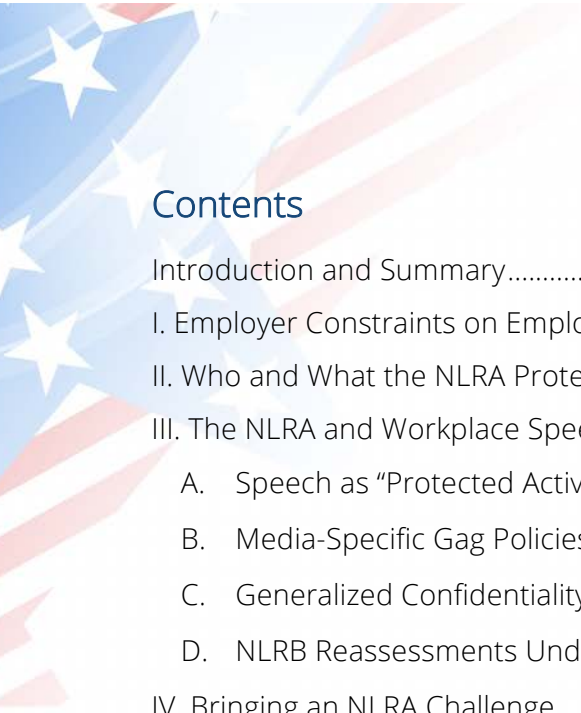




EMPLOYEES' RIGHT TO SPEAK
TO THE MEDIA:
CHALLENGING WORKPLACE
GAG POLICIES

A BRECHNER CENTER ISSUE BRIEF



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Introduction and Summary

During a 2016 labor dispute at O'Hare International Airport, longtime security guards Marcie Barnett and Sadaf Subijano gave interviews to Chicago's two major daily newspapers complaining that their employer, Universal Security, inadequately prepared them to deal with terrorist threats. Universal fired them, claiming that they divulged "sensitive security information" to the media.¹

The National Labor Relations Board concluded that the firings were illegal and in an August 2017 ruling, a federal district judge agreed.² The court ordered Universal to reinstate the two guards and rescind its rule prohibiting employees from speaking to journalists.

Reporters who ask people about their work have become accustomed to hearing that businesses forbid their employees from speaking to the media. "No-interviews" policies are commonplace in corporate America. But a growing body of federal labor law establishes that private employers cannot legally forbid employees from discussing work-related matters with the press.

Unfiltered access to front-line employees is essential for effective business reporting. Employees outside the corporate public-relations suite offer perspective and expertise that bring stories to life. When journalists are forced to settle for statements from professional public relations spokespeople, the depth and authenticity of news coverage suffers.

It is often assumed that private-sector employees have no legally protected right to discuss workplace matters, and no recourse if their employer punishes them for speaking to the media. But in fact, policies restricting workers from discussing their work with journalists regularly are struck down as unlawful. That's because federal labor law protects employees who complain in an effort to enlist help to improve working conditions.

Over the past three decades, the National Labor Relations Board ("NLRB") has ordered employers to rescind "media gag orders" more than a dozen times. Although Trump administration appointees to the NLRB have signaled that they will give greater deference to employers' policies, it is still possible—as the Chicago airport case demonstrates—to win a legal challenge, if an employer's policy penalizes sharing information about working conditions with the news media.

This White Paper examines the legality of policies that forbid employees in the private sector³ from talking about their work. Journalists and employees should be aware of the National Labor Relations

¹ Alexia Elejalde-Ruiz, *Union: O'Hare security officers fired for comments to media*, CHICAGO TRIBUNE (April 15, 2016), <https://www.chicagotribune.com/g00/business/ct-airline-security-firing-0416-biz-20160415-story.html?i10c.encReferrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8%3d&i10c.ua=1&i10c.dv=18>.

² *Hitterman v. Universal Security, Inc.*, No. 17 C 2616 (N.D. Ill. Aug. 17, 2017).

³ As discussed in Sec. III, the NLRA applies only to private employers and not to government workplaces. The First Amendment offers protection to public-sector employees comparable to that of the NLRA, *see, e.g., Moonin v. Tice*, 868 F.3d 853 (9th Cir. 2017) (striking down police agency's policy against sharing information about the agency's K-9

Act's ("NLRA") protections, so they can ask informed questions when businesses enforce legally questionable "gag" rules.⁴



I.

The Issue:

Employer Constraints on Employee Communications with Journalists

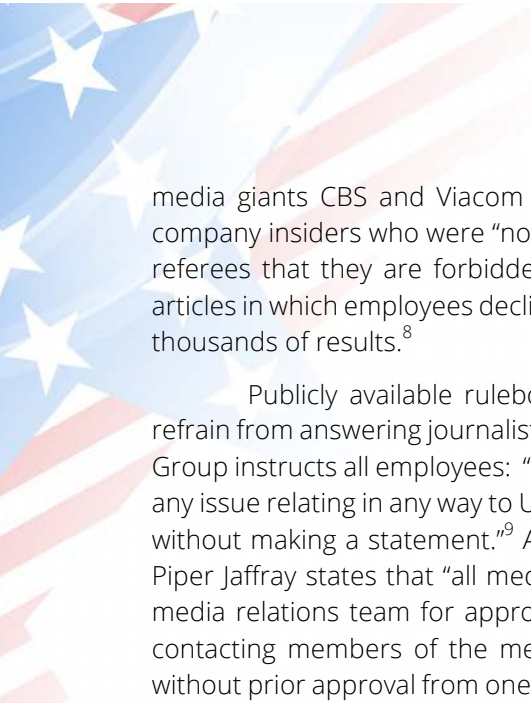
When discord arose over a directive for members of Radio City Music Hall's famed Rockettes dance team to perform at President Donald Trump's 2017 inauguration, journalists found themselves unable to speak to the performers. *Marie Claire* magazine secured an interview with one dancer using the pseudonym "Mary," who explained that Rockettes members were declining requests to discuss the controversy because "they're afraid of losing their jobs if they do[.]"⁵

Journalists covering the business community are frequently forced to rely on unnamed sources because of employer policies that forbid discussing company affairs with outsiders. For instance, when

unit as a violation of a disciplined trooper's free-speech rights). But a comprehensive analysis of the constitutional rights of government workers is beyond the scope of this paper.

⁴ This White Paper focuses on federal labor law, but it is important to note that state law (such as whistleblower protection statutes) and employment contracts may offer an additional level of protection against retaliatory discharge for sharing information learned on the job. Whistleblowing statutes often protect against retaliation for making reports to government agencies (such as auditors, police, or legislative committees) rather than to the general public or news media.

