Labor Unions & Labor Law

Acknowledgements

EJC is grateful to the following individuals for their assistance in updating the Labor Law Chapter for the 6th Edition:

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Table of Contents

Introduction

The relationships among employers, labor organizations and union-represented employees are governed primarily by the Labor Management Relations Act, 29 U.S.C. §§ 141-87. (As originally enacted in 1935, the law was called the National Labor Relations Act, and most practitioners still call it that.) That law was enacted in 1935 as the Wagner Act and amended in 1947 by the Taft-Hartley Act and in 1959 by the Landrum-Griffin Act.

The NLRA, among other things, creates the National Labor Relations Board, establishes the procedure for conducting representation elections, prohibits "unfair labor practices" by employers and unions, limits the circumstances under which unions can engage in picketing, permits lawsuits to enforce collective bargaining agreements and union constitutions, places restrictions on financial transactions between unions and employers, allows businesses injured by unlawful secondary boycotts to sue for damages, and imposes a duty of fair representation on unions.

The protection of the NLRA is not confined to union-represented employees or to employees involved in an organizing campaign. Employees who are merely complaining to their employer about working conditions might be engaged in protected activity and any retaliatory action by their employer could constitute an unfair labor practice.

The procedure for prosecuting unfair labor practices – under which charges are investigated by NLRB field examiners and then prosecuted by NLRB field attorneys if deemed meritorious – makes the NLRA a particularly useful law for workers who cannot afford to hire an attorney and who may be unable to litigate a case as a pro se party. Accordingly, in any case in which an employee seeking assistance may have been engaged in protected activity, the attorney should consider whether a violation of the NLRA has occurred.

Covered Employers

In general, the NLRA applies to private employers whose operations affect interstate commerce. The NLRB has adopted a series of standards that it applies in determining whether to assert jurisdiction over different types of employers. The board, for example, will not assert jurisdiction over a non-retail employer unless the employer annually ships goods, provides services or purchases goods from across state lines valued at $50,000 or more. *Siemons Mailing Service*, 122 NLRB 81 (1958). The board will not assert jurisdiction over a retail establishment unless its annual gross volume of business is at least $500,000. *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1958). But the NLRB exercises plenary jurisdiction over any private employer in the District of Columbia if the employer falls within the board's statutory jurisdiction, without regard to the value of services provided, or goods sold or purchased.

Employers covered by the NLRA include:

- any person acting as an agent of an employer, 29 U.S.C. § 151(2);
- two entities that together constitute a single employer or joint employers, *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800, 802 (1976) (single employer); *Sun Maid Growers of California*, 239 NLRB 346 (1979), *enf'd,* 618 F.2d 56 (9th Cir. 1980) (joint employer);
- the United States Postal Service, 39 U.S.C. § 1209;
- private health care institutions, including nonprofit hospitals, 29 U.S.C. § 152(14);
- nonprofit organizations, including private schools and charitable organizations, *Rhode Island Catholic Orphan Asylum*, 224 NLRB 1344 (1976);
- private nonprofit colleges and universities that receive gross annual revenue from all sources totaling at least $1,000,000, *Cornell University,* 183 NLRB 329 (1970);
- labor organizations, when acting as employers, *Garment Workers*, 131 NLRB 111 (1961);
- commercial enterprises operated in the United States by foreign governments, *German School of Washington*, 260 NLRB 1250 (1982); and
- Indian-operated commercial enterprises, *San Miguel Indian Bingo & Casino*, 341 NLRB 1055 (2004), *enf'd,* 475 F.3d 1306 (D.C. Cir. 2007).

Employers that the NLRA does not cover include:

- the government of the United States or any wholly owned government corporation, 29 U.S.C. § 152(2);
- federal reserve banks, 29 U.S.C. § 152(2);
- state governments and their political subdivisions, 29 U.S.C. § 152(2);
- entities covered by the Railway Labor Act, such as airlines and railroads, 29 U.S.C. § 152(2);
- international organizations, such as the World Bank and the International Monetary Fund, *Herbert Harvey, Inc.*, 171 NLRB 238 (1968), enforced, 424 F.2d 770 (D.C. Cir. 1969);
- church-operated schools, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979);
- horseracing and dog racing establishments, 29 C.F.R. § 103.3;
- foreign flag ships employing alien seamen, *McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10 (1963); and
- Indian-operated enterprises that perform traditional tribal or governmental functions, *Yukon Kushokwin Health Corp*., 341 NLRB 1075 (2004).

