Federal Bar Association
Labor and Employment Law Section
Spring 2012

The Labouring Oar

Message from the Chair

By José R. González-Nogueras

With this issue we revive our award winning newsletter *The Labouring Oar*, thanks to the efforts of several individuals, but especially Karleen J. Green and James D. Noël.

As we look to the future, it is essential to emphasize that this newsletter is not intended to serve only as a mechanism for the section board and committees to communicate with you as a member and provide information regarding the activities which we have planned. Rather, it is designed to provide another medium for you to contribute by submitting articles that enrich the practice of federal labor and employment law.

This newsletter is an important part of the goals we have set for this year to increase the value that our section provides to you. Therefore, we welcome your feedback regarding this issue, especially as to how it may have benefited you or how to improve our newsletter for your benefit.

We have seen an exciting increase in the number of members who are contributing in our section, including its committees and board. However, we would like to have more of our members involved in our committees to ensure representation of every federal circuit and every labor and employment law practice. Please consider joining one of our committees or contributing to our publications. It will increase your networking and be a great experience.

José R. González-Nogueras is a partner of Jiménez, Graffam & Lausell in Puerto Rico, representing employers in all areas of labor and employment law, including training, collective bargaining, and counseling as well as litigation in Puerto Rico and federal courts and government agencies. He also assists clients in the drafting of commercial agreements and litigates in copyright, environmental law, and products liability.

Section Happenings

- Set aside May 17, 2012, from 2:00–3:30 p.m. EDT for our webinar. The acting general counsel of the NLRB has recently issued two memos concerning social media cases and there already are some ALJ decisions regarding them. David Kelly, NLRB deputy associate general counsel, Division of Operations Management, Washington, D.C., will be the moderator of a panel in which Kenneth B. Siepman of Ogletree, Deakins, Nash, Smoak & Stewart P.C. will speak for the employer side and Marianne Reinhold of Reich, Adell & Cvitan will speak for the Union side. The panel will cover the reasoning behind the determination to find merit or no-merit in these types of cases.
- Our section looks forward to seeing you at the 5th Biannual Labor and Employment Law Conference on May 2-3, 2013, in New Orleans. The 2013 conference is co-sponsored by the Corporate and Association Counsel Division and the New Orleans Chapter of the FBA.
- Remember to save the date to attend our CLE at the FBA Annual Meeting and Convention in San Diego, Sept. 21, 2012: Trends in Labor and Employment Law: A Panel Discussion. This session will review the hot button issues for 2012 and beyond, covering agency action as well as recent decisions of note involving equal employment opportunity, retaliation, and wage and hour issues.
- Don't miss the networking opportunities and exposure you get when you write an article for our section newsletter, ***The Labouring Oar,*** or for "The Labor and Employment Corner" column in ***The Federal Lawyer***. Please contact Karleen Green at Karleen.Green@phelps.com if you are interested in publishing something in ***The Federal Lawyer*** or James D. Noel III at jdn@mcvpr.com if you are interested in writing an article for ***The Labouring Oar***.
- Please contact Karleen Green about contributing to our section's Circuit Updates.

A Look at What's Inside

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January 2012 Legislative and Congressional Update

By Craig A. Cowart, Fisher & Phillips LLP

Over-the-road Bus Drivers and the FLSA

The Driver Fatigue Prevention Act (S. 1977) was introduced by Sen. Charles Schumer (D-N.Y.) on Dec. 12, 2011. The bill would make over-the-road bus drivers subject to the maximum hours requirement of the Fair Labor Standards Act (FLSA). Section 13(b)(1) of the FLSA currently exempts employees "with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service" from the act's overtime provisions. Sen. Schumer's bill would amend § 13(b)(1) by specifically identifying drivers of buses "characterized by an elevated passenger deck located over a baggage compartment" and making those employees subject to the maximum hours requirement and overtime provisions. The bill has been referred to the Senate Committee on Health, Education, Labor and Pensions.

