AGENCIES RUN AMUCK: DEFENDING AGAINST FEDERAL INVESTIGATIONS

SHANNON H. HUTCHESON
Hutcheson Bowers LLLP
1301 South Mopac, Suite 430
Austin, TX 78746

State Bar of Texas
BUSINESS DISPUTES COURSE 2014
September 11 – 12
Houston

CHAPTER 11

SHANNON H. HUTCHESON
Hutcheson Bowers LLLP
1301 S. Mopac, Suite 430
Austin, Texas 78746
512-777-4448
Fax: 512-777-4497
shannon@hutchesonbowers.com

For over eighteen years, Shannon has represented companies of all sizes, from start-ups to publicly traded corporations, in virtually all aspects of labor and employment law, including counseling, training and litigation, as well in commercial disputes, including litigation and arbitrations involving customers, distributors and franchisees. Shannon has extensive experience investigating workplace complaints into alleged workplace misconduct, including alleged discrimination and harassment, as well as alleged fraud and self-dealing, by senior executives for companies of varied sizes, including large publicly traded companies, in places ranging from Texas to New York, London and Denver.

In 2011, Shannon co-founded a boutique law firm, Hutcheson Bowers LLLP, with her former litigation colleague, Allison Bowers, focusing on labor and employment defense. Prior to that, Shannon practiced with the international firm of Baker Botts LLP for twelve years in both Austin and Dallas, where she developed an extensive background in commercial litigation, handling matters ranging from professional malpractice defense to patent and trade secret litigation. Hutcheson Bowers LLLP is proud to be a certified woman-owned business, as well as a member of the highly selective National Association of Minority and Woman Owned Law Firms.

PUBLICATIONS, PRESENTATIONS, SERVICE AND AWARDS

- Board of Directors Secretary, Austin Children's Shelter (2014-present)
- President, Austin College Lawyer Alumni Association (2013-present)
- Rising Star in litigation by Texas Monthly magazine (2008, 2011, 2012)
- Member, University of Texas School of Law Steering Committee (2014-present)
- "Attorney Eyes Only: Confidentiality and Protective Orders in Business Litigation," State Bar of Texas, Business Disputes CLE (2013)
- "Arbitration: the Pros & Cons and the How-to's," University of Texas Annual Labor & Employment Law Conference (2012)
- "The Genetic Information Nondiscrimination Act: EEOC's 2011 Regulations," Labor & Employment Section of the Austin Bar (2011)
- Baker Botts Client Service Award (2007)
- Fellow, Texas Bar Foundation (2008-present)
- Martindale Hubbell AV-Preeminent rating
- Member, National Association of Women and Minority Owned Law Firms

EDUCATION

University of Texas School of Law, Doctor of Jurisprudence, with Honors, 1996, Order of the Coif
Austin College, B.A., Political Science, with departmental honors, 1993
Admitted to Practice: Texas; United States Court of Appeals for the Fifth Circuit, United States District Courts for the Eastern, Northern, Southern, and Western Districts of Texas

Table of Contents

Appendices

I. Department of Labor Investigations

A. Background

1. The DOL's 2014-2018 Strategic Plan

The Department of Labor ("DOL") has broad powers to conduct investigations into potential violations of the Fair Labor Standards Act ("FLSA") and the Family Medical and Leave Act ("FMLA"). The Department of Labor is not shy in exercising its power under this provision. In fact, the past decade has seen a steady increase in the amounts of back wages recovered annually. This trend is unlikely to end under current U.S. Labor Secretary, Tony Perez.