Covered Employees

In general, anyone employed by a covered employer is an "employee" within the meaning of the NLRA and covered by that law, unless otherwise excluded.

Employees who are excluded from coverage include:

- agricultural employees, 29 U.S.C. § 152(2);

- domestic employees working for a family, rather than a business, *Ankh Services, Inc.*, 243 NLRB 478 (1979);
- individuals employed by a parent or spouse, 29 U.S.C. § 152(2);
- independent contractors, 29 U.S.C. § 152(2);
- supervisors, which are broadly defined as persons "having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, 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," 29 U.S.C. § 152(11); and
- managerial employees, *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

Protected Concerted Activity

Under Section 8(a)(1) of the NLRA it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of protected rights. 29 U.S.C. § 158(a)(1). Under Section 8(a)(3), it is an unfair labor practice for an employer to discriminate against an employee who engages in protected activities or to discourage him or her, or other employees, from engaging in protected activities. 29 U.S.C. § 158(a)(3). Accordingly, an employee who has been discharged or disciplined, or threatened with either, by his or her employer may have a remedy under the NLRA if the employer's conduct was a response to the employee's protected activity.

Conduct protected by the NLRA is described in Section 7. That section states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Activity protected by Section 7 is not confined to conduct related to organizing or collective bargaining. Concerted activity for mutual aid or protection is protected, even if the employee is not represented by a union and even if the conduct is unrelated to organizing or collective bargaining.

To be protected, employee conduct must be concerted. In general, concerted activity is activity taken by two or more employees or by one employee on behalf of others. There are circumstances in which the conduct of a single employee would be deemed concerted activity. The NLRB holds, for example, that an individual's efforts to enforce the provisions of an existing collective bargaining agreement constitute concerted activity. *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), *enf'd,* 388 F.2d 495 (2nd Cir. 1967). That activity is deemed concerted even if the employee is mistaken about the content or meaning of the collective bargaining agreement. The Supreme Court endorsed that rule in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), in which a truck driver refused to drive a truck that he considered unsafe, relying on the provision in his collective bargaining agreement stating that employees could not be compelled to drive vehicles that were not safe.

The NLRB also holds that the conduct of an individual employee constitutes concerted activity where it is a "logical outgrowth" of group activity. An employee who called the Department of Labor following a group protest over the employer's new lunch hour policy was, for example, engaged in concerted activity. *Salisbury Hotel, Inc.*, 283 NLRB 685 (1987). An employee who, after several coworkers expressed concern about their supply of water, threatened to stop working if water did not arrive by a certain time, also was engaged in concerted activity. *Golden Stevedoring Co.*, 355 NLRB 410 (2001). Each of four employees who separately refused to work overtime was engaged in concerted activity because their conduct followed expressions of concern by several employees about the employer's overtime policy. *Mike Yurosek & Son, Inc.*, 306 NLRB 1037 (1992). An individual employee who complained to his supervisor about working conditions and said that his complaints were based on conversations with co-workers was engaged in concerted activity. *Manimark Corp.*, 307 NLRB 1059 (1992)[114]. Even more broadly, the NLRB has held that an employee who repeats a complaint previously expressed by a group of employees is engaged in concerted activity. *Alton H. Piester*, 353 NLRB No. 33 (2008), *enf'd,* 591 F.3d 332 (4th Cir. 2010).

An employee who acts individually and solely for his or her own benefit is not engaged in concerted activity. In *Meyers Industries*, 281 NLRB 882 (1986), the NLRB held that a truck driver who had complained to his employer and to the state transportation agency about the unsafe condition of his truck and, as a result, was discharged, was not engaged in concerted activity because he was acting only on his own behalf. The employee in that case, unlike the employee in *City Disposal*, was unable to rely on a provision in a collective bargaining agreement. When an employee was discharged because he had expressed his intention to file a workers' compensation claim, the NLRB concluded that he was engaged in concerted activity, but the Fourth Circuit disagreed. *Krispy Kreme Doughnut Co.*, 245 NLRB 1053 (1979), *enforcement denied*, 635 F.2d 304 (4th Cir. 1980). A conversation between two employees could constitute concerted activity, but, according to the Third Circuit, only if "engaged in with the object of initiating or inducing or preparing for group action or [if] it had some relation to group action." *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 688 (3rd Cir. 1964). But, in *Ellison Media Co.*, 344 NLRB 1112 (2005), the NLRB held that a conversation between two employees about sexual harassment constituted protected concerted activity.

