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Frank D. LoMonte

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When a Leak Becomes a Lifeline: Reinvigorating Federal Labor Law to Protect Media Whistleblowing About Workplace Safety

Frank D. LoMonte*

I. INTRODUCTION

At workplaces across the United States, the COVID-19 pandemic brought with it an epidemic of threats and firings as employee whistleblowers spoke out publicly about their concerns over safety inadequacies. In Bellingham, Washington, an emergency room physician said he was removed from his job for talking to a reporter about his Facebook post pleading for hospitals to provide workers with more protective masks.¹ A hospital chain in New York City circulated a memo warning employees they could be terminated for talking to the media without authorization.²

The silencing of employee dissent is not limited to the medical field. Distribution giant Amazon confirmed that it fired two tech workers critical of the company's coronavirus safety precautions because they violated a company policy against commenting publicly on Amazon's business

* Professor and Director of the Joseph L. Brechner Center for Freedom of Information at the University of Florida in Gainesville, Florida. B.A., 1992, Political Science, Georgia State University; J.D. (Order of the Coif), 2000, University of Georgia School of Law. Panelist, Seattle Journal for Social Justice Symposium 2021: Workers' Rights in the Wake of a Global Pandemic.

¹ Ron Judd, *ER Doctor Who Criticized Bellingham Hospital's Coronavirus Protections Has Been Fired*, SEATTLE TIMES (Aug. 2, 2020), <https://www.seattletimes.com/seattle-news/health/er-doctor-who-criticized-bellingham-hospitals-coronavirus-protections-has-been-fired/> [https://perma.cc/YQU2-6A5E].

² Olivia Carville, Emma Court & Kristen V. Brown, *Hospitals Tell Doctors They'll Be Fired if They Speak Out About Lack of Gear*, BLOOMBERG NEWS (Mar. 31, 2020), <https://www.bloomberg.com/news/articles/2020-03-31/hospitals-tell-doctors-they-ll-be-fired-if-they-talk-to-press> [https://perma.cc/8REL-BGS2].

practices without supervisory approval.³ A company vice president noisily resigned in protest, declaring that the firings were “designed to create a climate of fear.”⁴ These retaliatory personnel decisions are not limited to COVID-19 whistleblowing. In Indiana, a hospital discharge planner was fired after she spoke to the *New York Times* about her concern that nursing homes were “dumping” unprofitable patients on her hospital in violation of federal law.⁵

Remarkably, employers everywhere seem convinced that they have total control over what employees say to the press and public—even though federal regulators have told them, repeatedly, that they do not.

The latest reminder came in March 2020 in *Maine Coast Regional Health*, a case that involved whistle-blowing speech by a hospital insider. In that case, three Trump administration appointees to the National Labor Relations Board (NLRB) reaffirmed the Board’s longstanding position that categorical prohibitions on speaking to the news media are unlawful.⁶

The ruling in *Maine Coast Regional Health* was somewhat surprising, given the pro-management, anti-worker tone of recent NLRB decisions.⁷

³ Kari Paul, *Amazon Fires Two Employees Who Condemned Treatment of Warehouse Workers*, GUARDIAN (Apr. 14, 2020), <https://www.theguardian.com/technology/2020/apr/14/amazon-workers-fired-coronavirus-emily-cunningham-maren-costa> [<https://perma.cc/T3KE-EYQT>].

⁴ Jason Koebler, *Amazon VP Resigns, Calls Company ‘Chickenshit’ for Firing Protesting Workers*, VICE (May 4, 2020), https://www.vice.com/en_us/article/z3bjpj/amazon-vp-tim-bray-resigns-calls-company-chickenshit-for-firing-protesting-workers [<https://perma.cc/WJ6S-XBYB>].

⁵ Jessica Silver-Greenberg, *Hospital Employee Is Fired After Speaking to the New York Times*, N.Y. TIMES (Sept. 30, 2020), <https://www.nytimes.com/2020/09/30/business/employee-fired-nursing-homes-new-york-times.html> [<https://perma.cc/MD9Y-LU34>].

⁶ *Me. Coast Reg’l Health Facilities*, 369 NLRB No. 51, 2020 WL 1547466 (Mar. 30, 2020).

⁷ See Lynn Rhinehart, *Under Trump the NLRB Has Gone Completely Rogue*, NATION (Apr. 7, 2020), <https://www.thenation.com/article/politics/nlr-workers-rights-trump/> [<https://perma.cc/NG7P-YJ86>] (“In decision after decision, the NLRB has stripped workers of their protections under the law, restricted their ability to organize at their workplace, slowed down the union election process to give employers more time to

That the Board unanimously found that the Maine hospital broke the law by firing a longtime employee for writing a critical letter published in her local newspaper demonstrates how deeply ingrained this precedent is, resistant even to party turnover.⁸

Notwithstanding the Board's latest guidance, the NLRB under President Donald Trump's administration sent confusing signals about the extent of workplace speech protections. The confusion might understandably leave workers—and the journalists who need access to them—uncertain about when the law will and will not prevent employers from retaliating if employees give interviews without authorization. The fundamental right not to be fired for speech should not vary depending on which party happens to hold the majority of seats on the NLRB. The right should be codified, unmistakably, in federal law.

When employers disregard employees' rights to speak to the media, news coverage suffers. Journalists are left with the unpalatable options of relying on unnamed sources or quoting party-line spin from corporate spokespeople. Audiences must make do with incomplete accounts of how pseudonymous workers struggle to maintain hygiene in unnamed hospitals in unspecified locations.⁹

This article attempts to amplify a little-noted body of precedent that guarantees private-sector employees the right to discuss work-related matters with the media without fear. This right, the article observes, is of special urgency at a time of global health crisis when the public needs to hear from trustworthy subject-matter experts and to experience the stress and suffering of front-line medical workers. Because of mixed messages sent by the Trump-dominated NLRB, the article concludes, Congress

campaign against the union, repealed rules holding employers accountable for their actions, and undermined workers' bargaining rights.'")

⁸ Me. Coast Reg'l Health Facilities, 369 NLRB No. 51, 2020 WL 1547466, at *2.

⁹ E.g. Jamie Ducharme, 'No One Mentions the People Who Clean It Up': What It's Like to Clean Professionally During the COVID-19 Outbreak, TIME (Mar. 31, 2020), <https://time.com/5810911/covid-19-cleaners-janitors/> [<https://perma.cc/F6CP-NJUK>].

should clarify the longstanding principle that employers cannot gag their employees from discussing workplace concerns with the press.

Section II explains federal labor law protections and how regulators resolve complaints of unfair labor practices. Section III focuses on one particular right—the right to speak out about workplace concerns outside the chain of command—and how free speech became accepted as a necessary adjunct to the right to organize. It looks specifically at how healthcare institutions have become a regular flashpoint in the debate over what constitutes legally protected speech that employers may not punish. Section IV then focuses on how the Trump-appointed NLRB rolled back workplace retaliation protections and how the *Maine Coast Regional Health* case left intact a firewall protecting workers against extreme constraints on their speech. Section V discusses the confusing signals sent by the NLRB in recent rulings and attempts to reconcile the current state of employees’ free-speech rights. Section VI explores how tech giants Google and Tesla became the latest to face a reckoning over unduly heavy confidentiality rules. Finally, Section VII considers why it is important for workers to have the legally protected right to discuss work-related matters with the news media and how to safeguard that right more securely.

II. THE NATIONAL LABOR RELATIONS ACT: WHO AND WHAT IS PROTECTED?

In 1935, Congress passed the National Labor Relations Act (NLRA)¹⁰ to protect workers against abusive employment practices by securing the right to organize and bargain for better working conditions.¹¹ The statute grants

¹⁰ National Labor Relations Act, 29 U.S.C. §§ 151–69.

¹¹ See Lucas Novaes, *It’s Time to Stop Punting on College Athletes’ Rights: Implications of Columbia University on the Collective Bargaining Rights of College Athletes*, 66 AM. U. L. REV. 1533, 1540 (2017) (“[T]he Act is more than just a tool for preventing the disruption of labor by labor-management disputes. In granting a triad of rights to employees, the Act was, as Senator Wagner described, an affirmative vehicle for economic and social progress. Truly, Congress designed the Act to shield workers from

employees at NLRA-covered workplaces a wide range of protections, including the right to “self-organization,” to join labor unions, and to bargain collectively.¹² The NLRA outlaws specified “unfair labor practices,”¹³ and empowers a five-member panel of presidential appointees, the National Labor Relations Board (“NLRB”), to enforce the Act’s provisions.¹⁴

Section 7 of the NLRA guarantees workers the right to engage in “concerted activities” to advocate for improved workplace conditions.¹⁵ “Concerted activity” means speech or action “made on behalf of other employees” or undertaken “with the object of inducing or preparing for group action.”¹⁶ Speech qualifies as protected activity “when record evidence demonstrates group activities whether or not they are ‘specifically authorized.’ Moreover, individual activities that are the ‘logical outgrowth of concerns expressed by the employees collectively’ are concerted under the Act.”¹⁷

The NLRB has exclusive jurisdiction to resolve Section 7 claims, so an aggrieved employee’s recourse is to file a complaint with the Board (although Board actions are ultimately appealable through the federal courts).¹⁸ Once the NLRB’s regional legal counsel agrees to open a case,

employers who exploit them by threatening discharge as a self-help tool in combating organizing efforts.”) (citations omitted); *see also* Tim Robinson, *Outkicking the Coverage: The Unionization of College Athletes*, 77 LA. L. REV. 585, 589 (2016) (“the underlying purpose of the Act was to suppress workplace disputes arising from employers refusing to bargain with their employees”).