Secretary Perez recently issued the first Strategic Plan under his tenure. In releasing this Plan, he stated that his "vision" is for the Department of Labor to be the "Department of Opportunity" for employees and employers alike. *See* http://www.dol.gov/_sec/stratplan/. Under this Plan, one of the main strategic goals is to "promote fair and high-quality work environments" through "narrow[ing] wage and income equality, protect[ing] workers' rights, and secur[ing] wages and overtime." *Id.*

According to the Plan, for over 20 years "FMLA enforcement has been primarily complaint-driven: one employee and one compliance action to resolve a specific situation." http://www.dol.gov/_sec/stratplan/FY2014-2018StrategicPlan.pdf. The DOL's Wage and Hour Division ("WHD"), however, is changing to "a more strategic approach centered on securing corporate-wide compliance with the Act through directed investigations. WHD will continue this shift in FY 2014 and beyond." *Id.*

With respect to the FLSA, the WHD's "nationwide staff of investigators, supervisors, analysts, technicians and administrative employees" will continue administering the protections of the FLSA, using different enforcement methods. *Id.* Specifically, its methods "have evolved in recognition of the changes in industries and growth of new business models" where many companies outsource work. *Id.* In particular, the WHD is focusing on "business models that are characterized by the use of subcontracting, franchising, temporary employment, labor suppliers, independent contracting, and a contingent workforce." *Id.* According to the DOL, these practices are most often seen in certain industries, including the hotel, construction, janitorial, restaurants, garment, and health care industries. The DOL's goal is to "continue to increase the number and percentage of those directed investigations that are focused on those business models that contribute to non-compliance."

In 2013, the DOL had over 34,000 compliance actions and, by 2018, its target is almost 50,000. In 2013, 38% of those actions were directed actions, while its 2018 target is 50%. In 2013, the DOL found no violation in 23% of directed investigations and 21% of complaint investigations.

2. DOL's Coordination with the Internal Revenue Service

To strengthen its enforcement initiatives, the U.S. Secretary of Labor and the Commissioner of the IRS signed a memorandum of understanding ("MOU") to coordinate the two departments' mission to ensure employee classification compliance and education.

According to former Secretary of Labor, Hilda Solis, the purpose of the MOU is to send a "coordinated message" from the DOL and the IRS that they are "standing united to end the practice of misclassifying employees" as independent contractors, in order to ensure that "the American dream is still available for all employees and responsible employers alike." http://www.dol.gov/opa/media/press/whd/WHD20111373.htm. Several state agencies have also signed the MOU to participate in the DOL and IRS's efforts to correct employee misclassification. http://www.dol.gov/dol/2011MOUE-GovReport.htm. Texas, however, is not currently a party to a MOU with the DOL and IRS.

3. The DOL's Track Record

If the WHD increases its enforcement actions as planned, it will likely continue its trend of collecting more back wages annually. In 2001, the WHD collected almost $132 million in back wages for approximately 215,000 employees. By 2012, the WHD had more than doubled that amount, reaching the sum of over $280 million for over 300,000 employees. http://www.dol.gov/whd/statistics/

Texas employers, large and small, have been increasingly contributing to the DOL's collections over the last several years. And, each time the DOL's recovers money from an employer, it issues a press release. For example, a Houston hospital system, Harris Health System, recently settled with the DOL for over $2 million in unpaid overtime and over $2 million in liquidated damages. http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southwest/20130916.xml. Similarly, B & D Contracting Inc., a labor recruiting and staffing agency that caters to oil field services and maritime fabrication facilities along the Gulf Coast, has agreed to pay $1.6 million in back wages. http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southwest/20140710.xml.

Smaller Texas employers are not exempt from DOL scrutiny. For example, the DOL sued a small Austin restaurant, Hao Hao, which resulted in a recovery of $70,000 in back wages for FLSA violations. http://www.dol.gov/opa/media/press/whd/WHD20121013.htm. Similarly, the DOL recovered over $17,000 from Houston Ear, Nose & Throat Clinic LLP on behalf of an employee whose FMLA rights were violated. http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southwest/20131211.xml.

4. DOL's Enforcement Budget

The DOL's WHD 2014 budget was almost $225,000,000 and it is seeking an additional almost $30,000,000 from Congress for 2015 to support its initiatives, which would include an additional 305 full-time investigators. http://www.dol.gov/dol/budget/2015/PDF/CBJ-2015-V2-09.pdf.

