# The Tension Between the NLRA, the EEOC, and Other Federal and State Employment Laws: The Management Perspective

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## Introduction

Public opinion relating to workplace harassment has undergone a dramatic revolution in the past year.[1] Rarely a day passes without news of a high-profile harassment allegation.[2] Employers have responded to the demands of the public and their employees by erring on the side of assuring more reporting options, swifter and more thorough investigations, and, ultimately, harsher sanctions for offending employees.[3] The revolution will have a lasting impact on workplace norms by enhancing overall compliance with equal employment opportunity (EEO) obligations and providing a more equal playing field for employees. While the recent national trend primarily focuses on gender-based harassment, reports from members of other protected groups will also likely become more prevalent. Most would agree that these results are good news and long overdue. Certainly, the Equal Employment Opportunity Commission (EEOC) will welcome this grassroots movement supporting its primary charter. However, will the National Labor Relations

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1. *See* Karlyn Bowman, *Sexual Harassment: What Do the Polls Say?*, FORBES (Jan. 16, 2018), https://www.forbes.com/sites/bowmanmarsico/2018/01/16/sexual-harassment-what-do-the-polls-say/#5bafcc3c5ac0.

2. *See, e.g.*, Dan Corey, *A Growing List of Men Accused of Sexual Misconduct Since Weinstein*, NBC NEWS (updated Jan. 10, 2018), https://www.nbcnews.com/storyline/sexual-misconduct/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546.

3. Dana Wilkie, *How Companies Are Grappling with Sexual Harassment—From Firings to Oversight Panels*, SOC'Y FOR HUM. RES. MGMT. (Dec. 11, 2017), https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/sexual-harassment-responses.aspx.

Board (NLRB or the Board) help create a compliance-oriented culture free from discrimination and unlawful harassment?

Unfortunately, several Board decisions have run contrary to the EEOC's and Title VII's goals of eliminating workplace harassment and discrimination.[4] Further, the decisions also put employers on the horns of a federal agency dilemma—investigate and punish harassment to avoid the wrath of the EEOC or let harassers off without discipline to avoid NLRB sanctions. The National Labor Relations Act (NLRA or the Act) grants striking or picketing employees greater protection than they ordinarily receive under other federal and state employment laws.[5] NLRB rulings are at odds with anti-discrimination and anti-harassment protections at the state and federal level. Similarly, Board decisions put employers in a difficult position concerning compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA),[6] and other privacy-related laws.

Part I of this Article provides an overview of federal EEO laws and employers' duty to take action against workplace harassment. Part II examines the NLRB's decisions in cases involving vulgar and harassing speech from employees and illustrates the tensions created with other sources of law. Part III considers existing agency guidance and highlights the present opportunity to provide unified policies. Part IV describes the conflict between employers' obligations under the NLRA and under state EEO laws. Part V describes how NLRB decisions undermine important privacy protections.

## I. Federal Equal Opportunity Laws and the Duty to Take Action

### *A. Prohibited Harassment Under Title VII*

Title VII of the Civil Rights Act of 1964[7] prohibits workplace discrimination based on religion, ethnicity, country of origin, sex, race, and color.[8] Such discrimination is prohibited in any aspect of employment,

4. *NLRB and EEOC to Provide Guidance on the Line Between Harassment and Protected Concerted Speech*, HR POL'Y ASS'N (Nov. 17, 2017), http://www.hrpolicy.org/news/story/nlrb-and-eeoc-to-provide-guidance-on-the-line-between-harassment-and-protected-concerted-speech-14033.

5. *NLRA and the Right to Strike*, NAT'L LAB. REL. BD., https://www.nlrb.gov/news-outreach/fact-sheets/nlra-and-right-strike (last visited Sept. 8, 2018).

6. Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in various sections of Title 42 of the United States Code); *see also* Manuel Quinto-Pozos, *The Tension Between the NLRA, the EEOC, and Other Federal and State Employment Laws: The Union Perspective*, 33 A.B.A. J. LAB. EMP. L. 277 (2018).

7. 42 U.S.C. § 2000e–2000e-17 (2012).

