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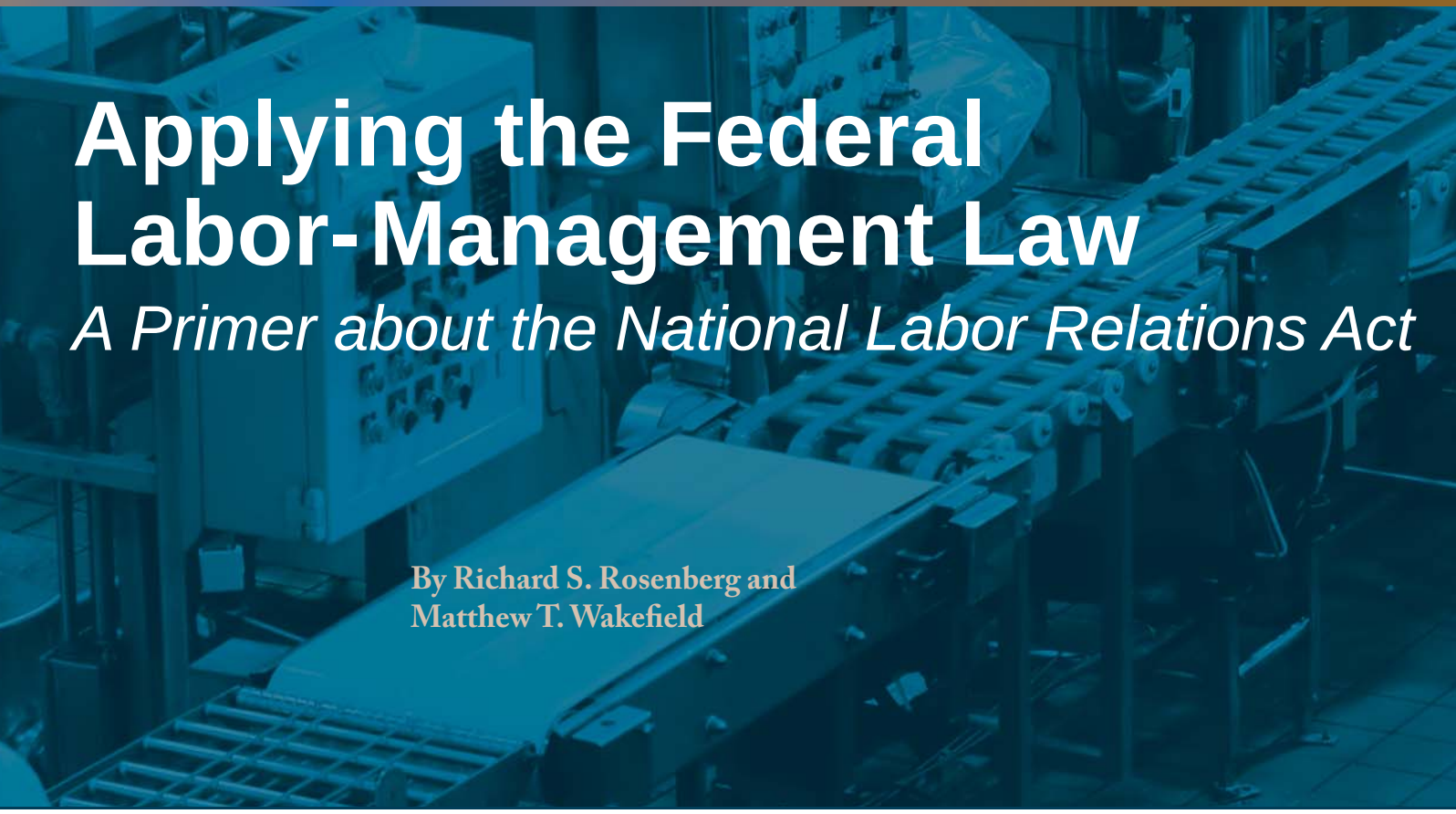

Applying the Federal Labor-Management Law

A Primer about the National Labor Relations Act

By Richard S. Rosenberg and Matthew T. Wakefield

ATTORNEYS WHO BELIEVE THAT THE FEDERAL labor-management law, known as the National Labor Relations Act ("NLRA"), applies only to unionized businesses, or to the less than 7% of the private sector workforce which actually belongs to a union,[1] are actually overlooking significant legal issues facing their business clients. Despite the fact that union membership in the United States has been steadily declining for decades, the National Labor Relations Board ("NLRB") under President Obama has been busy reinventing itself as a 21st century labor law watchdog agency.

