I. Introduction

Unlawful picketing, secondary boycotts, union violence, excessive initiation fees, and "featherbedding;" these are but a few of the activities prohibited by Section 8(b) of the National Labor Relations Act ("NLRA" or "Act"). Although the NLRA prohibits both employers and unions from engaging in certain conduct (known as unfair labor practices), Section 8(b) applies specifically to unions. Moreover, the NLRA and the National Labor Relations Board ("NLRB" or "Board") deal with issues involving both union and non-union employers, and there are some important rules that all employers should know. This paper offers a straightforward summary of Section 8(b) and outlines some of the significant NLRA rules that every non-union employer should know.

II. Section 8(b) of the NLRA

A. Section 8(b)(1)(A) and 8(b)(1)(B)

Sections 7 of the NLRA not only guarantees employees the right to promote, support, and join a union, it also guarantees them the right to "refrain from any or all such activities."¹ Section 8(b)(1)(A), therefore, makes it an unfair labor practice for a union to "restrain or coerce employees in the exercise of the rights guaranteed in Section 7." Importantly, however, the NLRB has consistently taken the position that Section 8(b)(1)(A) was not, and is not, intended to have the same broad application as Section 8(a)(1), which prohibits an employer from restraining

¹ NLRA, 29 U.S.C §157
or coercing employees in the exercise of their Section 7 rights.\(^2\) Thus, some activities that are prohibited under Section 8(a)(1) are not prohibited under Section 8(b)(1)(A).\(^3\) For example, it is unlawful for an employer to interrogate an employee about his or her support for a union, but a union can interrogate the same employee about his or her support without running afoul of section 8(b)(1)(A), so long as the union's interrogation does not involve violence or threats of violence.

Examples of situations where the NLRB or other courts has found unions to have violated Section 8(b)(1)(A) include:

- Fining or expelling a member for filing an unfair labor practice charge.\(^4\)
- Refusing to refer a union member for employment by withholding permits required for employment, by causing an employer to reduce an employee's seniority, or by attempting to cause the discharge or prevent the re-employment of a member employee.\(^5\)
- Adversely affecting a member's employment by maintaining a provision in its by-laws requiring that fines, assessments, or other internal indebtedness be paid before the union will accept monthly dues compelled by a union security clause.\(^6\)
- Fining an employee who is no longer a union member.\(^7\)
- Disciplining a member who refuses to engage in unlawful or unprotected activity.\(^8\)

\(^2\) National Maritime Union (Texas Co.), 78 NLRB 971 (1948); Boilermakers (Kaiser Cement Corp.), 312 NLRB 218 (1993).

\(^3\) See National Maritime Union (Texas Co.), 78 NLRB 971 (1948); NLRB v. Teamsters Local 639 (Curtis Bros.), 362 U.S. 274 (1960) (noting that Section 8(b)(1)(A) provides only a limited prohibition relating to "union tactics involving violence, intimidation and reprisals or threats thereof.”)

\(^4\) Laborers Local 294 (Hayward Baker Co.), 275 NLRB 278 (1985).

\(^5\) See Longshoreman (ILA) Local 1408 v. NLRB, 705 F.2d 1549 (11th Cir. 1983); Auto Workers (Pitt Processing Co.), 208 NLRB 736 (1974); Communications Workers Local 1104 v. NLRB, 520 F.2d 411 (2nd Cir. 1975).

\(^6\) Teamsters Local 572 (Ralph's Grocery), 247 NLRB 934 (1980).

• Threatening an employee with bodily harm or other violence.9
• Non-violent threats to a member employee where the threats are used to prevent the employee from exercising his Section 7 rights.10
• Threatening to take action against the employer if a non-union employee is hired.11

Section 8(b)(1)(B) prohibits a union from interfering with an employer's choice of representatives for collective bargaining or the adjustment of grievances.12 Thus, a union violates Section 8(b)(1)(B) when it engages in conduct that coerces an employer into discharging or demoting its grievance adjustment representative, even if the union does not expressly demand such action be taken.13 Likewise, it is unlawful for a union to coerce the employer in the selection of its representatives for the purpose of collective bargaining.14 For instance, the NLRB has found that restraint or coercion exists if a union disciplines a supervisor-member for performing his or her collective bargaining or grievance adjustment duties.15