8. *Id.* § 2000e–2(a)(1).

including compensation and all other terms, conditions, or privileges of employment.[9]

Title VII also prohibits workplace harassment based on protected categories.[10] In *Rogers v. EEOC*,[11] one circuit court explained that the statutory phrase "terms, conditions, or privileges of employment" is sufficiently expansive to protect employees from "a working environment heavily charged with ethnic or racial discrimination."[12] The court noted: "One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and . . . Title VII was aimed at the eradication of such noxious practices."[13]

*B. Hostile Work Environment Framework*

A hostile work environment can be created by "severe or pervasive" harassing conduct.[14] Verbal harassment must be "because of" the protected characteristic to be actionable.[15] For example, in gender harassment cases, the harassing comments must be gender-related rather than gender-neutral.[16] In race cases, comments must be slurs, epithets, or statements based upon readily identifiable racial stereotypes.[17] While lower courts have struggled to define what constitutes "severe" harassment in both gender and race cases, some have held that a single utterance of an extremely harmful racial epithet may be sufficient to constitute a hostile work environment.[18] Courts have been less willing to accept a single offensive comment as sufficient in gender

9. *Id*.

10. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) ("Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.").

11. Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971).

12. *Id*. at 238.

13. *Id*.

14. *Meritor*, 477 U.S. at 67; *see also* Baloch v. Kempthorne, 550 F.3d 1191, 1201 (D.C. Cir. 2008) (court "looks to the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, its offensiveness, and whether it interferes with an employee's work performance").

15. *See, e.g.*, McKinney v. Dole, 765 F.2d 1129, 1139 (D.C. Cir. 1985).

16. *See Sex/Gender Discrimination*, Workplace Fairness, https://www.workplacefairness.org/sexual-gender-discrimination (last visited Sept. 8, 2018).

17. *Racial Harassment*, Workplace Fairness, https://www.workplacefairness.org/race-harassment (last visited Sept. 8, 2018).

18. Ayissi-Etoh v. Fannie Mae, 712 F.3d 572, 577 (D.C. Cir. 2013) (one utterance of "n****r" sufficient for a reasonable jury to conclude that severe and pervasive hostile work environment exists); *see also* McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1118 (9th Cir. 2004) (one statement of "stupid n****r" by a supervisor in addition to other indirect evidence is sufficient to avoid summary judgment); Rodgers v. W.-S. Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993) ("Perhaps no single act can more quickly 'alter the conditions of employment . . . than the use of an unambiguously racial epithet such as 'n****r' by a supervisor" (internal citations omitted).).

cases, but some have come close, even when statements did not target any person directly.[19]

*C. Employer Liability and Defenses*

Employers are generally vicariously liable for hostile work environments created by supervisors.[20] Employers are also liable for hostile work environments created by non-supervisory employees if management was "negligent in failing to prevent harassment from taking place."[21] Nevertheless, courts permit compliance-focused employers to insulate themselves from potential hostile work environment liability by prompt investigation and remedial action likely to prevent future misconduct.

In *Burlington Industries, Inc. v. Ellerth*[22] and *Faragher v. City of Boca Raton*,[23] the Supreme Court provided employers a defense to a harassment claim if (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[24] Critical to the defense is implementation of a reporting mechanism, prompt investigation, and adequate remedial measures to prevent future misconduct.[25] In the absence of such corrective action, the employer faces potential liability.[26] Maintaining a responsive and accessible reporting process is critical to avoiding liability. Employees

19. *See, e.g.*, Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 811–12 (11th Cir. 2010) (en banc) (the use of "b***h," "f*****g b***h," "f*****g w***e," "crack w***e" and "c**t" in vicinity of plaintiff sufficient to support hostile work environment claim); Petrosino v. Bell Atl., 385 F.3d 210, 214, 232 (2d Cir. 2004) (jury finding of a hostile work environment reasonable in workplace with "persistent sexually offensive remarks and sexual graffiti"); Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 328, 335–36 (4th Cir. 2003) (en banc) (employer liable for male employees performing sex acts on female mannequin in presence of female employee).

20. Ida L. Castro, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EQUAL EMP. OPPORTUNITY COMM'N (June 18, 1999), https://www.eeoc.gov/policy/docs/harassment.html.

21. *See* Vance v. Ball State Univ., 570 U.S. 421, 449 (2013).

22. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

23. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

24. *Id*. at 807; *Ellerth*, 524 U.S. at 765.