B. Selection for DOL Investigation

Historically, the wide majority of investigations arose out of a complaint by an employee or employees. And, complaints do not necessarily come from employees. Rather, unions, competitors and other groups who advocate for employee rights may also lodge complaints. But, increasingly, the DOL has focused its efforts on targeted industries, including the hotel, construction, janitorial, restaurants, garment, and health care industries.

At an April 2014 conference, DOL's new FMLA Branch Chief, Helen Applewhaite, stated that the on-site investigations would now be a "standard practice." If this occurs, this will be a significant change in DOL practice. Chief Applewhaite indicated that like with FLSA investigations, employers should expect document requests aimed at identifying any "systemic" FMLA issues. Additionally, the DOL will interview managers to ensure that they have been trained appropriately on FMLA requirements and the employer's policies and procedures.

C. Initiation of the Investigation

The WHD has authority to investigate the wages, hours and other conditions and practices of employment in any covered industry. WHD investigators may inspect records, gather information, and question workers.

Typically, WHD inspectors will contact the employer in advance to advise them of initiation of any investigation. However, investigators may show up unannounced at the employer's offices, which often occurs when the WHD is concerned about the employer's credibility or cooperation.

Upon arrival the investigator will identify himself/herself and show his/her DOL credentials. The investigator will conduct an opening conference during which the investigator will discuss the nature and scope of the investigation and the categories of documents to be reviewed.

The investigator will then conduct the investigation by reviewing documents and interviewing employees. Investigators follow the guidelines set forth in the WHD "Field Operations Handbook," the key parts of which are available online. *See* http://www.dol.gov/whd/FOH/ . The Handbook is a good resource for those preparing to defend against an investigation.

During the investigation, WHD investigators enjoy broad power to conduct their investigation, including subpoena power. 29 U.S.C. §209. The WHD may issue subpoena duces tecum without "probable cause" beyond a statement that the documents are relevant and without needing prior judicial approval. *Oklahoma Press Pub. Co. v. Walling,* 327 U.S. 186 (1946).

D. Rights of Employers

1. Rights to Challenge WHD Subpoenas

While the investigator enjoys broad rights, employers have certain limited rights. First, an employer may refuse to allow the investigator to enter non-public areas without an administrative warrant. *Donovan v. Lone Steer,* 464 U.S. 408, 414 (U.S. 1984); *United States v. New Orleans Public Service, Inc.,* 734 F.2d 226, 228 (5th Cir. 1984). It is important to note, however, that this right is akin to that afforded under the 4th Amendment to the U.S. Constitution and, thus, may be waived. Accordingly, employers should be aware of their right to refuse to permit an investigator access to non-public portions of their workplace absent a warrant.

Second, the employer has a right to challenge the reasonableness of the investigator's subpoena and there are no monetary or other penalties for challenging the reasonableness of the subpoena before complying with it. *Donovan v. Lone Steer, Inc.,* 464 U.S. 408 (U.S. 1984). Therefore, if an investigator arrives without prior notice demanding immediate production of documents and immediate interviews of employees, the employer is empowered to challenge the reasonableness of those requests.

It is important to note, however, that due to the investigator's broad powers to use administrative subpoenas, any challenge to such a subpoena is likely only to delay compliance with it. To enforce the subpoena in court, the WHD must show only that: (1) the investigation is being conducted for a legitimate purpose; (2) the information sought may be relevant to the purpose; (3) the WHD does not already possess the information; and (4) the WHD has followed internal administrative procedures. *See U.S. v. Transocean Deepwater Drilling, Inc.,* 936 F.Supp.2d 818, 821 (S.D.Tex. 2013). Thus, an employer should do a cost-benefit analysis of fully cooperating immediately with a subpoena versus challenging it and likely creating an adversarial relationship with the investigator.