Recent NLRB decisions and administrative actions demonstrate the agency's willingness to branch out far beyond the union organizing process and traditional unionized labor-management relations. Indeed, although the last major amendment to the NLRA was in 1959, recent interpretations of the Act by the NLRB prohibit non-union employers from disciplining employees for certain postings on Facebook,[2] outlaw seemingly innocuous employee handbook policies and bar arbitration agreements which restrict class action claims.[3]

NLRA Coverage

The NLRA applies to almost all private sector employees and employers in the United States, with the most notable exceptions being the air, rail and agricultural industries. Some small businesses, such as those with less than $500,000 in annual sales, also may be excluded. It's always a good idea to confirm the Act's applicability to your client's business.

The NLRA was intended primarily to protect the rights of employees. As a result, the Act's protections do not apply to most employer representatives, such as managers and supervisors (whose actions are nevertheless attributable to the employer under a strict liability theory). Congress excluded them by defining a "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Thus, anyone who has authority to perform at least one of these enumerated functions is exempt from the Act's protections as a supervisor, provided the individual in question either can take such action without approval of another employer representative or can recommend such action to another employer representative and the recommendation is typically accepted without any additional investigation, and provided further that the action to be taken is not merely routine or insignificant. Notably, the title of the person means nothing.[4]

In deciding whether an individual is a supervisor or an employee, the NLRB is concerned only with the individual's

demonstrated authority. For example, if an individual has the final authority to decide whether to take disciplinary action against an employee, that person would be a supervisor, provided he/she is not simply issuing an automatic warning for tardiness or other routine disciplinary actions which may be dictated by an employer policy and procedure manual.[5] Alternatively, if that same individual made a recommendation to more senior management or human resources that an employee should be disciplined (concerning a non-routine issue), and that recommendation is approved without any additional investigation by another employer representative, the individual making the recommendation would be deemed a supervisor because he/she has the authority to effectively recommend discipline.

Purpose of the NLRA

The expressly stated purpose of the NLRA is that of "encouraging the practice and procedure of collective bargaining" and protecting employee rights "to full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[6] In other words, Congress has explicitly endorsed the idea of unionization.

The cornerstone of the Act is Section 7, which implements the Act's purpose by expressly declaring the rights of employees "to form, join or assist a labor organization"[7] So-called Section 7 activity includes the "concerted" actions of two or more employees for their "mutual aid or protection," or "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."[8] This is referenced in the cases as "protected concerted activity".

Aside from traditional union organizing or collective bargaining activities, examples of protected concerted activities range from one employee confronting a supervisor on behalf of other employees about workplace concerns, even matters as simple as the room temperature being too cold or the calculation of a commission, to two or more employees refusing to work in protest of anything that falls within the broad terms "wages, hours, or other terms and conditions of employment," even if no other employees agree with them.[9] Notably, it does not matter at all whether the employees are represented by a union. The Act applies to all businesses that meet the applicable jurisdictional standards.

It usually comes as a surprise to employers that employees have a federally protected section 7 right to speak out collectively to customers or others in the public about their wages, hours and other terms and conditions of employment, even using harsh and unflattering terminology.[10] Indeed, an employer policy or rule declaring such matters to be confidential runs afoul of the Act, as is any discipline for violating such a rule.

Section 7 also explicitly protects the right of employees to refuse to join in these activities, except that employees may be required by a collective bargaining agreement to pay union dues in order to remain employed, which is the case with most union contracts in states such as California.[11]

Section 7 is not without limitation. For example, it generally does not protect partial strikes (such as performing only part of a normal work assignment), sit-in strikes (such as refusing to leave the workplace at the end of a shift), picket-line violence or public disparagement of the employer's products or services.[12]