⁵ Kaitlin Menza, *A Rockette Speaks Out*, MARIE CLAIRE (Dec. 27, 2016), <https://www.marieclaire.com/politics/a24421/rockette-donald-trump-inauguration/>.



media giants CBS and Viacom began discussing a merger, journalists were left to quote anonymous company insiders who were “not permitted to speak to the media.”⁶ The National Football League tells its referees that they are forbidden from giving interviews about their work.⁷ An online search for news articles in which employees decline to provide information because of their employer’s gag policies returns thousands of results.⁸

Publicly available rulebooks from major American businesses routinely instruct employees to refrain from answering journalists’ questions. A “code of conduct” available on the website of UnitedHealth Group instructs all employees: “If you are contacted by a member of the media seeking information about any issue relating in any way to UnitedHealth Group, refer the person to the Communications Department without making a statement.”⁹ An undated “media policy” accessible on the website of investment bank Piper Jaffray states that “all media interview requests received by employees must be submitted to the media relations team for approval prior to the interview taking place. Employees are prohibited from contacting members of the media or otherwise pitching a story to the media regarding Piper Jaffray without prior approval from one of the media relations contacts.”¹⁰ In a rulebook dated 2004 and available online, drug wholesale giant AmerisourceBergen instructed its employees: “No associate should communicate with the media regarding Company business. Any media requests should be forwarded to


⁶ Jessica Toonkel, *Exclusive: Viacom, CBS CEOs discuss potential merger - sources*, REUTERS (Jan. 25, 2018), <https://ca.reuters.com/article/businessNews/idCAKBN1FE2XT-OCABS>.

⁷ See Jennifer Fermino, *Super Bowl 50's head linesman is New York's own Wayne Mackie, a city Housing and Preservation inspector*, NEW YORK DAILY NEWS (Feb. 6, 2016), <https://www.nydailynews.com/sports/football/super-bowl-50-head-linesman-new-york-wayne-mackie-article-1.2522507> (article about city housing inspector “who under NFL rules is not allowed to speak to the media” about his side job as a football referee).

⁸ See, e.g., Jackie Harrison-Martin, *\$1 Lotto 47 ticket sold at Romulus Speedway station is worth \$1.2 million*, NEWS-HERALD (Feb. 5, 2018), http://www.thenewsherald.com/news/lotto-ticket-sold-at-romulus-speedway-station-is-worth-million/article_985ba9a0-a250-5001-a577-f8dc18db8741.html (quoting communications manager for parent company, “Speedway employees are not authorized to speak to the media”); Janet Jones Kendall, *What will become of Macy's, Burlington Coat Factory if the county buys Columbia mall?*, STATE (Dec. 21, 2017), <https://www.thestate.com/news/business/biz-columns-blogs/shop-around/article191131984.html> (“a store manager at Macy’s said he was not permitted to speak with the media but was not aware of the announcement”); Megan Quinn, *Broomfield Safeway store to close in August*, DAILY CAMERA (July 21, 2014), http://www.dailycamera.com/ci_26190327/broomfield-safeway-store-close-august?source=most_viewed (“An employee, who did not give a name because Safeway workers are not allowed to speak to the media, said workers were told they would be connected with jobs at other Safeway stores.”).

⁹ UNITEDHEALTH GROUP, CODE OF CONDUCT 34, *available at* <https://www.unitedhealthgroup.com/content/dam/UHG/PDF/About/UNH-Code-of-Conduct.pdf>.

¹⁰ PIPER JAFFRAY, MEDIA POLICY, *available at* www.piperjaffray.com/pdf/media_policy.doc.



the Vice President of Investor Relations.”¹¹ Questions have even been raised about how freely employees of media companies themselves are allowed to speak; in a 2015 article, *Columbia Journalism Review* reported that the handbook for Vice Media LLC “says that employees are prohibited from speaking to the media unauthorized and ‘must immediately report all media inquiries from media outlets about the Company’s business to the Communications Director or a Senior Manager before any response is made to the inquiry.’”¹²

While companies understandably have an interest in avoiding harm if employees disclose business secrets or air personal grudges, categorical rules against unapproved contact with journalists are disfavored under federal law. There is every chance that, as in the case of the O’Hare security guards, policies requiring employees to refuse all requests for comment from the media are unlawful and will be voided if legally challenged.

There’s no reliable way to quantify how often employees get punished for making comments about their employers. The closest approximation is survey data about whether employees feel safe “blowing the whistle” about workplace hazards or wrongdoing. One nationwide survey of U.S. workers conducted in 2011 by the nonprofit Ethics Resource Center found that retaliation for complaining about on-the-job misconduct was widespread and apparently on the rise. As the study results were summarized by *The New York Times*:

More than one in five employees interviewed said they experienced some sort of reprisal when they reported misconduct, ranging from being excluded from decision-making activities and getting the cold shoulder from other employees to being passed over for promotion. That is almost double the number who said they were retaliated against in the 2007 study. Even more alarming, in 2009, 4 percent of those who said they experienced reprisals for reporting wrongdoing cited physical threats to themselves or their property. In 2011, that rose to 31 percent.¹³

Because private employers are under no compulsion to make their employee handbooks public, it is difficult to say how widespread formal gag rules are. Informal workplace norms handed down among coworkers (“don’t get caught talking or you’ll get in trouble”) sometimes are believed to reflect official

¹¹ AMERISOURCEBERGEN, CODE OF ETHICS AND BUSINESS CONDUCT 5, *available at* http://media.corporate-ir.net/media_files/IROL/61/61181/corpgov/code_of_ethics1.pdf.

¹² Chris Ip, *The Cult of Vice*, COLUMBIA JOURNALISM REVIEW (July/August 2015), https://www.cjr.org/analysis/the_cult_of_vice.php.

¹³ Alina Tugend, *Opting to Blow the Whistle or Choosing to Walk Away*, N.Y. TIMES (Sept. 20, 2013), <https://www.nytimes.com/2013/09/21/your-money/deciding-when-to-blow-the-whistle-and-when-to-walk-away.html>.



company policy. This paper focuses on officially disseminated gag policies, because unofficial word-of-mouth norms are, as a practical matter, impossible to challenge.

II.

Who and What the NLRA Protects

Congress passed the National Labor Relations Act (“NLRA”)¹⁴ in 1935 to protect workers against abusive employment practices by securing the right to organize and bargain for better working conditions. The NLRA outlaws specified “unfair labor practices” and empowers a five-member panel of presidential appointees, the National Labor Relations Board (“NLRB”), to enforce the Act’s provisions. The Act applies only to private-sector employers and not government agencies. The Board does not have jurisdiction over small, local “mom-and-pop” employers. NLRB jurisdiction depends on the volume of business done. For most industries, the trigger is \$50,000 a year in annual interstate business, but for some (such as shopping centers and hospitals), the threshold is based on gross revenues rather than interstate business.

