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

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Introduction

Many labor and employment lawyers have encountered circumstances presenting tensions between employees' National Labor Relations Act (NLRA or Act) Section 7[1] rights and another law. The other law often raises the specter of employer liability to additional employees, individuals, or entities. Here are some examples:

- While picketing outside the employer's place of business, a locked-out employee makes racially offensive comments to or about replacement workers.[2]
- An employee in a non-union workplace circulates a letter to co-workers and managers, complaining that the employer's diversity policy and other policies unfairly benefit women, minorities, and liberals, while disfavoring white men and conservative viewpoints. The letter goes viral and causes outrage inside and outside the company.[3]
- Just before a union certification election, an employee vents frustration with a manager in a Facebook post filled with profanity and insulting the manager's mother and family. Because the Facebook page is public, it is visible not only to co-worker Facebook friends but to all who access the page.[4]

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1. National Labor Relations Act (NLRA), 29 U.S.C. § 157 (2012).
2. Cooper Tire & Rubber Co. v. NLRB, 866 F.3d 885, 889 (8th Cir. 2017).
3. Louise Matsakis, *Google Employee's Anti-Diversity Manifesto Goes 'Internally Viral,'* Motherboard (Aug. 5, 2017), https://motherboard.vice.com/en_us/article/kzbm4a/employees-anti-diversity-manifesto-goes-internally-viral-at-google.
4. Pier Sixty, LLC, 362 N.L.R.B. No. 59, at 1–2 (Mar. 31, 2015).

- An employee in a healthcare facility, in a disciplinary proceeding, views, prints, and submits protected health information about a patient to rebut the employer's allegations of misconduct.[5]

How do employees, unions, employers, and government agencies navigate situations like these that implicate multiple areas of law? If a potential conflict exists between the NLRA and Title VII of the Civil Rights Act of 1964 (Title VII) or between the NLRA and the Health Insurance Portability and Accountability Act (HIPAA),[6] can the parties comply with all relevant laws? How are key players to know which source of law to follow? Who decides?

Some of the respective key players may argue as follows (using only one of the situations as an example):

Employee: "I should have the right to voice my opinion or thoughts on the subject of race and gender, including by making comments that some might find offensive. I should not have to choose between that right and the right to engage in pro-union or protected concerted activity."

Union: "We do not agree with or condone the member's opinion or choice of words. However, the NLRA protects employees' right to advocate for wages and working conditions. Some tension and discomfort are to be anticipated. The employee's conduct is not so outrageous or opprobrious that it loses the protection of the Act."

Employer: "We respect employees' Section 7 rights. However, the law also gives the right to all employees to be free from discrimination and harassment. Not only is harassment bad for our company, an employee's discriminatory comments or conduct could make us legally liable to other employees subjected to discrimination and harassment."

All: "We need clarity!"

Part I of this Article describes typical situations when tensions between the NLRA and other laws arise. Part II reviews past guidance from governmental agencies that attempted to address overlapping and conflicting laws. Part III articulates best practices for employees, unions, and employers facing overlapping and conflicting laws when agencies fail to offer clear guidance.

I. National Labor Relations Board Cases

The National Labor Relations Board (NLRB or the Board) has decided cases involving overlapping issues, including conflicts between the NLRA and anti-discrimination laws. Regardless of the other statute

5. Veritas Health Servs., Inc., 359 N.L.R.B. 992, 1003–04 (2013).
6. Health Insurance Portability and Accountability Act, 45 C.F.R. pt. 160.

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implicated, these cases raise common questions. How can employees maintain NLRA protections without risking their jobs? Is the employer without recourse if employees violate company policies while engaged in NLRA-protected activity? How should the NLRB's regional offices, Administrative Law Judges (ALJs), and the Board answer these questions? What about state or federal equal employment opportunity agencies? Here are some of the Board's responses.