25. *See e.g.*, Sutherland v. Wal-Mart Stores, Inc., 632 F.3d 990, 996 (7th Cir. 2011) (employer that investigated harassment allegations and took swift disciplinary action to deter future conduct awarded summary judgment in hostile work environment case); Wilson v. Moulison N. Corp., 639 F.3d 1, 7 (1st Cir. 2011) ("[P]laintiff must demonstrate that the employer knew or should have known about the harassment yet failed to take prompt and appropriate remedial action.").

26. *Faragher*, 524 U.S. at 789 (employer's knowledge of harassment and refusal to act may be read as "the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy").

who legitimately do not believe the employer will take corrective action need not follow the process.[27]

In summary, employers have the following options for handling harassing conduct: Take complaints of harassment seriously, conduct an investigation, and implement discipline to prevent future harassment, or face current and future liability for failure to keep employees free from discrimination and harassment. Thus, the EEOC expects employers to take effective action in response to worker harassment. Does the NLRB give employers a contrary directive? If so, what are employers to do?

## II. The NLRB's Protection of Vulgar and Harassing Speech

Over the last decade, the NLRB has repeatedly found that employers committed unfair labor practices when they disciplined employees for bad language. In some of these cases, the employee's conduct would have given rise to an employer's obligation under Title VII to take prompt effective action.[28] The Board's 2016 decision in *Cooper Tire & Rubber Co.*[29] was not the first in which the NLRB excused behavior that would have seemed a sufficient basis for termination.[30] The case, though, is a quintessential example of the tension between an employer's competing obligations under the NLRA and federal anti-discrimination and anti-harassment laws.

### *A.* Cooper Tire & Rubber Co.

In *Cooper Tire*, a picketing employee made racist comments toward African-American replacement workers.[31] After the strike ended, an employer investigation led to the employee's discharge.[32] Discharge was based on the employee's comment: "Hey, anybody smell that? I smell fried chicken and watermelon" as a van of African-American replacement workers entered the worksite.[33] The company believed

27. *See* Vance v. Ball State Univ., 570 U.S. 421, 449 (2013) (evidence relevant in determining whether employer unreasonably failed to prevent harassment includes "[e]vidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed").

28. *See, e.g.*, Pier Sixty, LLC, 362 N.L.R.B. No. 59, at 3–4 (Mar. 31, 2015) (reversing termination for employee who called a supervisor a "nasty mother f****r" in a Facebook post urging co-workers to vote for the union); Starbucks Corp., 360 N.L.R.B. 1168, 1171 (2014) (overturning termination of employee who uttered profanities at a manger in the presence of customers while off-duty and engaged in union activity); Plaza Auto Ctr., Inc., 360 N.L.R.B. 972, 981–82 (2014) (employee did not lose protection of National Labor Relations Act despite calling manager several profanities and making other personal insults during a meeting that resulted in termination).

29. Cooper Tire & Rubber Co., 363 N.L.R.B. No. 194 (May 17, 2016).

30. *See id.* at 12 (affirming administrate law judge's ruling).

31. *Id.* at 4.

32. *Id.* at 5.

33. *Id.* at 4. The employee also yelled, "Hey did you bring enough [Kentucky Fried Chicken] for everyone?" *Id.* These comments were the sole basis of discharge. *Id.*

that "making racist comments is not protected activity" and that consequently "firing an employee because he makes racist comments cannot violate the Act."[34]

Relying on *Clear Pine Mouldings, Inc.*,[35] the Board used an objective standard to analyze employee picket-line conduct that considers whether the comments "may reasonably tend to coerce or intimidate employees in their rights protected under the Act or whether those statements raised a reasonable likelihood of an imminent physical confrontation."[36] The Administrative Law Judge (ALJ), whose opinion the Board adopted, explained that the racist and offensive comments should not "be evaluated in the context of the normal workplace environment."[37] Applying *Clear Pine Mouldings*, the ALJ concluded:

> [The] statements were offensive and racist, and certainly may have been disrespectful to the dignity and feelings of African-American replacement workers, [but] there is no evidence to establish that the statements contained overt or implied threats, that they coerced or intimidated employees in the exercise of their rights protected under the Act, or that they raised a reasonable likelihood of an imminent physical confrontation.[38]

The ALJ explained that his findings were "consistent with well-established Board precedent . . . . [A] striker's or picketer's use of even the most vile language and/or gestures, standing alone, does not forfeit the protection of the Act, so long as those actions do not constitute a threat."[39] Indeed, the ALJ was correct that Board decisions have regularly overturned discharges of employees for offensive language uttered in the context of concerted activity.[40] These decisions create significant tension between the NLRA and other federal statutes, most significantly Title VII.