Congressional Reaction to NLRB Final Rule—Followed by President's Recess Appointments

Sen. Mike Enzi (R-Wyo.) wasted no time before responding to the final rule released by the National Labor Relations Board (NLRB) that makes radical changes to union representation election procedures. Enzi, ranking member on the Senate Health, Education, Labor, and Pensions Committee, responded on the same day the final rule was released by announcing his intention to challenge the rule under the Congressional Review Act (CRA). The CRA provides that the House or Senate can prevent an agency from enforcing a rule by introducing a joint resolution.

In his announcement, Enzi stated:

> The rule issued today by the NLRB will allow union bosses to ambush employers with union elections before employers have a fair chance to learn their rights and explain their views to employees, as required by law. I plan to lead the fight against this onerous rule by introducing a resolution of disapproval under the Congressional Review Act. It is disappointing that union advocates believe their best chance to succeed, when it comes to union elections, is to ensure that only one side of the story is able to get out. Instead of using backdoor political maneuvers to boost anemic union memberships and smother our nations struggling economy, this Administration should help America regain its strong financial footing.

In addition to the potential challenge under the CRA, the NLRB's final rule is being challenged in a lawsuit filed by the National Chamber Litigation Center along with the Coalition for Democratic Workplace. The lawsuit contends that the rule violates the National Labor Relations Act, the Regulatory Flexibility Act, the Administrative Procedure Act, and free speech and due process constitutional rights.

In other NLRB news, on Jan. 4, 2012, President Obama announced that he intended to make three recess appointments to the NLRB. As established by the Supreme Court in the 2010 opinion *New Process Steel*, three sitting board members are required in order for the NLRB to exercise its full authority. On Jan. 3, 2012, the recess appointment of former member Craig Becker expired, leaving the board without the required three members. Despite numerous objections like that of the U.S. Chamber of Commerce, which called the recess appointments "highly irregular and virtually unprecedented," President Obama bypassed the Senate confirmation process and appointed Sharon Block (D), Richard Griffin (D), and Terence Flynn (R) to the board. Block, Griffin, and Flynn were sworn in on Jan. 9, 2012, bringing the NLRB to a full five-member board for the first time since August 2010.

The Computer Fraud and Abuse Act Update

By James D. Noël III, McConnell Valdés LLC

This article is intended to provide an updated overview of the Computer Fraud and Abuse Act and some practical pointers from the point of view of an employment law practitioner who represents employers.

If you are an employment defense counsel, then you should already be using the Computer Fraud and Abuse Act (CFAA) as a weapon for a potential counterclaim, to cut off damages or to file a civil law suit against the person who has sued your client, among others. In our new work environment computer information is often used in unauthorized ways and to the detriment of that employer who you are defending in a lawsuit. Thus, investigation and discovery of a potential violation should be part of defense counsel's strategy in most cases.

The CFAA establishes civil claims against any employee who has accessed a "protected computer" without authorization or has exceeded the authorization which was given by the employer and with the intent to commit fraud and thereby obtain anything of value, unless the use of the computer is the object of the fraud and the value of such use is not more than $5,000 in any one year period; or to otherwise cause damages or loss to the employer. *See* 18 U.S.C. § 1030(a)(2)(C),[1] § 1030(a)(4)[2] and § 1030(g).[3]

Courts have interpreted "defraud" under the CFAA as meaning "wrongdoing one in his property rights by dishonest methods or schemes."[4] Whereas § 1030(a)(2)(C) requires that the person obtain "information".[5]

Damage is "any impairment to the integrity or availability of data, a program, a system, or information, that 'causes loss aggregating at least $5,000 in value during any 1-year period to one or more individuals.'" 18 U.S.C. § 1030(e)(8)(a) and loss is "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, systems, or information to its condition prior to the offense." 18 U.S.C. § 1030 (e)(11).

The computer which is protected by the CFAA is one "which is used in interstate or foreign commerce or communication." 18 U.S.C. § 1030(e)(2)(B). It is unlikely that computers used at work are not either being used in interstate or international commerce or communication. In my investigation and discovery, I will cover the facts necessary to support this somewhat obvious conclusion. As a defense lawyer in the employment law, I don't have any client which is not involved in interstate commerce and uses computers for this.