2. Right to Counsel

Employers have a right to have counsel during an investigation. Employers should also have a member of the site's management or human resources present as well. Their presence is essential to respond to any questions, monitor the investigator, and, to the extent possible, generally protect the employer's interest. While a company representative is generally permitted to be present for management interviews, they are never permitted to attend interviews of non-exempt employees.

E. The Closing Conference

Once an investigator has completed their factual review, they will schedule a conference with the employer to review their findings and any relief sought. During this conference, the investigator will seek an agreement from the employer to correct any violations and to pay any back wages that are found to be due. Employers should be careful responding immediately to the investigator's demands and may want to request time to review and respond to the findings and any back wage calculations.

F. Post-Investigation

If the employer does not agree with the investigator's findings, the WHD may refer the matter to the Office of the Solicitor for litigation. The WHD also notifies employees of their right to file a private lawsuit. These letters now contain information regarding the DOL's "Bridge to Justice" lawyer referral program, which connects claimants with lawyers who may be willing to litigate their case. In litigation, an affected employee could seek back wages, liquidated damages in an amount equal to the back wages, attorneys' fees, and costs.

G. Pre-Investigation Steps

The best protection from a WHD investigation begins long before an investigator ever arrives and it includes self-auditing of practices, policies, and recordkeeping, as well as training and a developed investigation response plan.

1. Audit to Ensure FMLA Compliance

Employers should consider taking some basic steps to ensure that they are in compliance with the FMLA and all applicable regulations.

- FMLA Policy: Employers should confirm that their FMLA policy has been updated in light of the March 2013 regulations. A comparison of the old and new regulations is available at http://www.dol.gov/whd/fmla/2013rule/comparison.htm.
- FMLA correspondence forms: Employers should confirm that their FMLA correspondence forms (e.g., notices sent to employees regarding leave requests and during leave requests, certification forms, job

descriptions, etc.) comply with the applicable laws and regulations. The DOL approved forms are available online at http://www.dol.gov/whd/fmla/2013rule/militaryForms.htm.

- FMLA Recordkeeping: Employers should review their records to make sure they have all FMLA records for at least the last three years. According to the WHD, employers must maintain records that contain the following:
  - Basic payroll and identifying employee data.
  - Dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave), including the hours of the leave, if FMLA leave is taken in increments of less than one full day.
  - Copies of employee notices of leave provided to the employer under the FMLA, if in writing, and copies of all eligibility notices given to employees as required under the FMLA (copies may be maintained in employee personnel files).
  - Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leave.
  - Premium payments of employee benefits.
  - Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for designation and for the disagreement.

See http://webapps.dol.gov/elaws/whd/fmla/8b6.aspx.

- Training. Employers should make sure that all managers have been trained on its FMLA policy and implementation procedures.
- FMLA poster. Employers should post the DOL's FMLA poster "prominently." If a large portion of your workplace speaks another language, the poster should also be made in that language. http://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

2. Audit to Ensure Wage & Hour Compliance

Employers should consider taking some basic steps to ensure that their workers are properly classified as employees or independent contractors, and that they are in compliance with the FLSA and all applicable regulations.

- Independent contractor classifications. Employers should review their 1099 forms and the associated job duties to confirm all workers are properly classified.
- Exempt/Nonexempt classifications. Employers should review their written job descriptions to confirm that they are current and, if exempt, support the exemption.
- Pay practices. Employers should review timekeeping practices to ensure nonexempt employees are paid for all required time and to ensure they are not making improper deductions from the salary of exempt employees.
- Review all records to ensure that they are keeping the appropriate records. Payroll records must be kept for a minimum of three years, and "records on which wage computations are based" (e.g., time cards, schedules, deduction records) must be kept for a minimum of two years. http://www.dol.gov/whd/regs/compliance/whdfs21.htm
- According to WHD, at a minimum, employers must retain "basic records" that contain the following information:
  - Employee's full name and social security number.
  - Address, including zip code.
  - Birth date, if younger than 19.
  - Sex and occupation.
  - Time and day of week when employee's workweek begins.
  - Hours worked each day.
  - Total hours worked each workweek.
  - Basis on which employee's wages are paid (e.g., "$9 per hour", "$440 a week", "piecework")
  - Regular hourly pay rate.
  - Total daily or weekly straight-time earnings.
  - Total overtime earnings for the workweek.
  - All additions to or deductions from the employee's wages.
  - Total wages paid each pay period.