### *B.* Consolidated Communications *and Judge Millet's Powerful Concurrence*

*Consolidated Communications v. NLRB*,[41] decided shortly after *Cooper Tire*, confronted this tension directly. The D.C. Circuit upheld the Board's decision that two suspensions of striking employees violated the Act but reversed the Board with respect to a striker who

34. *Id.* at 9.

35. *Id*. at 7; *see also* Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044, 1048 (1984) (National Labor Relations Board (NLRB or Board) applied objective test to determine that striking employee's verbal threats were sufficiently intimidating to deny reinstatement).

36. *Cooper Tire & Rubber Co.*, 363 N.L.R.B. No. 194, at 7.

37. *Id*. at 9.

38. *Id*. at 8. This finding was adopted by the Board. *Id.* at 1.

39. *Id*.

40. *See, e.g.*, *supra* note 28 and accompanying text.

41. Consol. Commc'ns v. NLRB, 837 F.3d 1 (D.C. Cir. 2016).

followed a company manager several miles away from the job site.[42] Circuit Judge Patricia A. Millet, the opinion's author, also wrote a concurrence to

> convey [her] substantial concern with the too-often cavalier and enabling approach that the Board's decisions have taken toward the sexually and racially demeaning misconduct of some employees during strikes. Those decisions have repeatedly given refuge to conduct that is not only intolerable by any standard of decency, but also illegal in every other corner of the workplace.[43]

Judge Millet wrote that the Board's decisions "have winked away [conduct] . . . that has trapped women and minorities in a second-class workplace status."[44] While she recognized that "rough words and strong feelings can arise in the tense and acrimonious world of workplace strikes," Judge Millet regarded targeted sexual or racial degradation of others as "categorically different" than other "rough words,"[45] and that conduct "designed to humiliate and intimidate another individual *because of and in terms of that person's gender or race* should be unacceptable in the work environment."[46]

Her concurrence recognized:

> It will often be quite hard for a woman or minority who has been on the receiving end of a spew of gender or racial epithets—who has seen the darkest thoughts of a worker revealed in a deliberately humiliating tirade—to feel truly equal or safe working alongside that employee again. Racism and sexism in the workplace is a poison, the effects of which can continue long after the specific action ends.[47]

Accordingly, she urged the Board to reframe its objective standard to measure "threats" from the perspective of a reasonable person in the target's position, as analyzed under Title VII, and "how nigh impossible it is to cabin racism's and sexism's pernicious effects."[48] Judge Millet's concurrence is compelling. Adopting her revised objective standard could potentially allow the Board to harmonize protecting striking workers' rights with Title VII's command to prevent harassment and hostile work environments.

42. *Id.* at 20.
43. *Id*. at 20 (Millet, J., concurring).
44. *Id*. at 21.
45. *Id.*
46. *Id.*
47. *Id*. at 24.
48. *Id.*

## III. Agency Guidance and the Opportunity to Present a Unified Policy

### *A. Joint Agency Cooperation*

Conflicts between the NLRA and Title VII are not new. Recognizing that both employers and unions prefer coordinated guidance, Deputy (and former Acting) General Counsel Jennifer Abruzzo announced in 2017 that the two agencies would work together to publish guidance on the intersection between the two laws.[49] This guidance has not been issued. Now would be a perfect time for the EEOC and NLRB to coordinate their approaches to offer employers clear and consistent guidance because both agencies are currently reconsidering various earlier doctrines in the face of changes in Commission and Board membership.

### *B. EEOC Harassment Guidance*

The EEOC unveiled its seventy-five-page guidance on sexual harassment for public comment in January 2017.[50] It is designed to consolidate and replace the multiple guidance documents on the topic released over several decades.[51] The proposed guidance includes a section titled "Promising Practices," which lists "five core principles," which, according to the EEOC, "have generally proven effective in preventing and addressing harassment":

- Committed and engaged leadership;
- Consistent and demonstrated accountability;
- Strong and comprehensive harassment policies;
- Trusted and accessible complaint procedures; and
- Regular, interactive training tailored to the audience and the organization.[52]

The guidance also identifies "reasonable corrective actions" for employers that encounter workplace harassment: "Once an employer has notice of potentially harassing conduct, it is responsible for taking reasonable corrective action to prevent the conduct from continuing. This includes conducting a prompt and effective investigation *and taking appropriate action based on the findings of that investigation*."[53] To take "appropriate corrective action," the guidance explains:

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49. *See* Hassan A. Kanu, *Labor Board and EEOC to Clarify Overlap in Anti-Bias, Labor Laws*, BLOOMBERG BNA (Nov. 13, 2017), https://www.bna.com/labor-board-eeoc-n73014471998.

