrate that the [proposed additional] employees share an ‘overwhelming community of interest with [the petitioned-for] employees . . . it is impossible to say that the factors [between the two groups] overlap almost completely.”³²

In practice, the *Specialty Healthcare* standard shifts far too much discretion to unions to select a bargaining unit tailored specifically to their interests and the extent of their organizing success. As such, the Board’s “approach to unit determination [] permits easy rationalization of any desired result” sought by the union and impermissibly cedes its gatekeeping function to the union.³³

²⁹ *Specialty Healthcare*, 357 NLRB at 945-46.

³⁰ *Id.*

³¹ *Id.* at 944.

³² *Volkswagen Group of America, Inc.*, 364 NLRB No. 11, slip op. at fn 1 (Aug. 26, 2016) (emphasis added).

³³ *DPI Secuprint, Inc.*, 362 NLRB 172 (2015) (Johnson, dissent).

Perhaps the biggest problem with the *Specialty Healthcare* standard is that it is blind to the realities of an employer's workplace. For decades before its advent, the Board would not make a unit determination without considering the nature and function of the particular business setting in which the employees sought to organize: "[I]f the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered."³⁴ The Board also recognized that permitting bargaining "based upon a [job] title . . . would result in creating a fictional mold within which the parties would be required to force their bargaining relationship. Such a determination could only create a state of chaos rather than foster stable collective bargaining."³⁵ These are the precise ills the *Specialty Healthcare* standard has fostered.

Subsequent decisions applying *Specialty Healthcare* highlight the practical illogic of this new standard. In *Macy's, Inc.*,³⁶ for example, the Board approved of a unit limited solely to employees in the employer's cosmetics and fragrance department. In reaching this ruling, the Board turned its back on decades of precedent holding that in the retail industry, the "optimum" bargaining unit is a storewide unit.³⁷ The Board thus rejected the employer's argument that the only appropriate unit should include all sales floor personnel, holding that the unit was rationally drawn based on the employer's own departmental lines (ignoring, of course, that those lines were nothing but small sections of a single department store and that the employees in each department were performing essentially the same function, only with different products).³⁸

Taken to its logical conclusion, there is nothing in a decision like *Macy's* that would prevent the union there from going on to organize myriad additional units in the same department store, each requiring their own collective bargaining unit and union representative. Indeed, just last month, a Board Regional Director certified elections in nine separate bargaining units consisting of teaching fellows assigned to nine different academic departments at Yale University. Applying the *Specialty Healthcare* standard, the Regional Director found the nine separate units were all separate, "readily identifiable" groups because each included "all teaching fellows who teach for a specific academic department."³⁹ The Regional Director found separate units could be allowed because the employees in each different group "share a community of interest with one another."⁴⁰

³⁴ *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962).

³⁵ *Id.* at 139-40.

³⁶ 361 NLRB No. 4 (2014).

³⁷ See, e.g., *May Department Stores Co.*, 97 NLRB 1007 (1952) (storewide unit "optimum unit for purposes of collective bargaining."); *I. Magnin & Co.*, 119 NLRB 642 (1957) (storewide unit "basically appropriate unit" in retail); *Sears, Roebuck and Co.*, 184 NLRB 343 (1970) (storewide unit "presumptively appropriate.")

³⁸ See *Macy's*, slip op. at 8-9.

³⁹ *Yale University*, Case Nos. 01-RC-183014 et seq., Decision and Direction of Election at 29 (Jan. 25, 2017).

⁴⁰ *Id.* at 30 (emphasis added).

The burdens such a bizarre results create for employers are all too obvious. In Yale’s case, the artificial fragmentation of its faculty could spawn in-fighting between departments, each of which will have similar motivations to fight for the most favorable terms and conditions of employment. In the meantime, the university will be paralyzed by endless collective bargaining negotiations and hampered in its ability to promulgate workplace policies if restricted by different terms and conditions in nine different labor agreements.

Former Board Member Brian Hayes predicted just such adverse consequences shortly after *Specialty Healthcare’s* issuance in 2011: “[T]his new standard will encourage petitioning for small, single classification and/or single department groups of employees . . . lead[ing] to the balkanization of an employer’s unionized workforce, creating an environment of constant negotiation and tension resulting from competing demands of the representatives of numerous micro-units.”⁴¹ That is precisely the situation many employers are now in as a result of the *Specialty Healthcare* standard. In an effort to facilitate organizing in the unit preferred by the union, the Board has opened the door to a “balkanization” of the American workplace that plainly is out of step with the policies underlying the Act and decades of prior precedent.⁴²

III. REDEFINING THE “JOINT EMPLOYER” DOCTRINE THREATENS TO UNDERMINE LONGSTANDING BUSINESS RELATIONSHIPS

As troubling as these recent developments in the Board’s representation case rules and precedent have been, they may not be the worst blow the Board has dealt employers. That

⁴¹ *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB 2015 at 2020-23 (2011) (Hayes, dissent)

⁴² To date, most of the federal appellate courts to have addressed challenges to *Specialty Healthcare* have ruled that while application of the standard might violate the Act under certain circumstances, the test articulated in the majority opinion is not unlawful on its face. See, e.g., *Nestle Dreyer’s Ice Cream Co. v. NLRB*, 821 F.3d 489, 499 (4th Cir. 2016) (*Lundy* prohibits “overwhelming” test where Board “conducts a deficient community-of-interest analysis – that is, where the first step of [*Specialty*] fails to guard against arbitrary exclusions.”); *Constellation Brands U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 792 (2d Cir. 2016) (denying enforcement and noting that “[s]tep one of [*Specialty*] expressly requires the [Board] to evaluate several factors relevant to whether the interests of the group sought were sufficiently distinct from those of other employees.”); *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 441 (3d Cir. 2016) (“This initial community-of-interest test—and its application—reflects the standard used by the Board in prior decisions.”). Some federal judges, however, have seen the test for what it is. See, e.g., *Macy’s, Inc. v. NLRB*, 844 F.3d 188 (5th Cir. 2016) (dissent from denial of rehearing *en banc*) (“The panel erred by allowing the NLRB’s decision to stand when it and its underlying foundations are marred by the misapplication of the NLRA and its historical interpretation.”). The author respectfully suggests that the decisions ratifying bargaining units under the *Specialty Healthcare* framework are out of step with the analysis that these courts have historically identified as necessary to a meaningful community-of-interest analysis. Although not recognized as such in these decisions, the real first step in the *Specialty Healthcare* test is limited to whether the proposed unit is “readily identifiable.” As discussed, this analysis is by no means “traditional,” does not consider the interests of anyone besides those in the proposed group, and inherently dismisses commonalities that may exist between the proposed group and other employees. Application of *Specialty Healthcare* as prescribed in the majority opinion therefore does—by its own terms—accord controlling weight to the extent of organization in violation of the Act. While it remains to be seen whether the courts will recognize this irremediable flaw in the *Specialty Healthcare* framework and invalidate the standard altogether, the Board can (and should) save the courts and the parties to representation cases the trouble by revisiting and returning its unit determination precedent to the traditional *Newton-Wellesley* analysis.

arguably came in August of 2015, when the Board announced a new legal standard for determining if a business is the “joint employer” of individuals employed by another business. The decision, *Browning-Ferris Industries, Inc.* departed from decades of established precedent and established a test of sweeping scope that threatens to redefine the employer-employee relationship across all areas of business and industry in the United States.⁴³

The *Browning-Ferris* majority premised its decision on a claimed need to return the Board’s joint-employer standard to the state in which it existed before the Board supposedly narrowed the test in recent decades. The history of the Board’s joint-employer precedent suggests this premise is inaccurate at best, and intentionally misleading at worst. The new standard promises to go *much* further in practice than prior Board precedent by dramatically increasing the number of entities who will face joint-employer liability.