  - Date of payment and the pay period covered by the payment.
- Training. Employers should make sure that all managers have been trained on the basics of wage & hour laws and applicable employer policies.

3. Develop DOL Inspection Plan

Employers should consider taking some basic steps to develop a plan in the event of an audit. A plan should include the following:

- Identify who should be notified in the event of an unannounced DOL inspection (e.g., senior management, counsel, front-line supervisors).
- Identify who will participate in the investigation and in what capacity (e.g., conference participants, document reviewers, production personnel, witness preparer, etc.).
- Identify appropriate locations for the investigation (e.g., space for the conference, interviews and a workspace for the investigator.

II. EEOC On-Site Investigations

A. Background

1. The EEOC's Strategic Enforcement Plan

In 2012, the EEOC adopted its Strategic Enforcement Plans for the years 2013-2016. The SEP established three main objectives: (1) to combat employment discrimination through strategic law enforcement; (2) to prevent employment discrimination through education and outreach; and (3) to deliver excellent and consistent service through a skilled and diverse workforce and effective systems.

To best achieve these objectives, the EECO established six enforcement priorities. They are:

- Eliminating barriers in recruitment and hiring. The EEOC plans to achieve this by targeting particular industries that have a history of recruiting and hiring practices that result in underrepresentation of protected classes, including through analysis of census data and EEO reports. The EEOC is targeting both class-based recruitment and facially neutral recruitment practices.
- Protecting immigrant, migrant and other vulnerable workers. The EEOC plans to achieve this objective by using targeted outreach to workers who may be unaware of their rights or be afraid of exercising them.
- Addressing emerging and developing issues. The EEOC SEP has already identified three developing issues of focus, including pregnancy-related discrimination under the ADA and the PDA and discrimination against lesbian, gay, transgender and bisexual employees.
- Enforcing equal pay laws. According to EEOC Trial Attorney, Anna Pohl, field offices are "particularly encouraged to use directed investigations and Commission charges" to address compensation systems and practices that discriminate against female employees. http://www.americanbar.org/content/newsletter/groups/labor_law/ll_flash/2014/jan2014/eeoc.html.
- Preserving access to the legal system. The EEOC will focus on overly broad waivers, settlement provisions, and other actions that are prohibited by the EEOC's Guidance on Non-Waivable Employee Rights Under EEOC-Enforced Statutes.
- Preventing harassment through systemic enforcement and targeted outreach. Harassment is still one of the most frequent complaints raised in charges and one-third of EEOC systemic lawsuits were focused on harassment in the workplace.

2. The EEOC's Track Record

In 2013, over 93,000 claims were filed, with retaliation claims being asserted in over 40% of them. http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm. Texas led the nation in the number of charges filed -- over 9,000, or almost 10% of all charged filed nationwide, were in Texas. *Id.*

In 2013, the EEOC resolved over 97,000 charges and filed 131 lawsuits, including 21 systemic cases. *Id.* Through its mediation and conciliation efforts, the EEOC secured a record $372 million from employers in 2013. *Id.* Through litigation completed in 2013, the EEOC obtained almost $40 million dollars in damages. *Id.*

In 2014, the EEOC plans on litigating more cases and expects to file an even greater number of systemic cases. Simultaneously, the EEOC will continue its focus on its mediation and conciliation programs, which have

become an integral part of its enforcement program. In 2012, 91% of EEOC settlements occurred through mediation. And, 98% of 2012 participants in EEOC mediations reported being confident in the program.