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9 Teamsters Local 729 (Penntruck Co.), 189 NLRB 696 (1971).
10 Longshoreman (ILWU), 79 NLRB 1487 (1948).
11 Theatrical Stage Employees Local 52 (Michael Levee Prods.), 238 NLRB 19 (1978).
12 Section 8(b)(4)(A) makes it unlawful for a union for force an employer to join any labor or employer organization. Each party to a collective bargaining relationship has the right to select its representatives for bargaining and has a corresponding duty to deal with the other party's selected representatives. While many of the NLRA's provisions overlap, for the sake of clarity, we address each provision separately above.
14 Longshoreman Local 333 (Morania Oil Tankers), 233 NLRB 387 (1977).
15 Typographical Union No. 18 (Northwest Publications), 172 NLRB 2173 (1968); Typographical Union No. 16 (Chicago) (Hammond Publishers), 216 NLRB 903 (1975).
B. **Section 8(b)(2)**

Under Section 8(b)(2), it is an unlawful for a union "to cause or attempt to cause" an employer to discriminate in violation of Section 8(a)(3), which prohibits an employer from discriminating or discouraging union membership. A union need not act with the specific motive of encouraging union membership to violate Section 8(b)(2).\(^\text{16}\) Rather, a union violates the Act if the foreseeable consequences of its actions are to encourage or discourage union membership.\(^\text{17}\)

While a wide range of union conduct may influence or cause an employer to discriminate, the most typical violations of Section 8(b)(2) occur when a union tries to get the employer to discharge a non-union employee or a member who has fallen into disfavor with union leadership.\(^\text{18}\) The United States Supreme Court has reasoned that the termination of a non-member directly encourages union membership, while the discharge of a member who has incurred the leadership's personal and political disfavor does so indirectly.\(^\text{19}\) In other words, a union cannot exercise influence over an employer beyond that which the law permits.

A union also violates 8(b)(2) if it seeks or promotes to retaliate against an employee who criticizes the union. For example, a union may violate 8(b)(2) if it causes the employer to stop scheduling an employee for overtime or extra work shifts because the employee is critical of the

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\(^{16}\) *NLRB v. St. Joe Paper Co.*, 319 F.819 (2nd Cir. 1963).

\(^{17}\) *Id.*

\(^{18}\) *Plumbers & Pipe Fitters Local 669 v. NLRB*, 778 F.2d 8 (D.C. Cir. 1985); *NLRB v. Laborers Local 644*, 810 F.2d 655 (7th Cir. 1987).

\(^{19}\) *Radio Officers v. NLRB*, 347 U.S. 17 (1954).
Similarly, a union may not discriminate against an employee who opposes union leadership during a union election.  

C. **Section 8(b)(3)**

Section 8(b)(3), like 8(a)(5), requires a union to meet and bargain with the employer in good faith. Thus, Sections 8(a)(5) and 8(b)(3) impose a reciprocal duty on the employer and the union to bargain in "good faith." What constitutes good faith bargaining is not always clear, and the NLRB generally employs a totality of the circumstances test to determine whether the union and the employer have met and conferred in good faith.  

Because the NLRB considers all of the circumstances, isolated incidents of misconduct will not generally result in a finding of bad faith bargaining.  

The NLRA does not set forth the number of times the parties are required to meet, but it does require them "to meet at reasonable times and confer in good faith with respect to . . . the negotiation of an agreement."  

Importantly, the Act does not require the parties to agree; rather, the parties are only required to negotiate in good faith.  