A. Cooper Tire & Rubber Co.

In *Cooper Tire & Rubber Co.*,[7] collective bargaining negotiations between the employer and the union broke down.[8] The employer locked out the represented employees and hired replacements.[9] The locked-out employees picketed outside the employer's facility and vociferously objected to the replacement workers who crossed picket lines.[10] Among other things, the picketing employees "display[ed] their middle fingers," swore at, and wished injury upon the replacement workers.[11]

One picketing employee made racist comments.[12] After a van transporting replacement workers, including some African Americans, crossed the picket line, the picketing employee said: "Hey, did you bring enough [Kentucky Fried Chicken] for everyone?" and "Hey, anybody smell that? I smell fried chicken and watermelon."[13]

The employer fired the employee for his picket-line comments.[14] Under a new collective bargaining agreement (CBA), the union filed a grievance and an unfair labor practice (ULP) charge, which was initially deferred.[15] The arbitrator denied the grievance and upheld the termination under the CBA's "just cause" provision.[16] The Regional Director refused to defer to the arbitrator's award.[17]

The ALJ reviewed past Board law defining what kinds of picket-line misconduct was sufficiently severe to lose statutory protection.[18] He distinguished "employee conduct in the working environment,"[19]

7. Cooper Tire & Rubber Co., 363 N.L.R.B. No. 194 (May 17, 2016), *enforced*, 866 F.3d 885 (8th Cir. 2017).

8. *See id.* at 3.

9. *Id.*

10. *Id.* at 3–4.

11. *Id.* at 4.

12. *Id.*

13. *Id.* Though the employee denied making the second comment, both an arbitrator and the ALJ concluded otherwise. *Id.* at 4–5.

14. *Id.* at 5.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 7–10.

19. *Id.* at 7.

governed by *Atlantic Steel Co.*,[20] from employee conduct during a strike or on the picket line,[21] governed by *Clear Pine Mouldings, Inc*.[22]

The *Atlantic Steel* test includes four factors: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; (4) and whether the outburst was, in any way, provoked by an employer's unfair labor practice."[23] By contrast, picket-line conduct loses NLRA protection under *Clear Pine Mouldings* and its progeny if it includes verbal threats that "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."[24] The Board considers profanity, absent threats, not to create a reasonable likelihood of imminent physical confrontation.[25] Racial slurs, without threats or violence, also do not lose the Act's protection.[26]

Applying these principles in *Cooper Tire*, the ALJ concluded that because the picketer did not engage in threatening behavior, and because the comments were neither directed at nor heard by replacement workers, the comments were not intimidating or coercive.[27] Although despicable, the comments did not lose the Act's protection.[28] The Eighth Circuit enforced the Board order, finding that the Board's decision was not "illogical or arbitrary" and was supported by substantial evidence.[29]

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20. *Id.* at 9; Atl. Steel Co., 245 N.L.R.B. 814 (1979).

21. *See Cooper*, 363 N.L.R.B. No. 194, at 7.

22. Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044 (1984), *enforced*, 765 F.2d 148 (9th Cir. 1985), *cert. denied*, 474 U.S. 1105 (1986).

23. *Atlantic Steel*, 245 N.L.R.B. at 816.

24. *Clear Pine Mouldings*, 268 N.L.R.B. at 1046.

25. *See* Catalytic, Inc., 275 N.L.R.B. 97, 98 (1985) (employee calling a non-striker's wife a "God d****d b***h" over the phone was insufficient to establish a reasonable tendency to coerce or intimidate); *see also* NMC Finishing, Inc., 317 N.L.R.B. 826, 830 (1995) (striking employee carrying a sign stating "Who Is Rhonda F [. . .] sucking today?" directed at a non-striking employee, though vile and offensive, was not violent and did not make likely an imminent physical confrontation); Calliope Designs, Inc., 297 N.L.R.B. 510, 521 (1989) (striker's comments to non-striker calling her a "w***e" and a "prostitute," stating that she was sleeping with the employer's president, and similar comments, though "obscene, insulting and indecent," did not lose NLRA protection).

26. Airo Die Casting, Inc., 347 N.L.R.B. 810, 811–12 (2006) (discussing racial slurs directed at African American employees); Detroit Newspapers, 342 N.L.R.B. 223, 234–35 (2004) (same).

27. Cooper Tire & Rubber Co., 363 N.L.R.B. No. 194, at 8, 10 (May 17, 2016), *enforced*, 866 F.3d 885 (8th Cir. 2017).

28. *Id.* at 10. Though neither the ALJ nor the National Labor Relations Board (NLRB) seemed to incorporate this fact in their reasoning, there was evidence that the employer had not punished as harshly another employee who similarly violated the harassment policy. *Id.* at 5. Reportedly, the arbitrator distinguished the previous violation from the one at issue. Although the union and the NLRB General Counsel attempted to advance this argument at the court of appeals, the employer moved to strike because the issue had not been preserved by exceptions. The court did not base its decision on this argument. *See Cooper*, 866 F.3d at 892 n.2.