One "exceeds authorized access" when it is used with authorization, but to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter. *Id.* § 1030(e)(6). I will ask and if no such policy exists, recommend that employers have a policy in place which establishes limitations on the use of computers, even by persons who are high in the management ladder. The policy should carefully define the employees' duty of loyalty to include gaining access of computer data during employment and later using it to compete with the employer, so that one may argue that such use violates this condition for the authorized access of the data and clearly prohibits such disloyal use. Note that various courts have dismissed claims where the employee had authorized access to such information and used it.[6]

As I point out at the outset, the CFAA may be used to sue or counterclaim a present or former employee when one discovers a violation of this law after the discharge of the employee or during litigation.[7] It may also be used to limit employer liability under the after acquired evidence doctrine,[8] among other uses.

Various courts have held that a lack of authorization may be established by an explicit statement or it may be implicit by limitations such as password protection.[9]

To clients I recommend that even top executives should have language in their employment contracts to show that the position is one of confidence and trust, the computer data which will be placed in the executive's hands in confidence and trust must not be accessed for the personal benefit of the executive or other persons or entities engaged in the same or similar business, activities or operations as that of the employer, etc. Therefore, when investigating an employee who had access to a computer, one should ask the employer about the scope of the authorization given to the employee and what restrictions were placed over such use, if any.[10] Questions to ask include whether the employer uses confidential log in identifications (passwords) and these are routinely changed to protect security;[11] has a policy on the use of electronic data; has a confidentiality agreement and/or confidentiality policy for its employees;[12] has a practice of cutting off access to employees upon finding out that they are leaving the company;[13] and/or has a code of business conduct which prohibits using any data from the company computer to compete or help someone compete against it, among others.

One must also get information on the employee's duties when considering whether or not to bring a claim. In one case, an employees' accessing confidential information on the employer's computers, a pharmaceutical care provider, was not considered to be access to a protected computer "without authorization" under the CFAA, since the employees as part of their jobs had limited access to their employer's computer systems; however, employees' alleged accessing of reports that were outside the scope of their duties, and e-mailing of confidential information to their personal accounts, was considered as "exceeding authorized access" under the CFAA.[14]

A corporate officer may have been given authorization, but some courts have found that a cause of action exists under the CFAA when, at a time when the employee has acquired interests which are adverse to the employer, the access is used violation of the duty of loyalty.[15]

There are various courts which have held that liability arises when the person misappropriates information to which he or she did not have authorized access.[16] Under § 1030(a)(2)(C) a

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prima facie case is shown by presenting evidence that: 1) the use of the computer involved interstate or foreign communication; 2) it was used to obtain information without authorization or exceeding the employees authorization;[17] and 3) loss or damages are shown under one of the five factors set out in § 1030(c)(4)(A).[18]

An example is *International Airport Centers, L.L.C. v. Citrin*, 440 F.3d 418, (7th Cir. 2006), on subsequent appeal 455 F.3d 749, where an employee caused the "transmission" of a program which caused damage to a protected computer, and "intentionally accessed" the computer "without authorization," or "exceeding authorization," by installing a secure-erasure program on his employer's computer either by downloading it from the Internet or by copying it from a disk onto the computer, and the program caused the deletion of the employer's files, and the employee's authorized access to the computer terminated when he quit his employment in violation of his employment contract and resolved to destroy the files. Thus, discovery and/or requests to admit may be used to explore the use of computers and try to pin the employee down to a prima facie case.

With respect to the third element of the prima facie case, damages or loss includes "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, systems, or information to its condition prior to the offense." 18 U.S.C. § 1030(e)(11). Therefore, one may consider recommending that the client retain an expert to restore data and diagnose the computer, and the fees may be claimed as part of the damages of at least $5,000 which one needs to prove.[19]

James D. Noël is a capital member in the Labor and Employment Law Practice Group of McConnell Valdés. He is also a member of the Health Law Practice Team. Noël is a past president of the Puerto Rico Chapter of the FBA and an active member of the chapter's Counsel of Past Presidents; a Fellow of the Foundation of the FBA; and an active member of the Labor and Employment Section of the FBA.