While the Act does not define good faith, courts have attempted to define the concept as follows:

- "A sincere effort . . . to reach a common ground. A bona fide intent to reach an agreement, the continual engagement of bargaining, the exchanging of

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23 Horsehead Resource Dev. Co. v. NLRB, 154 F.3d 328 (6th Cir. 1998); NLRB v. Hi-Tech Cable Corp., 128 F.3d 271 (5th Cir. 1997).
24 NLRA §8(d).
proposals, and meeting at a reasonable time and a reasonable place that is convenient for both parties . . . an open mind and a sincere desire to reach an agreement [and] the obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement;”\textsuperscript{26} and

- "[I]f the purpose of collective bargaining is to promote the 'rational exchange of facts and arguments' that will measurably increase the chance for amicable agreement, then sham discussions in which unsubstantiated reasons are submitted for genuine arguments should be anathema."\textsuperscript{27} 

Given the lack of clarity on what constitutes good faith bargaining, it is perhaps easier to define what constitutes bad faith bargaining. For instance, the following union actions have been held to constitute \textit{per se} violations:

- Insistence upon bargaining over non-mandatory subjects;\textsuperscript{28}
- A union's insistence upon permissive subjects to the point of impasse;\textsuperscript{29}
- Refusing to meet at reasonable times;\textsuperscript{30}
- A union's refusal to sign a written agreement that has been ratified by the membership.\textsuperscript{31}

D. \textbf{Section 8(b)(4)}

Although unions have the right to use handbills, pickets, and strikes against employers with whom they have a labor dispute ("primary employers"), Section 8(b)(4) prohibits some, but not all, forms of boycotting against employers with whom the union does not have a direct labor conflict ("secondary employers"). Section 8(b)(4), known as the secondary boycott provision

\begin{footnotes}
\footnotetext[26]{NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943).}
\footnotetext[27]{NLRB v. General Elec. Co., 418 F.2d 736, 750 (2nd Cir. 1969).}
\footnotetext[28]{NLRB v. Katz, 369 U.S. 736 (1962).}
\footnotetext[29]{NLRB vs. Hod Carriers, 384 F.2d 55 (9th Cir. 1967).}
\footnotetext[30]{Caribe Staple Co., 313 NLRB 877 (1994).}
\footnotetext[31]{Graphic Communications Local 554 (World Color Press), 306 NLRB 844 (1992).}
\end{footnotes}
even though it does not contain such language, prohibits a union from engaging in conduct intended to induce strikes or concerted work stoppages by employees of a secondary employer.\(^32\) It is also illegal for a union to picket a secondary employer with whom they have no labor dispute, if the goal of such picketing is to make that company cease doing business with a primary employer.\(^33\)

Even though a union is generally prohibited from picketing a secondary employer's worksite, there are limited circumstances under which a union may lawfully picket a secondary employer's place of business.\(^34\) Under the NLRB's *Moore Dry Dock* standard a union may picket a secondary employer's work-site if the primary employer is 1) present at the secondary employer's work-site; 2) the primary employer is engaged in its normal business at the work-site; 3) the picketing occurs reasonably close to the situs of the primary employer; and 4) the picketing must identify the primary employer.\(^35\)

Finally, a union may peacefully handbill and banner a secondary employer's customers and employees without violating 8(b)(4).\(^36\) However, the handbilling and bannering cannot have the effect of inducing an employee, other than the employees of the primary employer, to refuse to perform his or her job duties.\(^37\)

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34. *Sailors Union of the Pac. (Moore Dry Dock Co.)*, 92 NLRB 547 (1950).

35. *Id.*


37. *Id.*
E. **Section 8(b)(5)**

Under Section 8(b)(5), it is unlawful for a union to impose excessive or discriminatory initiation fees on employees covered by a union-security clause. To determine whether an initiation fee is excessive or discriminatory, the NLRB will consider a variety of factors including:

- The practices and customs of other unions in the industry;
- The wages currently being paid to the affected employees;
- The motive underlying the increase in fees;
- The uniformity of applying the fees; and
- The economic justification for the increase in fees.\(^{38}\)

The NLRB has previously found that a union's financial problems do not justify an increase in initiation fees.\(^{39}\) Similarly, increasing fees for the purpose of deterring an employer from hiring new employees has also been found to violate Section 8(b)(5).\(^{40}\)

F. **Section 8(b)(6)**

Section 8(b)(6) was added to the NLRA to combat "featherbedding." Featherbedding is a technique unions use to artificially create work for their members and force a company to retain employees, even though no work is available. Section 8(b)(6), therefore, prohibits a union from causing or attempting to cause "an employer to pay or deliver . . . any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

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\(^{38}\) See e.g., Theatrical Stage Employees Local 841 (National Broadcasting Co.), 225 NLRB 994 (1976); Boilermakers Local 749 (Sequoia Employers Council), 192 NLRB 502 (1971).