29. *Cooper*, 866 F.3d at 891; *see also* Consol, Commc'ns, 360 N.L.R.B. 1284, 1284 (2014), *enforced*, 837 F.3d 1 (D.C. Cir. 2016) (striking worker grabbing his crotch in the presence of female non-striking worker did not lose NLRA protection and rejecting argument that a single incident could give rise to Title VII of the Civil Rights Act of 1964

B. James Damore and Google

In 2017, James Damore, a senior engineer at Google, internally circulated a memorandum criticizing company efforts to promote diversity and what he claimed was company political bias against conservative viewpoints.[30] In "Google's Ideological Echo Chamber,"[31] Damore argued that Google should replace its gender and ethnic diversity programs with efforts to promote "ideological diversity."[32] He also asserted that more men than women work in software engineering because of biological differences between the sexes that make men more suitable for such work, rather than because of bias and discrimination.[33]

The memorandum caused an uproar among employees and was widely covered in the media.[34] Google fired Damore.[35] Google's CEO sent a company-wide message acknowledging employee rights to debate the merits of some of the issues raised but concluded that Damore violated the company's Code of Conduct by resorting to "harmful gender stereotypes."[36]

Damore filed a ULP charge against Google.[37] Damore and another plaintiff also filed a class-action lawsuit against Google under California state law making claims of discrimination on the basis of political belief, race and gender, as well as on the basis of retaliation.[38]

(Title VII) employer liability for sexual harassment); *cf.* Pier Sixty, LLC, 362 N.L.R.B. No. 59, at 6 (Mar. 31, 2015) (without considering arguments of conflict with Title VII obligations, holding that the pro-union employee's vulgarity-laced, but not ethnicity-, race- or gender-specific, public Facebook post complaining about manager, insulting manager's family, and encouraging a vote for the union did not lose protection under the totality of circumstances including the employer's anti-union animus, the "off-duty" nature of the post, and the employer's tolerance of workplace vulgarity).

30. Aja Romano, *Google Has Fired the Engineer Whose Anti-Diversity Memo Reflects a Divided Tech Culture*, Vox (Aug. 8, 2017), https://www.vox.com/identities/2017/8/8/16106728/google-fired-engineer-anti-diversity-memo.

31. *Id.*

32. Ryan Browne, *Fired Google Employee Claims 'Lack of Ideological Diversity Has Hurt Our Products,'* CNBC (Aug. 10, 2017), https://www.cnbc.com/2017/08/10/fired-google-employee-lack-of-ideological-diversity-has-hurt-our-products.html.

33. Romano, *supra* note 30.

34. *See id.*; *see also* Browne, *supra* note 32.

35. Romano, *supra* note 30.

36. *Id.*

37. The charge was withdrawn, refiled and later again withdrawn. Josh Eidelson, *Fired Google Engineer Loses Diversity Memo Challenge*, Bloomberg (Feb. 16, 2018), https://www.bloomberg.com/news/articles/2018-02-16/google-firing-of-damore-was-legal-u-s-labor-panel-lawyer-said; *see also* Ryan H. Vann & Melissa Logan, *TheTension Between the NLRA, the EEOC, and Other Federal and State Employment Laws: The Management Perspective*, 33 A.B.A. J. Lab. Emp. L. 291 (2018).

38. Elizabeth Dwoskin & Craig Timberg, *Google, Twitter Face New Lawsuits Alleging Discrimination Against Conservative Voices*, Wash. Post (Jan. 8, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/01/08/google-faces-a-lawsuit-over-discriminating-against-white-men-and-conservatives/?utm_term=.f4b859b7f0b6.

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C. Veritas Health Services, Inc.