To be deemed protected, employee activity must be concerted and for "mutual aid or protection." In *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), the Supreme Court read that language broadly to include efforts by employees "to improve terms or conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Id.* at 565. Under this standard, employees who file administrative claims or lawsuits, or who write to legislators to protect or advance their interest as employees, are acting for their mutual aid or protection. *See Kaiser Engineers*, 213 NLRB 752 (1974) (A group

[114] The 6th Circuit denied enforcement of the board's order, holding that "the evidence in this case is too thin to support a conclusion that… Fields was acting on behalf of anyone other than himself."*Manimark v. NLRB*, 7 F.3d 547 (6th Cir. 1993).

of engineers wrote letters to legislators opposing any change in immigration laws that would allow foreign engineers to enter the United States.).

Some categories of employee conduct are unprotected. Violent conduct is unprotected. Conduct that is unlawful or that constitutes a breach of contract (for example, a strike in violation of an applicable no-strike clause) is also unprotected. Employee statements may be unprotected if they reveal confidential employer information, *International Business Machines Corp.*, 265 NLRB 638 (1982); if they contain deliberately or maliciously false information about the employer, *Walls Mfg. Co.*, 137 NLRB 1317 (1962), *enf'd,* 321 F.2d 753 (D.C. Cir. 1963); or if they unfairly disparage the employer's product or services in a manner unrelated to employee interests or working conditions, *NLRB v. IBEW Local 1229,* 346 U.S. 464 (1953). Employee conduct that is flagrant or offensive may be unprotected, but an employee does not necessarily lose the protection of the NLRA by making statements that are loud, boisterous or even profane. *Media General Operations, Inc.*, 351 NLRB 1324 (2007).

Undocumented Employees

Undocumented workers are "employees" within the meaning of the NLRA. They are therefore protected by that law and entitled to file unfair labor practice charges. *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883 (1984). Notification of immigration authorities that an employee is undocumented constitutes a constructive discharge of that employee, and an employer would commit an unfair labor practice by reporting an undocumented employee in retaliation for his or her protected activity. *Id.* An undocumented employee who is discharged in violation of the NLRA, however, is not entitled to reinstatement or back pay. *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002).

The NLRB general counsel has taken the position that an undocumented employee who is knowingly hired by an employer and then unlawfully discharged is entitled to a remedy of conditional reinstatement. To be reinstated, however, the employee would have to satisfy the verification procedures contained in the 1986 Immigration Reform and Control Act IRCA). 8 USC § 1101, et seq.

An employee's undocumented status has no relevance to the merits of an unfair labor practice case (if, for example, the employer discharges an undocumented employee because of his or her protected conduct). The NLRB will not consider the employee's undocumented status, unless and until it is raised at the compliance stage, where the issue of what back pay the employer owes can be litigated. *Tuv Taam Corp.*, 340 NLRB 756 (2003).

Filing an Unfair Labor Practice Charge

For individual employees with limited means, filing an unfair labor practice charge with the National Labor Relations Board offers significant advantages over other forms of litigation. After a charge is filed, it will be investigated by an NLRB field agent who will interview the

charging party and, if the charge appears to have merit, will seek information from the charged employer. If the NLRB general counsel concludes that the charge is meritorious and the employer refuses to settle on the terms offered, the general counsel will issue a complaint and an NLRB field attorney will litigate the case against the charged employer. Thus, if a charge is meritorious, the NLRB will assume the burden of obtaining information and litigating the case.

An unfair labor practice case against an employer is initiated by filing an unfair labor practice charge. The charge is a one-page form that can be obtained from the NLRB's website, www.nlrb.gov and at http://wrmanual.dcejc.org/38. The charge asks for certain information about the employer and requires the charging party to state what section of the NLRA the employer violated and to describe in general terms the employer conduct that constituted the violation.

The NLRB will not initiate a case on its own; a charge must be filed. The charge, however, does not have to be filed by the affected employee. Anyone can file an unfair labor practice charge with the NLRB.