\(^{39}\) Id.

\(^{40}\) Id.
The application of this section was limited by two 1953 Supreme Court decisions. Those decisions, in essence, allow for unions to insist upon and receive payment for employees, so long as some work is performed, even though that work is unnecessary. Thus, Section 8(b)(6) only applies when a union demands that an employer pay employees who do not actually perform work.

G. Section 8(b)(7)

Section 8(b)(7), like Section 8(b)(4), places restrictions on a union's ability to picket. Specifically, where recognition or organization is an objective of the picketing, 8(b)(7) will apply even if there are other lawful motives. Thus, anytime a union does picket it is critically important to read the picket signs, lawfully collect leaflets, and listen to union chants so as to ascertain whether the picketing has an organizational or recognitional objective. Examples of organizational or recognitional picketing that 8(b)(7) prohibits include:

- 8(b)(7)(A) prohibits a rival union from picketing an employer that has lawfully recognized another union, so long as there are no questions concerning representation;
- 8(b)(7)(B) prohibits a non-certified union from picketing when a valid election has been conducted under Section 9(c) within the preceding twelve (12) months. This prohibition applies regardless of whether the picketing union was a participant in the election; and
- If recognitional or organizational picketing is not barred by subparagraphs (A) or (B), subparagraph (C) limits the picketing duration to a "reasonable period" not to exceed 30 days, unless a representation petition is filed prior to the end of the 30 day period. Picketing beyond the 30 day period violates section 8(b)(7)(C).


42 Plumbers & Pipe Fitters Local 32 (Bayley Constr.), 315 NLRB 786 (1994).
Absent an organizational or recognitional objective, the following types of picketing are not prohibited by 8(b)(7):

- Picketing to protest unfair labor practices or discharges;\(^\text{43}\)
- Picketing to protest the wages paid by a non-union employer that are lower than the standard set by union contracts in the area (i.e., area-standards picketing);\(^\text{44}\) and
- Picketing to "truthfully advise the public that an employer does not employ members of, or have a contract with, a [union], unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment not to pick up, deliver or transport any goods or not to perform any services"\(^\text{45}\) (i.e., informational picketing).

Finally, the Act does not define the term "picket" or "picketing," although definitions have been gleaned from relevant case law. For example, the NLRB has applied Section 8(b)(7) to persons who placed signs in a snow bank abutting the employer's premises, watched from the warmth of nearby cars, and emerged from the cars to answer questions about the signs or to speak to delivery drivers.\(^\text{46}\) While this activity did not conjure up notions of the traditional methods of picketing (e.g., marching back and forth while carrying a sign), the NLRB found that such conduct had the same aspects and effect of unlawful organizational or recognitional picketing.\(^\text{47}\)

\(^{43}\) Waiters & Bartenders Local 500 (Mission Valley Inn), 140 NLRB 433 (1961).
\(^{44}\) Painters Dist, council 711 (JC Two, Inc.), 351 NLRB 1139 (2007) (noting that a union must first make a "reasonable inquiry" concerning the wage rates paid by the picketed employer).
\(^{46}\) Teamsters Local 182 (Woodward Motors), 135 NLRB 851 (1962).
\(^{47}\) Id.
III. Important Rules for the Non-Union Employer

Non-union employers often believe that the NLRA and NLRB only deal with issues involving employers that have unions. That is not the case. Many rules apply regardless of whether an employer is unionized or not. Below are some of the more significant NLRA rules that every non-union employer should know.