Under the new standard, the Board considers two or more businesses to be joint employers if: (1) both entities are employers under the common law; and (2) both employers share or codetermine those matters governing the “essential terms and conditions of employment.” This standard, on its face, is essentially a restatement of earlier Board precedent. However, *Browning-Ferris* goes much further:

We will no longer require that a joint employer not only *possess* the authority to control employee’s terms and conditions of employment, but also *exercise* that authority . . . Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer’s control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly – such as through an intermediary – may establish joint employer status.⁴⁴

In other words: (i) a company’s retention of an unexercised right to control another company’s employees, or (ii) a company’s exercise of mere indirect control on the employment terms of those employees, are now both relevant and potentially dispositive of joint-employer status. This leads to an obvious question: if a putative joint employer never actually exercises direct control over the employees of another company, how much retained or indirect control will be sufficient to establish joint-employer status?

The murky guidance provided by the Board’s majority opinion makes this question almost impossible to answer. And the consequences of a finding that a customer business and its subcontractor are joint employers could be significant, including: (i) a requirement that the customer participate in collective bargaining with the union that represents (or seeks to represent) the subcontractor’s employees; (ii) a finding that picketing directed at the customer is no longer illegal secondary activity under federal labor law; (iii) shared liability for unfair labor practices committed against the subcontractor’s employees; and (iv) potential limitation of the customer’s business flexibility.

All of these risks are now likewise inherent in the dealings between franchisor and franchisee; temporary staffing agency and end-user of temporary labor; general contractor and

⁴³ 362 NLRB 186, slip op. (August 27, 2015).

⁴⁴ *Id.* at 2.

subcontractors, and perhaps even parent and subsidiary. The test articulated in *Browning-Ferris* is broad enough on paper to cover all of these relationships, many of which have never before been subjected to joint-employer liability under the Act.

Uncertainty continues to predominate over how to deal with the Board's new standard. This Subcommittee introduced legislation in the prior term that would amend the National Labor Relations Act to return the definition of "employer" to that which existed prior to the Board's decision in *Browning-Ferris*. I fully support that effort.

In the meantime, and unless and until such a change is made by Congress or a newly constituted Board, employers are left to guess at how to address the risks created by this new standard. Some may conclude that if they are going to be held responsible for the liabilities of their suppliers, subcontractors or franchisees, they must exert more control over their day-to-day operations so that they can be more aware of, and seek to mitigate, these liabilities. Franchisors would become responsible for matters like who to hire, when to fire, and how much to pay. On the other hand, franchisees would be relegated to middle managers, no longer in control of their own success.

Other employers may decide to avoid joint-employer liability by reducing their level of control over business partners. The potential unintended consequences of this course could include an increase in incidents of workplace violence and harassment, if the putative employer relinquishes a say in who can work on its jobsite; an increase in on-the-job accidents, if the putative employer decides to no longer require subcontractors to comply with its own safety rules, or refuses to supply them with safety equipment; and a degrading of the integrity of a franchised brand, if the franchisor/putative employer decreases or discontinues its oversight over matters such as product line and preparation, customer experience and satisfaction, and store appearance. None of these outcomes would be beneficial to American business.

Ironically, the Board may wind up discouraging the very behaviors it claims its new policy is intended to foster in labor-management relations. Unions, human rights groups and others in the employment community have challenged companies to implement responsible contractor policies and codes of conduct not only for their own employees, but for those of their suppliers and business partners. *Browning-Ferris* discourages employers from doing just that. If, for example, a general contractor were to require that its subcontractors pay a living wage, comply with federal anti-discrimination and overtime regulations, or implement minimum safety procedures, they may be cementing their status as joint employers under the Board's new standard.

The Board's previous joint-employer standard worked well for over thirty years. It provided management and labor alike with predictability in terms of who is the employer of any given group of employees, knowledge that is vital to stable collective bargaining and effective labor relations. The new standard shatters that stability and throws both sides into new and unprecedented territory.

A. The Act (and The Common Law) Limits The Board's Authority to Define Who is an "Employer" and Who is an "Employee"

The history underlying passage of the Taft-Hartley amendments to the Act make clear that Congress has restricted the Board to well-established principles of common law agency in determining who is an employer and who is an employee under the Act, and that those principles do not support the Board's sweeping decision in *Browning-Ferris*. Prior to Taft-Hartley, the U.S. Supreme Court had held that the Act's definition of "employee" should include independent contractors. The Court based this holding on the belief that anyone having an "economic relationship" with a firm should be deemed its "employee," and that the employment relationship should be determined based on "economic facts rather than technically and exclusively by previously established legal classifications."⁴⁵

In response to the Supreme Court's decision in *Hearst*, Congress amended the Act to expressly exclude "independent contractors" from the definition of "employee."⁴⁶ Congress also revised the definition of "employer," limiting the definition to those who are "acting as an agent of an employer."⁴⁷ Taft-Hartley's legislative history illustrates that Congress' intention in making these changes was to limit the employer-employee concept to instances in which the putative employer exercised some direct form of control over the putative employee:

[The concept of "employee"], according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire . . . [and who] work for wages or salaries under direct supervision.⁴⁸

Thus, Taft-Hartley reflects Congress' rejection of more expansive and policy-based notions like the "economic realities" philosophy in favor of the principles of common-law agency. Those principles have long been recognized by the courts as requiring much more than the indirect or retained but unexercised control espoused by the majority in *Browning-Ferris*. For instance, the Supreme Court has held for over 100 years that "under the common law loaned-servant doctrine immediate control and supervision is critical in determining for whom the servants are performing services."⁴⁹ More recent judicial decisions have emphasized that the common law test for employer status requires evidence of direct and immediate control.⁵⁰

⁴⁵ *NLRB v. Hearst Publications*, 322 U.S. 111, 128-28 (1944).

⁴⁶ 29 U.S.C. §153(3).

⁴⁷ 29 U.S.C. §152(2) (emphasis supplied).

⁴⁸ H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947)(emphasis supplied); *see also id.* at 11 (revised definition of "employer" "makes employers responsible for what people say or do only when it is within the actual or apparent scope of their authority, and thereby makes the ordinary rules of the law of agency equally applicable to employers and unions."); and *id.* at 68 ("before the employer can be held responsible for a wrong . . . the man who does the wrong must be specifically an agent or come within the technical definition of an agent.").

⁴⁹ *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 6 (1963), citing *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909).

⁵⁰ *See, e.g., Cmty. For Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)(because Copyright Act of 1976 does not define "employer" or "employee," Court must look to common law to determine whether work of artist hired by petitioner was "work for hire" under statute; common law focuses on "the hiring party's right

The lesson to be drawn from this history is simple: (1) the Board must use traditional common law principles when deciding who is an “employer” and who is an “employee” under the Act, and (2) those principles have always been understood by interpreting courts as requiring more than mere indirect, or reserved but unexercised, control by the putative employer over the day-to-day work of the putative employees.