¹² 29 U.S.C. § 157.

¹³ 29 U.S.C. § 158(a).

¹⁴ 29 U.S.C. § 153.

¹⁵ 29 U.S.C. § 157.

¹⁶ *Aro, Inc. v. NLRB*, 596 F.2d 713, 718 (6th Cir. 1979).

¹⁷ Ann C. McGinley & Ryan P. McGinley-Stempel, *Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media*, 30 HOFSTRA LAB. & EMP. L.J. 75, 89 (2012) (citations omitted).

¹⁸ *Amalgamated Util. Workers v. Consol. Edison Co. of N.Y.*, 309 U.S. 261, 264–65 (1940).

the NLRB staff becomes the proponent in a quasi-prosecutorial role, so the complainant need not expend resources pursuing the case.¹⁹

In recent years, the Board has taken quite an expansive view of what constitutes speech in preparation for group action. Even an informal remark on a Facebook page can qualify as protected speech if it concerns working conditions and invites others to join in advocating for better treatment.²⁰

The NLRA has significant limits. Only non-supervisory employees are protected, and “supervisor” has a broad reach.²¹ A “supervisor” is statutorily defined 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.²²

Hospital charge nurses have been treated as “supervisory” for purposes of the NLRA, as have junior attorneys at law firms and tenure-track college professors.²³ Certain categories of private employers are beyond the

¹⁹ *Id.* at 265.

²⁰ *See, e.g.,* Hisps. United of Buffalo, Inc., 359 NLRB No. 37 (Dec. 14, 2012) (finding that workers who used an exchange on a personal Facebook wall to vent about a supervisor’s unfairness were engaging in protected activity and could not lawfully be fired because author invited colleagues to join her by writing: “My fellow coworkers how do u feel?”).

²¹ *See* Jeffrey M. Smith, *The Prospects for Continued Protection for Professionals Under the NLRA: Reaction to the Kentucky River Decision and the Expanding Notion of the Supervisor*, 2003 U. ILL. L. REV. 571. 580–81 (2003) (noting a modern trend for the Supreme Court to read “supervisory” exemption to NLRA protection broadly, in ways that increasingly exclude professionals such as registered nurses).

²² 29 U.S.C. § 152(11).

²³ *See* GGNSC Springfield LLC v. NLRB, 721 F.3d 403, 412 (6th Cir. 2013) (holding registered nurses are recognized as supervisors because they have authority to direct and discipline nursing assistants); *The Martin L. Grp., LLC*, No. 10-CA-078395, 2013 WL 1886383, slip op. (N.L.R.B. Div. Judges May 6, 2013) (holding associate at small law firm qualified as supervisory because of oversight over paralegal and clerical staff);

NLRB's authority to regulate, including nonprofit educational institutions that provide a religious educational environment.²⁴

For the NLRA to apply, the business must engage in some discernible level of interstate commerce.²⁵ For most industries, the trigger is \$50,000 a year in annual interstate business, but for some, such as shopping centers and hospitals, the threshold is based on overall gross revenues.²⁶ Hence, a hospital with annual revenues exceeding \$250,000 will be subject to the NLRA regardless of its interstate activity.²⁷ Employees at nonprofit hospitals, whose status was long a matter of dispute, were expressly included within the NLRA's coverage by a 1974 amendment.²⁸

Most importantly, the NLRA does not apply to the government workplace.²⁹ So a rule forbidding employees of a state-owned hospital from speaking to journalists could not be challenged to the NLRB. Instead, an aggrieved employee would have a claim under the First Amendment, which applies only to government employers.³⁰ The First Amendment, like the

NLRB v. Yeshiva Univ., 444 U.S. 672, 686 (1980) (holding university professors are supervisory for NLRA purposes where they exercise discretion over curriculum, course scheduling, graduation standards, and other core institutional functions).

²⁴ See *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824, 832 (2020) (explaining that “the Board lacks jurisdiction if the school (1) holds itself out to the public as a religious institution . . . ; (2) is nonprofit; and (3) is religiously affiliated.”).

²⁵ NLRB, *Jurisdictional Standards*, <https://www.nlr.gov/about-nlr/rights-protect/the-law/jurisdictional-standards> [https://perma.cc/G9VQ-DP8T].

²⁶ *Id.*

²⁷ *Id.*

²⁸ Pub. L. No. 93-360, 88 Stat. 395 (July 26, 1974).

²⁹ See Jessica A. Magaldi & Jonathan S. Sales, *Exploring the NLRB's Jurisprudence Concerning Work Rules: Guidance on the Limits of Employer Policy to Regulate Employee Activity on Social Media*, 52 U.S.F. L. REV. 229, 236 (2018) (identifying categories of workers outside the Act's protection, including “public sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse,” among others).

³⁰ See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) (“The text and original meaning of those Amendments, as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech.”) (emphasis in original).

NLRA, is understood to outlaw broad gag orders, and unlike the NLRA, it applies to agencies of all sizes and protects employees of all ranks.³¹

Notably, principles of legal standing that normally preclude a bystander from filing a claim asserting injuries to third parties are relaxed in the NLRB setting. Board rules allow “any person” to file a charge against any other person engaged in an unfair labor practice.³² There does not appear to be any barrier to an organization aggrieved by its inability to speak to employees, such as a news media outlet, from being the complainant initiating an NLRB case. However, there is no indication that news organizations have ever tried this tactic.

Importantly, the NLRA proscription against gag orders is just one of an array of federal and state protections for workers who speak out about health and safety concerns. The U.S. Department of Labor recently reminded employers that, in many industries, federal whistle-blower protection laws outlaw retaliation against employees who alert regulators of safety hazards.³³ What is unique about the NLRA, however, is that it protects not just speech to auditors, investigators, and other oversight agencies, but also speech directed to a public audience.³⁴

³¹ Frank D. LoMonte, *Putting the ‘Public’ Back into Public Employment: A Roadmap for Challenging Prior Restraints that Prohibit Government Employees from Speaking to the News Media*, 68 KAN. L. REV. 1 (2019).

³² 29 C.F.R. § 102.9 (2017).

³³ *U.S. Department of Labor Reminds Employers that They Cannot Retaliate Against Workers Reporting Unsafe Conditions During Coronavirus Pandemic*, U.S. DEP’T OF LAB. (Apr. 8, 2020), <https://www.dol.gov/newsroom/releases/osha/osha20200408> [<https://perma.cc/PU6U-2WQ9>]; *You Cannot Retaliate Against Workers Reporting Unsafe Conditions, Cautions the DOL*, OCCUPATIONAL HEALTH & SAFETY (Apr. 10, 2020), <https://ohsonline.com/articles/2020/04/10/you-cannot-retaliate-against-workers-reporting-unsafe-conditions-cautions-the-dol.aspx> [<https://perma.cc/5V3R-BB72>].

³⁴ See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) (recognizing that employees’ NLRB-protected right to act in the interests of “mutual aid or protection” includes the right to “improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.”).

III. THE RIGHT TO BLOW THE WHISTLE

For decades, regulators have understood the NLRA to forbid private-sector employers from proscribing their employees from discussing work-related issues with the news media. The NLRB has interpreted Section 7 to apply to discussing workplace issues with journalists because workers may seek to enlist public support to change their employer's practices.³⁵ So, in the Board's view, a policy requiring employees to keep all work-related information confidential or to clear all interactions with journalists with a supervisor or public relations officer is an unlawful labor practice.³⁶ The Board understands the right to give interviews without pre-approval to be an extension of the right to engage in protected organizing activity without needing the employer's permission.³⁷ As an NLRB judge observed in invalidating a workplace rule that forbade sharing "any information" about the company with the news media without sign-off from a company executive:

Certainly one can imagine a situation where employees who are unhappy with their wages, hours, or terms and conditions of employment may be interested in bringing their complaints to the attention of the local press, with the hope that adverse publicity, as

³⁵ See *Leather Ctr., Inc.*, 312 NLRB No. 83, 1993 WL 391151 (Sept. 30, 1993), at **14 ("The Board has consistently held employees have a right under Section 7 of the Act to convey their complaints or grievances against their employers to representatives of the media as well as other third parties, in an effort to secure favorable coverage and/or aid and support.").

³⁶ *Id.*; see also *Remington Lodging & Hosp., LLC*, 362 NLRB No. 123, 2015 WL 3814051 (June 18, 2015), at **2 (ordering hotel to rescind handbook rule forbidding employees from giving any information to the news media "regarding the hotel, its guests, or associates, without authorization from the General Manager and to direct such inquiries to his attention"); *Double Eagle Hotel & Casino*, 341 NLRB No. 17, 2004 WL 210355 (Jan. 30, 2004), at **3, **5 (finding that casino violated employees' Section 7 rights by enforcing overbroad media-relations policy that stated: "Without appropriate approval, under no circumstances shall you provide information about the company to the media.").

