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# Employers Take Note: Just In Time For Labor Day NLRB Issues Multiple Decisions That Significantly Erode Many Employer Interests

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The NLRB continues to take aim at and significantly erode employer interests. In just the past the past few weeks the NLRB has issued decisions:

- Further undermining employer investigations by finding that even a “recommendation” of confidentiality in such circumstances violated Section 7
- Throwing out an employer policy related to company confidential information and also finding its no-photograph policy violated Section 7
- Impairing the future effectiveness of unionized employer drug testing policies by requiring a union representative *in person* before testing can be performed (a decision with very significant implications)
- Continuing to invalidate employer employee individual arbitration agreements under Section 7, notwithstanding the fact that federal courts have openly rejected the Board’s position
- Demonstrating that the “special circumstances” test established in *Purple Communications* related to employee email system usage is extremely narrow

What follows discusses these disturbing anti-employer decisions; and it certainly appears that under the current Board this trend is bound to continue. **Don’t Think About Recommending Confidentiality In Employer Investigations – Employer Policies Can’t Do That Either** In *The Boeing Co.*, 362 NLRB 195 (2015), the NLRB majority held that to "recommend" was identical to "directed," and invalidated an employer's confidentiality notice to employees regarding human resources investigations. The policy in question initially stated that employees were "directed not to discuss" HR investigations with fellow co-workers; the revised policy stated that "we recommend that you refrain from discussing" the case. The NLRB majority concluded that despite the change in language, the revised notice was "virtually identical" to the original notice. The majority noted that "recommend" was defined as "to advise," and that such language went beyond stating a preference and became a "request," such that employees would not feel free to disregard the recommendation. Finally, the majority concluded that a blanket rule was overbroad. The dissenting member stated that the language of "recommend" and "suggest" would not be reasonably understood by an employee as a mandatory condition, or an interference with an employee's

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Section 7 rights. He noted that prior cases with "suggestive" language also included a mandatory component in the challenged notices; here, in contrast, the notice did not contain any mandatory language and was an expression of opinion. Finally, he stated his belief that striking the notice violated the employer's Section 8(c) right to communicate its opinion to its employees. **Rules Against Confidentiality and Restricting Employee Photographing – Notwithstanding the ALJ Finding to the Contrary - The Board Finds Those May Be Illegal Too** In *Caesar Entertainment d/b/a Rio All-Suites Hotel and Casino,* 362 NLRB 190 (2015), the majority reversed the decision of an administrative law judge (ALJ) and invalidated employee rules regarding confidentiality and photography restrictions by employees. The first policy prohibited employees from "disclosing to anyone outside the Company . . . any information about the Company which has not been shared by the company with the general public." The majority found the rule was overbroad, and necessarily would bar communications protected by Section 7, such as "salary structures." While agreeing that companies could protect their proprietary information, the majority found the blanket rule did not make any distinction between confidential and Section 7-protected information. The second policy prohibited employees from using their cell phones to take photos on company property. The majority found the rule was overbroad as well, and would have prevented employees from photographing, for example, unsafe job conditions or violations of labor law. While agreeing that companies could protect their guests' privacy, the majority noted that the photograph ban was not tailored to that interest. The third policy restricted employees' use of computers at work, and the majority remanded the policy to the ALJ in light of the board's decision in *Purple Communications, Inc.,* 361 NLRB 126 (2014). The dissenting member argued that employees would reasonably read the disclosure policy, which specifically named information such as company data, plans and strategies, and research and analysis, as protecting proprietary information, not a blanket ban on protected Section 7 communications. He also argued that since employees have no general right to possess or use cell phones on employee property or in the course of Section 7 activity, the question was whether employees would view the photograph ban as restricting protected activity. He stated that in light of the obvious need of the company to protect guest privacy and gaming operations, a reasonable employee would not conclude the photograph ban prohibited protected activity. **The NLRB Equates Employer Reasonable Suspicion Drug Test with Investigatory Interview Significantly Eroding Unionized Employer Drug Testing Programs** In *Manhattan Beer Distributors,* 362 NLRB 192 (2015), the majority concluded that a where an employee requests the presence of a union representative prior to an employer-mandated drug test, the union representative had to be physically present to count as representation. In the individual case, an employee arrived at work exhibiting signs of drug influence. The employer informed him he would have to take a drug test. The assistant shop steward was unavailable. The employee spoke with the shop steward, who stated he would not come in person, but advised him over the telephone. The employer asked the employee to take the test, and the employee refused and was subsequently terminated for failing to take the drug test. The majority concluded that *NLRB v. Weingarten*, 420 U.S. 251 (1975) contemplated the physical presence of a union representative for assistance. The majority noted that the only permissible choices for the employer were to grant the employee's request for a union representative, ask the employee to take the test voluntarily, or proceed without the test. While acknowledging that employees could not make employers wait indefinitely to perform a drug test,