B. The Board’s Prior Joint-Employer Standard Provided Businesses With Predictability and Stability in Their Business Relations

The Board’s pre-*Browning-Ferris* precedent remained relatively consistent for decades and was faithful to Congress’ command that employer status under the Act must be established based on common law agency principles. Over the past thirty years, the Board’s joint-employer decisions established several clear-cut and easy to understand principles:

(1) the “essential element” in the joint-employer analysis is whether a putative joint employer’s control over employment matters is “direct and immediate;”⁵¹

(2) control, to be sufficiently indicative of joint-employer status, cannot merely be “limited and routine,”⁵² and

(3) the Board should not “merely” rely on the existence of contractual provisions, but rather must look “to the actual practice of the parties;” in other words, retained but unexercised control is insufficient by itself to create joint-employer status.⁵³

to control the manner and means by which the product is accomplished”); *Gulino v. N.Y. State Education Department*, 460 F.3d 361, 379 (2d Cir. 2006) (interpreting *Reid* in Title VII case as “countenanc[ing] a relationship where the level of control is direct, obvious and concrete, not merely indirect or abstract”)(emphasis supplied); *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009) (Wal-Mart not joint employer of the employees of its suppliers where it had no right to “immediate level of day-to-day control”)(emphasis supplied); *Patterson v. Domino’s Pizza, LLC*, 333 P.3d 723 (Cal. 2014) (franchisor not liable for franchisee’s harassment of its employee under California Fair Employment and Housing Act, because traditional agency principles “require[] a comprehensive and immediate level of day-to-day authority over matters such as hiring, firing, direction, supervision, and discipline of the employee.”)(emphasis supplied).

⁵¹ *Airborne Express*, 338 NLRB 597, 597 fn. 1 (2002); see also *Southern California Gas*, 302 NLRB 456 (1991) (building management company was not the joint employer of workers supplied by a janitorial company—regardless of the fact that the building management company dictated the number of workers to be employed, communicated specific work assignments to the workers’ manager, and ultimately determined whether the cleaning tasks had been completed properly—because manager exercised no direct control besides communicating the job to the contractor and making sure contracted work was completed as requested).

⁵² *AM Property Holding Corp.*, 350 NLRB 998 (2007) (noting the Board generally has found supervision to be limited and routine where a supervisor’s instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work).

⁵³ *Id.* (“[T]he contractual provision giving AM the right to approve [contractor] hires, standing alone, is insufficient to show the existence of a joint employer relationship.”).

The Board’s requirement that control must be “direct and immediate” to establish joint-employer status, and that retained but unexercised control alone is not probative of such status, are concepts that are easy to comprehend and apply in practice. These benchmarks have allowed businesses of all sizes to structure and enter into myriad business relationships—contractor and subcontractor; lessor and lessee; franchisor and franchisee; and parent and subsidiary, to name a few—with confidence that they could operate free from the fear of being found a joint employer, provided they followed the Board’s guidance.

The Board’s “direct and immediate” requirement also ensured that a putative employer must actually be involved in those matters most critical to the employment relationship, such as hiring, firing, scheduling, establishing wages, and directly supervising the performance of work. In a practical sense, employers who do not exercise this level of control over the employees of a staffing firm, subcontractor or franchisee are not “meaningfully” affecting the terms and conditions of their employment. The Board’s prior precedent recognized this fact and did not subject companies to disputes or liability involving employees over which they had little control.

Moreover, the standard made sense for both “sides” of a given business transaction. A larger franchisor, or general contractor, may have contractual relationships with dozens (or even thousands) of business partners. It makes no sense to impute joint-employer liability to such entities if they are not in a position to directly address workplace issues, meaningfully affect the outcome of collective bargaining, or remedy the unlawful actions of their business partners.

On the other hand, the vast majority of small business owners—whether they are franchisees, subcontractors, or suppliers of temporary labor—are not in business to be middle managers. The Board’s prior joint-employer standard allowed them to enter business relationships with the knowledge that they could operate their business with a degree of autonomy and freedom, which is the very reason they may have started a business to begin with.

At the same time, the Board’s recognition that the exercise of control that is merely “limited and routine” does not give rise to joint-employer status allowed businesses to maintain a reasonable degree of commercial oversight over brand integrity, contractor efficiency, and overall quality without risking liability for doing so. It is not unreasonable for a major franchisor, for example, to expect that its franchisees adhere to certain standards that preserve and maintain the status of the franchised brand. Preservation of such standards are what enable the brand to succeed in the first place. Franchisees likewise benefit from adherence to such standards. Indeed, a small business owner may elect to open a successful restaurant franchise rather than his or her own branded restaurant specifically because the value and commercial attraction of the brand is likely to enhance the restaurant’s profitability and ultimate success. That would not be possible if the franchise did not impose certain minimum standards on its franchisees. The Board’s prior precedent recognized that maintenance of such standards alone should not turn the franchisor into a joint employer.

Similarly, a general contractor performing a major commercial or residential construction project must rely on the work of dozens of specialty trades. Sequencing the timing and execution of each of these trades is critical to successful completion of the project. Exercising control over the timing of the work performed by a subcontractor and expecting that the work will meet a certain minimum standard should not turn the general contractor into a joint

employer. Again, the Board’s prior standard would not have found a joint-employer relationship between the general contractor and its subcontractors based on the exercise of such indirect controls.

C. The *Browning-Ferris* Standard Radically Departs From Prior Precedent and Leaves Employers in The Dark as to The Relevant Standard

In *Browning-Ferris*, the Board jettisoned its previously clear precedent in favor of a new standard of virtually unbounded scope. The Board’s majority opinion takes employers, unions and employees alike on a confusing journey through prior precedent—misconstruing it along the way—and concludes by establishing an amorphous standard that is both theoretically limitless and practically unworkable. The new standard allows for a finding of joint-employer status where an employer *retains, but does not exercise*, control over another firm’s employees, or where it exerts only *indirect* control over their employment terms. This standard is a marked departure from the precedent discussed above. Moreover, it is unfaithful to the legislative intent underlying Taft-Hartley and divorced from the realities of American business.

To justify its expansive holding, the *Browning-Ferris* majority argued that the current test’s requirements “leave the Board’s joint employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships.” The majority claimed that the increase in the number and scope of temporary employment arrangements in the United States over the past two decades “is reason enough to revisit the Board’s current joint-employer standard.”⁵⁴ Despite the majority’s claims to the contrary, its justification for revisiting the test is grounded in the same “economic realities” philosophy that Congress rejected when it passed Taft-Hartley.

Thus, in restating the joint-employer standard, the *Browning-Ferris* majority issued the following sweeping statement that goes well beyond any reading of its “traditional” precedent:

We will no longer require that a joint employer not only *possess* the authority to control employees’ terms and conditions of employment, but also *exercise* that authority . . . Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer’s control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly – such as through an intermediary – may establish joint employer status.⁵⁵

Despite referring to the common law, the majority offered no guidance, besides the new and disturbing passage quoted above, for determining when such a relationship might exist between putative employer and putative employee. The majority’s articulation of its new test disturbingly suggests that retained control by itself can give rise to a joint-employer finding, and/or that the exercise of indirect control by itself can result in such a finding.

⁵⁴ *BFI*, 362 NLRB 186, slip op. at 1, 11.

⁵⁵ *Id.* at 2.