³⁷ See *Nova Se. Univ. v. NLRB*, 807 F.3d 308, 315 (D.C. Cir. 2015) ("Under long-established Board precedent, an employer may not condition the exercise of section 7 rights upon its own authorization.").

reported in the press, may serve to embarrass the employer, and, thus, exert enough pressure to motivate the employer to improve working conditions. This is the essence of concerted activity, and, as protected conduct, cannot be abridged.³⁸

Time after time, employers caught unlawfully gagging their employees have been told to rewrite their policies. For instance, in 2017, a U.S. district judge in Illinois ordered an airport security contractor, Universal Security, to rescind its policy prohibiting employees from speaking to the media and to reinstate two O’Hare International Airport guards who were fired for violating the policy.³⁹ The employees had complained to the news media about the inadequacy of the training and equipment their employer provided, an obvious matter of public concern where airport safety is implicated.⁴⁰

In 2015, an NLRB judge ordered cellphone carrier T-Mobile to stop enforcing a provision in its employee handbook that stated: “All inquiries from the media must be referred without comment to the Corporate Communications Department.”⁴¹ The administrative law judge (ALJ) rejected the company’s rationalization that the rule prohibited employees only from offering “an official company response” to the media, because the wording lacked any such limiting language: “The rule could reasonabl[y] be viewed by employees as encompassing inquiries about wages, labor disputes, and other terms and conditions of employment.”⁴²

Other examples of media-relations policies struck down as unlawfully broad by the NLRB and federal courts include:

³⁸ Portola Packaging, Inc., 361 NLRB 1316, 1342 (Dec. 16, 2014).

³⁹ Hitterman v. Universal Security, Inc., No. 17 C 2616, 2017 WL 3531519 (N.D. Ill. Aug. 17, 2017).

⁴⁰ See *id.* at *2 (characterizing statements for which guards were fired).

⁴¹ T-Mobile USA, Inc., 2015 L.R.R.M. (BNA) 178934, 2015 WL 1254849, slip op. (N.L.R.B. Div. Judges Mar. 18, 2015).

⁴² *Id.*

- A petroleum company’s media policy instructing workers that it is “against company policy for anyone but . . . authorized company spokespersons to speak to the news media” and that if employees are contacted by the media, “no information exchange is permitted concerning [company] operations.”⁴³
- A resort hotel’s regulation stating: “At no time should any employee, manager, or director of the Resort engage in communication either verbally or in writing, with a member of the news media, without prior approval and direction from either the Human Resources Director or the General Manager.”⁴⁴
- A confection manufacturer’s directive to employees that “all inquiries from the media and other organizations be referred to the corporate office” and that communications with the media must be “specifically authorized.”⁴⁵

Mandatory “confidentiality” policies, even if they do not mention the news media specifically, have fared no better under Section 7 scrutiny. The Board routinely finds confidentiality policies to be unlawfully overbroad if they leave the impression that an employee may face disciplinary action for discussing workplace concerns as a step toward NLRRA-protected organizing activity.⁴⁶ Examples include:

- A trucking line’s employment contract classifying “personnel information and documents” among numerous categories of confidential information that “must stay within” the company.⁴⁷

⁴³ Phillips 66, 2014 NLRB LEXIS 921, at *110, *113 (Nov. 25, 2014).

⁴⁴ Pleasant Travel Servs., Inc., 2010 WL 3982203 (N.L.R.B. Sept. 28, 2010).

⁴⁵ Interbake Foods LLC, 2013 NLRB LEXIS 583, at *371–72 (Aug. 30, 2013).

⁴⁶ *See* Cintas Corp. v. NLRB, 482 F.3d 463, 469–70 (D.C. Cir. 2007) (affirming that employer’s handbook requiring employees to maintain “confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters” was unlawfully broad, and distinguishing more narrowly tailored confidentiality policies that have been found lawful).

⁴⁷ Flex Frac Logistics, L.L.C. v. NLRB, 746 F.3d 205, 207 (5th Cir. 2014).

- A locomotive manufacturer’s pre-employment non-disclosure agreement forbidding employees from discussing “compensation, payments, correspondence, job history, reimbursements, and personnel records” with any third party without supervisory approval.⁴⁸
- A private elementary school’s policy that barred employees from disclosing “any material or information” about the company, specifically including anything about the company’s “financial and business affairs,” and that also prohibited “disparaging remarks” about the company or doing anything harmful to the reputation of the business or its owners.⁴⁹

Among the companies found to be violating the NLRA was the (since-renamed) Trump Marina Casino Resort in Atlantic City. In a 2009 ruling, the NLRB ordered the Trump resort to rescind a company policy providing that only specified top managers could speak with the media after an employee union representative complained that he was reprimanded for violating the policy.⁵⁰

When the case was litigated in 2007, the Trump organization’s lawyers argued that the company’s rules merely provided a process for facilitating interviews, rather than restraining employees from speaking.⁵¹ But an administrative law judge found that a policy requiring supervisory approval before speaking inhibits workers from sharing their concerns with the public.⁵²

A. Political Football: Northwestern Kicks Off “Employee” Speech Showdown

The NLRB operates largely in obscurity but experienced a brief moment of popular-culture prominence during a dispute over the status of college

⁴⁸ Relco Locomotives, Inc., 358 NLRB 229, 242 (Apr. 12, 2012).

⁴⁹ Muse Sch. CA, 2014 WL 4404737, 2014 NLRB LEXIS 688 (Sept. 8, 2014).

⁵⁰ Trump Marina Assocs., Inc., 354 NLRB No. 123, 2009 WL 5178368 (Dec. 31, 2009).

⁵¹ *Id.* at **5.

⁵² *Id.* at **6.

football players. In January 2014, Northwestern University players sought recognition for the purpose of forming a bargaining unit and filed a petition with the NLRB, a first for college sports.⁵³ The case took a rollercoaster ride through the agency. The NLRB's regional counsel found that major-college football—an employer-controlled, revenue-generating activity in which labor is exchanged for compensation—constitutes “employment” for purposes of the NLRA.⁵⁴ In reaching its conclusion, the NLRB cited the control that the university “employer” exercised over athletes' communication with journalists and use of social media.⁵⁵ On appeal, the NLRB decided not to decide. The Board declined to exercise jurisdiction, asserting that it would create an untenable competitive imbalance if private universities, which are subject to NLRB strictures, were held to different standards than the public institutions they play against.⁵⁶ By declining jurisdiction, the Board vacated the regional counsel's opinion, and the status of college athletes, for purposes of federal labor law, remains unresolved.

But Northwestern's game went into overtime. Just as the Board was reaching its decision on the issue of eligibility for unionization, a California labor lawyer filed a complaint alleging that Northwestern was violating the NLRA by restraining football players from speaking freely to the press and public.⁵⁷ Before the Board could act on the complaint, Northwestern

⁵³ Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes' Rights Movement*, 38 CARDOZO L. REV. 1627, 1637 (2017) (discussing history of case).

⁵⁴ *Id.* at 1637–38; see also Nw. Univ., Case No. 13-RC-151359 (N.L.R.B. Mar. 26, 2014), <https://www.nlr.gov/case/13-RC-121359> [<https://perma.unl.edu/3YWC-3MU8>] (Decision and Direction of Election).

⁵⁵ *Id.* at 1638–39.

⁵⁶ Nw. Univ., 362 NLRB No. 167, 2015 WL 4882656 (Aug. 17, 2015).

⁵⁷ Frank D. LoMonte & Virginia Hamrick, *Running the Full-Court Press: How College Athletic Departments Unlawfully Restrict Athletes' Rights to Speak to the News Media*, 99 NEB. L. REV. 86, 126 (2020).

rewrote its Football Handbook to remove the most onerous restrictions.⁵⁸ In response to the complaint, the Board’s associate general counsel issued a September 2016 “Advice Memorandum” identifying the policies that *would* have been deemed unlawful had they not been removed from the handbook.⁵⁹ Among the practices flagged as contrary to the NLRA were requirements that athletes receive approval before speaking with the press and that they say only “positive” things to the media.⁶⁰ Because Northwestern ameliorated the past unlawful practices in its revised manual, the Board decided to close the case without taking action.⁶¹

The revised Northwestern handbook provides something of a roadmap for the type of workplace speech policies that the NLRA will permit.⁶² For instance, the university removed a passage stating: “You should never agree to an interview unless the interview has been arranged by the athletic communications office. All media requests for interviews with student athletes must be made through athletic communications.”⁶³ In place of a

⁵⁸ Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Nat’l Lab. Rels. Bd., to Peter Sung Ohr, Reg’l Dir. of Region 13 (Sept. 22, 2016) [hereinafter Kearney Memo].

⁵⁹ See Lester Munson, *Free to Tweet: Northwestern’s Restrictions on Football Players Ruled Unlawful*, ESPN (Oct. 10, 2016), https://www.espn.com/espn/otl/story/_/id/17765516/nlrb-rules-northwestern-restrictions-unlawful [<https://perma.cc/ES9D-TYX5>].