In *Veritas Health Services, Inc.*,[39] the Board held that the employer hospital violated NLRA Sections 8(a)(1)[40] and 8(a)(3)[41] by discharging an employee for union activity and found that the employer's justification (that the employee had violated HIPAA[42]) was pretextual.[43] The challenge to the employee's discharge was one of several ULPs filed against the employer for its conduct during a union organizing campaign.[44]

During the organizing campaign, the California Department of Public Health asked to inspect certain employer records.[45] The Department concluded that a hospital employee failed to check a patient's vital signs prior to discharge.[46] The employer disciplined the employee, a known union supporter whose photo was featured on pro-union leaflets.[47] During a conference between the employee and a supervisor, the supervisor showed the employee information and discussed details from the patient's file.[48] The employee requested permission to inspect the patient's records to formulate a response, and the supervisor granted the request and wrote the patient's identifying information on a slip of paper so the employee could retrieve the records.[49] The employee printed an emergency room report, redacted the patient's name, reviewed the information, and returned to the supervisor's office with the document, explaining that the records showed the doctor knew of the patient's health status and authorized discharge.[50] The supervisor did not modify the discipline.[51]

Next, the employee appealed his discipline using the hospital's grievance procedure.[52] The employee attached several documents from

39. Veritas Health Servs., Inc., 359 N.L.R.B. 992 (2013).

40. National Labor Relations Act, 29 U.S.C. § 158(a)(1) (2012).

41. *Id.* § 158(a)(3).

42. *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). HIPAA prohibits "covered entities," such as hospitals, doctors, and other health care providers (but generally not most other employers), from disclosing patients' protected health information. 42 U.S.C. §§ 1171, 1177 (2012).

43. *Veritas Health Servs.*, 359 N.L.R.B. at 996, 1007–08. This decision was reviewed under *NLRB v. Noel Canning*. 134 S. Ct. 2550 (2014) (invalidating the Board's decision where three of the five members were invalidly appointed during Senate recess). A new three-member panel of the Board reaffirmed the ALJ's recommendation. Veritas Health Servs., Inc., 362 N.L.R.B. No. 32 (Mar. 19, 2015).

44. *See Veritas Health Servs.*, 359 N.L.R.B. at 992–93.

45. *Id.* at 1001.

46. *Id.*

47. *Id.* at 1001–02.

48. *Id.*

49. *Id.* at 1002.

50. *Id.*

51. *Id.*

52. *Id.*

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the patient's file to his grievance form.[53] They were redacted to exclude the patient's name, but the documents retained certain numbers that linked the patient to the hospital's records.[54] The employee attached a note from the doctor containing details about the patient's blood pressure and internal numbers specific to the patient's visit.[55]

Following the employee's submission of the grievance and supporting documents, the employee was summoned to meet a manager.[56] The manager questioned the employee about his accessing, printing, and attaching copies of the patient's records and informed him that each constituted a separate HIPAA violation.[57] A few days later, the manager prepared a report stating that the hospital found no violation of HIPAA because the employee accessed the records believing he was acting in the scope of his job.[58] The report stated that the employee would be retrained, reeducated, and issued a written warning.[59] However, the employee's employment was terminated the next day.[60] Separately, the hospital informed the patient that her records had been accessed, but that the records were not distributed and her personal information never compromised.[61]

Ruling in favor of the terminated employee, the ALJ reasoned that the hospital led the employee to believe that he was authorized to access the patient's file because the supervisor explicitly gave the employee permission to do so.[62] Further, the hospital's written policies explained that employees could access patient information on a "need to know" basis to perform their work.[63] Additionally, the supervisor had herself accessed and printed the same patient records.[64] The emergency room doctor disclosed the patient's record number in his memorandum supporting the grievance.[65] Yet only the union supporter was terminated.[66] Moreover, other employees had previously disclosed

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53. *Id.*
54. *Id.*
55. *Id.* at 1002–03.
56. *Id.* at 1003.
57. *Id.* at 1003–04.
58. *Id.* at 1004.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 1005.
63. *Id.*
64. *Id.* at 1006.
65. *Id.* at 1007.
66. *Id.* at 1006–07. Although unmentioned by the ALJ in his decision, agency regulations promulgated to enforce HIPAA clarify that "covered entities," such as the employer in this case, may use protected health information for "health care operations," defined to include "resolution of internal grievances." 45 C.F.R. §§ 164.501, 164.506(c)(1) (2017).

patient information and did not face the same consequences as the union supporter.[67] The Board adopted the ALJ's decision.[68]

D. Olean General Hospital

Olean General Hospital[69] involved a union request for information from the employer hospital regarding a survey by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO).[70] The union represented a unit of nurses and argued that because the parties were bargaining over staffing levels, the union was entitled to know if the JCAHO survey and resulting report implicated staffing.[71] In response to the union's request, the employer's president disclosed some, but not all, details of the report.[72] Subsequently, the employer stated that it had referred the information request to its attorneys.[73] The union filed ULPs over the refusal to provide information.[74]