Endnotes

[1]1030(a)(2)(C) covers whoever "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains … information from any protected computer.

[2]Section 1030(a)(4) covers the employee who "knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period."

[3]Section 1030(g) provides that: "Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in subclauses (I), (II), (III), (IV), or (V) of subsection (c)(4)(A)(i). Damages for a violation involving only conduct described in subsection (c)(4)(A)(i)(I) are limited to economic damages. No action may be brought under this subsection unless such action is begun within 2 years of the date of the act complained of or the date of the discovery of the damage. No action may be brought under this subsection for the negligent design or manufacture of computer hardware, computer software, or firmware.

[4]*Shurgard Storage Centers Inc. v. Safeguard Self Storage Inc.*, 119 F. Supp. 2d 1121, 1126 (W.D. Wash. 2000) (citing *McNally v. United States*, 483 U.S. 350, 358, 107 S. Ct. 2875, 97 L.Ed.2d (1987) (interpreting mail fraud statute)); accord *United States v. Czubinski*, 106 F.3d 1069, 1078 (1st Cir. 1997) (holding that the CFAA's use of the word "defraud" "should apply to those who steal information through unauthorized access as part of an illegal scheme."

[5]*See United States v Willis*, 476 F.3d 1121, 1125 (10th Cir., 2007).

[6]For example, employees who accessed electronic information in ordinary course of their duties and competitor that had license to access an employer's software were found not to have violated the CFAA's prohibition against unauthorized access to protected computers, even if they subsequently misused or misappropriated that information, in violation of their employment and license agreements, where the company did not allege that the employees' and competitor's access was unauthorized or in excess of its authorization. *Oce North America Inc. v. MCS Services Inc.*, 748 F. Supp. 2d 481 (D. Md., 2010). In a case involving a credit union it was found that an employee did not access a computer without authorization, nor did she exceed her authorized access, in violation of the CFAA, though she did violate a noncompete agreement, when after she resigned she contacted her clients in an effort to solicit them for her new employer, sent emails containing client lists that included sensitive client information from her work email at credit union to her personal email address, and accessed and switched password protected web profile pages to make credit union clients appear as if they were affiliated with her new employer. *Landmark Credit Union v. Doberstein*, 746 F. Supp. 2d 990 (E.D. Wis. 2010). *Also see Orbit One Communications Inc. v. Numerex Corp.*, 692 F. Supp. 2d 373 (S.D.N.Y. 2010).

[7]For example, the CFAA authorized the use of its civil remedies to sue former employees and their new companies for seeking a competitive edge through the wrongful use of information from the former employer's computer system. *Pacific Aerospace & Electronics Inc. v. Taylor*, 295 F. Supp. 2d 1188 (E.D. Wash. 2003).

[8]"After-acquired evidence" is information which an employer discovers after an employee has been fired and which provides a separate cause for termination. *See McKennon v. Nashville Banner Publishing Company*, 513 U.S. 352, 115 S. Ct. 879 (1995), which explains that after-acquired evidence may be taken into account when determining the remedy for a discrimination claim. Where there is after acquired evidence of wrongdoing that would have led to termination on legitimate grounds had the employer known about it, neither reinstatement, nor front pay are appropriate remedies. Moreover, with regards to the cal-

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NLRB and Social Media

Thursday, May 17, 2012
2:00 – 3:30 p.m. (ET)

Sponsored by the *Labor and Employment Law Section*
of the Federal Bar Association

The Acting General Counsel of the National Labor Relations Board has issued two memos concerning social media cases, as well as one Board decision and three ALJ decisions related to social media. To date, approximately 75 cases have been forwarded from the different Regions to the NLRB's Division of Advice concerning social media controversies. The focus of this Webinar is to discuss these cases and the reasoning behind the determination to find merit or no-merit in these types of cases. The goal is to provide guidance to federal practitioners who appear before the NLRB in handling these types of cases.