D. The Uncertainty Created By The Board’s New Standard Will Lead to Unintended Legal Consequences, Stifle New Business Growth, Inhibit Job Creation, and Harm Small Business

The Board has a responsibility to establish and maintain precedents that offer some measure of predictability for employers and unions alike, and for good reason. “To comply with [the Board’s] rules . . . substantial planning is required . . . When it comes to the duty to bargain . . . there is no more important issue than correctly identifying the ‘employer.’ Changing the test for identifying the ‘employer,’ therefore, has dramatic implications for labor relations policy and its effect on the economy.”⁵⁶

Accordingly, the Board must articulate a compelling reason for changing a standard as critical as identifying the “employer,” and when changing such a standard must do so in a manner that is understandable and practicably workable for the layperson. The new *BFI* standard does the opposite. As Member Miscimarra and former Member Johnson pointed out in their dissent:

The majority abandons a longstanding test that provided certainty and predictability, and replaces it with an ambiguous standard that will impose unprecedented bargaining obligations on multiple entities in a wide variety of business relationships, even if this is based solely on a never-exercised ‘right’ to exercise ‘indirect’ control over what a Board majority may later characterize as ‘essential’ employment terms. This new test leaves employees, unions and employers in a position where there can be no certainty or predictability regarding the identity of the ‘employer.’ . . . This confusion and disarray threatens to cause substantial instability in bargaining relationships, and will result in substantial burdens, expense, and liability for innumerable parties, including employees, employers, unions, and countless entities who are now cast into indeterminate legal limbo, with consequent delay, risk and litigation expense.⁵⁷

Thus, the biggest concern with the Board’s new test may be the sheer confusion that it has created. Indeed, the *BFI* majority’s sprawling opinion has been challenging to fully understand, even for the most experienced labor law practitioners. Since its release in August of 2015, labor lawyers have puzzled over how the test may apply in future cases. The test leaves numerous questions unanswered. For example, in the absence of evidence of the exercise of direct control by a putative employer, how much indirect control must the firm exercise before it is a joint employer? Must it exercise indirect control over a large number of factors, or just one or two? And how much retained, but unexercised, control will now be sufficient? Must the firm retain near total control? What if the evidence suggests the firm has actually exercised no control at all? And what about the case where a firm retains only the right to exercise indirect control? Could the Board now find joint employer status in the case of an entity that retains only indirect control, and exercises no control, over a group of putative employees? The *BFI* majority does not answer.

⁵⁶ *Id.* at 21 (Miscimarra and Johnson, dissent).

⁵⁷ *Id.* at 23 (Miscimarra and Johnson, dissent).

These unanswerable hypotheticals beg a troubling question: if experienced labor lawyers are unable to determine with confidence how the test may apply in future cases, how can the business community possibly be expected to understand how *Browning-Ferris* may affect their businesses going forward?

The answer is simple: they cannot. And that is the biggest problem with what the *Browning-Ferris* majority has done. The uncertainty created by the Board's new test is likely to lead to industrial paralysis as firms struggle with how to avoid joint-employer status under the standard. In this regard, the NLRB is not like the Department of Labor, or OSHA, where employers can request, and receive, opinion letters on the lawfulness of planned business activities. Notwithstanding the recent spate of overregulation from these agencies, employers seeking to comply with federal wage/hour and workplace safety laws can at least obtain reliable feedback from the agencies charged with enforcing those laws.

But the Board has no equivalent to the opinion letter. Employers cannot call or write to the Board and ask whether they will become a joint employer if they enter into a business transaction or include certain controls in commercial contracts. Instead, the Board's legal precedents are supposed to provide that guidance. And, as demonstrated throughout, the *Browning-Ferris* decision does the opposite. The uncertainty over how the new standard might be applied will hamstring those in the business community seeking to structure their contractual relationships going forward.

The *Browning-Ferris* test is not just a problem for businesses involved in leased worker arrangements. The test is open-ended enough to be applied to find joint-employer status in virtually *any* business relationship. The dissenting Members understood and highlighted this troubling fact:

Contrary to [the majority's] characterization, the new joint-employer test fundamentally alters the law applicable to user-supplier, lessor-lessee, parent-subsubsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships under the Act.⁵⁸

The dissent's warning is easily illustrated by several examples:

Franchisor – Franchisee

According to the International Franchise Association, which submitted an amicus brief in *Browning-Ferris* opposing the new standard, in 2012 there were 750,000 franchises in the United States employing over 8 million workers. These businesses generated a staggering \$769 billion in economic output and accounted for approximately 3.4 percent of America's gross domestic product.⁵⁹ Virtually all franchises must exercise some level of control over the consistency and integrity of the franchised brand so that both parties can reap the benefits of the brand. Indeed, the franchisor is legally required to maintain control over its brand in order to maintain the

⁵⁸ *Id.* at 23 (Miscimarra and Johnson, dissent).

⁵⁹ Br. of IFA at 1.

trademarks it has licensed to franchisees.⁶⁰ Prior to *Browning-Ferris*, the Board avoided finding joint-employer status in most franchisor-franchisee relationships absent evidence of direct control.⁶¹ But now, if a franchisor retains and/or exercises control over the manner in which the franchisee sets up a store, how it prepares and markets its products, what tools or equipment it uses in the performance of the franchised business, and how the franchisee's employees operate the business, the Board may find it has retained sufficient indirect control over the employment terms of the franchisee's employees to be their joint employer. Thus, franchisors may be exposing themselves to joint-employer liability simply by maintaining controls that are legally required in order to preserve the status of their trademarks under federal law.

The consequences of a broad application of the *Browning-Ferris* standard to the franchising industry could be catastrophic. Large franchisors cannot possibly be expected to know, let alone attempt to control, all of the minute details regarding the employment relations of their franchisees. But if *Browning-Ferris* would make them joint employers with their franchisees, many franchisors might elect to reduce their use of the franchise model in order to protect themselves from legal liabilities the franchise model was created to avoid in the first place. The reduction in the use of the franchise model could have a deleterious effect on job creation and reduce the number of opportunities for small business entrepreneurs to realize their dreams of owning their own business. Small business franchisors could be equally damaged by the ruling. For example, the owner of a fledgling franchise may decide never to expand, lest he or she risk the unthinkable prospect of becoming a joint employer every time a new franchisee signs on.

Alternatively, franchisors may decide, as in the construction industry, that control over their brand is too important, not to mention legally required. Instead of implementing measures to avoid joint-employer status (indeed, in most cases it will be unrealistic for a franchisor to allow franchisees to make their own decisions about store appearance, product type and quality, etc.), franchisors may embrace that status and impose near total control over their franchisees. Franchise owners would be reduced to middle managers and lose the ability to manage their small business free from outside interference.

General Contractor – Subcontractor

One of the primary responsibilities of a general construction contractor is making sure that projects are completed on time in order to meet inspections and delivery requirements. To do this, general contractors commonly exercise tight control over the timing and sequencing of the services performed by specialty trades and other subcontractors. They may require additional labor and/or increased overtime when delays threaten to run a project behind schedule. They may also delay the completion (or even the commencement) of a particular subcontractor's work in order to allow for the completion of a different part of the project. This is arguably strong

⁶⁰ See, e.g., *Barcamerica International USA Trust v. Tyfiled Importers, Inc.*, 289 F.3d 589, 596 (9th Cir. 2002) (“A trademark owner may grant a license and remain protected provided quality control of the goods and services maintained under the trademark by the licensee is maintained.”).

⁶¹ See, e.g., *Tilden, S.G., Inc.*, 172 NLRB 752 (1968) (franchisor not a joint employer, despite franchise agreement dictating “many elements of the business relationship,” because franchisor did not exercise “direct control” over franchisee's labor relations).

indicia of control by the general contractor over the terms and conditions of employees of its subcontractors, i.e., scheduling. It is unclear, given the amorphous new standard, whether the exercise of control over subcontractor scheduling alone would turn a general contractor into a joint employer, but in combination with other indicia, it would be almost certain to do so.