A. Protected Concerted Activity

Section 7 of the NLRA gives all employees, including non-union employees, the right to engage in protected concerted activity. Protected concerted activity generally involves two or more employees acting together to address a collective employee concern.\(^{48}\) However, a single employee acting on behalf of others or who is initiating group action or who has discussed the matter with co-workers can also be engaging in protected concerted activity.\(^{49}\) Employers violate the NLRA if they have knowledge of the concerted nature of the employee's activity and take adverse action against the employee because of that activity.\(^{50}\)

Conversely, an employee who is acting only on his or her own behalf on a personal concern is generally not engaged in protected concerted activity.\(^{51}\) Indeed, individual action is not protected concerted activity, even if the employee is pursuing a right under local, state, or federal law that governs the workplace.\(^{52}\)

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50 See id.
52 Id.
B. **Prohibiting Employees from Discussing Their Pay with Co-Workers**

Under the NLRA employees have the right to communicate with their co-workers regarding their wages and rates of pay.\(^{53}\) At least one court has found that a rule prohibiting employees from discussing their wages with each other violates Section 7.\(^{54}\) In fact, the NLRB has found that the mere existence of such a policy violated the NLRA, even though no employees were ever disciplined for discussing their pay.\(^{55}\) Interestingly, the prohibition need not be a written policy – oral instructions not to discuss wages also violate the NLRA.\(^{56}\)

C. **Employee Right to Solicit and Distribute Literature on Behalf of a Union at Work**

Under the NLRA, employees on paid or unpaid non-working time (breaks, meal periods, etc.) are allowed to solicit other employees during their non-working time in both working and non-working areas.\(^{57}\) Employees may also distribute literature during non-working time in non-working areas.\(^{58}\) Accordingly, while employers may have no solicitation and no distribution rules, those rules must be drafted carefully so as to not prohibit appropriate solicitation or distribution.\(^{59}\) Moreover, valid distribution and solicitation rules cannot be discriminatorily

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\(^{53}\) See NLRA, at § 157.

\(^{54}\) *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531 (6th Cir. 2000).

\(^{55}\) *University Medical Center*, 335 NLRB 1318 (2001).

\(^{56}\) See *id*.

\(^{57}\) *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)

\(^{58}\) *Id*.

\(^{59}\) *Id*. 
enforced against those who are soliciting or distributing on behalf of a union and not others.\textsuperscript{60} To date, the NLRB has recognized a limited carve out from this rule for the United Way.\textsuperscript{61}

**D. Placing Restrictions on Bulletin Board Postings**

As a general rule, employers can prohibit employees from posting any items on a company bulletin board.\textsuperscript{62} For instance, an employer may prohibit employees and a union from posting pro-union literature or union meeting announcements on company bulletin boards.\textsuperscript{63} Even so, the NLRB has long held that an employer may not discriminatorily enforce restrictions on employee postings on bulletin boards.\textsuperscript{64}

Most employers either don't have a rule against employees posting personal items on bulletin boards, or do not consistently enforce the rules they do have. Prior to the NLRB's 2007 decision in *Guard Publishing Co. d/b/a The Register-Guard*, 349 NLRB 1007 (2007), the Board employed a strict rule regarding what constituted discriminatory enforcement. Based on *The Register-Guard*, however, an employer may lawfully maintain policies permitting and prohibiting certain types of postings as long as the prohibition is not tied to employees' union-related conduct. Accordingly, it is lawful for an employer to have a policy that allows employees to use the employer's bulletin boards for charitable solicitations but not for non-charitable solicitations.

\textsuperscript{60} See *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

\textsuperscript{61} *Hammary Mfg. Corp.*, 265 NLRB 57 (1982).

\textsuperscript{62} *Eaton Tech., Inc.*, 322 NLRB 848 (1997) (ALJ decision citing *Vincent Steak House*, 216 NLRB 647 (1975)).

\textsuperscript{63} Id.

\textsuperscript{64} Id.
E. **Prohibiting Employees From Discussing Internal Harassment Complaints**

Employers often instruct employees who are interviewed during the course of investigating workplace harassment not to discuss the matter with their co-workers. Some employers may even maintain a confidentiality rule prohibiting employees from discussing sexual harassment complaints among themselves. A 2002 NLRB decision, however, calls such practices and policies into question.65

In *Phoenix Transit System*, the NLRB held that such a confidentiality rule and the employer's enforcement of that rule restricted the exercise of employees' protected right to discuss sexual harassment complaints amongst themselves. In *Phoenix Transit*, the employer was investigating allegations of sexual harassment regarding a supervisor. The employer met with employees, advised them that the investigatory meeting was "confidential," and that matters talked about were not to be discussed even among the co-workers involved in the investigation. The employer gave interviewees no explanation for that instruction and placed no time limit upon it. Eventually, the employer determined that supervisor had engaged in appropriate conduct and required him to undergo counseling. However, it never informed employees who complained of the harassment or who were interviewed about the outcome of the investigation.