B. EEOC On-Site Investigations

Employee interviews and on-site investigations are playing an increasing role in the EEOC's charge investigation. According to the EEOC Compliance Manual, the EEOC's typical approach will be to schedule an on-site in advance with an employer. *See* EEOC Compliance Manual 25.2(a). Like the DOL, however, the EEOC is not required to provide advance notice, especially where it is concerned about an employer's cooperation. *Id.* at 25.2(b)(1). Again, like with the DOL, an employer must decide whether to allow an investigator access to its premises when he/she arrives unannounced or whether to require a subpoena.

With respect to witness interviews, the EEOC may interview witnesses identified by the charging party before the employer has even responded to the charge. *Id.* at 23.4. If the investigator decides to conduct on-site interviews, however, they are instructed to do so at a time that minimally interferes with the employer's business operations. *Id.* at 23.6. Finally, the employer has a right for its attorney to be present for interviews of management; however, neither the employer nor its attorneys may attend non-management employee interviews. *Id.*

C. EEOC Subpoena Power

The EEOC also has broad power to subpoena "any person who has custody or control of relevant evidence." *Id.* at 24.1. As the Supreme Court explained, "[s]ince the enactment of Title VII, courts have generously construed the term 'relevant' and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer." *EEOC v. Shell Oil Co.,* 466 U.S. 54, 68-69 (1984). The EEOC's power, however, is tied to the underlying charge of discrimination and should not be construed so broadly as to give the EEOC "unconstrained investigative authority." *Id.* at 64-65.

Despite the breadth of the EEOC's subpoena powers, the EEOC requires its investigators to attempt to obtain information through "other investigative methods" before resorting to the use subpoenas. EEOC Compliance Manual 24.1. The Manual also requires the investigator to consider the employer's ability to produce the information before requesting it. *Id.* at 24.4.

D. Pre-onsite Steps

Before the investigator's (hopefully) scheduled visit, there are a number of steps that an employer should consider taking, from the receipt of the charge forward.

- Responding to the Charge
  - Notify legal counsel and HR upon receipt of charge.
  - Consider who should conduct the investigation (HR vs. counsel) and all related privilege issues.
  - Review applicable law and employer policies.
  - Conduct a prompt, thorough investigation into the allegations, including reviewing relevant documents and interviewing relevant witnesses.
  - Consider providing a comprehensive response, which explains all relevant circumstances and the bases for the employment actions at issue. If there was a legitimate nondiscriminatory reason for the action, explain and document it.
  - Provide copies of relevant documentation with the charge response.
  - Be sure to carefully review and verify the accuracy of every factual allegation in the response.
  - If the employer has taken the same action against similarly situated employees, explain that action and consider including the supporting documentation.
  - Involve your counsel. Have them draft, or at a minimum review, the response.
  - Be sure to collect and preserve all relevant documentation. *See* 29 CFR 1602.14.
  - Confirm that the employer has up-to-date required EEO postings
- Preparing for the on-site visit
  - Attempt to limit the scope of the on-site with the investigator.
  - Confirm with the investigator all document categories that are to be produced at the on-site. Consider providing them in advance.
  - Ask the investigator for a list of those employees to be interviewed in advance.
  - Prepare each employee for the interview. Remember, however, that comments to non-management employees are not

privileged. Thus, you should be very careful not to create the appearance of coaching them or acting in a manner that interferes with the investigation.
- Carefully choose the location for the interviews.

III. National Labor Relations Board Investigations

A. Background

1. The NLRB's 2013 Performance and Accountability Report

The National Labor Relations Board's ("NLRB") Performance and Accountability Report contains some valuable insights as to the agency's activities, results and priorities. http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1674/NLRB2013par.pdf.

According to the report, during fiscal year 2013, the public filed over 21,000 unfair labor practice charges of which 35% were found to have merit. The agency recovered over $16 million on behalf of employees as backpay or reimbursement of fees, dues, and fines and offered reinstatement to over 1,300 employees.