Join us for an up to date discussion on this important and developing topic.

Speakers:

David Kelly, Esq.
Deputy Assistant General Counsel, Division of Operations Management,
National Labor Relations Board
Washington, DC

Kenneth B. Siepman, Esq.
Employer Counsel
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Indianapolis, IN

Marianne Reinhold, Esq.
Union Counsel
Reich, Adell & Cvitan
Santa Ana, CA

Registration Fee: $49 for FBA Labor and Employment Law Section members
$69 for non-members

After you register, you will receive by email registration confirmation, a web address access link, and log-in instructions.

1.5 hours of CLE credit pending.

Early online registration is recommended due to limited space.

For additional information, please contact Sherwin Valerio 571-481-9108 or Jenny Bosak 571-481-9118, at the Federal Bar Association.

The NLRB's New Employee Rights Notice Posting Rule: An Advertising Campaign for the Resurgence of the NLRA

by Miguel A. Nieves-Mojica

I have always been fascinated by how well marketing concepts work in every aspect in our society. In marketing, whenever there is a "need" or a "want" for something, sooner or later there will be a business willing to satisfy it. However, regardless of how good your product or business might be, to achieve success you need to inform consumers—specifically, your target market—about what is so special regarding your product and how can they get it. Even after the initial success in the life of a product, when demand begins to take a downturn, marketing plans and advertising campaigns may reboot new life to the product through the use of phrases such as: *"Now with Additional Service Hours…"*; *"Now it's easier than ever…"*; and *"This is an exclusive offer for preferred clients…."*

In real life, samples of marketing efforts are found everywhere, from the obvious private sector marketing campaigns to the not so obvious government efforts to promote new services and public policies. Businesses, Unions and even the Equal Employment Opportunity Commission (EEOC) advertise their services to achieve bigger results in their production. The EEOC does it through the required posting under Section 711 of Title VII. Now, the National Labor Relations Board (NLRB) is ready to follow the path of advertising glamour by implementing its newest policy: the Employee Rights Notice Posting Rule.

Let me be clear about something: I see no problem in using marketing concepts to promote government services and policies. On the contrary, as a capitalist society that is what we are all about. At a time when the NLRB faces a dramatic decline in their case filing numbers, implementation of the notice could not have come at a more appropriate time for the agency. Particularly, the NLRB has seen its yearly representation elections numbers steadily falling from 3,296 in 1998 to 1,304 in 2009. That is a drop of about 60% in eleven (11) years and a sign that something had to be done: an idea to appropriately market the NLRB's legal principles, public policies and services in the 21st Century. Currently, that "something" or "idea" is the New Employee Rights Notice Posting Rule.

So, the unavoidable question is: Can the NLRB successfully promote the resurgence of its own services? Will there be a turnaround towards upward numbers in the filing of union representation petitions because of the new posting rule requirement? Results will start to show in the near future, when an effective date is established by the NLRB to officially require most private sector employers to post a notice informing employees around the nation of their right under the National Labor Relations Act (NLRA) and the type of services that the NLRB provides.

Previously, the effective date for the posting was April 30, 2012. However, it was recently changed in part as a result of pending judicial challenges, and is still subject to change, but the idea is to start requiring posting as soon as feasible. These challenges in federal courts have raised several concerns related to the posting. In *Chamber of Commerce v. NLRB*, Case No. 2:11-cv-02516-PMD (D.S.C. Sept. 19, 2011), the Chamber of Commerce alleges that the NLRB failed to perform an initial regulatory flexibility analysis to evaluate the impact of the proposed rule on small businesses covered by the NLRA, and that the NLRB lacks the statutory authority to impose the notice requirement. In another lawsuit, this one filed in the D.C. Circuit, *National Ass'n of Manufacturers v. National Labor Relations Board, et al.*, Case No. 1:11-cv-01629-ABJ (D.D.C. Sept. 8, 2011) it is asserted that the rule "has been promulgated in excess of the board's statutory authority under the NLRA" to issue rules and regulations required to carry out the provisions of the NLRA and requesting the court to permanently enjoin the NLRB from "implementation, enforcement and application of the Rule." Resolution of these lawsuits is still pending.