Months later, another employee complained to a co-worker about the same supervisor's conduct. That co-worker happened to be one of the employees who earlier had complained to the company. That employee then details concerns about the sexual harassment complaint against the supervisor in a union newsletter article. The article described the experience of the employees who reported the alleged harassment and stated that all persons interviewed had been instructed not to discuss the matter. The employee also asserted that management had done

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nothing in response to the complaints and that the supervisor was continuing with offensive behavior. The company fired the employee for breaking the confidentiality instruction. The employee then filed an unfair labor practice charge with the NLRB.

The NLRB held that in publishing the article, the employee was involved in protected concerted activity because he was making an effort to alert fellow employees of alleged misdeeds and injustices being practiced upon them by the employer. The Board noted that the right of freedom of communication is not limited to organizational rights because "non-organizational protected activities are entitled to the same protections and privileges as organizational activities."\(^66\) The NLRB noted that if the communications had been published with knowledge of their falsity or with reckless disregard of whether they were true or false, they would not be protected. However, the Board found that the employer had failed to let employees know the outcome of the investigation. Consequently, the employees had a valid interest and right to discuss the matters among themselves.

F. **Stating a Union-Free Philosophy in Employee Handbooks**

An employer may convey its preference to remain union-free to its employees without violating the NLRA. However, failure to consider the language used in such policies carefully can cause an employer to run afoul of the NLRA. For example, a union-free clause that encourages employees to report union activity or union harassment or that promises to stop violations of a distribution or no solicitation policy may violate the Act. The NLRB has held that this type of language suggests the employer will prohibit union organizing activities.\(^67\)

\(^66\) Id. at 510.

Thus, the NLRB has held that requiring employees to sign an acknowledgment form that states they will abide by the terms and conditions of a handbook which includes a union-free clause also violates the Act.\textsuperscript{68} The NLRB sees such a document as an employer enforced requirement or contract that its facility remain union-free.

G. \textbf{Refusing to Hire of Discharging Union "Salts"}

Union's often send their own employees, known as "salts," to an employer's business for the purpose of obtaining employment and organizing that employer's workforce. A "covert salt" keeps his or her union affiliation hidden and, once hired, attempts to organize the employer from within. An "overt salt" wears union paraphernalia (t-shirts, buttons, hats, etc.) during the application or interview process. The overt salt often files an unfair labor practice charge if not hired asserting that the employer's decision to not hire him or her was motivated by the salt's union support. If hired, the salt will attempt to organize the employer from within.

Importantly, it is lawful for a union to place someone within an employer for the purpose of soliciting union support, but it is unlawful for an employer to refuse to hire a person because he supports a union or will try to organize one. Despite those limitations, there are many legitimate reasons to reject applicants that apply equally to salts and non-salts. For example:

- It is lawful to refuse to hire applicants who are less qualified or over qualified than other applicants.
- It is lawful to refuse to take applications from salts if no applications are being taken from anyone.
- It is lawful to have a policy stating that applications will only be considered for some period of time (i.e., 30 days).

\textsuperscript{68} Id.
• It is lawful to reject individuals whose prior wage rate is greater than that of the position they are seeking.

• It is lawful to reject individuals with "gaps" in employment history on the application.

• It is lawful to refuse applications from third party referral sources.

• It is lawful to only hire applicants with internal references.\(^\text{69}\)

An employer should have a written policy outlining some or all of the above requirements and it must consistently and uniformly apply them.

IV. Conclusion

Union unfair labor practices, although less common than employer unfair labor practices, are an important part of the NLRA framework. In addition, the NLRA applies to all work environments, even those that are non-union.

\(^{69}\) See *Allstate Power Vac, Inc.*, 354 NLRB No. 111 (2009).