The report also explains the NLRB's goals to "protect democracy in the workplace" and to:

> create a positive labor-management environment for the nation's employees, unions, and employers by assuring employees free choice on union representation and by preventing and remedying statutorily defined unfair labor practices. The NLRB maintains a citizen-centered and results-oriented philosophy to best serve the needs of the American people.

Id.

The report also highlights the NLRB's activities relating to workplace policies and practices that could result in a chilling an employee's Section 7 rights. To that end, the agency's general counsel stated that he intends to put a "prosecutorial focus" on workplace policies that he believes are "clearly illegal," with a specific focus on those policies that restrict employees from communicating with each other about wages and compensation.

2. NLRB Website for Non-Union Employees

The NLRB has a new web page that is directed to employees, "even if they are not in a union." The web page contains a map, which contains links to cases involving § 7 protected concerted activity. The website address is: http://www.nlrb.gov/rights-we-protect/protected-concerted-activity

The following information is on the first page of the website:

> Whether or not concerted activity is protected depends on the facts of the case. If you have questions, please contact an Information Officer at your nearest NLRB Regional Office, which you can find on this page or by calling 1-866-667-NLRB. The Information Officer will focus on three questions:
>
> (1) Is the activity concerted?
>
> Generally, this requires two or more employees acting together to improve wages or working conditions, but the action of a single employee may be considered concerted if he or she involves co-workers before acting, or acts on behalf of others.
>
> (2) Does it seek to benefit other employees?
>
> Will the improvements sought – whether in pay, hours, safety, workload, or other terms of employment – benefit more than just the employee taking action? Or is the action more along the lines of a personal gripe, which is not protected?
>
> (3) Is it carried out in a way that causes it to lose protection?
>
> Reckless or malicious behavior, such as sabotaging equipment, threatening violence, spreading lies about a product, or revealing trade secrets, may cause concerted activity to lose its protection.

3. OSHA Referrals to the NLRB

On May 21, 2014, the NLRB sent a memorandum to all employees stating that the Board had entered into a referral program with OSHA. Under the program,

OSHA will refer claimants who are past the 30-day OSHA statute of limitations to the NLRB because "it is likely that some of these cases may also raise claims arising under the [NLRA]." http://www.btlaborrelations.com/wp-content/uploads/2014/05/OM-14_60.pdf. According to the memorandum, OSHA estimates that it will refer 300 to 600 cases each year under the agreement.

B. Recent Legal Developments

1. Noel Canning v. NLRB, 573 US ___ (2014).

In January 2013, the Court of Appeals for the D.C. Circuit issued its decision in *Noel Canning v. NLRB*, ruling that President Obama's "recess appointments" to the NLRB were unconstitutional. *See* 705 F.3d 490 (D.C. Cir. 2013). The Board had ruled against Noel Canning Corp., a canning and bottling company, in an unfair labor practices dispute, which Noel Canning appealed. On appeal, the company argued that the Board lacked authority to issue its decision because the President appointed the members of the board under the Recess Appointments Clause of the U.S. Constitution. The Court of Appeals concluded that the three "recess" appointments made by President Obama on January 4, 2012, were "invalid from their inception" because the President exceeded the scope of his authority.

The Supreme Court agreed with the result, holding that a recess of three days was too short a time to bring the recess within the scope of the Recess Appointments Clause. As a result of this decision, more than seven hundred decisions issued by the board between January 4, 2012 and August 3, 2013 are invalid. Further, to the extent subsequent decisions relied on the invalidated precedent, their validity is also called into question unless and until the board reaffirms the decisions.

2. McDonald's USA, LLC as Joint Employer

On July 29, 2014, NLRB General Counsel announced that it had authorized 43 complaints against McDonald's Franchisees and the franchisor, McDonald's USA, LLC, as a joint employer. http://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-authorizes-complaints-against-mcdonalds. Both the franchisees and the franchisor will be named as a respondent in the administrative proceeding if a settlement is not reached.