⁶⁰ See Roger M. Groves, *Memorandum from Student-Athletes to Schools: My Social Media Posts Regarding My Coaches or My Causes Are Protected Speech—How the NLRB Is Restructuring Rights of Student-Athletes in Private Institutions*, 78 LA. L. REV. 69, 120 (2017) (discussing the Northwestern memorandum and observing that “if a student-athlete at a private school chose to speak to the media directly about working conditions, practice times, coach interruptions of classes, dangerous practice conditions, or failure to follow concussion protocol, for example, Section 7 protects the student-athlete’s right to do so.”).

⁶¹ Kearney Memo, *supra* note 58, at 6.

⁶² See Michael Pego, *The Delusion of Amateurism in College Sports: Why Scholarship Student Athletes Are Destined to Be Considered “Employees” Under the NLRA*, 13 FIU L. REV. 277, 308 (2018) (stating that the NLRB’s Kearney memorandum “sent a clear warning” to private universities about what level of control over athletes will be tolerated if they are deemed to be statutory employees).

⁶³ Kearney Memo, *supra* note 58, at 5.

restraint on communicating, the revised handbook wording, deemed lawful by the NLRB, merely offers the employer's assistance as an option:

As responsible student athletes, you may directly speak with members of the media if you choose to do so. If you are contacted directly by the media . . . you have the option of referring the media to the athletic communications office for a response or to personally speak with the media representative.⁶⁴

This language represents a compromise position, demonstrating that it is possible for an employer to help media-shy employees field interview requests without intimidating them from speaking out candidly if they are comfortable doing so.

B. Critical Care: The NLRA and Hospital Employee Speech

Perhaps predictably, hospitals and other healthcare institutions have been frequent battlegrounds over employee speech rights. Understandably, hospitals are protective of confidentiality because of statutory privacy duties, including the Health Insurance Portability and Accountability Act (HIPAA), which requires healthcare providers to maintain the confidentiality of patient records.⁶⁵ But when confidentiality policies are broadly drawn to inhibit employees from discussing concerns over working conditions, the NLRA is implicated.

The NLRB has often supported the speech rights of employees in the healthcare field. In a 1975 case, the Board sided with two nurses who were punished for writing letters to the local newspaper and interviewing with a TV news station to publicize their complaints about pay and working conditions at the local hospital.⁶⁶ Similarly, in 1982, an appellate court affirmed the Board's finding that a nurse engaged in protected activity when he wrote a complaint letter to the local newspaper after his superiors

⁶⁴ *Id.*

⁶⁵ Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320d-6 (1996).

⁶⁶ *Cnty. Hosp. of Roanoke Valley, Inc.*, 220 NLRB No. 50 (1975).

failed to offer him redress for low pay and poor working conditions because the letter referenced the plight of other employees and was part of a series of discussions with co-workers.⁶⁷ In a 2002 case, a federal appeals court upheld the Board’s determination that a Massachusetts hospital violated the NLRA by enforcing an overbroad prohibition forbidding employees from discussing “hospital operations” with anyone, “except strictly in connection with hospital business.”⁶⁸ And in a ruling just after Trump took office, the D.C. Circuit affirmed the Board’s decision that an Arizona hospital’s confidentiality policy, which threatened termination and legal action against anyone caught discussing “private employee information” without authorization, was unlawfully overbroad; however, the decision indicated that the hospital could legitimately enforce a narrower proscription against discussing ongoing investigations of personnel issues.⁶⁹ In sum, decades’ worth of NLRA precedent establishes that healthcare institutions can neither punish covered employees from sharing workplace concerns with the media nor enforce blanket confidentiality rules that inhibit taking complaints public.⁷⁰

C. Punishment for “Disloyal” Speech Versus Blanket Pre-Speech Restraints

Importantly, the right to speak is not absolute. The NLRA allows employers to penalize employees for leaking trade secrets, disclosing

⁶⁷ NLRB v. Mount Desert Island Hosp., 695 F.2d 634, 639–40 (1st Cir. 1982).

⁶⁸ Brockton Hosp. v. NLRB, 294 F.3d 1000, 106–07 (D.C. Cir. 2002).

⁶⁹ Banner Health Sys. v. NLRB, 851 F.3d 35, 41–42 (D.C. Cir. 2017).

⁷⁰ In a case that went against the employee speaker, *St. Luke’s Episcopal-Presbyterian Hosp., Inc. v. NLRB*, a nurse who gave a television interview accusing her employer of jeopardizing patient health by altering nurses’ shifts and assignments was found to have engaged in materially false disparagement. *St. Luke’s Episcopal-Presbyterian Hosp., Inc. v. NLRB*, 268 F.3d 575, 580 (8th Cir. 2001). The case exemplifies that, while employers may not discipline employees merely for violating a prohibition against giving interviews, they still may impose sanctions if the speech amounts to maliciously sabotaging the employer’s business.

confidential customer information, or falsely holding themselves out as speaking on the company's behalf.⁷¹

There is a crucial distinction between firing an employee for violating a blanket no-interview policy, which is clearly unlawful, and firing an employee for the content of speech that damages the employer's business. A different analysis applies when the punishment is about the substance of what the employee said, instead of the decision to grant the interview.

The NLRB analyzes content-motivated, punitive actions under a similar framework that applies to public employees' First Amendment claims under the Supreme Court's *Pickering v. Board of Education* decision.⁷² Under *Pickering*, once it is established that an employee has spoken as a citizen addressing a matter of public concern, disciplinary action is unlawful unless the employer's interest in avoiding workplace disruption outweighs the employee's right to speak.⁷³

Similarly, even when a private-sector employee engages in NLRA-protected speech, the employer can still prevail if it shows that the employee's speech was so extremely "disloyal" that it amounted to an attempt to sabotage the employer's business, such as falsely maligning the employer's product.⁷⁴ For instance, in its oft-cited *Jefferson Standard* decision, the Supreme Court found speech to be unprotected when striking

⁷¹ For instance, in *NLRB v. Knuth Bros., Inc.*, a federal appeals court found that a printing company employee exceeded the boundaries of NLRB-protected speech by divulging confidential information "in reckless disregard of his employer's business interests." *NLRB v. Knuth Bros., Inc.*, 537 F.2d 950, 956 (7th Cir. 1976). In that case, a union organizer working in a printing plant went behind the back of the customer who placed a printing order and directly contacted that customer's business partner, sharing information that jeopardized the printing order, which was beyond the scope of his authority with the company. *See id.* at 955.

⁷² *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

⁷³ *Id.* at 568.

⁷⁴ *See Sierra Publ'g Co. v. NLRB*, 889 F.2d 210, 217–18 (9th Cir. 1989) (finding that a labor union representing newspaper employees engaged in protected speech that did not meet the legal standard of "disloyalty" even though the union's letter to newspaper advertisers depicted the employer's business as struggling).

TV broadcast technicians distributed thousands of “vitriolic” handbills denouncing the substandard quality of programming their employer offered, a broadside at the company unrelated to working conditions.⁷⁵ Conversely, the Board found no punishable disloyalty when satellite television technicians complained to a news reporter that their employer’s compensation system financially penalized them if they failed to sell customers unnecessary additional equipment because the statements were not “maliciously untrue.”⁷⁶ The “disloyalty” cases, however, are about specific instances of speech, and not about a blanket prohibition against discussing anything work-related with the press or public.

Despite three decades’ worth of unbroken precedent from the NLRB and federal courts finding the policies unlawful, broad “media gag” policies remain pervasive across every industry, even at law firms and media companies. A 2019 study by the Brechner Center for Freedom of Information found that handbook rules categorically prohibiting employees from discussing work-related matters with the media were in force at workplaces throughout the country and were readily discoverable online, suggesting that the employers believed there was nothing wrong with enforcing such prohibitions.⁷⁷ This belief may be because the “media gag” policies are the handiwork of public-relations officers who lack legal training, or it may be because companies are willing to risk a finding of illegality in exchange for greater image control. The typical “sanction” for

⁷⁵ NLRB v. Local Union No. 1229 (Jefferson Standard), 346 U.S. 464, 476 (1953) (holding although criticism of the employer took place during a worker-rights dispute, the speech was unprotected because it “attacked public policies of the company which had no discernible relation to that controversy”).

⁷⁶ Mastec Advanced Techs., 357 NLRB No. 17 (July 21, 2011); *see also* Sierra Publ’g Co., 889 F.2d at 216–17 (collecting cases in which NLRB found speech to be protected even though it was harshly critical of the employer).

⁷⁷ Frank LoMonte, *Private Employers: You Can’t Forbid Your Workers from Talking to Journalists*, POYNTER (Jan. 14, 2019), <https://www.poynter.org/reporting-editing/2019/private-employers-you-cant-forbid-your-workers-from-talking-to-journalists/> [https://perma.cc/K7QH-S5FQ].

enforcing an overbroad media policy is nothing more than an order to rescind it, which is hardly a compelling deterrent.⁷⁸

IV. A RIGHT TURN, BUT NOT A U-TURN: THE TRUMP NLRB AND THE *MAINE COAST REGIONAL HEALTH* CASE

The case of fired whistleblower Karen Jo Young came before the NLRB at an uncertain time for workers' rights.⁷⁹ After Donald Trump became president in January 2017 and began putting his stamp on the agency, the NLRB began disowning some of its previous pro-employee positions.⁸⁰

For example, in December 2017, the Board withdrew guidance issued by the Obama Administration that cautioned employers against telling employees that their off-hours, personal social media use was subject to monitoring or that they were obligated to post only favorable comments about the business.⁸¹ In March 2020, the Board overruled its prior precedent that categorically forbade including "non-assistance" language in severance agreements to prevent departing employees from supporting the labor complaints of their former co-workers.⁸² Perhaps the most high-profile instance came from a dispute involving rideshare workers in California, for which the Board's general counsel issued an interpretation that Uber and

⁷⁸ See, e.g., *Cintas Corp. v. NLRB*, 482 F.3d 463, 466 (D.C. Cir. 2007) (noting that after finding that an apparel manufacturer maintained unlawful handbook provisions, the NLRB ordered that employer to rescind the handbook, reissue it to employees without the unlawful language, and post a remedial notice).