Lawyers advising clients about personnel matters must be sensitive to the broad reach of the Act when advising about planned employer actions such as discipline or discharge. If the NLRB concludes that the action was in response to protected section 7 activity, then the action is unlawful. In a so-called "mixed motive" case (i.e., the employer allegedly has multiple reasons for the adverse action), the employer's action will be deemed a violation of the Act if it can be shown that the employee's protected section 7 activity played a role.[13]

Primary Functions of the NLRB

The NLRB is headquartered in Washington, D.C. In the absence of political maneuvering inside the beltway, the NLRB is run by five members, one of whom is Chairman. Board members are appointed by the President of the United States, by and with the advice of the Senate, to staggered five-year terms. The NLRB has 32 regional offices throughout the United States. Southern California is split into two regions, with Region 21 based in downtown Los Angeles and Region 31 based on the westside. The San Fernando Valley is in Region 31.

The NLRA established two primary purposes for the NLRB. One is to supervise the process by which employees may designate a collective bargaining representative. This is typically accomplished by an NLRB supervised secret-ballot representation election.[14] The agency is responsible for determining such things as who is eligible to vote and for ensuring that elections are conducted fairly and properly.

President Obama's appointees to the NLRB recently amended agency regulations to shortcut the timeline between a union filing a petition for an election and the election being conducted, which currently occurs in a median time of 38 days.[15] The U.S. Chamber of Commerce has a lawsuit pending in the U.S. District Court for the District of Columbia, challenging these amendments. If the speedier election process is upheld, employers can expect to see an increase in union organizing activity.

The NLRB is also responsible for investigating objections to an election whenever they are filed by whichever party loses the election. If the NLRB concludes that that a party who won the election engaged in objectionable conduct that likely interfered with the election process, it will set aside the outcome and conduct a new election.

The other primary purpose of the agency is to investigate and, when merited, prosecute allegations that an employer or union committed what are known as "unfair labor practices."[16] An unfair labor practice is any violation of section 8 of the NLRA, as determined by the NLRB.

The important function of investigating and prosecuting unfair labor practices falls under the direction of the NLRB's General Counsel, who is appointed by the President of the United States, by and with the advice of the Senate, for a term of four years. The NLRB General Counsel is vested with virtually unreviewable prosecutorial discretion. The recent action by the NLRB to issue a formal complaint against Boeing Corporation over its establishment of a new plant in the Southeast (over the objection of its labor union) demonstrated just how powerful the NLRB's General Counsel can be.

NLRB Actions Involving Employer Rules and Policies

Corporate counsel should review all employer policies for compliance with the Act. The NLRB has found union and non-union employers alike to have committed unfair labor practices simply by maintaining rules or policies, that tend to "interfere with, restrain, or coerce" employees in the exercise of section 7 activities. For example, the NLRB has held that employers may not maintain rules or policies which prohibit employees from:

- discussing their wages, benefits, schedules, discipline or other terms and conditions of employment amongst themselves or sharing those views with customers or members of the public
- wearing union buttons, pins or stickers, even if the employer provides a uniform
- leaving their assigned work area or ceasing work without permission
- making negative remarks about a manager or the employer
- bringing a complaint to anyone other than the employer
- making false, profane or malicious statements
- returning to "the premises" of the workplace outside of his/her normal shift
- talking to or providing information about the company to the media

- soliciting other employees during their non-work time
- distributing flyers during non-work time or in non-work areas
- being negative[17]

Likewise, the NLRB will find an employer commits an unfair labor practice when it takes disciplinary action or terminates an employee for engaging in section 7 activities. Thus, an employer would commit an unfair labor practice if it took adverse action against an employee who, on behalf of other employees, complained on Facebook or to the media or a customer, about low wages, a challenging workload or an insensitive supervisor, even if using unflattering terms such as "son of a b_." Section 7 does not, however, protect such activity where the employee is merely expressing an individual gripe.[18]

NLRB Investigation of Unfair Labor Charges

Any person, organization or entity may file an unfair labor practice charge against an employer or a union, even someone who has no connection to the charged party or the purported victim. In order to be timely filed, a charge must be filed and served within six months of the unfair labor practice occurring.[19] While there is no standing requirement, the charging party must promptly provide evidence in support of the charge to the NLRB agent assigned to investigate, including making witnesses available to be interviewed by the agent and to give testimony in the form of a sworn affidavit.