The General Counsel's authorization is consistent with the NLRB's previously stated intention of broadening the circumstances under which a joint employer relationship may be found to exist. This announcement has broad implications for franchisors, as well as for those businesses that outsource work, including those in the hotel/motel, beauty services, janitorial, and gas station/convenience store industries.

3. NLRB's Continued Focus on Social Media and Confidential Information

The NLRB has continued to focus heavily on employer policies and practices that it deems to have a chilling effect on employee rights under the NLRA, including the following:

- Finding social media policies violated employee rights. *See* Durham School Services, 360 NLRB No. 85; Dish Network Corp. 59 NLRB 108 (April 30, 2013); Design Technology Group 359 NLRB 96 (April 19, 2013).
- Finding broad employer policies on confidential information violated employee rights. *See* Hoot Winc, LLC, Case No. 31-CA-104872 (May 19, 2014); Lily Transp. Corp., Case CA-108618 (April 22, 2014)
- Finding Boeing notice to employees "recommending" that they not discuss investigations with other employees had a chilling effect on the exercise of protected 7 Rights. Case No. 19-CA-089374 (July 26, 2013).

4. Recent Employer Victories

Despite the seemingly pro-employee outcome of the NLRB's cases, employers have prevailed in a few important new cases. In *Landry's*, the restaurant had a policy that prohibited employees from posting "any words, logo or other marks that would infringe upon the trademark, service mark, certification mark or other intellectual property rights of the Company or its business partners." The NLRB argued that employees would not understand this policy to prohibit only technical "infringement. In rejecting this position and permitting the policy, the ALJ concluded that the employee is placed in "the position of having to exercise his or her best judgment in determining whether postings that include particular 'words, logos, or other marks' may run afoul of the provision." Case No. 32-CA-118213 (June 26, 2014).

In *Whole Foods Market*, the NLRB upheld a policy that prohibited employees from making recordings of conversations in the workplace because the rule did not restrict the employees' rights to engage in protected Section 7 activity and it was not promulgated in

response to union activity. Case No. 01-CA-096965 (Oct. 30, 2013).

C. The NLRB process

1. The NLRB's Casehandling Manual for Unfair Labor Practices

The NLRB's Casehandling Manual for Unfair Labor provides helpful guidance to employers on the entire unfair labor practices ("ULP") process from intake and investigation through the issuance of a complaint and the formal administrative proceeding.
http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/CHM-I.pdf

2. The NLRB Investigation Process

The initial process is similar to that of an EEOC charge – the Board provides notice of the charge to the employer and requests a written response form the employer. The Board, however, takes the position that it has the authority to require the employer's witnesses to sign sworn statements that are prepared by the investigator. *See* Casehandling Manual at 10052.5. If the employer refuses to provide witnesses, the Board may conclude that the employer has less than fully cooperated. *Id.* at 10054.4. If the Board concludes that the employer failed to "provide full and complete cooperation," the Board may (i) decide the case on the evidence obtained, (ii) issue an investigative subpoena to obtain "relevant and necessary evidence," or (iii) in certain circumstances, contact material witnesses directly to obtain sworn testimony. *Id.* at 10054.5

Section 11 of the NLRA grants the Board broad powers to investigate charges, including the power to subpoena testimony and documents. According to the manual, however, investigative subpoenas, "are no substitute for a promptly initiated, dogged, and thorough pursuit of relevant evidence from cooperative sources." *Id.* at 11770. And investigators are directed to use investigative subpoenas "responsibly" in order to collect the necessary evidence to permit the Regional Director to, among other things, decide whether a complaint should be issued. *Id.*

Once the investigation is complete, the investigator presents it to the Regional Director to for a decision on whether to issue a complaint. If the Regional Director intends to issue a complaint against the employer, a board agent will notify the parties and offer to assist the parties with settlement discussions. *Id* at 10252. If a settlement is not reached, an administrative hearing will be held.