⁷⁹ *Me. Coast Reg'l Health Facilities*, 369 NLRB No. 51, 2020 WL 1547466 (Mar. 30, 2020).

⁸⁰ See Lynn Rhinehart, *Under Trump the NLRB Has Gone Completely Rogue*, NATION (Apr. 7, 2020), <https://www.thenation.com/article/politics/nlr-workers-rights-trump/> [<https://perma.cc/CKK5-663U>] (presenting liberal critiques of Trump Labor Board policies in the context of employees' need to organize for safety improvements during the COVID-19 pandemic).

⁸¹ See Memorandum from Peter B. Robb, General Counsel, NLRB Off. of the Gen. Couns., to All Regional Directors, Officers-in-Charge & Resident Officers (Dec. 1, 2017) (withdrawing, among others, G.C. Memo 15-04, which set forth the Obama Administration's views on unlawful coercive practices by employers).

⁸² *Baylor Univ. Med. Ctr.*, 369 NLRB No. 43 (2020).

Lyft drivers were not “employees” of the companies for which they drove, disentitling them to the benefit of many labor law protections.⁸³ In an August 2019 report, the progressive-leaning Center for American Progress cited the rideshare opinion and other NLRB decisions as part of what it called the Trump Administration’s “ongoing efforts to stack the deck against American workers.”⁸⁴

The most direct retrenchment on employee speech rights came in a December 2017 ruling involving aircraft company Boeing.⁸⁵ Up until the *Boeing* case, the Board had long maintained that a workplace speech restriction will be struck down, even if it does not overtly mention NLRA-protected activity, if a reasonable worker would understand it to constrain legally protected rights.⁸⁶ This standard traces back to the Board’s 2004 decision in the case of *Lutheran Heritage Village-Livonia*, involving a nursing home’s rule forbidding profane or harassing speech in the work setting.⁸⁷ There, the ALJ decided, and the Board’s majority agreed, that the rule did not unlawfully inhibit Section 7-protected activity, and the ALJ applied a two-step analysis that became the Board’s framework for evaluating workplace speech restrictions.⁸⁸ First, if a rule “explicitly restricts activities protected by Section 7,” then it is unlawful.⁸⁹ If the restriction is not explicit, the Board then inquires whether employees would

⁸³ Vanessa Romo, *Uber Drivers Are Not Employees, National Relations Board Rules. Drivers Saw It Coming*, NPR (May 15, 2019), <https://www.npr.org/2019/05/15/723768986/uber-drivers-are-not-employees-national-relations-board-rules-drivers-saw-it-com> [<https://perma.cc/V6HC-DCGS>].

⁸⁴ SAHARRA GRIFFIN & MALKIE WALL, CTR. FOR AM. PROGRESS ACTION FUND, PRESIDENT TRUMP’S ANTI-WORKER AGENDA (Aug. 28, 2019), <https://cdn.americanprogressaction.org/content/uploads/sites/2/2019/08/28055223/Trump-Anti-Workers-Factsheet.pdf> [<https://perma.cc/G7PV-6NFW>].

⁸⁵ *Boeing Co.*, 365 NLRB No. 154, 2017 WL 6403495 (Dec. 14, 2017).

⁸⁶ *Martin Luther Mem’l Home, Inc. (Lutheran Heritage Village-Livonia)*, 343 NLRB No. 75, 2004 WL 2678632 (Nov. 19, 2004), at **2.

⁸⁷ 343 NLRB No. 75, 2004 WL 2678632 (Nov. 19, 2004).

⁸⁸ *Id.* at **2.

⁸⁹ *Id.* (emphasis in original).

“reasonably construe” the rule as prohibiting Section 7 activity, whether the rule was promulgated in retaliation for protected organizing activity, or whether the rule has actually been applied in an unlawfully speech-restrictive way.⁹⁰ If any of those is true, then under the *Lutheran Heritage* standard, the rule is unenforceable even if facially unobjectionable. As speech-protective as the decision now appears in hindsight, two of the five NLRB members opined that the *Lutheran Heritage* majority opinion did not go far enough. The two dissenters would have declared the nursing home’s policy to be so confusing and overbroad as to constitute an unfair labor practice.⁹¹

In *Boeing*, a more conservative NLRB confronted the legality of a manufacturer’s rule banning employees from using cameras in the workplace.⁹² Under prior NLRB precedent, Boeing’s rule would likely have been invalid because it could be interpreted as forbidding the collection of evidence of safety hazards, a practice that is necessary to advance NLRA-protected advocacy. Instead, the Board explicitly overruled *Lutheran Heritage* and decided that, henceforth, a rule that does not target NLRA-protected activity on its face will not be deemed illegal just because it might sweep in some legally protected conduct.⁹³ Rather, the Board will balance the severity of the rule’s infringement on workers’ rights against the employer’s rationale for the rule.⁹⁴ The Board explained that the *Lutheran Heritage* rule was too absolute in requiring employers to “eliminate all ambiguities from all policies, rules and handbook provisions that might conceivably touch on some type of Section 7 activity,” which the Board regarded as unworkable and inconsistent with the Board’s own past

⁹⁰ *Id.*

⁹¹ *Id.* at **6.

⁹² *Boeing Co.*, 365 NLRB No. 154 (N.L.R.B.), 2017 WL 6403495 (Dec. 14, 2017), at **1.

⁹³ *Id.* at **8–9.

⁹⁴ *Id.* at **4.

practice.⁹⁵ Under its newfound standard, the Board decided that Boeing’s rule did not constitute an unlawful incursion into Section 7-protected rights because the rule was justified by Boeing’s concern for protecting confidential manufacturing techniques, safeguarding employees’ personal privacy, and minimizing the risk that employee name badges could be counterfeited or that information about the plant’s security systems might fall into the hands of terrorists.⁹⁶

In December 2017, just two weeks after the Board issued the *Boeing* decision, Karen Jo Young filed her unfair labor practice case against her former employer, Maine Coast Memorial Hospital.⁹⁷ Young’s case furnished an opportunity for the Board to apply the *Boeing* approach and retreat further from precedent that protected employees against retaliation when they shared workplace concerns with the press and public.

The case began when Young, who worked in the rehab unit at Maine Coast Memorial, wrote a letter to the local newspaper, *The Ellsworth American*, expressing concern over what she perceived as a decline in morale and working conditions after the hospital became part of a larger corporate chain.⁹⁸ In the letter, Young wrote that high turnover of physicians was provoking “unrest, uncertainty and concern among the staff, patients and the community,” and criticized hospital administrators for spending too much time in meetings and “not working where patients are being cared for.”⁹⁹

The day after the letter appeared in the newspaper, Young was called to the hospital’s personnel office and presented with a termination notice.¹⁰⁰

⁹⁵ *Id.* at **10.

⁹⁶ *Id.* at **6–7.

⁹⁷ Me. Coast Reg’l Health Facilities, Case No. 01-CA-209105, Signed Charge Against Employer (Dec. 28, 2017).

⁹⁸ Steve Fuller, *MCMH Staffer Loses Job After Her Letter Published*, ELLSWORTH AM. (Sept. 27, 2017), <https://www.ellsworthamerican.com/featured/mcmh-staffer-loses-job-letter-published/> [<https://perma.cc/AQ9J-QWQ2>].

⁹⁹ *Id.*

¹⁰⁰ *Id.*

The notice informed Young she had violated the media policy of Maine Coast Regional's parent company, Eastern Maine Health Systems ("EMHS").¹⁰¹ The media policy at the time read:

No EMHS employee may contact or release to news media information about EMHS, its member organizations or their subsidiaries without the direct involvement of the EMHS Community Relations Department or of the chief operating officer responsible for that organization. Any employee receiving an inquiry from the media will direct that inquiry to the EMHS Community Relations Department, or Community Relations staff at that organization for appropriate handling.¹⁰²

Young filed both a civil lawsuit (which remains pending) and an NLRB charge of unfair labor practices. On November 2, 2018, an NLRB administrative law judge ruled that Young was fired in violation of the NLRA and ordered her reinstatement.¹⁰³

The ALJ found that the company policy under which Young was discharged violated the NLRA because the policy could reasonably be interpreted to interfere with the exercise of legally protected speech rights: "The Media Policy significantly burdens the exercise of NLRA rights. The Board has repeatedly recognized the importance of employees' communications to the media and other third parties as a means of publicizing labor disputes and drawing an employer's attention to the need for improvements to working conditions."¹⁰⁴ At a hearing before the ALJ, the hospital chain's chief communications officer testified that the purpose of the policy was "to control the company's brand and reputation," as well

¹⁰¹ *Id.*

¹⁰² Me. Coast Reg'l Health Facilities, Case No. 01-CA-209105, 2018 WL 5786016, slip op. at 4 (N.L.R.B. Div. Judges, Nov. 2, 2018).

