



PLUNKETT COONEY  
ATTORNEYS & COUNSELORS AT LAW

## Winds of Change

NLRB Shifts Momentum  
Toward Employers

Presented by  
**Laura M. Dinon**  
**Sydney R. Puricelli**

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### Today's Presenters



**Sydney R. Puricelli**  
(248) 594-6246  
spuricelli@plunkettcooney.com



**Laura M. Dinon**  
(231) 348-6417  
ldinon@plunkettcooney.com

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### Why Does it Matter?

- National Labor Relations Board (NLRB) is an independent federal agency that protects the rights of private sector employees to join together, **with or without a union**, to improve their wages and working conditions.
- While the National Labor Relations Act (NLRA) was passed primarily to encourage collective bargaining, it also protects the rights of non-union employees.

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### Rights of Non-Unionized Employees

- Includes right to engage in “protected concerted activities,” such as:
  - Two or more employees addressing their employer about improving their pay
  - Two or more employees discussing work-related issues beyond pay, such as safety concerns, with each other

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### Rights of Non-Unionized Employees

- An employee speaking to an employer on behalf of one or more co-workers about improving workplace conditions




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### Protected Concerted Activity

- Definition — in the past, it has always been expansive, especially under the Obama administration.
- New cases illustrating no protected concerted activity have been found.
- *Alstate Maintenance*, 367 NLRB No. 68 (2019)




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### Alstate Maintenance

367 NLRB No. 68 (2019)

- Airport workers
- “We did the job last year and didn’t get a good tip.”
- Holding: Other employees being present does not automatically make statement concerted activity.
- Test: (1) Is it truly a group complaint, and (2) are employees preparing for group action?




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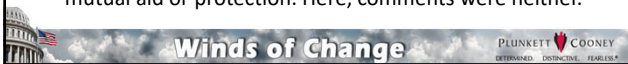
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### Protected Concerted Activity

- Individual employee’s complaint about possibility of not receiving tips from customers was not a protected concerted activity, even though it was made in front of other employees.
- Employer did not have any control over tips.
- Takeaway: Gripping is not a protected activity—the activity must be both concerted and undertaken for purpose of mutual aid or protection. Here, comments were neither.




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### Quicken Loans, Inc.

367 NLRB No. 112

- Employee was terminated for listening to another employee’s personal gripes in employer’s (public) restroom and stated, “I understand why you are frustrated.”
- Supervisor was listening in the stall!

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**Quicken Loans, Inc.**

**367 NLRB No. 112**

- Both employees were terminated.
- NLRB found this statement was not protected concerted activity because it did not hold goal of "mutual aid or protection."




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**Protected Concerted Activity**

- Takeaway: Where an employee is expressing a personal complaint, there is no protected activity.
- Behind the scenes: Second employee had a spotty work history.




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**Advice Memorandum**

**General Motors, 07-CA-053570**

- Employer did not violate Act when it terminated an employee for posting a derogatory comment on employer's Facebook page.

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### Advice Memorandum

General Motors, 07-CA-053570

- It has come to my attention that someone did not like my "foul language" in my postings last week and decided to report me. Well, I believe I am still an American have this thing called "the Right to Free Speech." If you are offended at foul language then you have every right not to read what I write. So, to the person who reported me, kiss my a\*\*!

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### Advice Memorandum

General Motors, 07-CA-053570

- NLRB opined that comment expressed that employee's personal anger with a co-worker and made on his own behalf and did not involve common concerns.




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### Protected Concerted Activity

- Takeaways:
  - Gripping is not protected.
  - Individual complaints are not protected.
  - Mere presence of other employees does not deem any action concerted activity.
  - Overly broad policy can still be actionable.




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## Independent Contractors Cannot Unionize

- NLRB has revised its test for employee status, making it easier for some employers to stop workers from forming unions or bringing federal labor complaints.
- *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019)




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## *SuperShuttle DFW, Inc.* 367 NLRB No. 75 (2019)

- Court found van operators for Dallas-Fort Worth branch of airport shuttle company could not form a union because they are independent contractors who are not protected by the NLRA.
- Dissenting opinion: "the Federal government is backtracking on who's an employee and who's an independent contractor." Constangy Shea.




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## Contract Coverage Standard

- Standard for determining whether a unionized employer's unilateral change in a term or condition of employment violates the National Labor Relations Act
- *M.V. Transportation, Inc.* (28-CA-173726; 368 NLRB No. 66)




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**M.V. Transportation, Inc.**

**(28-CA-173726; 368 NLRB No. 66)**

- NLRB will examine plain language of parties' collective bargaining agreement to determine whether change made by employer was within scope of contractual language, granting employer right to act unilaterally. If it was, NLRB will honor plain terms of parties' agreement, and employer will not have violated the Act by making changes without bargaining.