The charge should be filed with the nearest regional office of the NLRB. In this area, the nearest regional office is Region 5 in Baltimore, MD. Its address is Bank of America Center, Tower II, 100 South Charles St., 6th Floor, Baltimore, MD 21201. The phone number is (410) 962-2822 and the fax number is (410) 962-2198. Region 5 also operates a resident (sub-regional) office at 1099 14th St. NW, Room 6300, Washington, DC 20570-0001. The telephone number is (202) 208-3000, and the fax number is (202) 208-3013. A charge can be filed in person, by mail or by fax, but not online. NLRB regional offices appoint field examiners to act as information officers and help those needing assistance in filing a charge. Employees who feel that they need such assistance may wish to speak, in person or by phone, to the NLRB employee acting as information officer. Both the regional office in Baltimore and the resident office in Washington, DC have employees proficient in Spanish and other languages.

Unfair labor practice charges must be filed with the NLRB within six months. 29 U.S.C. § 160(b). If more than six months has elapsed since the unfair labor practice took place, a charge is untimely and will be dismissed. The six-month period can be tolled if the charging party did not have actual knowledge of the conduct that constituted the violation, and in limited circumstances an unfair labor practice might be deemed a continuing violation. *Metromedia, Inc.*, 232 NLRB 486 (1977) (tolling).

After a charge is filed, it will be assigned for investigation to an NLRB field agent. The charging party should be prepared to present evidence in support of the charge, including witnesses (which may include or be limited to the charging party) with firsthand knowledge of the relevant facts. The NLRB field agent will interview the charging party, either in person or by telephone, and prepare an affidavit, based on the interview, for the charging party to sign. The interview and the preparation of the affidavit can take several hours in some cases. If the case appears to have merit, the field agent will then ask the employer to respond to the charge and offer witnesses to be interviewed.

After the evidence is collected, the regional office will evaluate the case. If the regional director concludes that the charge has no merit, the regional office will ask the charging party to withdraw the charge. If the charging party declines, the regional director will dismiss the charge. Dismissals can be either "short form" or "long form." A long form dismissal explains in detail why the charge is being dismissed. If the charging party wants to appeal the dismissal, he/she should ask for a long form dismissal. A dismissal can be appealed to the NLRB General Counsel in Washington, DC at 1099 14th St. NW, Washington, DC 20570-0001. A charging party has 14 days to appeal a dismissal, but the general counsel has the authority to grant an extension of time for such appeals.

If the regional director concludes that the charge has merit, the regional office will attempt to settle the case. A settlement offer will be made to the charged employer, which the employer can accept or reject. The charging party will be invited to join in the settlement, but charges can be settled over the objection of a charging party.

If the case cannot be settled, the NLRB general counsel will issue a complaint against the charged employer. The general counsel has the authority to seek injunctive relief while the case is pending. 29 U.S.C. 160(j). Such relief, however, is rarely sought.

After the general counsel issues a complaint, a hearing will be scheduled before an NLRB administrative law judge (ALJ). Before the hearing takes place the NLRB may schedule a conference with a settlement judge who, as the title suggests, will try to settle the case. The charging party has the right to participate in any of those settlement discussions.

The charging party is a party to the unfair labor practice case and has the right to participate in all aspects of the case, including the hearing before the ALJ. If the charging party is not proficient in English, s/he should inform the ALJ that an interpreter is needed.

At the hearing before the ALJ, an attorney for the NLRB general counsel's office will prosecute the case against the charged employer. The charging party can participate in the hearing as a party and call, examine and cross-examine witnesses. One does not have to be a lawyer to participate in the hearing before the ALJ. After a witness testifies for the general counsel, the employer will ask to see any affidavits that the witness has signed. The employer will then use the affidavit in its cross-examination of that witness. A witness, including the charging party, should take care to ensure that his or her testimony is consistent with his or her affidavit.

In most cases, briefs are filed with the ALJ after the hearing. The charging party can file a brief, but is under no obligation to do so. Briefs are usually due in 35 days, but extensions of time are common. In cases that are not particularly complex, the ALJ can ask for closing arguments in lieu of briefs and issue a decision from the bench.

If s/he does not issue a decision from the bench, the ALJ will issue a written decision sometime after the hearing. The issuance of a decision can take several months. In discharge cases, the typical remedy is back pay, reinstatement and a cease and desist order.