If the charging party is able to present sufficient evidence to indicate an unfair labor practice occurred within the last six months, the NLRB agent offers the charged party an opportunity to provide evidence in defense of the allegations, including making witnesses available to be interviewed by the agent and to give testimony in the form of sworn affidavits. The NLRB agent may also contact third parties to obtain evidence and testimony. Neither the charging party nor the charged party is obligated to share with the other any information or evidence provided to the agency during the investigation.

Regional Director Determination

Once the NLRB agent completes the investigation, the Regional Director will make a determination on the merits of the charge allegations. In certain unique cases, the Region may submit the investigation to the NLRB General Counsel's Division of Advice (Advice), which is located at the NLRB headquarters in Washington, D.C.

Advice formulates and executes policy decisions on certain types of unfair labor practices to prosecute, which is done in the form of a confidential Advice memorandum. Depending upon the severity and number of allegations, an investigation may take anywhere from a few weeks to a few months. The agency traditionally finds some merit in 32% to 40% of all charges filed.[20]

If a charging party declines to withdraw the allegations found to be without merit, the allegations are formally dismissed, giving the charging party the opportunity to appeal the Regional Director's decision to the NLRB General Counsel's Office of Appeals (Appeals). Historically, Appeals upholds the Regional Directors' decisions in over 98% of all cases.[21] Absent Appeals reversing the Regional Director, a charging party has no further legal recourse on allegations that have been dismissed.[22]

Settlements are Encouraged and Promoted

If a Regional Director believes an allegation to have merit, the NLRB agent will so advise the charged party and offer an opportunity to settle the matter. The NLRB customarily orders a "make-whole" remedy for an employer or union that violates the Act. In settling, the NLRB seeks to achieve the same or similar result.

Thus, for example, if an employer were to fire an employee for engaging in protected concerted activities, the employer would be required to reinstate the employee, reimburse the employee for all lost wages and benefits (plus interest) and post an NLRB issued notice. The Notice, which typically must be posted for 60 days, advises employees of their rights, contains an affirmative commitment that the employer will not interfere with such rights and specifies the steps which the employer is taking to make the employee whole.

Depending upon the case, such steps may include: (1) requiring an official of the employer to read the notice to all employees; (2) removal of a disciplinary action from an employee's file; (3) reinstating an employee and reimbursing the employee for lost pay and benefits; (4) offering employment to an employee who was not hired because of his/her union or other protected concerted activities; (5) rescinding a rule or policy that is contrary to the NLRA; and (6) advising an employee that the employer will not attempt to use the rescinded adverse actions against the employee in the future.

With settlements, the Notice does not state that the charged party has been found to have violated the Act. This is not the case after a case goes to trial and an employer or union has been found to have violated the Act. Over the last 10 years, the NLRB has settled between 91.5% and 99.5% of all cases in which a Regional Director has found merit.[23]

Hearings Before an Administrative Law Judge

Absent settlement, the Regional Director will issue a formal complaint and set the matter for a trial before one of the NLRB's administrative law judges. (At this point, the charged party is now referred to as the respondent.) The respondent must file an answer to the complaint within 14 days. In certain cases, the Regional Director may seek an injunction in the federal district court, such as to stop certain unlawful conduct by a union or to require an employer to restore the status quo pending the outcome of the agency litigation.

While the charging party may participate in the trial before the administrative law judge, an NLRB attorney in the region (referred to as "counsel for the General Counsel") will have sole responsibility for prosecuting the allegations in the complaint. Although it is ideal for charging parties and respondents to be represented by experienced labor counsel, the NLRB permits a party to represent themselves or even to be represented by a non-attorney.

The NLRA does not permit any pre-trial discovery. However, trial subpoenas (documents and witnesses) are available to all parties. At the hearing, parties will have the opportunity to examine and cross-examine witnesses, and to introduce relevant evidence. In most cases, the parties are given the opportunity to file post-hearing briefs before the

administrative law judge issues a decision and recommended order.

NLRB Orders

If neither party files exceptions, the NLRB adopts the administrative law judge's recommended order in an unpublished decision. If any party files exceptions to the ALJ's decision, the matter is assigned to a panel of three members of the NLRB that will then rule on the exceptions, typically in a published decision. When the NLRB is fully constituted with five members, either or both of the two members who were not assigned to the case may join in the decision. This typically occurs when the NLRB wants to make a shift in policy, such as to reverse prior interpretations of the NLRA. Over the last ten years, the General Counsel has succeeded in winning before administrative law judges and the Board all or a portion of the allegations in 78% to 91% of all complaints that are issued.