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**M.V. Transportation, Inc.**

**(28-CA-173726; 368 NLRB No. 66)**

- Mandatory subjects of bargaining — before NLRB would examine behavior of the parties to determine if there was a waiver




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**Contract Coverage Standard**

- Contract Coverage Test
- Avoids arbitrary interpretation
- Ensures the parties have engaged in meaningful negotiation
- Parties are in control.

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### Contract Coverage Standard

- Takeaway: Language of the collective bargaining agreement controls!



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### Mandatory Arbitration

- Cordia Restaurants, Inc.*, 368 NLRB No. 43 (2019)
- Employers are not prohibited under NLRA from informing employees that failing or refusing to sign a mandatory arbitration agreement will result in their discharge.

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## Mandatory Arbitration

- Employers are not prohibited under NLRA from promulgating mandatory arbitration agreements in response to employees opting into a collective action under the Fair Labor Standards Act or state wage and hour laws.
- Epic Systems v Lewis*

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## Mandatory Arbitration

- Court held that employers can force workers to waive the right to file class actions and, instead, require them to go through individual arbitrations if they think their rights have been violated. *Epic Systems v Lewis*
- Cordua restaurants goes even a step further.




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## Post Arbitration

- NLRB has returned to its traditional standard for post-arbitral deferral, when considering arbitrator's prior resolution of a grievance concerning discipline or discharge that allegedly violated the NLRB.
- Under restored standard, NLRB will defer to arbitrator's decision if:
  - Arbitral proceedings appear to have been fair and regular

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### Post Arbitration

- All parties have agreed to be bound.
  - Arbitrator considered the unfair labor practice issue.
  - Arbitrator's decision is not clearly repugnant to Act.
- United Parcel Service, Inc.*, 369 NLRB, December 2019




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### Profane & Offensive Outbursts

- NLRB is seeking input on exactly when do offensive outbursts become egregious enough to lose the protection of federal labor law.
- General Motors case—Worker Charles Robinson complained to board about being suspended for an outburst in which he repeatedly directed the F-word at a supervisor.

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### Profane & Offensive Outbursts

- "Shop Talk" or not?
- Comments on previous cases, including:
  - *Plaza Auto Center*, 360 NLRB 972 (2014)—worker claimed protection under NLRA from profane language
  - *Pier Sixty, LLC*, 362 NLRB 505 (2015)—involving a profane Facebook post
  - *Cooper Tire*, 363 NLRB No. 194 (2016)—involving racist picket-line comments




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### Plaza Auto Center

- Non-unionized auto company
- Salesman challenged policies and was told to stop asking so many questions or quit.
- Salesman called manager a “f\*\*\*ing crook” and an “a-hole” (also that he was stupid and nobody liked him).
- Four factor test from *Atlantic Steel*: (1) Place, (2) subject matter, (3) nature of outburst and (4) provocation




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### Pier Sixty, LLC

- Service industry employees undergoing certification vote
- Enunciated a different test—whether employee’s conduct was “opprobrious.”
- Consider employee’s Facebook post:
  - Bob is such a Nasty Mother F\*\*\*er don’t know how to talk to people!!!! Eff his mother and his entire effing family!!!! What a loser! Vote YES for the Union!!!!

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### Pier Sixty, LLC

- BUT consider employer’s behavior....
- Completely different test:
  - (1) Employer antiunion animus (2) provocation (3) impulsive reaction or deliberate (4) location (5) subject matter (6) nature of the social media post (7) whether employer allowed such language (8) employer rule(s), and (9) discipline of other employees—for same or similar conduct

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### Pier Sixty, LLC

- Takeaway: If you want a rule to stick, managers have to abide by it as well. (All's fair during election season!)




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### Cooper Tire

- Racial epithets during a CBA lockout
- Picket lines / replacement workers – *emotionally charged situation*
- Three members of union were terminated. Following execution of new CBA – two officials were brought back except one.

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### Cooper Tire

- Comments to black replacement workers: “Hey, did you bring enough KFC for everyone?” and “Hey, anybody smell that? I smell fried chicken and watermelon.”

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### Cooper Tire

- Arbitrator: Use of racial slurs on picket line increased possibility that constant verbal exchanges between picketers and replacement workers would escalate into violence.
- Board Test: Striker’s or picketer’s use of even most vile language and/or gestures, standing alone, does not forfeit protection of the Act, so long as those actions do not constitute a threat.

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### Cooper Tire

- KFC and fried chicken comments were racist, offensive and reprehensible, but they were not violent in nature and did not contain any overt or implied threats to replacement workers or their property.