A finding of joint-employer status between general contractor and subcontractor could cause a variety of problems at a construction site. If the general contractor is a joint employer with its subcontractors, and a labor dispute arises between one of the subcontractors and its union, it may be impossible for the general contractor to set up a valid reserved gate system, which allows neutral employers to avoid picketing and other concerted activity in which unions may lawfully engage during disputes with primary employers. Moreover, the general contractor's status as a joint employer could prevent it from replacing a subcontractor whose employees go out on strike, as doing so may now be an unfair labor practice. Thus, an entire commercial construction project could be paralyzed because of the labor problems of a single subcontractor. The resulting delays could cause the general contractor to incur millions of dollars in penalties for failing to complete the project on time.

While some might view such actions by a general contractor to be “anti-union,” it should be obvious that a general contractor's decision to replace a striking subcontractor may have no effect on the result of collective bargaining negotiations between the subcontractor and its union or on the ultimate employment status of the subcontractor's employees. The subcontractor may have dozens of other jobs (all of which may be union jobs) to which it can assign its workforce. The general contractor should not be forced into the practical equivalent of commercial handcuffs while it waits for a subcontractor to resolve matters with its union. But a finding of joint-employer status under *Browning-Ferris* would do just that. A general contractor with several dozen specialty subcontractors could be completely paralyzed as a result.

In this way, *Browning-Ferris* could have the perverse result of encouraging general contractors to avoid bidding on union jobs, which would shrink their portfolio of projects and impact their own employment levels. Alternatively, general contractors may simply refrain from working with unionized subcontractors in order to avoid being trapped in a business relationship they cannot get out of without risking substantial labor law liability. Another possibility is that general contractors will insource specific trades. Such decisions will reduce the number of opportunities for outside subcontractors. The economic impact on the subcontractors—many of which are small businesses—and their employees, could be significant.

Alternatively, general contractors who cannot insource the specialty trades may decide to exert total control over the work of their subcontractors. If a general contractor concludes it is going to be a joint employer under *Browning-Ferris* no matter what it does, it may go in the other direction and dictate everything about a subcontracted project. This would dramatically reduce the subcontractor's own flexibility and reduce it to a mere subdivision of the general contractor instead of an independent business.

Building Owner – Cleaning Contractor – Private Equity Owner

Many commercial building owners outsource certain tasks like facilities management and janitorial work. Under *Browning-Ferris*, a building owner that requires its cleaning

subcontractor to provide a certain number of cleaners per shift, to complete the work by a certain time each night (for example, before normal business hours the following day), and to clean using certain, environmentally-friendly solutions, may now be a joint employer, even if the owner does not dictate who the contractor assigns to do the work or how much they are paid, and/or if the contractor supervises all of the work performed by the cleaners.

Further complicating matters, the cleaning contractor may be owned by a private equity firm. Under *Browning-Ferris*, if the private equity firm selects the contractor's board of directors and key officers, dictates changes in its employee benefit plans or other workplace policies, and decides whether the contractor should pursue certain business opportunities (such as the types of cleaning services it offers), the private equity firm may also be a joint employer with the cleaning contractor.

This hypothetical provokes many more disturbing questions. If a union successfully organized the janitors working for the cleaning contractor, the Board might now require all three entities—cleaning contractor, building owner and private equity firm—to participate in bargaining. As far-fetched as this seems, it is clearly the *Browning-Ferris* majority's intent. After all, the majority noted the new standard was motivated in part by a desire to “encourage the practice and procedure of collective bargaining.”⁶² The obviously divergent interests of these three independent businesses suggests bargaining could be difficult. Indeed, the businesses at the table may be required to disclose the details of their other business relationships not only to the union, *but to each other*. While they are all involved in a business partnership with respect to the building in question, they may also be competitors in other respects. The private equity firm may own other buildings that compete with the building owner for commercial leasing tenants. The cleaning contractor may have subcontracts to clean those other buildings with economics that are not as lucrative as those in its contract with the building owner. And the building owner may employ a security contractor that is owned by a different parent entity, again with different (and better) economics.

The possibilities for conflict between the parties—not over the cleaning employees and their union, but over their other commercial endeavors and their desire to prevent the disclosure of those endeavors to arm's-length business partners—are literally endless. In this way, the *Browning-Ferris* test may have the ironic unintended effect of *frustrating* collective bargaining instead of facilitating it.

Yet another potentially sinister effect of the *Browning-Ferris* test is that it might also prohibit the parties from modifying (or even terminating) their business relationships. If the building owner receives bids from competing cleaning firms to perform the work at a lower price, it might be inclined to terminate its contract with the cleaning contractor and select a different partner, or insource the work. But if the building owner is a joint employer with the outgoing cleaning contractor, and it bases its decision to switch contractors in part on avoiding cost increases resulting from the cleaning contractor's collective bargaining agreement, it may be violating the Act, which prohibits an employer from taking adverse action against its “employees” for engaging in collective bargaining. The building owner's motivation might not

⁶² *BFI*, slip op. at 12.

be “anti-union” in any way, but rather economic. Nevertheless, joint-employer status could prevent the owner from making a switch in contractors.

Similarly (and unbelievably), a decision by the private equity firm to sell the cleaning contractor to another entity because it has become unprofitable could be seen as an unfair labor practice. If the private equity firm is a joint employer with the cleaning contractor and its motivation in selling is to avoid economic losses caused by a labor dispute between the cleaning contractor and its union, selling the company could violate the Act. In other words, the most fundamental aspect of American business—the decision whether to do business at all—may be subject to Board (over)regulation under *Browning-Ferris*.

E. The Board Has Doubled Down On *Browning-Ferris*

Since its decision in *Browning-Ferris*, the Board has issued two other major rulings that even further expand the standard in bargaining unit formation cases. In *Miller & Anderson, Inc.*,⁶³ the Board overturned Bush-era precedent and held that a union seeking to represent employees in bargaining units that combine both solely and jointly employed employees is no longer required to obtain the consent of the employers, provided the proposed bargaining unit is appropriate under “traditional” Board precedent. Under *H.S. CARE LLC, d/b/a Oakwood Care Center*,⁶⁴ the Board would not allow employees from nominally different employers to form a bargaining unit together without employer consent. The Board in *Miller & Anderson* argued this rule was inconsistent with the Act’s preference for encouraging collective bargaining and claimed that it would be appropriate to “return” the state of the law to that which existed prior to *Oakwood Care*.

A closer look, however, reveals the Board did no such thing. As Member Miscimarra noted in his dissent, the Board’s *Miller & Anderson* rule will affect many more businesses than the pre-*Oakwood Care* rule for two important reasons: (1) whether employers are deemed joint-employers is now determined by the Board’s dramatically expanded *Browning-Ferris* test; and (2) the “traditional” precedent used to decide whether a proposed bargaining unit is appropriate is now the infamous *Specialty Healthcare* rule described above. Thus, *Miller & Anderson* greatly increases the chances of a union forming a bargaining unit that includes the employees of two different employers without their consent.

In *Retro Environmental, Inc.*,⁶⁵ the Board made it much more difficult for employers to prove that their joint employer relationship has ended. The Board in that case found that Green Job Works and Retro Environmental (the supplier and user of temporary labor, respectively) were joint employers. The companies had worked together for over 5 years and Green Job Works (the supplier) had provided temporary labor on at least 10 of Retro Environmental’s construction projects. The parties’ relationship was governed by a formal agreement that had expired at the time of the Board’s ruling.