¹⁰³ *Id.* at 17–18.

¹⁰⁴ *Id.* at 18.

as to provide a “safety net” for employees unaccustomed to talking to reporters.¹⁰⁵

Further, the judge found that the violation was not cured when the company rewrote the policy after Young lodged her complaint; the company had added a disclaimer that the policy “does not apply to communications by employees, not made on behalf of EMHS or a Member Organization, concerning a labor dispute or other concerted communications for the purpose of mutual aid or protection protected by the National Labor Relations Act.”¹⁰⁶ The ALJ found that because the company was still insisting that Young was properly fired even under the revised media policy, the inevitable conclusion was that the policy forbade workers from engaging in protected speech.¹⁰⁷ The judge ordered Young’s reinstatement, with back pay, and directed the employer to post a notice stating in part that hospital policy “does not prohibit you from communicating with the news media, with or without the involvement or permission of the Maine Coast Memorial Hospital or EMHS, regarding employees’ terms and conditions of employment or union activity.”¹⁰⁸

The hospital appealed, and the case sat inactive for months at the NLRB until, on March 30, 2020, the Board agreed that Young’s firing violated the NLRA.¹⁰⁹ In a brief 3-0 opinion, the Board applied the *Boeing* standard and summarily affirmed the ALJ’s finding that the hospital’s original media policy was unlawfully broad.¹¹⁰ Accordingly, because Young was fired in

¹⁰⁵ *Id.* at 5.

¹⁰⁶ *Id.* at 20.

¹⁰⁷ *See id.* (“[D]espite the placement of the saving clause in the relatively brief Media Policy, the only logical conclusion is that the Policy still unlawfully prohibits NLRA protected activity such as that engaged in by Young.”).

¹⁰⁸ *See id.* at Appendix.

¹⁰⁹ *Me. Coast Reg’l Health Facilities*, 369 NLRB No. 51, 2020 WL 1547466 (Mar. 30, 2020).

¹¹⁰ *Id.* at *2.

reliance on an impermissible policy, the Board affirmed that the firing was unlawful and upheld the reinstatement order.¹¹¹

However, the Board reversed the ALJ as to the legality of the hospital's amended media policy.¹¹² The Board found that, with the addition of the disclaimer, no objectively reasonable employee could interpret the amended rule to interfere with NLRA-protected rights.¹¹³ The decision thus represents a half-measure of victory for employee speech rights: As the law stands post-*Boeing*, a media gag policy may no longer be automatically deemed invalid, but an employer still will have difficulty demonstrating why a broad prohibition on speaking to the media is justified. The case is now on appeal to the First Circuit U.S. Court of Appeals,¹¹⁴ but appellate review of NLRB decisions is deferential, and the board will not be overruled so long as its interpretation is supported by substantial evidence.¹¹⁵

V. MUDDLED MESSAGES ON MEDIA MUZZLING

A few months before issuing its opinion in *Maine Coast Regional*, the NLRB decided that a different employer's comparable set of restrictions on communications with the news media did not violate the NLRA. In *L.A. Specialty Produce Co.*, employees of a wholesale food distributor challenged both a confidentiality rule and a media-communications rule in their employer's manual, alleging that their breadth would chill employees

¹¹¹ *Id.* at *5.

¹¹² *Id.* at *3.

¹¹³ *Id.*

¹¹⁴ Thomas F. Harrison, *Covid Amplifies Appeal over Speech Rights of Health Care Workers*, COURTHOUSE NEWS SERV. (Jan. 6, 2021), <https://www.courthousenews.com/covid-amplifies-appeal-over-speech-rights-of-health-care-workers/> [<https://perma.cc/2C8M-UU5B>].

¹¹⁵ See *St. John's Mercy Health Sys. v. NLRB*, 436 F.3d 843, 846 (8th Cir. 2006) ("The Board's construction of the Act is entitled to considerable deference . . . and must be upheld if it is reasonable and consistent with the policies of the Act.") (internal quotes and citation omitted).

from engaging in NLRA-protected speech.¹¹⁶ The media policy provided: “Employees approached for interview and/or comments by the news media, cannot provide them with any information. Our President, Michael Glick, is the only person authorized and designated to comment on Company policies or any event that may affect our organization.”¹¹⁷

The ALJ concluded that the policy constituted an unlawful restraint on the exercise of Section 7 rights, but the full Board disagreed.¹¹⁸

The Board found that the company did not unlawfully gag employees from speaking because even though the first sentence of the policy (“cannot provide them with any information”) acknowledged no exception for NLRA-protected speech, the second sentence effectively narrowed the first.¹¹⁹ That is, a reasonable employee, viewing the policy as a whole, would conclude that it applied only to instances in which employees were asked for comment on the company’s behalf, not as individuals.¹²⁰

Lauren McFerran, at the time the Board’s lone Democrat, wrote a sharply worded dissent, as she did in the *Boeing* case. Because the employer’s media-contact rule was at best ambiguous, she predicted, employees will censor themselves in fear of losing their jobs:

[T]he majority’s speculation that an employee would read the rule to suggest that their employer would prohibit them from talking to media “when approached” but would not care what they said if not approached cannot be taken seriously. No reasonable person, let alone a reasonable employee, would interpret the rule so illogically.¹²¹

¹¹⁶ LA Specialty Produce Co., 368 NLRB No. 93, 2019 WL 5100795 (Oct. 10, 2019).

¹¹⁷ *Id.* at *1.

¹¹⁸ *Id.* at *6.

¹¹⁹ *Id.* at *7.

¹²⁰ *See id.* (“a reasonable employee would understand that he or she is only precluded from speaking *on behalf of the Respondent* when approached for comment”) (emphasis in original).

¹²¹ *See id.* at *13 (McFerran, dissenting).

It is somewhat difficult to square the outcome in *L.A. Specialty* with the outcome, just a few months later, in *Maine Coast Regional Health* (which actually cited *L.A. Specialty* for support).¹²² Notably, the Board did not purport in *L.A. Specialty* to be overruling any of its own past precedents, including such cases as the aforementioned *T-Mobile* and *Phillips 66*, in which policies comparable to LA Specialty Produce Company's were struck down as unduly broad.

Thus, rather than viewing the case as overturning three decades of precedent, the challenge is to harmonize it with other rulings addressing workplace media gags. The best way to reconcile the case with both past and subsequent NLRB precedent is to read the opinion as giving sanction only to policies that restrict employees from holding themselves out as authorized to speak for the employer, which is an unremarkable proposition.

In a footnote, the majority acknowledged that the employer's rule lacked clarity. They stated, "it would be better still if the rule included a statement that employees remain free to express their personal opinions to the media," but that the failure to explicitly state that employees have the right to speak to the media in their individual capacity did not render the rule facially unlawful.¹²³ In other words, even the majority recognized that employees do have a legally protected right to speak to the media about personal opinions and impressions, so a future employee fired for such expression could still mount a Section 7 case even as the law is set forth in *L.A. Specialty*. Still, given the remarkable breadth of the policy that was disputed in *L.A. Specialty Produce*, the case suggests a willingness by the Board to give the benefit of the doubt to the employer when policies are unclear.

¹²² Me. Coast Reg'l Health Facilities, 369 NLRB No. 51, 2020 WL 1547466, at *2 (Mar. 30, 2020).

¹²³ See *id.* at *7, n. 11.

VI. THE VIEW FROM MOUNTAIN VIEW

Tech companies are famously protective of both their proprietary business secrets and of their reputations. Unsurprisingly, Silicon Valley employers regularly tell their employees—on dubious legal grounding—that they are forbidden from saying anything about their work without the company’s approval.¹²⁴ The pervasiveness of mandatory nondisclosure policies is one factor blamed for tech companies’ lack of progress on workplace diversity and harassment issues because employees feel constrained not to bring public pressure to bear to force change.¹²⁵ Three Amazon employees told the *Guardian* that they were threatened with firing for publicly criticizing the company’s lack of progress on reducing its carbon footprint, accused of violating a company directive “barring employees from speaking about the company’s business without prior approval from management.”¹²⁶

In 2015, tech giant Google was the target of both a lawsuit under California employment law and an NLRB complaint, alleging that the

¹²⁴ See Emily Birnbaum, *A Wall of Silence Holding Back Racial Progress in Tech: NDAs, PROTOCOL* (July 1, 2020), <https://www.protocol.com/nda-racism-equality-diversity-tech> [<https://perma.cc/PYU6-DAX9>] (reporting survey results that show sixty-five percent of tech company workers say they have been required to sign a nondisclosure agreement, and thirty-eight percent of those workers believe that the agreement includes speaking out about “injustices in the workplace”).

¹²⁵ See *id.* (“Six current or former tech employees who spoke with Protocol said they experienced racism and discrimination in the workplace but can’t speak out for fear of retribution from their employers. The employees, who either spoke on the condition of anonymity or declined to name the tech companies they worked for on the record, said they believe NDAs are holding back racial progress in the industry”); see also Marisa Kendall, *How Silicon Valley Silences Sexual Harassment Victims*, MERCURY NEWS (July 17, 2017), <https://www.mercurynews.com/2017/07/16/how-silicon-valley-silences-sexual-harassment-victims/> [<https://perma.cc/PS9S-CTY9>] (“Companies including Google and Tesla have been accused of using their confidentiality agreements to stifle employee speech.”).