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### Profane Outbursts

- Takeaway: Unless employee incites actual violence or uses threats of violence, NLRB will allow racial epithets within context of a picket line.
- So what’s positive?!

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### Profane Outbursts

- NLRB is clearly uncomfortable with two things: (1) lack of a single standard in these cases and (2) egregious nature of these cases.
- New standard should be espoused that employer's will know and be able to follow.



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### Limiting Access to Employer Property

- Kroger Limited Partnership I Mid-Atlantic and United Food and Commercial Workers Union Local 400, case number 05-CA-155160
- NLRB held that managers at Kroger supermarket in Virginia were on solid ground when they asked police to expel union representatives from a shared shopping center parking area.

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### Limiting Access to Employer Property

- Reasoning: Protest and boycott activities are not sufficiently similar in nature to charitable, civic, or commercial activities to warrant a finding of discrimination based on disparate treatment of such conduct, regardless of the amount of charitable, civic or commercial activities permitted.



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### Employer Right to Restrict Use of Email

- *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, December 17, 2019
  - Overruled *Purple Communications*, holding that employees do not have statutory right to use employer’s email and other IT resources to engage in non-work related communications

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### Employer Right to Restrict Use of Email

- Employers have right to control use of their equipment, as long as they don’t discriminate against union or other protected concerted communications



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### Confidentiality in Investigations

- NLRB just overturned a 2015 decision which required employers to prove on a case-by-case basis, that requiring confidentiality was required to preserve integrity of investigations.
- In *Apogee Retail LLC d/b/a Unique Thrift Store*, December 2019, the NLRB determined:

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## Investigations

- That investigative confidentiality rules limited to duration of investigation are generally lawful




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## Social Media Policies

- Employer policies cannot chill rights under Section 7.
- NLRB Memo re Coastal Industries, Inc.
- General rule against disparaging company on social media, absent limiting context or language, would cause employees to refrain from publicly criticizing employment problems on social media.

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## NLRB Memo re Coastal Industries, Inc.

- “All information gathered by, retained or generated by the company is confidential” is too broad such that workers could believe it included information about their working conditions and pay.




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## Social Media Policies

- Provides context under which employers can prepare their social media policies because those policies are legal!
- However, refer to Advice Memorandum to General Motors, which will provide a map to a policy being overly broad.



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## Questions?



**Sydney R. Puricelli**  
(248) 594-6246  
spuricelli@plunkettcooney.com



**Laura M. Dinon**  
(231) 348-6417  
ldinon@plunkettcooney.com



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## Post-Webinar Survey



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## Continuing Education Credits




SHRM


SHRM-CP | SHRM-SCP

**RECERTIFICATION PROVIDER**

2019



Winds of Change



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## Event Page ... Please Share!

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Sydney R. Purcell

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**Register Now: Winds of Change Webinar**

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6/15 Webinar  
01/16/2020 | Noon to 1:15 p.m.  
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Winds of Change

SHRM ABILITY MANAGEMENT TRACK: EMPLOYERS

Date: January 16, 2020  
Time: Noon to 1:15 p.m.  
Cost: Complimentary

The National Labor Relations Board is traditionally known as being employee friendly. However, under the Trump Administration, employers are being their voices heard.



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## Upcoming Event




Be My Valentine  
(or Elsie!)


Dealing with Dark Tales from the Workplace

Feb. 7 Employment Law Seminar

Feb. 7 • Troy Marriott Hotel • 8 a.m. Registration • 8:30 a.m. to noon Seminar



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## Please Follow, Like & Share!

The screenshot shows the Plunkett Cooney website. At the top, the navigation menu includes Home, About, Archives, Contact, and Contribute, along with the website URL www.plunkettcooney.com. The main content area features a header for 'THE SOPHISTICATED EMPLOYER BLOG' with the tagline 'Your legal resource for workforce management!'. Below this, there is a featured article titled 'Michigan Supreme Court Decides not to Issue Advisory Opinion on Constitutionality of the PMLA' with a sub-headline 'Supreme Court's decision leaves Michigan's Paid Medical Leave Act intact, for now'. A 'Subscribe' section is visible on the left, offering options for RSS, Email, and social media links for LinkedIn, Twitter, and Facebook. The footer contains the 'Winds of Change' logo and the Plunkett Cooney tagline 'DETERMINED. DISTINCTIVE. FEASIBLE.'.

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## Have a Great Day!

The screenshot shows a 'Thank You' message on the Plunkett Cooney website. The text 'Thank You' is written in a large, elegant, cursive font. The footer features the 'Winds of Change' logo and the Plunkett Cooney tagline 'DETERMINED. DISTINCTIVE. FEASIBLE.'.

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