Private educational institutions occupy a special category; they are exempt from the NLRA if they receive less than \$1 million in gross annual revenue.¹⁵ Whether the NLRA extends to institutions with a religious identity has been an especially contentious issue with no clear answer.

A nonprofit educational institution is exempt from the Act if the institution holds itself out to the public as overtly religious (even if secular subjects are taught) and is formally affiliated with a religious order or denomination.¹⁶ Typically, this status is determined case-by-case; the NLRB will consider the involvement of the religious order in daily operations of the school, the degree to which religion plays a role in the school’s curriculum, whether religious factors are used in employee hiring and evaluation,¹⁷ and whether the school holds faculty out as performing a religious function in furtherance of a religious mission.¹⁸

Importantly, employees in managerial positions are unprotected, and that applies even if the scope of supervisory authority is relatively small. The NLRB has long interpreted the Act to cover only non-

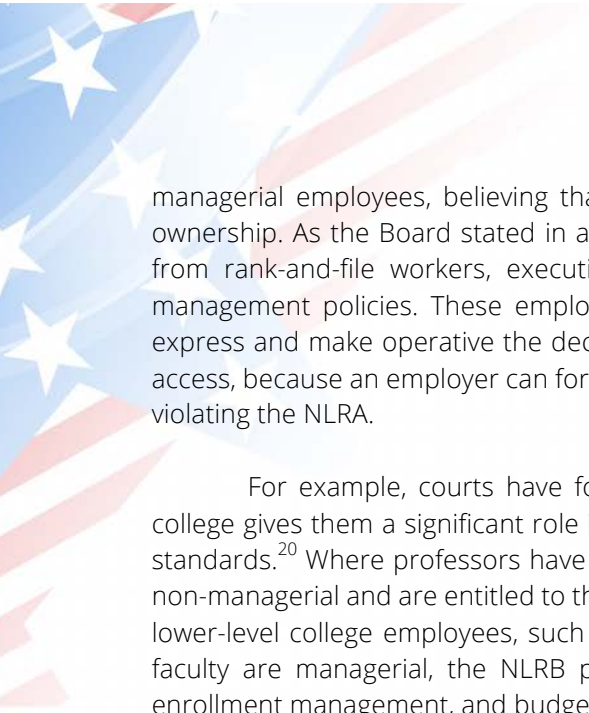
¹⁴ 29 U.S.C. §§ 151-169.

¹⁵ National Labor Relations Board, *Jurisdictional Standards*, <https://www.nlr.gov/rights-we-protect/jurisdictional-standards> (last visited January 8, 2018).

¹⁶ *Univ. of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002).

¹⁷ *Id.* at 1339.

¹⁸ *Pac. Lutheran Univ.*, 361 N.L.R.B. No. 157 (2014).



managerial employees, believing that employees in supervisory roles are essentially aligned with the ownership. As the Board stated in a 1946 ruling: “We have customarily excluded from bargaining units from rank-and-file workers, executive employees who are in position to formulate and effectuate management policies. These employees we have considered and still deem managerial in that they express and make operative the decisions of management.”¹⁹ This is important in the context of media access, because an employer can forbid managerial-level employees from speaking to journalists without violating the NLRA.

For example, courts have found that college professors can be managerial employees if the college gives them a significant role in governance, including setting admissions policies and graduation standards.²⁰ Where professors have minimal participation in governance, however, they are considered non-managerial and are entitled to the benefit of the NLRA.²¹ Likewise, the NLRA has been held to protect lower-level college employees, such as graduate teaching assistants.²² In determining whether college faculty are managerial, the NLRB puts greatest weight on their authority over academic programs, enrollment management, and budgeting.²³

To sum up, the benefits of the National Labor Relations Act apply to non-managerial employees at large private-sector employers with a few statutory exemptions, such as overtly religious institutions and agricultural operations. At institutions covered by the NLRA, employees may have legally protected rights to discuss work-related matters with the media, whether the employer approves or not.

III.

The NLRA and Workplace Speech

A. Speech as “Protected Activity”

The NLRA is understood to protect employees’ ability to speak freely, because the workplace is “the natural gathering place” for employees to discuss working conditions.²⁴ In a 1978 decision, the U.S.

¹⁹ Ford Motor Co., 66 N.L.R.B. No. 1317, 1322 (1946).

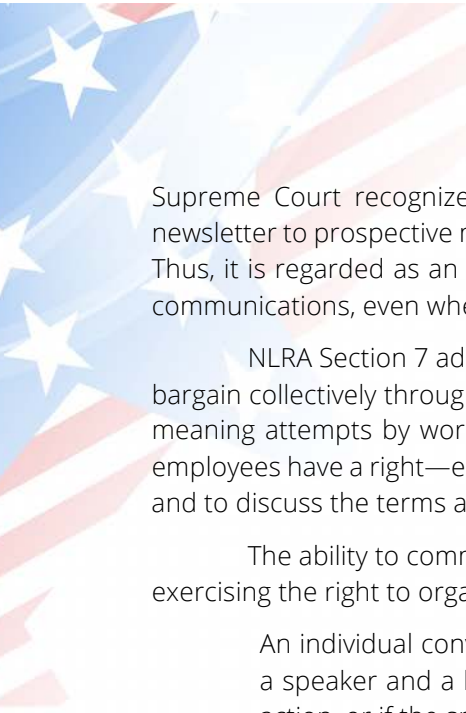
²⁰ See NLRB v. Yeshiva Univ., 444 U.S. 672, 682 (1980) (finding that Yeshiva University faculty qualify as “managerial,” because they “formulate and effectuate management policies by expressing and making operative the decisions of their employer”) (citation omitted).

²¹ David Wolcott Kenfall Mem. Sch. v. NLRB, 866 F.2d 157 (6th Cir. 1989).

²² Trustees of Columbia Univ., 2015 WL 1169323 (N.L.R.B. 2015).

²³ Pac. Lutheran, 361 N.L.R.B..