The NLRB wants the new Employee Rights Notice to be posted in conspicuous places in the workplace, where other notifications of workplace rights and employer rules and policies are posted. This is similar to classic NLRB remedial notice posting requirements; like the EEOC Notice, and akin to a promotional marketing effort in the private sector. If the employer uses internal and/or external websites for personnel policies and workplace notices, a link to the Employee Rights Posting must be published there. The NLRB has made it clear that it will accept no shortcuts on this matter. The idea is to broadcast the rights of employees under the NLRA. Understandably, like an enterprise hit by the recession, the Employee Rights Notice seeks to promote the NLRB services to their target market (i.e. employees) in an effort to jumpstart employee participation in the services provided by the already 75-year-old federal agency.

However, as always, change brings questions and questions are fertile land for controversy. As a labor law practitioner, there are at least three things about the Employee Rights Notice requirement that in my opinion should require further consideration: (1) the NLRB's self-proclaimed prerogative to toll the six (6) months limit established under § 10(b) of the NLRA to file unfair labor practice charges, if the employer fails to have the notice posted; (2) the easiness in which knowledge will be established in unfair labor practice proceedings, through the testimony of employees claiming that X or Y supervisor saw them while reading the NLRB's notice; and (3) the one-way street requiring only employers to post the Notice or face consequences, while not requiring similar responsibility to unions, although both (employers and unions) may be found in violation of employee rights under the NLRA.

So, can the NLRB really implement a so-called action plan to further market its public policy services? Is it possible to see the NLRB running an advertising campaign reminiscent to marketing phrases like: *"Now with Additional Service Hours…"*; *"Now its easier than ever…"*; and *"This is an exclusive offer for preferred clients…"*? Let's further consider the matter.

"*Now with Additional Service Hours…*" or the Equitable Tolling of the NLRA's Time Limit of § 10(b).

Proponents against the NLRB's prerogative to toll the six-month limit under § 10(b) to file unfair labor practice charges may find sufficient grounds to seriously challenge the concept.

The self-proclaimed policy may constitute an *ultra vires* act by the NLRB because it would seek to have the NLRB running afoul to the time limit established by Congress under § 10(b) of the NLRA. Note that the NLRB would not be interpreting a set of facts to decide when does the time limit should begin to run, but rather the NLRB would be able to expand the time limit under § 10(b) based on a violation to its rules and regulations instead of the limit expressly established by Congress. Under such circumstances, it is not difficult to foresee the NLRB's new tolling policy as vulnerable to attacks on constitutional grounds.

The intention of the NLRB through the implementation of the equitable doctrine is to give some teeth to an otherwise toothless regulation that would have no consequence for non-compliance with the posting obligation. The background of the NLRB's tolling policy shows that it is somewhat of a copy of the EEOC's equitable tolling policy, regularly followed in instances where an employer fails to post the EEOC notice, which gives employers a serious reason to comply. For example, the filing period of Age Discrimination in Employment Act claims may be extended by court if the employer has failed to prominently post the EEOC Notice in the workplace. *See American Airlines, Inc. v. Cardoza-Rodriguez*, 133 F.3d 111 (1st Cir. 1998). However, it is important to note that the EEOC marches to the beat of a different drum. Title VII of the Civil Rights Act of 1964, as amended, expressly requires employers to post the notice and imposes a fine as punishment for failing to post the EEOC notice. On the other hand, the NLRA does not contain a posting requirement established by Congress and it does not include the imposition of fines for an employer's failure to post their new notice.

"*Now Its Easier Than Ever…*" or the Simple Alternatives to Attain Evidence of "Knowledge."