50. *Proposed Enforcement Guidance on Unlawful Harassment*, EQUAL EMP'T OPPORTUNITY COMM'N (2017), https://www.regulations.gov/document?D=EEOC-2016-0009-0001.

51. *Id.* at 4–5.

52. *Id.* at 68.

53. *Id.* at 59 (emphasis added).

> To avoid liability, an employer must take corrective action that is "reasonably calculated to prevent further harassment" under the particular circumstances at that time. Corrective action should be designed to stop the harassment and prevent it from continuing. The reasonableness of the employer's corrective action depends on the particular facts and circumstances at the time when the action is taken. Considerations that will be relevant in evaluating the reasonableness of an employer's corrective action include the following:
>
> 1) Proportionality of the corrective action: Corrective action should be proportionate to the seriousness of the offense. If the harassment was minor, such as a small number of "off-color" remarks by an individual with no prior history of similar misconduct, then counseling and an oral warning might be all that is necessary. *On the other hand, if the harassment was severe or persistent despite prior corrective action, then suspension or discharge may be appropriate*.
> 2) Authority granted harasser . . .
> 3) Whether harassments stops . . .
> 4) Effect on complainant . . .
> 5) Options available to the employer . . .
> 6) The extent to which the harassment was substantiated . . .
> 7) Special consideration when balancing anti-harassment and accommodation obligations with respect to religious expression . . . .[54]

### *C. EEOC's Special Task Force on Harassment*

In 2015, the EEOC created the Select Task Force on the Study of Harassment in the Workplace.[55] One year later, the Select Task Force released its findings in a report by co-chairs Chai Feldblum and Victoria A. Lipnic.[56]

The Select Task Force advised employers not to view harassment training as a way to avoid legal liability, but as a prevention tool that is "part of a holistic culture of non-harassment that starts at the top."[57] It specifically recommended promoting employee "civility" as a method to reduce future harassment—a word the NLRB has long considered problematic when included in employer policies and work rules.[58] It recommended that employers institute bystander intervention training and workplace civility training to instruct employees "what conduct is unacceptable in the workplace" and to provide managers and

54. *Id.* at 62–65 (emphasis added).

55. *See* Chai R. Feldblum & Victoria A. Lipnic, Equal Emp. Opportunity Comm'n, Select Task Force on the Study of Harassment in the Workplace, at iv (2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

56. *See generally id*.

57. *Id.* at v.

58. *Id.* at 54–56.

supervisors "effective tools to respond to observation or reports of harassment."[59]

Unfortunately, some Special Task Force advice would likely violate the NLRA. For example, the Special Task Force, while praising workplace civility training as a successful harassment prevention tool, nevertheless acknowledged that broad workplace civility codes "may be read to limit or restrict certain forms of speech [and] may raise issues under the NLRA."[60] It urged the EEOC and NLRB to "confer and consult, and attempt to jointly clarify and harmonize the interplay of the NLRA and the federal EEO statutes."[61]

*D. A Step in the Right Direction*

The NLRB Division of Advice has shown an increased willingness to consider the broader implications of race and gender harassment when assessing protected concerted activity. A 2018 Advice Memorandum instructs employers how to balance successfully NLRA-protected concerted activity with Title VII anti-discrimination obligations.[62]

The case that is the subject of the Advice Memorandum arose from an employee's actions following a 2017 diversity and inclusion summit.[63] The employee drafted a memorandum outlining his concerns with the employer's programs and a "'monoculture' that created an 'ideological echo chamber'" where contrary viewpoints, such as his, "were shamed to silence."[64] He also made degrading and discriminatory comments about women that constituted sexual harassment.[65] In the memorandum, NLRB Associate General Counsel Jayme L. Sophir explained: "Where an employee's conduct significantly disrupts work processes, creates a hostile work environment, or constitutes racial or sexual discrimination or harassment, . . . [it is] unprotected even if it involves concerted activities regarding working conditions."[66] In requesting the NLRB to dismiss the charge, Sophir noted that the employer "carefully tailored the message it used in discharging the Charging Party, as well as its follow-up message to all employees, to affirm their right to engage in protected speech while prohibiting discrimination or harassment."[67]

59. *Id.* at 54.
60. *Id.* at 56.
61. *Id.* at 43.
62. Advice Memorandum, Case 32-CA-205351, NLRB OFFICE OF THE GEN. COUNSEL (Jan. 16, 2018).
63. *Id.* at 1–2.
64. *Id.* at 2.
65. *See id.* at 5.
66. *Id.* at 4.
67. *Id.* at 5.