²⁴ See, e.g., NLRB v. Magnavox Co. of Tenn., 415 U.S. 322 (1974) (holding that workplace rule against distribution of



Supreme Court recognized that a union had the legally protected right to distribute a recruitment newsletter to prospective members on the employer's property in a way that did not interfere with work.²⁵ Thus, it is regarded as an unfair labor practice for employers to unduly interfere with worker-to-worker communications, even when the workers are using channels or devices provided by the employer.²⁶

NLRA Section 7 addresses the rights of employees to self-organize, form labor organizations, and bargain collectively through representatives of their choosing.²⁷ This is referred to as “concerted activity,” meaning attempts by workers to organize for purposes of improving working conditions. For instance, employees have a right—except in very limited circumstances—to use their work email to organize unions and to discuss the terms and conditions of employment during non-working hours.²⁸

The ability to communicate about work-related matters is protected as essential for meaningfully exercising the right to organize. As one NLRB ruling framed the scope of protected speech:

An individual conversation ... may constitute concerted activity although it involves only a speaker and a listener if the speaker sought to initiate, induce, or prepare for group action, or if the speaker's words had some relation to group action in the interest of the employees. Concerted activity can include concerns expressed by an individual that are the logical outgrowth of concerns expressed by the group.²⁹

Employees' protected right to speak has limits. If the speech is regarded as so disloyal that it sabotages the employer's operations, then the employee can be punished even for speech that touches on working conditions.³⁰ “Disloyalty” is understood to mean speech that actually seeks to undermine the employer's operations, not merely criticism of the employer's business practices, no matter how harsh.³¹

literature can constitute an interference with employees' statutorily protected right to organize).

²⁵ *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

²⁶ See, e.g., *Purple Commc'ns, Inc. and Communications Workers of Am.*, 361 N.L.R.B. No. 126201, (2014) (holding that, when an employer provides email access for business purposes, the employer must tolerate the use of the email system for statutorily protected communications).

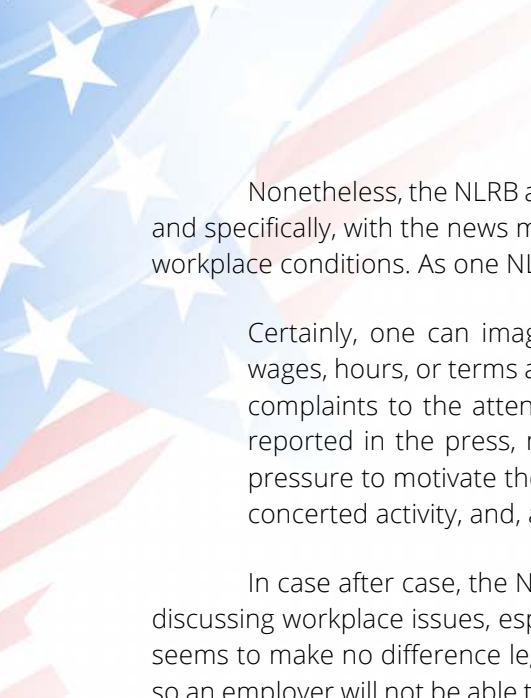
²⁷ 29 U.S.C. § 157.

²⁸ *Purple Commc'ns.*, 361 N.L.R.B. No. 12601. The NLRB's position on the matter was reconfirmed in a supplemental decision and order, *Purple Communications, Inc. and Communications Workers of America*, 365 N.L.R.B. No. 50 (2017).

²⁹ *Relco Locomotives, Inc.*, 358 N.L.R.B. 229, 242 (2012) (citation omitted).

³⁰ See *NLRB v. Electrical Workers*, 346 U.S. 464, 472 (1953).

³¹ See *Sierra Pub'lg Co. v. NLRB*, 889 F.2d 210, 217-18 (9th Cir. 1989) (finding that labor union representing



Nonetheless, the NLRB and its staff have recognized communications beyond worker-to-worker—and specifically, with the news media—as a legally protected extension of the right to advocate for better workplace conditions. As one NLRB judge put it:

Certainly, one can imagine a situation where employees who are unhappy with their wages, hours, or terms and conditions of employment may be interested in bringing their complaints to the attention of the local press, with the hope that adverse publicity, as reported in the press, may serve to embarrass the employer, and, thus, exert enough pressure to motivate the employer to improve working conditions. This is the essence of concerted activity, and, as protected conduct, cannot be abridged.³²

In case after case, the NLRB has found that employers can go too far in gagging employees from discussing workplace issues, especially issues bearing on employee compensation or safety.³³ Notably, it seems to make no difference legally whether the gag is made part of a “rulebook” or part of a “contract,” so an employer will not be able to evade responsibility for an otherwise-unlawful restraint by claiming that the employee consented to it voluntarily as part of an employment agreement.³⁴

B. Media-Specific Gag Policies Invalidated

Most recently in 2014, an NLRB administrative law judge (“ALJ”) found that a company’s news media policy, which effectively acted as a blanket gag order on everyone other than a designated spokesperson, was unlawful under the NLRA.³⁵

The case, filed by the United Steelworkers Union (“USU”) against petroleum giant Phillips 66, alleged a series of unfair labor practices directed at employees of an oil refinery in Santa Maria, California.

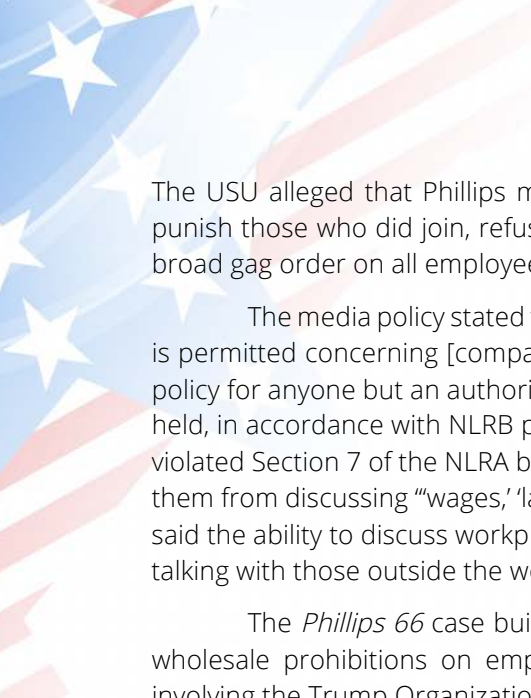
newspaper employees engaged in protected speech that did not meet the legal standard of “disloyalty” even though union’s letter to newspaper advertisers depicted employer’s business as struggling).

³² Portola Packaging, Inc., 2012 WL 4049013 (N.L.R.B. Sept. 13, 2012) (invalidating provisions in employee handbook stating that employees “should not provide any information regarding the Company to the media” and that the release of any documents to the media must be approved by the company’s chief financial officer).

³³ Phillips 66, 2014 NLRB LEXIS 921 (N.L.R.B. Nov. 25, 2014); In re Banner Health Sys., 358 N.L.R.B. No. 93 (2012).