Section 8(a)(3) of the NLRA provides that it shall be an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." In *Wright Line, A Division of Wright Line Inc.*, 251 NLRB 1083 (1980), the NLRB established a two-prong test to determine whether an employer has discriminated in violation of § 8(a)(3) of the NLRA. First, the Government must establish a prima facie case by establishing the inference that protected conduct was the motivating factor in the employer's decision. The elements commonly required to establish a prima facie case are: (1) union or protected activity by the employee; (2) employer knowledge of that activity; and (3) union animus on behalf of the employer. *See Ampersand Publishing LLC*, 357 NLRN No. 51 (2011). Second, once the prima facie case is established, the employer must prove that it would have taken the adverse action against the employee, even in the absence of the protected conduct. *See Consolidated Bus Transit Inc.,* 350 NLRB 1064 (2007).

The element of "knowledge" in the first prong is of utmost importance to validate the theory that the purported unlawful conduct against an employee was implemented in response to the employee's protected activities. "Knowledge" is a very important ingredient in § 8(a)(3) discrimination cases because without evidence of the employer's knowledge of the protected activity, the adverse employment action could respond to anything other than an employee's exercise of his or her rights under the NLRA. Thus, the new NLRB's posting requirement will clearly be a game changer in § 8(a)(3) discrimination claims. It is completely foreseeable that many future NLRB cases will be based on the allegation of employees claiming that they were seen reading the NLRB notice. Remember: the notice will have to be posted in a conspicuous place, where other notifications of workplace rights and employer rules and policies are posted. It would be interesting to track prospectively the number of cases where an employee alleges that a management representative saw him or her reading the notice before the employer took an adverse employment action against him or her.

"*This Is An Exclusive Offer for Preferred Clients…*" or How the NLRB Posting Requirements and Its Punitive Effects Only Apply to Employers.

The idea behind the NLRB Notice is to notify employees of their rights under the NLRA. In my view, the concept is noble and follows what is the official policy of the federal government: to promote collective bargaining between employers and their employees. However, I find worrisome the way all the burden is placed on one side: the employer. The NLRB has made it clear that all private sector employers that fall within its jurisdiction are required to post the notice. In the event that the employer fails to post the notice, consequences will follow, such as a subjective finding of union animus in unfair labor practice cases and the equitable tolling of § 10(b) time limitations to file an unfair labor practice charge.

The problem does not lie with the content of the notice. Apart from other controversies that have been raised regarding its content, a sincere review of the document shows that employees are informed about the provisions regarding unlawful conduct on behalf of employers, as well as the provisions regarding unlawful conduct by labor organizations. Hence, everyone is onboard with the rules of engagement. However, the problem lies in who bears the burden of posting to inform the employees. The unavoidable question is: *If the purpose is to inform employees about their rights in situations of unlawful conduct on behalf of employers and labor organizations, then why are unions not required to inform the employees that they intend to adequately represent about such matters in a similar fashion to the employers' responsibilities and with comparable consequences?*

When employers fail to post and unfair labor practice charges are filed against them, the NLRB may find union animus through a presumption and find it appropriate to apply the equitable tolling of time limitations. However, when an employee files an unfair labor practice charge against a union, no presumption will be applied if the union failed to inform its members (or the employees it is seeking to represent) of the notice content. In conclusion, there would be no alternative for a charging party employee to pray for the equitable tolling of their § 10(b) time limit to file an unfair labor practice charge against a labor organization.

The result is a clearly uneven playing field. If there is intention to address the need of promoting collective bargaining and employee rights under the NLRA, let all players deal with similar

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conditions, obligations and consequences. After all, the purpose is to inform employees of all their rights under the NLRA and it only seems adequate to have them receive the information from all key players (employers and labor organizations) to the collective bargaining process.

Once a new effective date is established by the NLRB for the posting requirement and if the pending court challenges fail, we will be able to analyze how this new requirement by the NLRB will impact—or not—the current status of the labor movement and collective bargaining in the United States. However, the NLRB should not oversee one fundamental question that all good marketers make when facing a decline in the demand for their products: *Is it time to revamp advertising and promotional efforts for our existing product, or is it time to overhaul the product itself to make it a more relevant alternative in the current 21st Century market?* The answer to that question may hold the future and the role of the NLRA and the NLRB in our nation's new economic and societal realities.