the majority stated that in the instant case, the employer did not wait at all. Finally, the board concluded that the employee had been discharged for asserting his rights to a union representative in violation of Section 8. The dissenting member stated his opinion that a phone call was sufficient consultation with a union representative in that situation. Expressing his concern for the majority's new policy, the dissenting member noted the strong interest in employers maintain a drug or alcohol free workplace, and the need for time sensitive drug and alcohol testing. Weighed against the relatively minimal assistance a union representative could offer in a drug testing situation, he concluded that physical presence was not required and that the employee's right to consult with a union representative had been met. Finally, he concluded that the employee was fired for exhibiting credible signs of drug use, and that his refusal to take the test was his own choice to forego an opportunity to show otherwise. If this Board were to extend *Weingarten* rights to non-union employers (not an un-plausible extension of the law given this Board's proclivities and willingness to extend protected concerted activity protections), this decision could significantly impact all employer and their interests in maintain drug free work environments. **NLRB Doubles Down on D.R. Horton Arbitration Agreement Ruling and Continues to Spurn Contrary Federal Circuit Court Decision** In *On Assignment Staffing Services, Inc.,* 362 NLRB 189 (2015), the NLRB majority (2-1) doubled down on its decision in *D.R. Horton* and *Murphy Oil*, and held that any agreement between an employer and employee for individual arbitration was unlawful. Such an agreement, even if non-mandatory, required an employee to "prospectively waive" their Section 7 rights in violation of the National Labor Relations Act. Essentially, the majority concluded, individual binding arbitration frustrated the ability of workers to collectively act, and therefore any such agreements were invalid. On the merits of the individual case, the majority found that where an employer provided for a 10-day "opt-out" of an arbitration agreement, the opt-out period nevertheless tended to interfere with free exercise of Section 7 rights. The majority concluded that requiring any affirmative steps, such as an opt-out, to preserve Section 7 rights burdened the exercise of those rights; and that opting out also forced employees to make an "observable choice" about their preferences regarding collective activity. The dissenting NLRB member reiterated his fundamental disagreement with *D.R. Horton* and *Murphy Oil*, restating that the majority improperly concluded that Section 7 guaranteed employees access to class action procedures and provisions that were not found in Section 7 itself, but other statutory schemes. He stated that there was no support in the Federal Arbitration Act that employees were a special or exempt class, and noted that the federal courts had not endorsed this theory. Turning to the individual case, the dissenting member stated that an agreement where an employee could unilaterally opt-out was, by definition, not mandatory, and did not burden Section 7 rights. Moreover, he stated that opting out could be done for a variety of reasons, not simply in support or disfavor of collective activity. To date the Fifth Circuit Court of Appeals has taken a dim view of the NLRB's *D.R. Horton* decision and reasoning and previously has held that the Board's position lacks legal merit. At the beginning of this week in the *Murphy Oil* case, which Murphy Oil has appealed to the Fifth Circuit, the NLRB's was again greeted with some hostility. The Fifth Circuit panel hearing the case seemed unimpressed (if not somewhat annoyed), and at least in that case it looks like the NLRB's position is headed for another less than favorable outcome. How other courts rule of course remains to be seen, and it is a distinct possibility that this issue ultimately may require a ruling by the United States Supreme Court. **NLRB Applies *Purple Communications* in Hospital**

**Setting And Refuses to Find Hospital Ban on Email Solicitation Was Justified** In *UMPC and its subsidiaries Presbyterian Shadyside and Magee-Womens Hospital of UPMC,* 362 NLRB 191 (2015), the majority, based on its ruling in *Purple Communications, Inc.,* 361 NLRB 126 (2014), concluded that a hospital could not demonstrate that its rule banning "solicitation" communications in employees' email use was justified by special circumstances. Reiterating the rule of *Purple Communications* that employees have a presumptive right to use their employers' email system to engage in Section 7-protected communications, the majority concluded that the hospital's rule of a total ban on solicitation-related emails was unjustified. While agreeing with the general principle that hospitals have a responsibility to minimize workplace distractions, the majority found that because the policy only banned solicitation-related emails, and not all personal e-mail use, the policy was not lawful. The majority also noted the fact that the ban was not restricted to employees' working hours. The dissenting member first reiterated his opinion that *Purple Communications* was wrongly decided. He then noted that, even so, under the special circumstances test, the hospital had made a showing of special circumstances. The majority agreed that a hospital had an interest in minimizing workplace distractions, and the dissenting member noted that an e-mail system functioned as a virtual work area, where an employer had a strong interest in regulating its use. The employees had other ways to communicate, such as speaking in person at a cafeteria. He noted that the policy covered solicitation of all activities, such as charitable events, and not just Section 7 communications. Moreover, because a hospital operates 24/7, there was no effective way for the hospital to control "after-hours" communications except for a full ban. The dissenting member stated his belief that the hospital's electronic communications policy (held unlawful by the ALJ and affirmed by the majority without comment) was permissible, as the policy only restricted e-mail use that was "disruptive," "offensive" or "harmful to morale" that an employee would reasonably understand as restricting misconduct, not protected activities, particularly given their status as healthcare workers.