⁶³ 364 NLRB No. 39 (2016).

⁶⁴ 343 NLRB No. 76 (2004).

⁶⁵ 362 NLRB No. 70 (2016).

When a union petitioned to represent a unit of laborers including workers retained by Retro Environmental from Green Job Works, the employers argued that the projects on which they were working were nearly finished, that there was no evidence Retro planned to use Green Job Works' employees on future projects, and that the parties' contractual agreement had expired. The Board, however, found that the employers' failed to prove that the planned cessation of their joint operations was imminent and definite. Confirming what many have feared since *Browning-Ferris*, the Board also noted that joint-employer status can indeed turn on whether employers merely possess authority to control employees, even if they do not exercise that control. Thus, the Board stated that three facts can create a joint-employer relationship in the temporary staffing industry:

[E]ven if the Employers' relationships were altered on future projects, certain key aspects of their relationship will likely remain stable. For example, while Green JobWorks, as the supplier employer, will retain primary responsibility for hiring, assigning employees to project sites, and firing, Retro will assuredly continue to dictate the number of workers to be supplied by Green JobWorks, continue to impose conditions on Green JobWorks' hiring to ensure that the workers supplied are adequately trained and qualified, and continue to retain the right to request a replacement if it is unsatisfied with a Green JobWorks-supplied employee. Therefore, given the distinct functions and areas of responsibility of each of the Employers, it is highly doubtful that the Employers' relationship on future projects could change in such a manner that would render them no longer joint employers of the employees in the petitioned-for unit.⁶⁶

In other words, the Board stated that a joint-employer relationship can be found where the user company states that it needs a certain number of employees with specific qualifications and has the authority to demand replacements. Of course, this description is inherent in most (if not all) temporary staffing arrangements. Under this logic, almost all temporary staffing relationships will result in a finding of joint employment.

IV. THE BOARD HAS RAISED ITS OWN PROFILE AT THE EXPENSE OF AMERICAN BUSINESS

The combination of the Board's "ambush" election rules, *Specialty Healthcare* bargaining unit precedent and *Browning-Ferris* joint employer rules, by themselves, represent some of the most consequential changes our labor law scheme has seen in decades. Incredibly, they are only the tip of a much larger iceberg. In its quest to raise its own profile over the last eight years, the Board has issued numerous other precedents that have come with a heavy price for American business.

The Board's goal to expand the reach of the Act (and the Board's own profile) was never a secret. In Chairman Mark Pearce's own words:

⁶⁶ *Id.*

A right only has value when people know it exists. We think the right to engage in protected concerted activity is one of the best-kept secrets of the National Labor Relations Act, and more important than ever in these difficult economic times. Our hope is that other workers will see themselves in the cases we've selected and understand that they do have strength in numbers.⁶⁷

Although the Act unquestionably protects non-union employees' rights to engage in concerted activity, the Board's actions over the last eight years have expanded the reach of the Act without much (if any) appreciation for the practical implications of its rulings. Through a series of decisions and guidance memorandums, the Board has extended the Act to individuals who were not previously deemed "employees," pushed the concept of "protected, concerted activity" to absurd new limits, and engaged in a targeted effort to dismantle myriad common sense employer work rules.⁶⁸ Employers have been left with a confusing patchwork of decisions that hinder their ability to continue many of the common sense business practices they have relied on for decades.

A. The Board Has Expanded The Scope and Type of Individuals Covered By the Act

The Board has expanded the reach of the Act by reclassifying previously exempt individuals as "employees" under the Act. Its decision in *Columbia University*⁶⁹ highlights this troubling trend. In *Columbia University*, the Board held that student teaching assistants can be employees under the Act. In reaching its decision, the Board explicitly overruled its 2004 decision in *Brown University*.⁷⁰ There, the Board had held that graduate teaching assistants were primarily students instead of employees, and that their relationship with their school was educational in nature. The Board reasoned that these students often performed their jobs as part of a degree program and that their research positions were designed primarily for educational benefit. In overruling *Brown University*, however, the Board rejected this dichotomy and broadly stated that "the payment of compensation, in conjunction with the employer's control, suffices to establish an employment relationship for purposes of the [A]ct."

Beyond its sweeping conclusion, however, the Board failed to address the practical implications of its decision and actively downplayed its holding. Relying on anecdotal evidence, the Board concluded that "no major disasters [] have arisen because of [graduate student] unions" in other settings and that "examples of collective bargaining in practice appear to demonstrate that economic and academic issues on campus can indeed be separated."⁷¹ From

⁶⁷ "Asserting Influence And Power In The 21st Century: The NLRB Focuses On Assisting Non-Union Employees," Elizabeth Milito, *The Federalist Society for Law & Public Policy Studies*, Engage Vol. 15, No. 1 (2014); available at: <http://www.fed-soc.org/publications/detail/asserting-influence-and-power-in-the-21st-century-the-nlr-b-focuses-on-assisting-non-union-employees>.

⁶⁸ *See id.*

⁶⁹ 364 NLRB No. 90 (2016).

⁷⁰ 342 NLRB No. 42 (2004).

⁷¹ 364 NLRB, slip op. at 10.

that, the Board noted that there was no empirical evidence showing that collective bargaining would “harm mentoring relationships between faculty members and graduate students.”⁷²

The Board’s decision glossed over the fundamental differences between traditional employment environments and the educational context. For example, the lines between supervisors and employees can be blurred in the university context. Faculty advisors who have traditionally guided students through their degree programs are transformed under the Board’s rule into statutory supervisors. This dual-relationship has the propensity to alter the daily interactions between students and faculty and negatively impact a university’s ability to execute its primary mission to educate its students.

The Board has also taken steps to extend the Act to the rapidly developing on-demand marketplace, where companies are turning more frequently to independent contractors to deliver their products to consumers. The Board’s Division of Advice released a guidance memorandum in August 2016 asserting that employers who misclassify workers as independent contractors violate Section 8(a)(1) of the Act by denying their right to engage in protected, concerted activity.⁷³ Earlier in the year, the General Counsel issued a GC Memorandum identifying cases involving employee misclassification and cases involving “the employment status of workers in the on-demand economy” as issues “of particular interest” to the Board.⁷⁴ These memoranda, which signal the Board is intent on forcing businesses to reclassify independent contractors as “employees,” are deeply troubling to many in the gig economy. For example, businesses in the ride-sharing industry depend on workers who retain complete control over when, and how long, they perform work. Many of those workers, in turn, have chosen to work in the gig economy because of the work-life flexibility it offers. If the Board has its way, entire business models delivering new and innovative services in today’s on-demand economy will become endangered.

B. The Board Has Stretched The Meaning of “Protected, Concerted Activity”

Section 7 of the Act has long protected employees’ right to engage in concerted activity to improve their terms and conditions of employment. In recent years, the Board has stretched the notion of concerted activity to untenable lengths. Waging war on workplace rules, the Board has overturned commonplace employer policies, such as confidentiality provisions and civility codes, and has placed overbroad restrictions on the regulation of employee misconduct. The effect of these decisions has been to create a new frontier in the workplace where employers are asked to abandon many of their longstanding methods of maintaining order and employee civility, and to stand idly by as employees engage in behaviors that, if left unaddressed, expose employers to liability under other federal and state statutes.

(i) The Board Has Protected Offensive and Racist Comments

⁷² *Id.*

⁷³ *See Pac. 9 Transp., Inc.*, NLRB Div. of Advice, No 21-CA-150875 (Dec. 18, 2015, released Aug. 26, 2016).