Unlike *Cooper Tire*,[68] this case did not involve striking employees who enjoy heightened protection.[69] Nevertheless, it assures employers that they can lawfully terminate employees who make discriminatory statements while expressing views on matters affecting working conditions or other concerted activity, provided the reason for termination is explicitly limited to unprotected actions.

## IV. Conflicts Between an Employer's Obligations Under the NLRA and Under State Equal Opportunity Laws

Conflicts arise not only from federal legislation but also from state and local laws affecting the workplace. States and municipalities have increasingly strengthened their own EEO and harassment laws and ordinances to impose even greater obligations on employers. As with Title VII and other similar federal legislation, an employer's duty to provide a workplace free of harassment or discrimination under state and local laws also can cause tension with its responsibilities under the NLRA. The Illinois Human Rights Act,[70] the California Fair Employment and Housing Act,[71] and the Colorado statute barring discriminatory and unfair employment practices are examples of such laws.[72]

The Illinois Human Rights Act (IHRA) definition of sexual harassment includes "any conduct of a sexual nature when . . . such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."[73] The IHRA imposes liability on an employer for "sexual harassment of the employer's employees by nonemployees or nonmanagerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures."[74]

The California Fair Employment and Housing Act (FEHA) makes it unlawful for an entity, its agents, or supervisors to "fail[ ] to take immediate and appropriate corrective action" when they know or should have known of sexual harassment.[75] The FEHA also imposes personal liability for prohibited harassment.[76] Further, the FEHA made it an unlawful employment practice for an employer or labor organization

68. *See supra* notes 31–39 and accompanying text.

69. *See* Advice Memorandum at 1–3, Case 32-CA-205351, NLRB Office of the Gen. Counsel. For more information on this case, see Quinto-Pozos, *supra* note 6, at 295–96.

70. 775 Ill. Comp. Stat. Ann. 5 (2018).

71. *See* Cal. Gov't Code §§ 12940–12952 (2018) (sections governing unlawful discriminatory practices).

72. Colo. Rev. Stat. § 24-34-402 (West 2018).

73. 775 Ill. Comp. Stat. Ann. 5/2-101(E)(3).

74. *Id.* 5/2-102(D).

75. Cal. Gov't. Code § 12940(j)(1).

76. *Id.* § 12940(j)(3).

"to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."[77]

The Colorado Revised Statute prohibits harassment, defined as the creation of "a hostile work environment based upon an individual's race, national origin, sex, sexual orientation, disability, age, or religion."[78] Such harassment becomes illegal if a complaint is filed with the appropriate authority at the victim's workplace and if such authority "fails to initiate a reasonable investigation of a complaint and take prompt remedial action if appropriate."[79]

These state laws impose upon employers greater obligations than their federal counterpart to respond quickly to and remedy harassment complaints.[80] Thus, they add another layer of potential liability if an employer tries to avoid NLRA liability by tolerating the conduct of a harassing employee engaged in concerted activity.

## V. NLRA and Privacy Concerns

Tensions between the NLRA and other employment-related laws are not limited to non-discrimination laws. There are also concerns that the NLRB has undermined important privacy protections. For example, in *Whole Foods Market Group, Inc.*,[81] the Board found that maintenance of work rules prohibiting the recording of conversations, phone calls, images, or company meetings without prior approval was unlawful.[82] The no-recording policy was designed to encourage employees to feel comfortable providing input about their work lives and voicing opinions.[83] The employer feared recording meetings would "chill the dynamic" and dampen employee interest in honestly sharing attitudes about store management.[84] There was no allegation that the policy explicitly restricted Section 7 activity.[85] Nevertheless, the Board found the rule overbroad because it did not differentiate between recordings protected by Section 7 and those that were unprotected.[86] Of course, the Board now uses more lenient standards when reviewing work rules since its 2017 decision in *Boeing Co.*[87] Perhaps future deci-