Any party dissatisfied with the ALJ's decision, including the charging party, can appeal to the NLRB by filing "exceptions" to the decision. Unless exceptions are filed, the decision of the ALJ becomes final. If exceptions are filed, the NLRB will issue a decision either adopting the ALJ's decision, modifying it or reversing it. In most cases, the NLRB issues a short-form decision adopting the decision of the ALJ.

The average time from the filing of a charge to the issuance of an NLRB decision is more than two years.

Final decisions of the NLRB can be appealed to the United States Courts of Appeals. 29 U.S.C. § 160(f). Cases may be appealed either to the D.C. Circuit or to the court of appeals in the circuit where the unfair labor practice occurred or where the appellant resides or transacts business.

Collective Bargaining Agreements and the Grievance-Arbitration Procedure

A collective bargaining agreement is a contract negotiated by a union and an employer establishing the terms and conditions of employment of workers represented by the union and covered by the agreement. An employee need not be a union member to be represented by a union or covered by a collective bargaining agreement. A collective bargaining agreement typically covers all employees in the bargaining unit represented by the union, regardless of whether they are union members.

A collective bargaining agreement establishes the wages and benefits to which covered employees are entitled. Benefits such as vacation, sick leave, health insurance and pension benefits, if they exist, are usually described in the collective bargaining agreement.

Most collective bargaining agreements include a provision stating that employees can be disciplined or discharged only for just cause. And, most agreements also include a grievance and arbitration procedure to resolve disputes arising under the agreement, including disputes over discipline and discharge.

The grievance procedure is initiated by filing a grievance. Some collective bargaining agreements permit employees to file their own grievances and some permit only the union to file. Most collective bargaining agreements limit the time within which a grievance can be filed, although in several circumstances (where, for example, the parties have a practice of ignoring the time limits) those time limits may be deemed waived.

The grievance procedure usually consists of several steps, each consisting of a meeting between union and management representatives. If the grievance is not settled at one step it proceeds to the next. If the grievance is not settled at the last step it can be referred to arbitration. The decision to refer a grievance to arbitration is typically made by the union. Some agreements permit an employer to file a grievance and to refer it to arbitration. Individual employees, however, do not have the right to refer a grievance to arbitration over the objection of the union.

The union has the right to settle a grievance, even if the grievant – the individual employee who is the subject of the grievance – objects to the terms of the settlement.

Arbitration consists of a hearing before a neutral arbitrator chosen by the employer and the union. The parties at the arbitration hearing are the union and the employer. The grievant is represented by the union, but the grievant is not a separate party (as is, for example, the charging party in an unfair labor practice case). The grievant has no right to separate representation or to call her own witnesses. The party filing the grievance, generally the union, has the burden of proof and puts on its case first. In discipline and discharge cases, however, the employer has the burden of proof and puts on its case first.

Federal district courts have the authority to enforce or vacate arbitration decisions. In reviewing arbitration awards, courts apply a highly deferential standard. If the employer is bound by an agreement to arbitrate, the circumstances in which a court will vacate an arbitration award are extremely narrow. *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

A collective bargaining agreement is an enforceable contract. A suit alleging a violation of a collective bargaining agreement can be filed in either state or federal court. 29 U.S.C. § 185(a); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). Regardless of where such suits are filed, they are governed by federal law. *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957). Since federal courts have original jurisdiction over suits to enforce a collective bargaining agreement, such suits can be removed from state court to federal court.

Either a union or an individual employee can sue an employer for breach of an applicable collective bargaining agreement. *Smith v. Evening News Association*, 371 U.S. 195 (1962) (suit by individual employee). But, where the collective bargaining agreement includes a grievance procedure, an employee or union must attempt to exhaust that procedure before filing a suit for breach of contract. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). An employee need not exhaust those procedures if exhaustion would be futile, *Glover v. St. Louis-San Francisco Railway Co.*, 393 U.S. 324 (1969); or if exhaustion is precluded either by the employer's repudiation of those procedures or by the union's wrongful refusal to use them, *Vaca v. Sipes*, 386 U.S. 171 (1967).