⁷⁴ *See* General Counsel Memorandum 16-01 (Mar. 22, 2016).

Profane outbursts generally are not protected by Section 7. Although the Board has traditionally granted employees some leeway for statements made in the heat of the moment, it has consistently held that extreme or threatening conduct is not protected. While paying lip-service to these limitations, the Board's recent decisions have protected increasingly offensive and outrageous behavior.

The Board's decision in *Plaza Auto Center, Inc.*⁷⁵ highlights this troubling trend. In that case, a used car salesman approached his manager to complain about his wages. During the exchange, the employee shouted profanities, calling his boss an "a—hole." The employee then stood up, pushed his chair aside, and told the manager that "he would regret it" if he fired the employee.

The Board went to great lengths to minimize the employee's behavior, rationalizing that:

- The employee's statement that his manager would "regret it" was not a threat of physical violence, but likely a warning about the legal consequences of firing the employee;
- Pushing the chair was not physically aggressive because the employee needed to move the chair to leave the room;
- The employer's interest in maintaining order in the workplace was lowered because the meeting took place behind closed doors and away from other employees;
- The employer likely provoked the outburst by threatening to fire the employee.

The Board went a step further in *Cooper Tire & Rubber Company*,⁷⁶ excusing racially inflammatory comments under the guise that they were protected, concerted activity. In *Cooper Tire*, the company discovered a video of picketers hurling racist comments at replacement workers during a labor dispute. When a car with replacement workers passed by the picket line, one of the union members yelled, "Hey, did you bring enough KFC for everyone?" Another picketer screamed "Go back to Africa, you bunch of f***ing losers." The picketers also joked: "Hey, anybody smell that? I smell fried chicken and watermelon."⁷⁷ On review, the Board affirmed an ALJ's decision that although the statements "most certainly were racist, offensive, and reprehensible," the statements were still protected because they were "not violent in character" or "contain[ed] any overt or implied threats to the replacement workers."⁷⁸

Protecting this type of inflammatory (and hateful) speech puts employers in a precarious situation. Now, when an employee engages in outrageous and inflammatory behavior that might also be connected to some workplace complaint or dispute, an employer must decide between upholding its obligation to protect other employees from a hostile work environment and violating the Act. Such employee behaviors, if left uncorrected, could expose the employer to

⁷⁵ 360 NLRB No. 117 (2014).

⁷⁶ 363 NLRB No. 194 (2016).

⁷⁷ *Id.* at *1.

⁷⁸ *Id.*

liability under other federal statutes such as Title VII. Given these types of rulings, it is unclear what (if any) options employers have to effectively address employee behavior that by virtually any measure but the Board's constitutes insubordination and harassment.

(ii) The Board Has Targeted Common Sense Provisions in Employee Handbooks and Policies

The Board has also targeted employer handbooks and work rules. Over the past eight years, it has struck down boilerplate confidentiality clauses, civility codes, innocuous workplace rules, and anti-harassment policies that have been found in employer handbooks and workplace rule guides for years.⁷⁹ The Board has reasoned in most of these cases that such policies might “chill” employees from using their Section 7 rights. Based on such assumptions, the Board has left employers wondering how to lawfully promulgate workplace standards for regulating employee conduct.

The Board's treatment of confidentiality policies shows the lengths to which it has been willing to go in its assault on the employer handbook. In *Banner Health*,⁸⁰ the Board held that an “Interview of Complainant” form used during workplace investigations violated Section 7. The form requested that interviewees refrain from discussing an ongoing employer investigation with others in order to protect the integrity of the investigation. On review, the Board struck down use of the form, holding broadly that, “[e]mployees have a Section 7 right to discuss discipline or ongoing disciplinary investigations involving themselves or coworkers. Such discussions are vital to employees' ability to aid one another in addressing employment terms and conditions with their employer.”⁸¹

Although lost on the Board, the reasons an employer may want to maintain confidentiality during a workplace investigation are obvious. Confidentiality is necessary to protect the privacy (not to mention the safety) of the parties involved, including the employee who is under investigation or the employee who made the complaint. It is also necessary to insure that employees suspected of wrongdoing do not coerce others into altering or recanting statements. Decisions like *Banner Health* frustrate an employer's ability to insure the integrity of a workplace investigation or protect employee privacy. Even more troubling, the Board's decision fails to explain (or even contemplate) how employers are to reconcile their obligations under the Act with countervailing confidentiality obligations under other federal laws.

The Board's decision in *Columbia University* (discussed above) highlights this conundrum. Colleges and universities, for example, are required under federal law to investigate student complaints against teachers and graduate assistants, some of which might involve highly sensitive and deeply personal sexual misconduct allegations. The Board's holding in *Banner Health* suggests that colleges and universities could violate the Act by complying with their

⁷⁹ See “Theater of the Absurd: The NLRB Takes On the Employee Handbook,” U.S. Chamber of Commerce (2015).

⁸⁰ 362 NLRB No. 137 (2015).

⁸¹ *Id.*, slip op. at 2.

obligations under the Family Educational Rights and Privacy Act⁸² and Title IX of the Education Amendments Act of 1972⁸³ to protect certain investigation files and witness statements from disclosure. Under the Board’s rationale, graduate assistants involved in such investigations might be “employees” under the Act and therefore cannot be prevented from discussing the investigation or its results with other “employees.”

The Board has also struck down boilerplate non-competition and non-solicitation provisions used by many employers on the grounds that they interfere with protected rights. In *Minteq International, Inc.*,⁸⁴ the employer had its new hires sign a relatively standard “Non-Compete and Confidentiality Agreement” that provided, among other things, that employees would not “intentionally solicit or encourage any present or future customer or supplier of the Company to terminate or otherwise alter his, her or its relationship with the Company in an adverse manner.” Employers have used such language for years to insure that employees do not leave their employ, form a competing business, and solicit the customers they serviced while working for their old employer. Limitations such as these are as common as they are logical.

Unfortunately, the Board fails to appreciate such logic. In *Minteq International*, it ruled that the employer’s non-solicitation language was unlawful on its face because it could be read to restrict employees’ ability to “improve terms and conditions of employment . . . through channels outside the immediate employee-employer relationship.”⁸⁵ Results like this one have left employers wondering whether taking even basic steps to protect the economic lifeline of any business—customer relationships—is now illegal in the eyes of the Board.

(iii) The Board Has Taken An Aggressive Stance on Social Media and E-mail Policies

The Board has also attempted to retool Section 7 for the 21st Century by delving into the area of social media and electronic communications. In most cases, its attempts to adapt the Act to today’s platforms have gone too far. For example, the Board held in *Purple Communications, Inc.*⁸⁶ that employers cannot prohibit employees from using employer e-mails systems to send personal messages, including union solicitations. Overturning existing precedent, the Board struck down an employer’s email policy that limited e-mail use to “business purposes only,” prohibited employees from “engaging in activities on behalf of organizations or persons with no professional or business affiliation with the company,” and prohibited employees from “sending uninvited email[s] of a personal nature.”

⁸² 20 U.S.C. §1232g; *see also* 34 CFR §§ 99.30-31.

⁸³ 20 U.S.C. §§1681 et. seq.; *see also* “Dear Colleague Letter,” U.S. Department of Education Office of Civil Rights (2011) (discussion confidentiality obligations), available at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

⁸⁴ 364 NLRB No. 63 (2016).

⁸⁵ *Id.*, slip op. at 7.

⁸⁶ 361 NLRB No. 43 (2014).