77. *Id.* § 12940(k).
78. COLO. REV. STAT. § 24-34-402(1)(a).
79. *Id.*
80. *Cf.* 42 U.S.C. § 2000e-2(a)(1) (2012).
81. *See* Whole Foods Mkt. Grp., Inc., 363 N.L.R.B. No. 87 (Dec. 24, 2015).
82. *Id.* at 3–4.
83. *Id.* at 2.
84. *Id.*
85. *See id.* at 3.
86. *Id.* at 4.
87. *See* Boeing Co., 365 N.L.R.B. No. 154, at 2 (Dec. 14, 2017) ("The Board will no longer find unlawful the mere maintenance of facially neutral employment policies, work rules[,] and handbook provisions based on a single inquiry, which made legality turn on whether an employee 'would reasonably construe' a rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future.").

sions will afford more discretion to employers when seeking to protect employee privacy.

The most difficult privacy-related decisions arise in the healthcare sphere under the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[88] In *Rocky Mountain Eye Center, P.C.*, the Board affirmed the ALJ's decision to reverse the discipline of two employees who accessed confidential company information.[89] The employees used the employer's internal information system, which also held confidential patient data, to obtain contact information for several other employees.[90] The employer's investigation concluded that accessing the system for this purpose violated the employees' confidentiality agreements.[91] One employee was terminated, and the other faced corrective counseling.[92] The Board ordered the employer to reverse the disciplinary action because employees would reasonably construe the language in the confidentiality agreement as prohibiting lawful Section 7 activity.[93] It determined the rule was overly broad because it lacked an exemption for discussion of wages, hours, and other working rules.[94]

These decisions harm the relationship not only between employers and employees but also between employers and unrelated third parties, such as patients, who depend on employers to secure their sensitive information.

Some Board decisions on patient privacy reach better conclusions. In *Flagstaff Medical Center*,[95] the Board found the employer's policy prohibiting employees from photographing hospital patients, property, or facilities did not violate the Act.[96] The Board reasoned that employees could not reasonably construe the policy as restricting Section 7 activity given patients' "weighty" privacy interests and the hospital's similarly significant interest in preventing the wrongful disclosure of patient information.[97] Additionally, no evidence suggested that employees were using photography for protective activities prior to the rule.[98]

88. *See generally* Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in various sections of Title 42 of the United States Code).

89. Rocky Mountain Eye Ctr., P.C., 363 N.L.R.B. No. 34, at 1 (Nov. 3, 2015).

90. *Id.*at 5–6.

91. *Id.* at 6.

92. *Id.*

93. *Id.* at 11.

94. *Id.*

95. *See* Flagstaff Med. Ctr., 357 N.L.R.B. 659 (2011), *enforced*, 715 F.3d 928 (D.C. Cir. 2013).

96. *Id.* at 662, 667–68.

97. *Id.* at 663.

98. *Id.*

**Conclusion**

For years, employers have been placed in a no-win situation: The NLRB has interpreted the NLRA to protect from discipline employees who engage in racist and other offensive discriminatory language in the midst of concerted activity for mutual aid and protection. On the same set of facts, however, the EEOC can condemn the employer's failure to impose appropriate disciplinary action as a violation of Title VII of the Civil Rights Act of 1964.

Yet more recently, employers have seen modest signs offering hope that this dilemma may be ameliorated. A D.C. Circuit Court concurrence harshly criticized the NLRB for enabling employees to engage in sexually and racially demeaning misconduct, and even the NLRB's own Division of Advice has instructed its regional offices that employers may lawfully discipline employees for discriminatory and harassing conduct occurring during otherwise protected activity if they simultaneously affirm workers' Section 7 rights. Ideally, for employers, the NLRB and EEOC should coordinate their enforcement roles and provide clear guidance to employers about how to navigate the tension between the NLRA and Title VII. The current moment, when both agencies are experiencing a transition in membership and a resulting reexamination of doctrine, provides an especially good opportunity for coordination to occur. Until then, however, employers trying to do the right thing may nevertheless find themselves in legal jeopardy. Moreover, even if such NLRB-EEOC coordination occurs, it unfortunately will not solve either the remaining conflicts between the NLRA and other federal workplace laws or the conflicts between the NLRA and state and local laws.