³⁴ For example, the gag rule struck down as unlawfully broad in *Leather Center, Inc.*, 312 N.L.R.B. 521, 525 (1993), was part of a manual that every employee was required to sign with an agreement to abide by its terms, which was placed in their personnel files. See also *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 207 (5th Cir. 2014) (affirming NLRB determination that document trucking company employees were required to sign was an overly broad restraint on speech; *Relco Locomotives*, *supra* n.27 (NLRB ruling in employees’ favor on challenge to “nondisclosure agreement” that each was told to sign as part of the hiring process).

³⁵ *Phillips 66*, 2014 NLRB Lexis 921.



The USU alleged that Phillips management pressured employees not to join the union, threatened to punish those who did join, refused to engage in good-faith collective bargaining, and imposed an overly broad gag order on all employee interactions with the news media.

The media policy stated that, if employees were contacted by the media, “no information exchange is permitted concerning [company] operations.” Employees were informed that it was “against company policy for anyone but an authorized company spokespersons [*sic*] to speak to the news media.”³⁶ The ALJ held, in accordance with NLRB precedent,³⁷ that the policy would tend to chill protected activity and thus violated Section 7 of the NLRA because employees could reasonably understand the policy as prohibiting them from discussing “‘wages,’ ‘labor disputes,’ and other terms and conditions of employment.”³⁸ The ALJ said the ability to discuss workplace conditions with coworkers is “the most basic of Section 7 rights,” and talking with those outside the workplace is a logical adjunct to that core right.³⁹

The *Phillips 66* case built on a foundation of two decades’ worth of NLRB precedent disfavoring wholesale prohibitions on employee communications with the news media—including, notably, one involving the Trump Organization.

In August 2008, an employee of the Trump Marina Casino Resort in Atlantic City was called into his manager’s office and confronted about a quote in the local newspaper, the *Atlantic City Courier Post*, made in his capacity as a union representative.⁴⁰ The employee, Mario Spina, was reminded of a company policy providing that only specified top managers are authorized to speak with the media, and told not to commit further violations of the policy.

Spina lodged an unfair labor practices complaint with the NLRB. An NLRB trial judge found in the employee’s favor, and the NLRB affirmed that finding in a December 2009 decision, finding both that the intimidating interrogation of Spina about his interview with the *Courier Post* was illegal and that the entire media policy was unlawfully broad.⁴¹ The Board found that the only justification offered by the employer—

³⁶ *Id.* at *19.

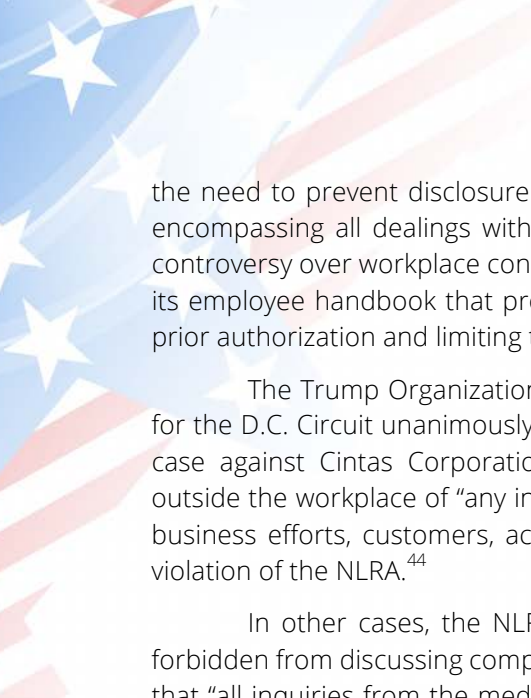
³⁷ See *Crowne Plaza Hotel*, 352 N.L.R.B. 382 (2008). In *Crowne Plaza*, the NLRB found that a policy forbidding unauthorized employees from speaking with the media about “any incident that generates significant public interest or press inquiries” was unlawfully broad. *Id.* at 386. The validity of the *Crowne Plaza* decision has been questioned, because it was the product of only a two-member majority vote on a depleted NLRB, but its core principles have since been reaffirmed several times.

³⁸ *Phillips 66*, 2014 NLRB at *34.

³⁹ *Id.*

⁴⁰ This factual narrative comes from the NLRB’s ruling in *Trump Marina Assoc., LLC*, 354 N.L.R.B. 1027 (2009).

⁴¹ *Id.* at 1030–31. Significantly, although the employer attempted to justify the prohibition by noting that the policy did not itself contain penalties for unapproved media interviews, the NLRB looked to the broader context of the



the need to prevent disclosure of proprietary or confidential information—could not justify a restraint encompassing all dealings with the media, even (as in Spina’s case) merely offering opinions about a controversy over workplace conditions. The Trump casino was directed to refrain from “enforcing rules in its employee handbook that prohibit employees from releasing statements to the news media without prior authorization and limiting the employees who are authorized to speak with the media.”⁴²

The Trump Organization appealed the NLRB ruling. In a brief opinion, the U.S. Court of Appeals for the D.C. Circuit unanimously affirmed the Board’s decision.⁴³ The court cited its own 2007 ruling in a case against Cintas Corporation, in which a company “confidentiality policy”—forbidding discussion outside the workplace of “any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters”—was found to be unduly restrictive in violation of the NLRA.⁴⁴

In other cases, the NLRB has struck down employee gag policies stating that employees are forbidden from discussing company “policies and/or practices” with the media,⁴⁵ or instructing employees that “all inquiries from the media and other organizations be referred to the corporate office” and that communications with the media must be “specifically authorized.”⁴⁶ This latter point bears emphasis: An employer that is subject to the NLRA may not enforce an absolute requirement that interviews with journalists be approved by supervisors in advance.⁴⁷

employee handbook and found that the policy implicitly carried the threat of dismissal, as did any other violation of the handbook.

⁴² *Id.* at 1031.

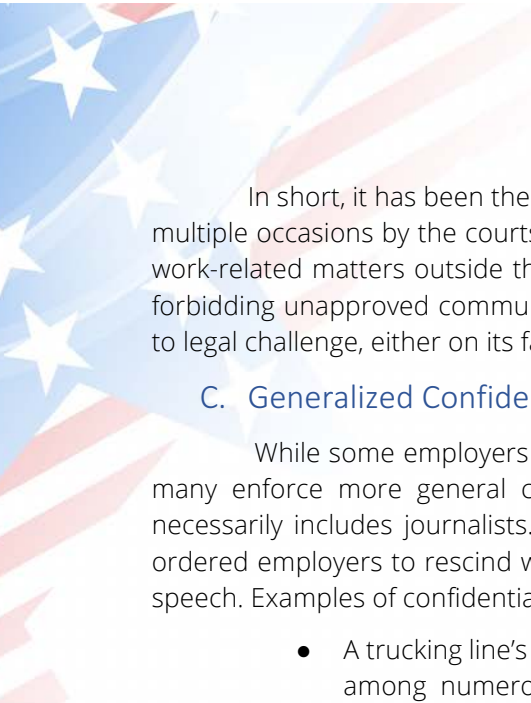
⁴³ *Trump Marina Assoc., LLC v. NLRB*, No. 10-1261 (D.C. Cir. May 27, 2011).