The Board reasoned that “email is a large and ever-increasing means of employee communication for a wide range of purposes” and that email has effectively become the new “natural gathering place” for employee communications. Although the Board likened email messages to the 21st Century “water cooler,” its ruling ignores the fact that if employees are permitted to use their employer’s e-mail system to conduct a unionization campaign, particularly during working hours, they can unduly disrupt normal business operations. Again, however, this decision—like like so many others—shows a willingness to elevate purported Section 7 rights over any practical concerns.

The Board has also targeted social media policies that prohibit employees from making disparaging public remarks online about their employer and/or its clients. In one recent decision, the Board found that language in Chipotle’s “Social Media Code of Conduct” prohibiting employees from posting “disparaging, false, misleading . . . statements about or relating to Chipotle, our employees, suppliers, customers, competition or investors” was unlawful.⁸⁷ Although the policy was clearly designed to prohibit dissemination of false and disparaging information—and was not intended to stifle debate about the terms and conditions of employment—the Board held that the Act permits employees to post false statements about their employer if they are not doing so knowingly or with reckless disregard for the truth. Because the policy applied to all “false” and “misleading” statements, the Board found it tended to chill Section 7 rights. Once again, the Board’s logic flouts common sense and completely disregards an employer’s legitimate business interest in prohibiting employees from publicly disparaging the business, its employees and its customers.

(iv) The Board Has Attacked Class and Collective Action Waivers

The Board has also sought to prevent employers from entering dispute resolution agreements with employees that bar the arbitration of class and collective action claims. In *D.R. Horton, Inc.*,⁸⁸ the Board ruled that requiring employees to agree to a class and collective action waiver in an arbitration agreement violates the Act. The Board’s rationale is that class waivers deprive employees of the right to engage in protected, concerted activity. The Board reaffirmed this rule two years later in *Murphy Oil USA, Inc.*⁸⁹ In both cases, the U.S. Court of Appeals for the Fifth Circuit denied enforcement, rejecting the Board’s logic. The Court held that the Act does not contain any congressional command overriding the Federal Arbitration Act; that the use of class action procedures is not a substantive right under Section 7 of the Act and that seeking to compel arbitration of such claims is not an unfair labor practice.⁹⁰

⁸⁷ 364 NLRB No. 72 (2016).

⁸⁸ 357 NLRB No. 184, slip op. (2012).

⁸⁹ 361 NLRB No. 72 (2014).

⁹⁰ See *Murphy Oil, USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). The Board’s *D.R. Horton* rule has also been rejected in several federal appellate courts in private party actions not involving the NLRB. See, e.g., *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir. 2014); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 296–97 & n. 6 (2^d Cir.2013) (determining that the FLSA does not contain a “contrary congressional command” that prevents an employee from waiving his or her ability to proceed collectively and that the FLSA collective action right is a waivable procedural mechanism); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1051-52 (8th Cir. 2013).

Undeterred, the Board has continued to enforce its rule that class and collective action waivers in employment agreements violate the Act. Since its decision in *Murphy Oil*, the Board has held that:

- Section 10(b) of the Act does not apply to claims that class/collective action waivers violate the Act because maintenance of an “unlawful work rule constitutes a continuing violation” not time-barred by Section 10(b);⁹¹
- An employer violates the Act by moving in court to compel arbitration on an individual basis, even though the language of the agreement does not expressly bar class and collective claims;⁹²
- An arbitration agreement that bars class and collective claims but permits employees to file claims with administrative agencies is still unlawful because administrative claims are not the same as a judicial forum where employees may litigate claims on a collective basis.⁹³

Despite the fact that most federal appellate courts that have addressed the Board’s *D.R. Horton* rule have rejected it, a Circuit split has developed as the Seventh and Ninth Circuits have recently accepted the Board’s logic.⁹⁴ The U.S. Supreme Court has granted *certiorari* in three cases stemming from the Board’s *D.R. Horton* rule, although the Court has indicated it will not consider the issue until its next term, meaning the murky state of the law on class and collective arbitration waivers is likely to persist until late 2017 or 2018.

In the meantime, the Board is likely to continue to invalidate class action waivers and/or discourage employers from adopting them, unless a newly constituted Board revisits this troubling policy and harmonizes its precedent with the Federal Arbitration Act and existing Supreme Court precedent.⁹⁵

V. CONCLUSION

The Board rules and policies addressed in this paper only begin to scratch the surface of the full extent to which the Board overturned or modified longstanding precedent in the past

⁹¹ *PJ Cheese, Inc.*, 362 NLRB No. 177 (2015).

⁹² *Century Fast Foods, Inc.*, 363 NLRB No. 97 (2016).

⁹³ *SolarCity Corporation*, 363 NLRB No. 83 (2015).

⁹⁴ *See Lewis v. Epic Systems*, 823 F.3d 1147 (7th Cir. 2016) (holding that an arbitration agreement that “precludes employees from seeking any class, collective, or representative remedies to wage-and-hour disputes” violates the NLRA), and *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016) (citing *Lewis*, holding that “an employer violates the National Labor Relations Act by requiring employees to sign an agreement precluding them from bringing, in any forum, a concerted legal claim regarding wages, hours, and terms and conditions of employment.”).

⁹⁵ *See, e.g., Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2309 (2013); *Mobility LLC v. Conception*, 131 S.Ct. 1740, 1748 (2011).

eight years. When added together, the amount of precedent changed by this Board is staggering. A December 2016 report published by the Coalition for a Democratic Workplace estimates that since 2009, the Board overturned a mind boggling total of over 4,500 years of prior precedent.⁹⁶ Many of these rulings, while not as damaging as the Board's micro-unit, joint employer and other rulings summarized above, are nevertheless problematic for employers.⁹⁷

As stated above, the time has come to reconstitute the Board to full, five-member status so that it can begin to re-examine and unwind the anti-business policies that predominated the Board's previous tenure. Restoring some semblance of fairness to the Board's precedents will balance the playing field of labor-management relations and allow the Board to regain the respect it once had as a highly-regarded agency.

⁹⁶ See generally "Was the Obama NLRB the Most Partisan Board in History?," Coalition for a Democratic Workplace and Littler's Workplace Policy Institute (Dec. 6, 2016).

⁹⁷ See, e.g., *GVS Properties, LLC*, 362 NLRB No. 194 (2015) (holding successor doctrine applies to a new employer that is required by a worker retention law to hire the predecessor's employees for a specific period of time); *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) (prohibits cancelation of dues checkoff at the expiration of the collective bargaining agreement giving rise to the checkoff obligation, on the grounds that checkoff agreements are part of the "status quo"); *American Baptist Homes d/b/a Piedmont Gardens*, 362 NLRB No. 139 (2015) (requiring employers to provide written employee witness statements to unions in response to information requests); *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014) (narrowing the conditions under which the Board will defer handling of unfair labor practice charges to the grievance and arbitration procedures in parties' collective bargaining agreements); *New York New York Hotel & Casino*, 356 NLRB No. 119 (2011) (requiring employers to allow subcontractors' off-duty employees access to company property); *Saint John's Health Center*, 357 NLRB No. 170 (2011) (along with related decisions, requiring employers to allow employees to wear union buttons, logos and clothing in the workplace, including employees who have access to patients or customers); *Carpenters Local 1506 (Eliason & Knuth)*, 355 NLRB No. 159 (2010) (along with related decisions, holding that displaying large banners stating "shame on" a neutral employer and proclaiming existence of a labor dispute at the neutral's premises or a common-situs construction site did not violate the Act's prohibition against secondary boycotts).