If the collective bargaining agreement contains a final and binding arbitration procedure, s/he can sue the employer for violating the collective bargaining agreement only if the employee can also show that the union breached its duty of fair representation in processing the grievance. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

Suits in which an employee alleges that the employer has breached the collective bargaining agreement and the union has breached the duty of fair representation are referred to as hybrid 301/DFR suits. In such suits, the fact that the arbitrator denied the grievance does not preclude the employee from prevailing, if s/he can show both a breach of contract by the employer and the duty of fair representation by the union. The statute of limitations applicable to

such suits is the six-month limitations period applied in unfair labor practices cases under the NLRA. *DelCostello v. Teamsters*, 462 U.S. 151 (1983). In suits in which a breach of the collective bargaining agreement, but not a breach of the duty of fair representation is alleged (where, for example, the agreement does not include a final and binding arbitration procedure), some courts have applied the six-month limitations period and others have applied the most analogous state statute of limitations.

The Duty of Fair Representation

Under the National Labor Relations Act and the Railway Labor Act, a union that represents employees in a bargaining unit has the legal right to represent all of the employees in that unit. 29 U.S.C. § 159(a). Individual employees do not have the right to opt out of union representation or to choose a representative different from that chosen by a majority of the employees. In *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944), the Supreme Court held that, if federal labor law gives a union the right to represent all employees in a bargaining unit, it implicitly requires that union to represent all of those employees fairly. Unions thus owe a duty of fair representation to the employees that they represent. That duty is owed to all employees represented by the union, regardless of whether they are union members.

The duty of fair representation applies to anything that a union does as a representative of employees. It applies to the negotiation of collective bargaining agreements, *Air Line Pilots v. O'Neill*, 499 U.S. 65 (1991); to the processing of grievances and arbitration cases, *Vaca v. Sipes*, 386 U.S. 171 (1967); and to the operation of an exclusive hiring hall, *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67 (1989). It does not apply to internal union decisions, such as admission to union membership or the imposition of internal union discipline.

The duty of fair representation is violated only by union conduct that is arbitrary, discriminatory or taken in bad faith. *Vaca v, Sipes*, 386 U.S. 171 (1967). Mere negligence, poor judgment or ineptitude does not breach the duty of fair representation. *Steelworkers v. Rawson*, 495 U.S. 362 (1990).

The duty of fair representation does not require a union to process a grievance or to take a grievance to arbitration, as long as the decision not to proceed is not arbitrary, discriminatory or made in bad faith. *Vaca v. Sipes*, 386 U.S. 171 (1967). The failure to process a meritorious grievance is not necessarily a breach of the duty. *Stanley v. General Foods Corp.*, 508 F.2d 274 (5th Cir. 1975). Nevertheless, a union breaches the duty of fair representation by arbitrarily ignoring a meritorious grievance or by processing it in a perfunctory manner. And, a union's refusal to process an employee's grievance because the grievant had supported a rival union candidate likely would be deemed a breach of the duty.

A claim for breach of the duty of fair representation may be litigated in either of two ways: Because a breach of the duty of fair representation is also an unfair labor practice, *Miranda Fuel Co.*, 140 NLRB 181 (1962), *enforcement denied*, 326 F.2d 172 (2nd Cir. 1963), an unfair labor practice charge can be filed with the NLRB alleging a breach of that duty. An

employee who claims that the union has breached the duty of fair representation also can file a lawsuit, typically in federal district court. *Vaca v. Sipes*, 386 U.S. 171 (1967). In either case, a six-month limitations period will apply. 29 U.S.C. § 160(b); *DelCostello v. Teamsters,* 462 U.S. 151 (1983).

Replacement of One Employer by Another

When one employer (the predecessor) is replaced by another (the successor), who performs essentially the same work as the predecessor in the same location, employees of the predecessor employer may ask whether the successor employer has any obligation to hire them and, if they are hired, whether the successor can change their terms of employment.

As a general matter, a successor employer has no obligation to hire the employees of the predecessor.