⁴⁴ *Cintas Corp. v. NLRB*, 482 F.3d 463 (D.C. Cir. 2007).

⁴⁵ *Leather Center, Inc.*, 312 N.L.R.B. 521, 522 (1993).

⁴⁶ *Interbake Foods LLC*, 2013 WL 4715677, 2013 NLRB LEXIS 583, *369 (N.L.R.B. Aug. 30, 2013).

⁴⁷ On this point, see also *Pleasant Travel Servs., Inc.*, 2010 WL 3982203 (N.L.R.B. 2010) (finding that resort hotel violated employees’ rights by enforcing regulation stating: “At no time should any employee, manager, or director of the Resort engage in communication either verbally or in writing, with a member of the news media, without prior approval and direction from either the Human Resources Director or the General Manager.”). The NLRB and reviewing courts have found no decisive distinction between a policy that forbids speaking versus a policy that conditions the right to speak on the employer’s permission. See, e.g., *Nova Southeastern Univ. v. NLRB*, 807 F.3d 308, 315 (D.C. Cir. 2015) (“Under long-established Board precedent, an employer may not condition the exercise of section 7 rights upon its own authorization.”).



In short, it has been the consistent position of the NLRB dating back at least to 1990, affirmed on multiple occasions by the courts, that it is an unfair labor practice to restrict employees from discussing work-related matters outside the workplace, including with journalists. An employer's policy completely forbidding unapproved communications with the news media is presumptively unlawful and vulnerable to legal challenge, either on its face or as applied to a particular employee's disciplinary case.

C. Generalized Confidentiality Policies Struck Down

While some employers specifically forbid discussing work-related matters with the news media, many enforce more general confidentiality rules covering all communication with outsiders, which necessarily includes journalists. The NLRB, and courts reviewing the Board's decisions, have regularly ordered employers to rescind wide-ranging confidentiality rules that leave no room for NLRA-protected speech. Examples of confidentiality policies found to be unlawfully broad include:

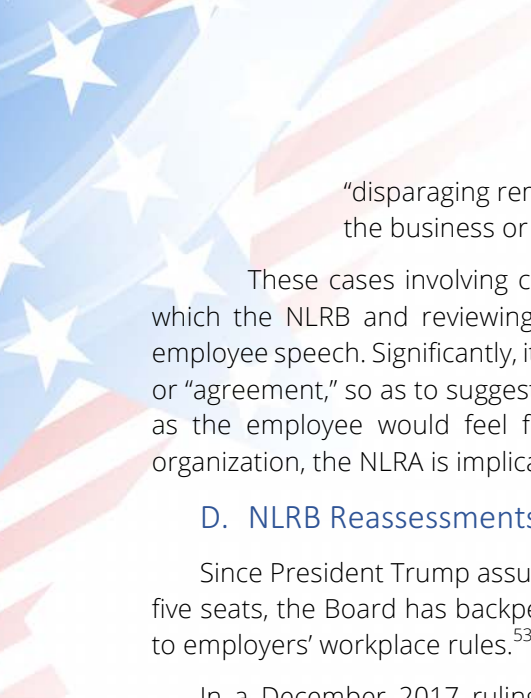
- A trucking line's employment contract classifying "personnel information and documents" among numerous categories of confidential information that "must stay within" the company.⁴⁸
- A Hooters' restaurant handbook that forbade employees from distributing "sensitive company materials or information to any unauthorized person or party," including any information "contained in any Company records."⁴⁹
- A daycare center's handbook directing that employees refrain from talking to customers about "local government regulations, the condition of center facilities, and the terms and conditions of employment[.]"⁵⁰
- A locomotive manufacturer's pre-employment non-disclosure agreement forbidding employees from discussing "compensation, payments, correspondence, job history, reimbursements, and personnel records" with any third party without supervisory approval.⁵¹
- A health benefit corporation's confidentiality policy that prohibited disclosing "any material or information" about the company, specifically including anything about the company's "financial and business affairs," and that also prohibited employees from

⁴⁸ Flex Frac Logistics, LLC v. NLRB, 746 F.3d 205, 207 (5th Cir. 2014).

⁴⁹ Hoot Winc, LLC, 363 N.L.R.B. No. 2, *103 (2014).

⁵⁰ Kinder-Care Learning Ctrs., Inc., 299 N.L.R.B. 1171, 1179 (1990).

⁵¹ Relco Locomotives, Inc., 358 N.L.R.B. 229, 242 (2012).



“disparaging remarks” about the company or doing anything harmful to the reputation of the business or its owners.⁵²

These cases involving communications with non-media outsiders reinforce the skepticism with which the NLRB and reviewing courts will view any rule, handbook, or contract that unduly curtails employee speech. Significantly, it has made no difference whether a restriction was phrased as a “contract” or “agreement,” so as to suggest that the employee had the ability to bargain for different terms; so long as the employee would feel forbidden from discussing working conditions with those outside the organization, the NLRA is implicated.

D. NLRB Reassessments Under the Trump Administration

Since President Trump assumed office in January 2017 and named appointees to three of the NLRB’s five seats, the Board has backpedaled on some of its pro-worker advisories, signaling greater deference to employers’ workplace rules.⁵³

In a December 2017 ruling involving the Boeing aircraft company, the Board retreated from its longstanding position that a workplace rule will be struck down, even if it does not overtly mention NLRA-protected activity, if a reasonable worker would understand it to constrain legally protected rights.⁵⁴ Instead, the Board decided, a rule that does not appear on its face to be targeted to legally protected activity will not automatically be assumed to be illegal just because it might sweep in some legally protected conduct. Rather, the Board will look at how seriously the rule infringes workers’ rights versus the employer’s justification for the rule, in a balancing-of-interests approach.⁵⁵ The Board did not directly address confidentiality policies or media gag policies, but the takeaway from the ruling is that workers will find it harder to prove that employer rules unlawfully inhibit their right to organize.