¹²⁶ Kari Paul, *Hundreds of Workers Defy Amazon Rules to Protest Company’s Climate Failures*, GUARDIAN (Jan. 27, 2020), <https://www.theguardian.com/technology/2020/jan/27/amazon-workers-climate-protest> [<https://perma.cc/QU6W-9EFA>].

company enforced unlawfully rigid policies against whistleblowing, releasing confidential information, and speaking to the press.¹²⁷ The lawsuit was dismissed on procedural grounds, but an appeal is pending before California's First District Court of Appeal.¹²⁸

Google was accused of requiring employees to sign an overbroad nondisclosure agreement as a condition of employment stating that “any information in any form

that relates to Google or Google's business that is not generally known” would be kept confidential.¹²⁹ The company was also accused of enforcing an employee code of conduct stating that employees must “never discuss the company with the press unless you've been explicitly authorized to do so by Corporate Communications.”¹³⁰ Google has consistently denied that any of its policies were illegal.¹³¹

Without fanfare or media attention, Google settled the NLRB case in September 2019 by agreeing to rescind its unlawful speech restrictions and post notices at its headquarters office and on its intranet informing workers of their NLRA-protected rights, including this statement: “You have the right to discuss wages, hours, and working conditions with other

¹²⁷ See Google, Inc., NLRB No. 32-CA-164766, Signed Charge Against Employer (Nov. 23, 2015), <https://www.nlr.gov/case/32-CA-164766>.

¹²⁸ Doe v. Google, Inc., Case No. A158826 (Cal. 1st App. Dist., docketed Nov. 12, 2019).

¹²⁹ Petition for Alternative & Peremptory Writs of Mandamus and/or Prohibition, or Other Appropriate Relief at 19, Doe v. Google, Inc., Case No. A158826, Petition for Alternative & Peremptory Writs of Mandamus and/or Prohibition, or Other Appropriate Relief at 19 (Cal. 1st App. Dist., filed Oct. 11, 2019).

¹³⁰ *Id.* at 20.

¹³¹ See Frank D. LoMonte, *Whistleblowers' Rights Could Be at Risk Under Trump's New Labor Board*, CNN (June 12, 2019), <https://www.cnn.com/2019/06/12/perspectives/national-labor-relations-board-trump-workers/index.html> [<https://perma.cc/ND32-D5LZ>] (quoting Google corporate spokesperson's response to suit: “Employees are free to express their views, raise concerns and connect and have multiple forums to do so. This case is without merit and we are defending the claim vigorously.”).

employees, the press/media, and other third parties, and we will not do anything to interfere with your exercise of those rights.”¹³²

In a recent application of the Board’s newly minted *Maine Coast Regional* decision, a 2-1 Board majority ruled against tech giant Tesla and its colorful founder/CEO Elon Musk in a case challenging the legality of a gag policy forbidding unauthorized communication with the news media.¹³³ Citing *Maine Coast Regional*, the Board majority found that Tesla’s policy was unlawfully broad, because a reasonable employee would understand the policy to apply even to disclosures of nonconfidential information made in the employee’s individual capacity.¹³⁴ Of great significance for future challenges to “gag” policies, the Board decided that anytime a policy requires preapproval for communicating with the news media, it will be presumptively unlawful unless the prohibition is limited to disclosure of genuinely confidential information, or to statements made on behalf of the employer.¹³⁵

The Google and Tesla cases provide a cautionary tale for all tech and media companies. These outcomes underscore the importance of updating workplace handbooks and contracts to make sure they fully comply with NLRA standards by leaving employees clear latitude to engage in federally protected speech without the need for supervisory approval.

¹³² See Conformed Settlement Agreement Unilateral, Google, Inc., NLRB No. 32-CA-164766, (Sept. 9, 2019), <https://www.nlr.gov/case/32-CA-164766> [<https://perma.cc/7U64-67YH>].

¹³³ See Tesla, Inc., 370 NLRB No. 101, 2021 WL 1171743, at *1 (Mar. 25, 2021) (describing Tesla’s mandatory employee confidentiality agreement, which provided in part: “**it is never OK to communicate with the media or someone closely related to the media about Tesla, unless you have been specifically authorized in writing to do so**” (boldface in original)).

¹³⁴ *Id.* at *5–6.

¹³⁵ *Id.* at *7.

VII. TAKEAWAYS: PROTECTING WORKPLACE WHISTLEBLOWERS

First Amendment law recognizes that the public has such a keen interest in the workings of government that the audience's right to receive information is constitutionally protected alongside the right to speak.¹³⁶ But the distinction between the public and private sectors is growing increasingly fuzzy as private industry takes on management of schools, prisons, and other traditional public functions.¹³⁷ As one law professor and former judge observed: "[T]he general public benefits from the goods and services which employees provide in the public sector no less than the private. Ours is also an economic system enhanced by laws and subsidies that tend to blur the public/private distinction in many contexts."¹³⁸ Additionally, multinational giants on the scale of Apple, Google, and Amazon are players in the public policy arena and the world economy. Their company practices (for instance, their use of fossil fuels or of renewable energy) can have as much of an impact on people's lives as the policies of a city, county, or state government. Accordingly, the public has an interest in the inner workings of privatized service providers that is comparably acute to the public's interest in the government itself.

The compelling nature of this interest came into sharp focus as the COVID-19 pandemic swept across the United States in 2020. People came to depend on private-sector companies, including Amazon, as their lifeline

¹³⁶ See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas.").

¹³⁷ See Craig D. Feiser, *Protecting the Public's Right to Know: The Debate over Privatization and Access to Government Information Under State Law*, 27 FLA. STATE U. L. REV. 825, 829 (2000) (describing increased popularity of contracting fire protection, transportation, jails, healthcare, and other core government services to private providers, with the promise of realizing savings, blurring the distinction between government service providers and private contractors).

¹³⁸ Joseph R. Grodin, *Constitutional Values in the Private Sector Workplace*, 13 INDUS. RELS. L.J. 1, 14–15 (1991).

to receive home-delivered food and medicine.¹³⁹ Private hospitals and nursing homes became epicenters of COVID-19, making the free flow of truthful information a literal matter of life and death.¹⁴⁰

As the NLRB was handing down its March 2020 decision in the Maine hospital case, communities across the United States began lockdowns that shuttered workplaces to prevent the spread of the deadly, novel coronavirus responsible for COVID-19. The press and public were struggling to piece together the true story of the pandemic in the face of government stonewalling and, at times, outright deception.¹⁴¹ With government agencies concealing or understating data about the spread of the novel coronavirus, news organizations were forced to create their own tracking mechanisms, which became widely accepted as more reliable than official public-health agency data.¹⁴² COVID-19 made painfully self-evident the need for trustworthy first-hand information from nurses, grocery clerks, delivery

¹³⁹ See Levi Sumagaysay, *The Pandemic Has More than Doubled Food-Delivery Apps' Business. Now What?*, MARKETWATCH (Nov. 27, 2020), <https://www.marketwatch.com/story/the-pandemic-has-more-than-doubled-americans-use-of-food-delivery-apps-but-that-doesnt-mean-the-companies-are-making-money-11606340169> [<https://perma.cc/7L92-LVWR>] (documenting rise in food delivery services as people avoid virus risk of indoor dining).

¹⁴⁰ See Priya Chidambaram, Rachel Garfield & Tricia Neuman, *COVID-19 Has Claimed the Lives of 100,000 Long-Term Care Residents and Staff*, KAISER FAM. FOUND. (Nov. 25, 2020), <https://www.kff.org/policy-watch/covid-19-has-claimed-the-lives-of-100000-long-term-care-residents-and-staff/> [<https://perma.cc/JRQ4-9EJE>]; Christina Jewett, Melissa Bailey & Danielle Renwick, *Nearly 600—and Counting—US Health Workers Have Died of COVID-19*, KAISER HEALTH NEWS (June 6, 2020), <https://khn.org/news/exclusive-investigation-nearly-600-and-counting-us-health-workers-have-died-of-covid-19/> [<https://perma.cc/KW96-UHQJ>].

¹⁴¹ See Mario Ariza, David Fleshler & Cindy Kirscher Goodman, *Secrecy and Spin: How Florida's Governor Misled the Public on the COVID-19 Pandemic*, SUN-SENTINEL (Dec. 3, 2020), <https://www.sun-sentinel.com/coronavirus/fl-ne-coronavirus-florida-desantis-spin-ss-prem-20201203-tyjmgkos6bd7vo7vnrpqliany-htmlstory.html> [<https://perma.cc/U59H-A3PV>] (describing how Florida's governor concealed and downplayed information about the severity of the coronavirus pandemic).