Miguel A. Nieves-Mojica is an associate attorney in the Labor and Employment Law Group at the law firm of Jiménez Graffam & Lausell in San Juan, Puerto Rico. He provides legal counseling to employers in Labor and Employment law matters. Prior to joining Jiménez Graffam & Lausell, Nieves-Mojica served as a field attorney and hearing officer for Region 24 of the National Labor Relations Board and represented employers, unions, and individuals in labor and employment law matters.

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culation of back pay the Supreme Court held that "a beginning point in the formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered." *McKennon, Id.* 513 U.S. at 361-362.

[9]*EF Cultural Travel BV v Zefer Corporation*, 318 F.3d 58, 62 (1st Cir., 2003).

[10]An employee's acquisition of confidential information prior to resigning and being hired by the employer's competitor was not "without authorization" or in a matter that "exceeded authorized access," where the employee was authorized to initially access the computer he used and was permitted to view the specific files he allegedly e-mailed to himself. *Shamrock Foods Co. v. Gast*, 535 F. Supp. 2d 962 (D. Ariz. 2008). *Also see University Sports Pub. Co. v. Playmakers Media Co.*, 725 F. Supp. 2d 378 (S.D.N.Y. 2010)(Computer systems administrator who was authorized to access advertising company's database of customer leads and historical sales data did not exceed his authorized access by obtaining confidential data and sending it to the company's former employee and current competitor, where he was authorized to access all information on the database, and even though copying or downloading information may not have been within the scope of his typical duties, his authorization was not limited so as to prevent him from doing so.)

[11]*See* 109 Am. Jur. Proof of Facts 3d 1, *Password-Protected Electronic Evidence in Civil Actions*.

[12]*See EF Cultural Travel BV v. Lzefer Corp., supra* 318 F.3d at 62 (holding that an employee breached a confidentiality agreement when he used confidential information he obtained as an employee to obtain information from his ex-employer's website, thereby exceeding his authorized access in violation of the CFAA).

[13]Employee's reading of e-mail from a customer after his resignation was not unauthorized where the employer had not suspended his email account, and the employee did not attempt to access his email account after it was suspended. *Clarity Services Inc. v. Barney*, 698 F. Supp. 2d 1309 (M.D. Fla. 2010).

[14]*US Bioservices Corp. v. Lugo*, 595 F. Supp. 2d 1189 (D. Kan. 2009)

[15]*See e.g., NCMIC Finance Corp. v. Artino*, 638 F. Supp. 2d 1042 (S.D. Iowa 2009)(Company vice president acted "without authorization" or "exceeded authorized access" when he accessed confidential and proprietary business information from his employer's computer that he had permission to access, but then used that information in a manner in breach of his duty of loyalty, with the intent to use the information in that manner at the time of access; *International Airport Ctrs LLC v. Citrin*, 440 F.3d 418, 420-421 (7th Cir., 2006); *EF Cultural Travel BV v. Explorica Inc.*, 274 F. 3d 577, 582-584 (1st Cir., 2001); and *Shurgard Storage Centers Inc. v. Safeguard Self Storage Inc.*, 119 F. Supp. 2d at 1125 (Citing the Restatement (Second) of Agency '112 (1958).

[16]*See e.g., Lasco Foods Inc. v. Hall and Shaw Sales, Mktg & Consulting LLC*, 600 F. Supp. 2d 1045, 1053 (E.D. Mo., 2009).

[17]An employer stated a claim against a former employee and his new company by alleging that the employee's use and abuse of the employer's proprietary information was "without authorization" or in excess of his "authorized access," despite claim that the employee had full and unrestricted access to all of the information at issue. *Guest-Tek Interactive Entertainment Inc. v. Pullen*, 665 F. Supp. 2d 42 (D. Mass. 2009).

[18]*See NCMI Finance Corporation v. Artino*, 638 F. Supp. 2d 1042, 1064 (S.D. Iowa, 2009).

[19]An employer suffers loss in form of expenses incurred in modifying computers to preclude further data transfer. *Shurgard Storage Centers Inc. v. Safeguard Self Storage Inc.*, 119 F. Supp. 2d at 174.