Since the Trump administration’s pivot on worker-rights issues, one judge has issued a ruling breaking with Board precedent and upholding an employer’s gag policy. In a brief opinion, the judge found that a North Carolina employer did not violate the NLRA by emailing employees to tell them that “only designated [company] representatives are permitted to speak with the press.”⁵⁶ The judge differentiated the case from prior cases striking down similar policies, finding no evidence that the email was motivated by anti-union bias. Because the ruling is one judge’s opinion, it is not binding precedent in future cases.

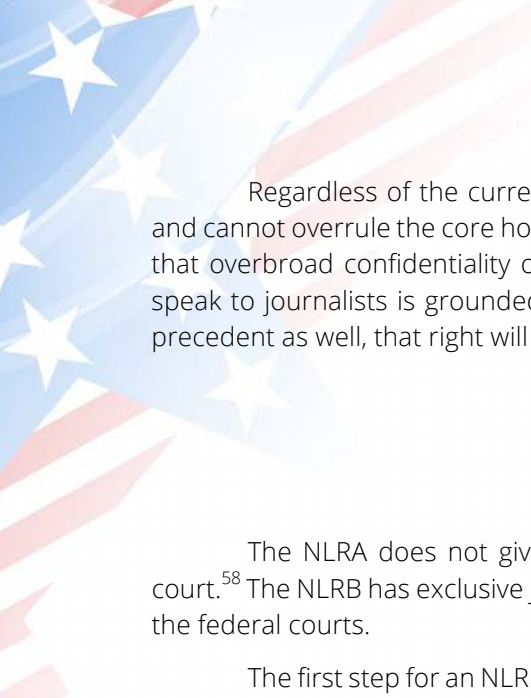
⁵² MUSE Sch. CA, 2014 WL 4404737, 2014 NLRB LEXIS 688 (N.L.R.B. Sept. 8, 2014).

⁵³ Mandatory Submissions to Advice, Memo GC 18-02 (N.L.R.B. Dec. 1, 2017).

⁵⁴ Boeing Corp., 365 N.L.R.B. No. 154 (2017).

⁵⁵ Id. at *3.

⁵⁶ HF Management Serv., LLC, 2017 WL 4098235, 2017 NLRB LEXIS 466, *2 (Sept. 14, 2017).



Regardless of the current administration's philosophy, the NLRB is bound by judicial precedent and cannot overrule the core holding of cases such as the D.C. Circuit's ruling in *Cintas Corp.*,⁵⁷ recognizing that overbroad confidentiality orders are unenforceable under the NLRA. Because employees' right to speak to journalists is grounded not just in NLRB caselaw but to some degree memorialized in judicial precedent as well, that right will not be easily undone regardless of who occupies the White House.

IV. Bringing an NLRA Challenge

The NLRA does not give an aggrieved person a right to challenge the employer's practices in court.⁵⁸ The NLRB has exclusive jurisdiction to bring a case, either at the board level or, ultimately, through the federal courts.

The first step for an NLRB action is to file a charge with the appropriate regional NLRB office, based on the location of the employer.⁵⁹ Charges must be filed with the Regional Director in the region where the unfair practice is alleged to have occurred.⁶⁰ The NLRB instructs complainants to set forth a simple factual account of the unlawful conduct; citations to legal authority, affidavits and other formalities are unnecessary. The complaint form must be served on the employer.

The regional office then does an investigation, including contacting the parties. The regional office then decides whether to issue a complaint. If the regional office issues a complaint, the case goes forward. If it chooses not to, the complainant can withdraw the charge or appeal the decision to the NLRB's Office of Appeal within 14 days (with a copy to be served on the regional office as well). If the regional office chooses not to issue a complaint and an appeal is unsuccessful, the case ends.

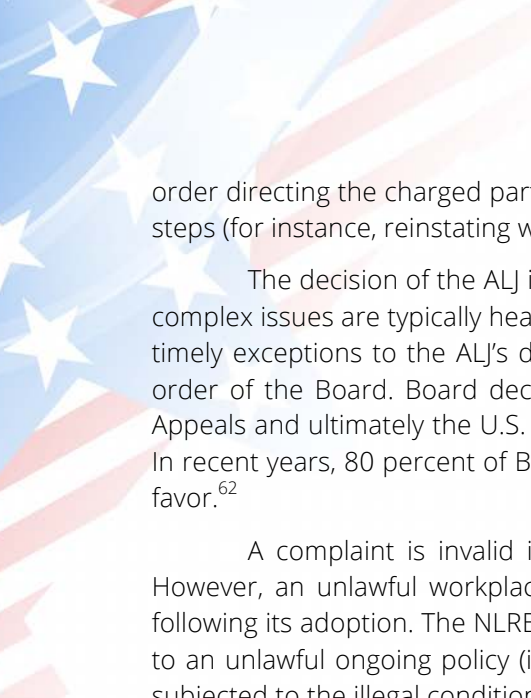
If the regional office issues a complaint, it will also include a notice of hearing. The NLRB will first try to settle, either before or after issuing the complaint. A settlement can be finalized by the NLRB and the employer with or without the consent of the complaining party. If no settlement can be reached, the case goes to a hearing before an administrative law judge ("ALJ"). The charging party can have an attorney participate in the hearing. The ALJ may either dismiss the complaint or, if a violation is found, issue an

⁵⁷ *Cintas Corp. v. NLRB*, 482 F.3d 463 (D.C. Cir. 2007).

⁵⁸ Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527, 1554 (2002) (questioning adequacy of recourse for workers under the NLRB).

⁵⁹ A map of the agency's 26 regional offices is online at <https://www.nlr.gov/who-we-are/regional-offices>.

⁶⁰ 29 U.S.C. § 102.10 (2016).



order directing the charged party to cease and desist from the unfair labor practice and take restorative steps (for instance, reinstating wrongfully fired workers).⁶¹

The decision of the ALJ is appealable to the full NLRB, though cases that do not present novel or complex issues are typically heard by a panel of three of the five members instead of the full Board. If no timely exceptions to the ALJ's decision are filed, that decision automatically becomes the decision and order of the Board. Board decisions are appealable to and enforceable by the U.S. Circuit Courts of Appeals and ultimately the U.S. Supreme Court, but the administrative process must be exhausted first. In recent years, 80 percent of Board decisions reviewed by the courts have been decided in the Board's favor.⁶²

A complaint is invalid if filed more than six months after the unfair labor practice occurs.⁶³ However, an unlawful workplace rule can be the subject of a complaint even more than a half-year following its adoption. The NLRB considers it a "continuing violation" for an employer to subject a worker to an unlawful ongoing policy (in other words, the violation is occurring each day that the employee is subjected to the illegal condition).⁶⁴ For example, the NLRB struck down an unlawful policy about the use of workplace email even though it had been on the books for more than six months, because each act of discriminatory enforcement was considered a new violation.⁶⁵

Significantly, federal regulations say that "any person" may file a charge against any other person engaged in unfair labor practices under the NLRA.⁶⁶ The term "person" in this context includes third-party organizations such as labor unions.⁶⁷ This opens the door to the possibility that a news organization unable to get interviews at a private corporation could challenge an overly restrictive workplace rule even where the employees themselves are afraid to do so.

