# NLRB Rulings Demonstrate That Employers Must Tread Carefully in Treatment of Employees

Henry M. Perlowski and Edward P. Cadagin

An increasingly active National Labor Relations Board means employers need to exercise greater caution in hiring and discipline to avoid burdensome payments and negative publicity.

At Arnall Golden Gregory's annual Employment Law Seminar, we explained how the NLRB has ruled for employees and unions in several recent key cases.

The NLRB has taken an expansive view of the joint employer doctrine and successor liability, and has sided with advocates of union representation. The board has also handed down decisions protecting employee speech in the cyber realm and employees who use vulgar language to express discontent – even in front of customers.

Here are the NLRB cases we discussed:

**McDonald's: the joint employee doctrine.** In July 2014, the NLRB's general counsel decided that McDonald's could be named as a joint employer along with its franchisees in unfair labor practices cases brought by employees. Under the National Labor Relations Act, "joint employers" exist where two separate legal entities share the ability to control or codetermine essential terms and conditions of employment. This decision has the potential to change the landscape of the American franchise system, as it would allow employees to bring claims against McDonald's corporate even if McDonald's was unaware of the franchisee's actions. This expansion of the joint employer doctrine also leaves franchisors more vulnerable to union organizing campaigns.

**Pressroom Cleaners: successor liability.** Pressroom Cleaners, Inc. is a cleaning service contractor specializing in cleaning printing plants. Pressroom Cleaners successfully bid to replace another contractor providing cleaning services at a particular location. After winning the bid, Pressroom Cleaners refused to hire any of the eight employees who had worked for the former contractor. The NLRB held that the refusal to hire these employees was motivated by Pressroom Cleaner's desire to avoid being deemed a successor to the existing collective bargaining agreement. Pressroom Cleaners was ordered to pay back wages dating to the time the company won the bid – a penalty that broke NLRB precedent. The decision means companies should be cautious when deciding whether to buy a company with unionized employees. It also means that opting for "open hiring" rather than hiring the predecessor's unionized employees comes with risk.

**CNN: joint employer and successor liability.** CNN terminated its contract with electronic equipment operator Team Video Services (TVS), whose employees are unionized, opting instead to bring the work "in house." Following the termination of the TVS contract, several CNN statements were interpreted as anti-union, the hiring process was manipulated to favor non-TVS applicants, CNN hired many former TVS employees but none of the most active union employees, and the former TVS employees received lower pay and fewer benefits. An administrative law judge ruled that CNN was a joint employer with bargaining obligations, and that it violated the National Labor Relations Act. The NLRB affirmed the judge's decisions and added that CNN was a successor to TVS and therefore acted unlawfully in unilaterally terminating the contract. The NLRB ordered several remedies, including reinstating former TVS workers not hired and making whole all former TVS employees with regard to pay and benefits. This case shows how the NLRB is expanding its definition of joint employer to include companies that "indirectly control" another employer's

decisions.

**FedEx Home Delivery: employee v. independent contractor.** The NLRB said FedEx Home Delivery drivers in Connecticut were employees (not independent contractors) of FedEx despite the fact that the D.C. Court of Appeals held that the same drivers in a different location were independent contractors. The NLRB declined to adopt the Court of Appeals' decision and added an extra factor to the traditional 10 factors considered in the common law independent contractor test: "Whether the evidence shows the employee is, in fact, rendering services as an independent business." The additional factor tipped the scales in favor of the workers being employees of FedEx, not independent contractors, the NLRB said. This case shows the NLRB aggressively pursuing union findings, going as far as to reinvent common law tests to get its way. Companies with independent contractors should assess the relationship under both the 10-factor test and the later 11-factor test.

**Jimmy John's: sick days.** A Jimmy John's franchisee penalized workers who called in sick without first finding a replacement. Minnesota workers responded by putting up posters protesting the policy. The posters asked potential customers if they could "tell the difference" between a sandwich made by a healthy worker and a sick worker. Six employees were fired and others received warnings. The NLRB ruled in August 2014 that the firings constituted unfair labor practices and ordered the workers reinstated with back pay.

**Triple Play Sports Bar: Facebook "Likes."** Triple Play Sports Bar fired employees who participated in a Facebook discussion about the business's tax computing errors. One commented on a post and the other simply "liked" the comment. The NLRB ruled that the comment and the "like" constituted dialog among employees about working conditions – a protected activity – and that firing the employees violated the National Labor Relations Act. The NLRB also said the business's internet/blogging policy violated the NLRA as it was overly broad and had the potential to chill the exercise of rights under the act

**Purple Communications: email usage.** The NLRB is considering whether employees should be allowed to utilize their employer's email system for communications related to Section 7 of the NLRA, which states employees have the right to engage in collective bargaining activities. The NLRB's general counsel has pushed hard for this change, but the board has decided to "hold" off for "further consideration" in light of a flood of amicus briefs contesting the change.

**Starbucks: vulgar barista.** NLRB reinstated a known union-supporting barista who had been fired after cursing at his managers in front of customers on two occasions. The Board said other employees had been treated leniently for similar conduct.

**Hooters: bikini contest.** Two employees participating in a bikini contest complained that the competition was rigged and yelled obscenities at a colleague when the prizes were awarded. A fight ensued that spilled out into the parking lot. The employees were fired for the outburst, and negative social media posts. An administrative law judge said the terminations were wrong because the employees were engaged in protected concerted activity. The judge also found that Hooters' handbook, which barred, for example, the discussing of tips, violated the NLRA.

**Bottom line:** Employers should be careful when disciplining employees for behavior that seems disparaging or outrageous; it is important to think about whether employees' activities could be seen as relating to a labor dispute. Also, employers should be wary when disciplining employees for social media comments that are critical of the company. Furthermore, a review of social media policies is recommended to ensure that employees' rights under the NLRA are not being chilled unintentionally.

## Authors and Contributors

**Henry M. Perlowski**
Partner, Atlanta Office
404.873.8684
henry.perlowski@agg.com

**Edward P. Cadagin**
Associate, Atlanta Office
404.873.8582
edward.cadagin@agg.com

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*Henry M. Perlowski leads Arnall Golden Gregory's Employment Practice and is a partner in the Litigation Practice. Edward P. Cadagin is an associate in the Litigation and Employment practices.*

**Atlanta Office**
171 17th Street NW
Suite 2100
Atlanta, GA 30363

**Washington, DC Office**
1775 Pennsylvania Ave., NW,
Suite 1000
Washington, DC 20006

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