¹⁴² Emily Sohn, *How the COVID Tracking Project Fills the Public Health Data Gap*, COLUM. JOURNALISM REV. (Mar. 24, 2020), https://www.cjr.org/the_profile/covid-tracking-project.php [<https://perma.cc/MFY5-R4CZ>].

drivers, and other frontline workers forming the public's "quarantine safety net."¹⁴³

Company insiders often furnish the candid information that journalists need to get beyond public-relations distortions and tell revealing stories. During the pandemic, healthcare workers have shared horrifying stories of being forced to work with inadequate protective equipment; one account in the *Guardian*, relying on anonymous sources, observed that nursing home employees "are terrified that if they blow the whistle, they'll lose their jobs."¹⁴⁴

Too often, journalists are shut out of access to employees with first-hand knowledge of newsworthy events. When a journalist for Northern California's *Sierra Sun* tried to report on health-and-safety conditions during the pandemic at local supermarkets, she was told that employees were forbidden from giving interviews and was left with an uninformative corporate statement that the stores "are compliant with the local health regulations."¹⁴⁵ The student newspaper at the University of Maryland-Baltimore College received the same response from a janitorial contractor when trying to interview cleaning staff about the effectiveness of

¹⁴³ See Louise Matsakis, *9 Amazon Workers Describe the Daily Risks They Face in the Pandemic*, WIRED (Apr. 10, 2020), <https://www.wired.com/story/amazon-workers-pandemic-risks-own-words/> [<https://perma.cc/V7EK-3GBE>] (recounting anonymized stories shared by delivery drivers and warehouse workers who describe working in unsanitary conditions without protective equipment and under intense time stress: "Each of them say they are terrified for their health and that of their families, and many believe Amazon isn't doing enough to ensure their safety.").

¹⁴⁴ See Alexandra Villarreal, *Scared and Sick Amid Covid-19: US Nursing Home Workers Afraid to Blow the Whistle*, GUARDIAN (May 5, 2020), <https://www.theguardian.com/world/2020/may/05/us-nursing-homes-coronavirus-outbreak> [<https://perma.cc/5Q5Y-FB7P>] (observing that "AristaCare staff largely spoke to the *Guardian* on the condition of anonymity for fear of consequences at work.").

¹⁴⁵ Rebecca O'Neil, *Food Service Industry, Grocery Stores Adopt Local Solutions to Sustain Operations, Nourish Truckee*, SIERRA SUN (May 8, 2020), <https://www.sierrasun.com/news/business/food-service-industry-grocery-stores-adopt-local-solutions-to-sustain-operations-nourish-truckee/> [<https://perma.cc/88AL-Y6NC>].

heightened disinfection protocols to prevent the spread of COVID-19.¹⁴⁶ Employees at retail giant Dollar General repeatedly told a *Mother Jones* journalist, who was reporting on labor activism and pandemic safety, that a company handbook forbids speaking with the media.¹⁴⁷

Journalists' inability to share the perspective of knowledgeable insiders carries real costs. The public's trust in the news media, after a four-year-long campaign of demonization under the Trump administration, is at historic lows.¹⁴⁸ Studies confirm that audiences find news accounts less trustworthy when they rely on unnamed sources.¹⁴⁹ When journalists are unable to speak to the experts of their choice, the diversity of news coverage suffers. Medical stories in particular often lack the perspective of front-line healthcare workers, in part because hospitals refuse to make nurses available for interviews with the media.¹⁵⁰ Additionally, the

¹⁴⁶ Anjali Dassarma, *Contracted Employees Need to Be Able to Speak for Themselves*, RETRIEVER (Apr. 6, 2020), <https://retriever.umbc.edu/2020/04/contracted-employees-need-to-be-able-to-speak-for-themselves/> [<https://perma.cc/MBR2-JVWA>].

¹⁴⁷ See Jacob Rosenberg, *A Dollar General Analyst Complained About Store Workers Getting Screwed. He Got Fired.*, MOTHER JONES (May 24, 2020), <https://www.motherjones.com/coronavirus-updates/2020/05/dollar-general-whistleblower-coronavirus/> [<https://perma.cc/TRZ3-YNQD>] (“Workers told *Mother Jones* they were afraid to speak on the record specifically because they feared harsh blowback from corporate. They said the employee handbook forbade them from speaking with the press.”).

¹⁴⁸ See Megan Brenan, *Americans' Trust in Mass Media Edges Down to 41%*, GALLUP (Sept. 26, 2019), <https://news.gallup.com/poll/267047/americans-trust-mass-media-edges-down.aspx> [<https://perma.cc/42RM-JW3K>] (reporting that only 41% of Americans say they have “a great deal” or “a fair amount” of trust in mass media to report the news “fully, accurately and fairly,” slightly up from record low of 32% in 2016, but down from a year earlier).

¹⁴⁹ See Ivanka Pjesivac & Rachel Rui, *Anonymous Sources Hurt Credibility of News Stories Across Cultures: A Comparative Experiment in America and China*, 76 INT'L COMMUN GAZETTE 641 (Sept. 23, 2014); Miglena Mantcheva Sternadori & Esther Thorson, *Anonymous Sources Harm Credibility of All Stories*, 30 NEWSPAPER RSCH. J. 54 (Sept. 1, 2009).

¹⁵⁰ See Diana Mason & Barbara Glickstein, *Why Don't Health Journalists Interview Nurses? We Asked Them.*, CTR. FOR HEALTH JOURNALISM (Jan. 8, 2019), <https://centerforhealthjournalism.org/2018/12/18/why-don-t-health-journalists-interview-nurses-we-asked-them> [<https://perma.cc/7C63-V6P8>] (reporting on dearth of nurses as

trustworthiness of information suffers when data is filtered through agencies that may have a political interest in “spinning” it, as opposed to being gathered directly from primary sources, such as hospital and nursing home employees.¹⁵¹

It is important for journalists and their lawyers to understand the law and ask tough questions when companies maintain a legally questionable gag policy. The public needs to hear the uncensored stories of workers risking their own health and safety to deliver food, stock grocery shelves, and tend to the sick and dying. Knowing that NLRA protection may not extend to an interview in which an employee is held out as speaking on the employer’s behalf, journalists may need to consciously consider how interview requests are framed and interviewee responses presented, to maximize the likelihood that their sources will be safe.

Because employees have been left uncertain where their rights begin and end—and employers are widely behaving as if no boundaries exist—Congress should step in and clarify the right to give an interview as a necessary extension of the right to organize. With the January 2021 inauguration of Democratic President Joe Biden, there is every reason to expect that the orientation of the NLRB will again swing in the direction of stronger union organizing rights, including Section 7-protected speech

sources in news coverage about public health and citing gatekeeping by hospital public-relations officers as one reason).

¹⁵¹ See Claudia Wallis, *When Politics Distorts Science*, SCI. AM. (Sept. 17, 2020), <https://www.scientificamerican.com/article/when-politics-distorts-science/> [<https://perma.cc/5TKK-69PN>] (documenting political interference in data reporting by U.S. Centers for Disease Control, which forbade journalists from speaking with field offices and filtered all media interactions through a public-relations office in Washington, D.C.); Christine Vestal, *Lack of Public Data Hampers COVID-19 Fight*, PEW (Aug. 3, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/08/03/lack-of-public-data-hampers-covid-19-fight> [<https://perma.cc/3GMR-HR85>] (reporting that hospitals were ordered to cease releasing COVID-19 data directly to the press and public and to instead funnel the data to Trump-appointed Department of Health and Human Services headquarters employees).

rights.¹⁵² It benefits no one, including employers, for fundamental workplace norms to shift depending on the composition of an appointed regulatory board; employment contracts and rulebooks should be equally enforceable—or not—regardless of who is in the White House. Significant aspects of the private workplace have already been “constitutionalized” through statutes that approximate the constitutional rights that apply in the public sector, including the right to equal protection.¹⁵³ Learning a lesson from COVID-19 and fortifying the public-health safety net in preparation for the next viral outbreak should include securing the legal right to share and receive information. It is not a radical notion to import a measure of First Amendment-like protection into the private workplace, especially given that so many private entities are delivering life-sustaining services, such as hospital care, in a way indistinguishable from (and often intertwined with) public entities.¹⁵⁴ We all benefit from the free flow of information about workplace safety—and never more than during pandemic conditions, when *everyone’s* safety depends on it.

¹⁵² See Alexia Elejalde-Ruiz, *Biden Expected to Usher in an Era of Worker-Friendly Labor Policies*, CHI. TRIB. (Nov. 25, 2020), <https://www.chicagotribune.com/business/ct-biz-biden-employment-workplace-changes-20201125-pwgg6wuclrh7h2fmd5a5wvpe-story.html> [<https://perma.cc/9ZQJ-JLGS>] (“Labor policies often swing back and forth as Republicans and Democrats trade control of the White House and install new leadership at the Labor Department, which enforces wage and hour laws, and the NLRB, which enforces labor law in relation to unionizing and collective bargaining.”).

¹⁵³ See, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (ruling that Title VII of the Civil Rights Act prevents an employer, public or private, from firing an employee on the basis of LGBT status); see generally Grodin, *supra* note 138.

¹⁵⁴ According to data from the Kaiser Family Foundation, 18.6% of America’s hospitals are operated by state or local government, and 81.4% are operated as either nonprofit or for-profit corporations. *Hospitals by Ownership Type*, KAISER FAM. FOUND., <https://www.kff.org/other/state-indicator/hospitals-by-ownership/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [<https://perma.cc/SH6U-GPM7>] (select “2018” in “Timeframe” drop-down menu).