⁶¹ National Labor Relations Board, *Decide Cases*, <https://www.nlr.gov/what-we-do/decide-cases>.

⁶² National Labor Relations Board, *Enforce Orders*, <https://www.nlr.gov/what-we-do/enforce-orders>. See Appendix A for a flowchart of the process produced by the NLRB.

⁶³ 29 U.S.C. § 160(b) (2012).

⁶⁴ See *PJ Cheese*, 362 N.L.R.B. No. 177, 1 (2015); *The Neiman Marcus Group*, 362 N.L.R.B. No 157, 1 (2015); *Cellular Sales of Missouri*, 362 N.L.R.B. 27,1 (2015) (all cases striking down unlawful arbitration policies). The Board considers the maintenance of an "unlawful workplace rule" as "a continuing violation that is not time-barred by Section 10(b)." *PJ Cheese*, *supra*.

⁶⁵ See *Richmond Times-Dispatch*, 346 N.L.R.B. 74, 76 (2005).

⁶⁶ 9 C.F.R. § 102.9 (2016).

⁶⁷ NATIONAL LABOR RELATIONS BOARD, NLRB CASEHANDLING MANUAL, PART 1, Unfair Labor Practice Proceedings 10014 (2017).



V.

Conclusion: Recommendations and Best Practices

In recent months, whistleblowers have come forward to expose serious sexual misconduct by executives at major media and entertainment corporations, including film producer Harvey Weinstein and the former chief executive of CBS Corporation, Les Moonves.⁶⁸ The public has an obvious interest in knowing about wrongdoing by powerful business executives, or about abusive workplace practices that put workers (or customers) at risk. Gagging employees from saying anything about their work to the news media is unnecessary, legally questionable, and contrary to the public's interest in safe and honest workplaces.

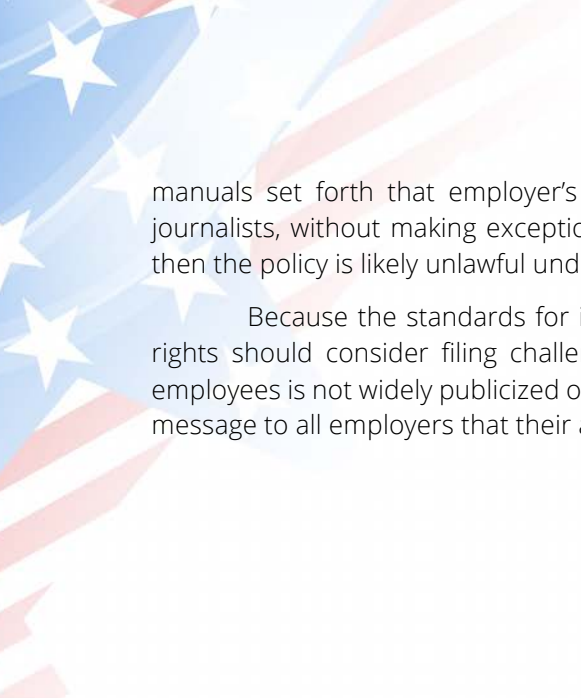
While there are exceptions—the NLRA will not protect managerial employees, employees of overtly religious institutions, or those at small local businesses—the Act does apply to many of the front-line workers whose first-hand knowledge of news has great journalistic value. A worker who is punished for “whistleblowing” speech about working conditions will have the clearest case under the NLRA if the employer retaliates. But even a worker who is punished for more routine speech—for instance, the department-store sales clerk who comments to the local TV station about the crowds on Christmas Eve—would have a claim under the NLRA if fired for violating an unlawfully overbroad policy. Because it can be hard to prove cause-and-effect between a disciplinary action and an employee's legally protected speech, the safest course is to “facially” challenge an unlawful policy before it becomes the basis for discipline.

Employers who believe confidentiality is necessary to protect their organizations can narrowly tailor their policies to stay on the right side of the law. Workers can lawfully be forbidden from divulging trade secrets, disclosing information shared by customers in confidence, or holding themselves out misleadingly as official spokespeople for the organization. For instance, the NLRB has upheld the legality of a policy stating that “(i)information should be provided to employees outside the department or to those outside the Company only when a valid need to know can be shown to exist,” because the policy was not, in the NLRB's assessment, an “absolute proscription.”⁶⁹

Journalists whose sources are fearful of speaking because of workplace prohibitions on unapproved contact with the media should try to obtain written copies of whatever rules, handbooks or

⁶⁸ See Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 23, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> (detailing allegations that Miramax co-founder took advantage of his powerful position to sexually harass or assault 13 women); Ronan Farrow, *As Les Moonves Negotiates His Exit From CBS, Women Raise New Assault and Harassment Claims*, NEW YORKER (Sept. 9, 2018), <https://www.newyorker.com/news/news-desk/as-leslie-moonves-negotiates-his-exit-from-cbs-women-raise-new-assault-and-harassment-claims> (describing fall of broadcasting executive who was accused by 12 women of sexual misconduct, including exposing himself and forcing them to perform sex acts).

⁶⁹ In re Double Eagle Hotel & Casino, 2003 WL 1176083, 2003 NLRB LEXIS 90, *7 (N.L.R.B. Mar. 3, 2003).



manuals set forth that employer's media policy. If the media policy completely forbids speaking to journalists, without making exceptions for sharing workplace grievances for the purpose of organizing, then the policy is likely unlawful under the NLRA.

Because the standards for initiating an NLRA case are quite informal, advocates for journalists' rights should consider filing challenges to overbroad speech policies. Since the law against gagging employees is not widely publicized or understood, challenging overly restrictive policies can help send the message to all employers that their authority over their employees' speech is limited.



Acknowledgements

This report was produced in January 2019 by the legal staff at the Brechner Center for Freedom of Information and is primarily the work of Director Frank D. LoMonte and Legal Fellow Linda Riedemann Norbut.

Valuable assistance was provided by Jeff Miles and Lindsay Trego, who compiled research on the NLRB complaint and appeals process as part of a pro-bono project during their time at the University of North Carolina School of Law. This white paper is adapted from an article by LoMonte and Norbut (“Stopping the Presses: Private Universities and Gag Orders on Media Interviews”), published in Vol. 9 (2018) of the American Association of University Professors’ *Journal of Academic Freedom*.

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