Notably, NLRB orders are not self-enforcing. Thus, if a respondent refuses to comply, the NLRB General Counsel's Division of Enforcement Litigation will file a petition for enforcement, which may be done in any circuit of the United States Court of Appeals where the respondent transacts business or where the unfair labor practice occurred.[24]

Similarly, the respondent or the charging party may file a petition for review of the NLRB's order in any circuit where such party transacts business, where the unfair labor practice allegedly occurred or in the United States Court of Appeals for the District of Columbia.[25] This occasionally results in a race to file in what may be perceived as a favorable circuit, given that petitions for review and enforcement must be heard together (normally in the circuit in which the first petition was filed).

In 2009, courts of appeals decided 61 NLRB enforcement and review cases. Of those cases, 88.5% were enforced in whole or in part, 78.7% were enforced in full, 6.6% were remanded entirely and 4.9% were not enforced entirely.

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[1] See http://www.bls.gov/news.release/pdf/union

[2] pdf 2 See http://www.nlrb.gov/news/acting-general-counsel-releases-report-social-media-cases

[3] *D.R. Horton, Inc.,* 357 NLRB No. 187 (2012).

[4] 29 U.S.C. §152(11).The burden of proving supervisory status is on the party who alleges that it exists. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711 (2001). *See Magnolia Manor Nursing Home*, 260 NLRB 377, 385 n.29 (1982).

[5] *See, e.g., Riverboat Servs. of Ind.*, 345 NLRB 116 (2005) (employees are not supervisors where their involvement in discipline was merely to refer problems to their superiors); *Pacific Beach Corp.*, 344 NLRB 177 (2005) (employee not a supervisor by simply distributing routine tasks among the employees and monitoring the way each task was performed); *Jordan Marsh Stores Corp.*, 317 NLRB 460 (1995) (preparing work schedules, selecting employees for overtime, changing assignments, and writing up records of personnel interviews did not rise to the level of independent judgment or supervisory status under the Act). *Fleming Cos.*, 330 NLRB 277 (1999) (recording instances of tardiness and absences and issuing standard disciplinary forms based on an accumulation of occurrences did not establish supervisory status).

[6] 29 U.S.C. §151.

[7] 29 U.S.C. §157.

[8] *Meyers Industries*, 281 NLRB 882, 887 (1986), aff'd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[9] *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14-15 (1962); *Citizens Investment Service Corp. v. NLRB*, 430 F.3d 1195, 1199 (D.C. Cir. 2005);*NLRB v. Jasper Seating Co.*, 857 F.2d 419 (7th Cir. 1988).

[10] *Reef Industries v. NLRB*, 952 F.2d 830 (5th Cir. 1991).

[11] 29 U.S.C. §§157, 158(a)(3), and 164(b). Currently, 23 states (Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming) and one territory (Guam) have in place a right-to-work law, meaning that employees cannot be required to pay union dues under threat of loss of employment.

[12] See *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 494 (1960);*NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977). *NLRB v. Local Union No. 1229*, IBEW, 346 U.S. 464 (1953).

[13] See Wright Line, 251 NLRB 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). The Wright Line test was subsequently approved by the U.S. Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[14] 29 U.S.C. §159.

[15] See Memorandum GC 11-03 (Jan. 10, 2011), which may be found at: http://www.nlrb.gov/summary-operations

[16] 29 U.S.C. §160.

[17] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Beth Israel Hospital v. NLRB*, 437 U.S 483 (1978); *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249 (10th Cir. 2005); *Handicabs, Inc. v. NLRB*, 95 F.3d 681 (8th Cir. 1996); *NLRB v. Ohio Masonic Home*, 892 F.2d 449 (6th Cir. 1989); *Salon/Spa at Boro, Inc.*, 356 NLRB No. 69 (2010); *Mission Foods*, 350 NLRB 336 (2007); W San Diego, 348 NLRB 372 (2006); Claremont Resort & Spa, 344 NLRB 832 (2005); *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enf'd* 203 F.3d 52 (D.C. Cir. 1999); *Leather Center, Inc.*, 312 NLRB 521, 528 (1993); *Kinder-Care Learning Ctrs.*, 299 NLRB 1171, 1172 (1990); *GHR Energy Corp.*, 294 NLRB 1011, 1012 (1989), *enf'd* 924 F.2d 1055 (5th Cir. 1991).