In the District of Columbia, however, there is a significant exception to that rule. The 1994 Displaced Workers Protection Act, D.C. Code §§ 32-101-03, protects three groups of employees: 1) employees hired by a contractor as food service workers; 2) employees hired by a contractor to perform janitorial or building maintenance services; and 3) nonprofessional employees hired by a contractor to perform healthcare or related services. Those employees are protected only if the predecessor employer employed at least 25 employees. D.C. Code § 32-101. The Displaced Workers Protection Act requires successor employers to retain for a 90-day transition period all covered employees who were employed by the predecessor at the site of the contract for at least 8 months. If at any time the new employer decides that fewer employees are needed than were employed by the predecessor, the new employer must retain employees by seniority within their job classifications. At the end of 90 days, the successor must prepare a written evaluation of each retained employee and offer continued employment to any employee whose job performance was deemed satisfactory. And, if a contractor's agreement is not renewed, but the contractor is awarded a new job in the District of Columbia within 30 days, the employer must retain at least 50 percent of the employees from each establishment (the old and the new) as needed to perform the job. D.C. Code § 32-102. An employee who has been wrongfully discharged in violation of the Displaced Workers Protection Act can bring an action in Superior Court and collect back pay for each day the violation continues, the cost of benefits that the new contractor would have incurred, and reasonable attorney's fees. D.C. Code § 32-103.

Although a successor employer may have no obligation to hire the predecessor employer's employees, it would be an unfair labor practice to refuse to hire the predecessor's employees because of their protected activity, because they are union members or union-represented, or to avoid the obligation to bargain with their union. *Howard Johnson Co. v. Hotel and Restaurant Employees*, 417 U.S. 249 (1974).

Employees who are union-represented and covered by a collective bargaining agreement may have certain additional rights. Many collective bargaining agreements include "successor"

clauses obligating the predecessor employer to obtain from any successor a commitment to hire the predecessor's employees or adopt the predecessor's collective bargaining agreement. Since the successor is not necessarily bound by that commitment, *NLRB v. Burns Security Services, Inc.*, 406 U.S. 272 (1972), an employee, or the union that represents the employees, would have to look to the predecessor for enforcement of those contractual rights or damages resulting from a breach.

There are, however, two circumstances in which a successor employer would be bound by the predecessor's collective bargaining agreement: 1) where the successor had, by explicit agreement or by its conduct, assumed the predecessor's agreement; or 2) where the successor employer is an alter ego of the predecessor. Alter ego status requires, at a minimum, common ownership and control *e.g., Crawford Door Sales Co.*, 226 NLRB 1144 (1976).

As long as its hiring decisions are not based on unlawful considerations (e.g., union membership), a successor employer is generally free to hire whomever it chooses. And, unless it has acquired an obligation (discussed below) to bargain with the union that represented the predecessor's employees, the successor employer can establish the initial terms and conditions of employment for those employees who are hired.

A successor employer that hires a majority of its employees from among the predecessor's employees thereby acquires an obligation to bargain with the representative of the predecessor's employees, as long as the new employer continued to use the same facilities and perform the same work as did the predecessor. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). Once the duty to bargain attaches, the employer is prohibited from unilaterally changing terms or conditions of employment without first bargaining to impasse with the employees' bargaining representative. If an employer makes it perfectly clear that it plans to retain all or most of the predecessor's employees and those employees will constitute a majority of the successor's employees, the successor would acquire a duty to bargain even before the employees were hired and would therefore be required to provide them with the pay and benefits that they had received from the predecessor. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

Dealing with Labor Unions

Since union-represented employees who contend that their employer has violated the collective bargaining agreement (by, for example, discharging them without just cause) generally must use and exhaust the grievance arbitration procedure to resolve those disputes, the relationship between employees and the union that represents them is an important one.

Section 104 of the 1959 Labor Management Reporting and Disclosure Act obligates a union to provide a copy of the collective bargaining agreement to any employee whose rights are affected by that agreement. 29 U.S.C. § 414. Any employee who does not have a copy of the collective bargaining agreement under which s/he is working should ask for a copy.

Unions are governed by constitutions that constitute enforceable contracts between the union and its members. *Wooddell v. IBEW Local 71,* 502 U.S. 93 (1991). Union constitutions sometimes contain appeal procedures that permit union members to appeal decisions of an affiliated local union. The local union's decisions not to process a grievance may or may not be appealable, depending on the language of the constitution and the union's practice.

Most unions are hierarchical organizations. A union member who does not receive a satisfactory answer at one level may want to consider communicating with a higher union authority. A member dissatisfied with the conduct of a job steward, for example, could contact, in ascending order, the chief steward, the local union president or business manager, the international representative who services the local union, the international vice president with jurisdiction over that local, and finally the international president of the international union with which the local is affiliated.