[18] *Severance Tool Indus.*, 301 NLRB 1166, 1170 (1991), *enf'd*, 953 F.2d 1384 (6th Cir. 1992); *Communication Workers of America*, 303 NLRB 264, 272 (1991); *Hospital of St. Raphael*, 273 NLRB 46 (1984).

[19] 29 U.S.C. §160(b).

[20] See Memorandum GC 11-03 (Jan. 10, 2011), which may be found at: http://www.nlrb.gov/summary-operations

[21] *Id.*

[22] 29 U.S.C. §153(d).

[23] See Memorandum GC 11-03 (Jan. 10, 2011), which may be found at: http://www.nlrb.gov/summary-operations

[24] 29 U.S.C. §160(e).

[25] 29 U.S.C. §160(f).

Test No. 43

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. The National Labor Relations Act applies only to unionized businesses.
   ❑ True ❑ False

2. The Speaker of the House of Representatives appoints the General Counsel of the National Labor Relations Board.
   ❑ True ❑ False

3. Aside from the air, rail and agricultural industries, the National Labor Relations Act applies to most California employers and employees.
   ❑ True ❑ False

4. An employer may not prohibit employees from making group complaints about wages, hours or other terms and conditions of employment.
   ❑ True ❑ False

5. The National Labor Relations Board is responsible only for conducting elections for employees to decide if they want to be represented by a union.
   ❑ True ❑ False

6. Anyone with the title of supervisor or manager is excluded from the protection of the National Labor Relations Act, regardless of their authority.
   ❑ True ❑ False

7. The National Labor Relations Board is run by seven persons appointed by the President of the United States.
   ❑ True ❑ False

8. An employer may avoid union problems by implementing a carefully worded policy that prohibits employees from being members of a union.
   ❑ True ❑ False

9. An employer may not ban pro-union employees from applying for employment.
   ❑ True ❑ False

10. Unions have rapidly expanded their membership since President Obama was sworn into office in January 2009.
    ❑ True ❑ False

11. The NLRB does not have contempt power to enforce its own orders.
    ❑ True ❑ False

12. An employer may discipline or terminate a group of employees who make false or disparaging comments about a supervisor.
    ❑ True ❑ False

13. If a group of employees walk off the job because they are upset with a new, lawful policy that their employer implements, the employees are protected from being fired by the employer only if they are represented by a union.
    ❑ True ❑ False

14. An employer may include a confidentiality requirement in any employment agreement, employee handbook or employee policy.
    ❑ True ❑ False

15. An employer may not have a policy that prohibits employees from talking to the media.
    ❑ True ❑ False

16. Once the Nation al Labor Relations Board's General Counsel determines there is merit to an unfair labor practice charge, the agency provides the charged party an opportunity to settle prior to issuing a complaint.
    ❑ True ❑ False

17. If an employee is fired for participating in protected concerted activities, the National Labor Relations Board prohibits any competitor of the employer from filing an unfair labor practice charge.
    ❑ True ❑ False

18. A San Fernando Valley employee wanting to file an unfair labor practice charge against his/her employer must contact the National Labor Relations Board office in Sacramento.
    ❑ True ❑ False

19. An employer must be represented by an attorney in NLRB proceedings.
    ❑ True ❑ False

20. Approximately 90% of all unfair labor practice charges filed against employers by employees, unions and/or their attorneys are ultimately found to be without merit.
    ❑ True ❑ False

MCLE Answer Sheet No. 43

INSTRUCTIONS:
1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
4. Mail this form and the $15 testing fee for SFVBA members (or $25 for non-SFVBA members) to:

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ANSWERS:
Mark your answers by checking the appropriate box.
Each question only has one answer.

1.	❑ True	❑ False
2.	❑ True	❑ False
3.	❑ True	❑ False
4.	❑ True	❑ False
5.	❑ True	❑ False
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