The Board acknowledged that New York law protected records involving medical review programs.[75] However, the Board held that the employer's confidentiality claim had to be balanced against the union's information need.[76] Once an employer's "legitimate and substantial confidentiality interest" is established, it must timely notify the union and seek to accommodate the union's request in an alternative manner, but this employer had not done so.[77] Further, because New York law acknowledged that "any other provision of law" could override its protections, the Board reasoned that the union's need for the information in negotiations overrode the employer's confidentiality interest.[78] The Board accommodated the employer's confidentiality arguments, however, by ordering redaction of patient names.[79] Finally, the Board limited the scope of access to the people involved in the union's representation functions.[80]

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67. *Veritas Health Servs.*, 359 N.L.R.B. at 1007–08.
68. *Id.* at 992–93.
69. Olean Gen. Hosp., 363 N.L.R.B. No. 62 (Dec. 11, 2015).
70. *Id.* at 5–6.
71. *Id.* at 5.
72. *Id.*
73. *Id.* at 6.
74. *Id.* at 1–2.
75. *See id.* at 6.
76. *Id.* (citing Detroit Edison Co. v. NLRB, 440 U.S. 301, 318–19 (1979)).
77. *Id.* at 6–7.
78. *Id.* at 7.
79. *Id.* at 8. The Board left open the possibility that the union, after examining the information, could later argue that patient names were relevant.
80. *Id.* at 9; *see also* Howard Univ., 290 N.L.R.B. 1006, 1008 (1988) (employer wrongfully refused to furnish portions of patient records to union for medical technologist's grievance over termination resulting from alleged errors, despite law protecting medical record confidentiality); LaGuardia Hosp., 260 N.L.R.B. 1455, 1455 (1982) (employer wrongfully refused to furnish portions of patient records that would prove or disprove alleged nurse errors cited for employee discipline, even though state law designated patient records as confidential, where state law made exceptions for situations

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II. Agency Guidance

Ideally, agencies that administer laws that potentially impose conflicting workplace legal obligations should—through coordination and guidance—inform employers, unions, and employees facing overlapping laws. Has this occurred? Has it helped?

Agency coordination efforts have historically taken various forms. For example, the Department of Labor and the Department of Homeland Security (DHS) entered into and periodically revised a Memorandum of Understanding (MOU) regarding immigration investigation and enforcement in workplaces with pending labor disputes.[81] The document defines "labor disputes" to include disagreements about workplace rights protected by various laws.[82] Under the MOU, DHS Immigration and Customs Enforcement is to refrain from conducting enforcement activities in worksites with pending labor disputes.[83] This policy seeks to avoid employer retaliation against employees participating in labor disputes.[84] The MOU gives government agencies latitude to authorize or prioritize certain enforcement actions.[85] The MOU does not, however, establish guidelines for the agencies, or the public, on how to resolve conflicts between the laws.[86]

As another example, the Equal Employment Opportunity Commission (EEOC), and its then General Counsel Jerry N. Hunter, entered into an MOU in 1993 regarding coordination in cases that could involve violations of both the Americans with Disabilities Act (ADA) and the NLRA.[87] The MOU specified how each agency should proceed when it received a charge potentially implicating both laws, established lines of communication between the agencies, and articulated confidentiality protections for documents shared between agencies.[88] The desired

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in which the law might require disclosure, nurses had accessed records in the scope of work, the employer had unilaterally shown portions of the records during earlier grievance meetings, and disclosure of the records could be restricted to only those employees and union staff involved in the grievances).

81. *See* Dep't of Homeland Sec. & Dep't of Labor, Revised Memorandum of Understanding Between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (2011), https://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Nat'l Labor Relations Bd. & Equal Emp't Opportunity Comm'n, Memorandum of Understanding Between the General Counsel of the National Labor Relations Board and the Equal Employment Opportunity Commission (1993), https://www.eeoc.gov/policy/docs/eeoc-nlrb-ada.html.

88. *Id.*

communications included interagency consultation regarding each agency's interpretations of relevant statutes.[89]

Regarding potential conflicts between the NLRA and Title VII, the EEOC and the NLRB have both commented on the possibility of coordinating efforts or providing guidance to harmonize potentially conflicting statutory obligations. The June 2016 Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace,[90] which proposed a number of strategies to curb workplace harassment, acknowledged that some of its suggested solutions or approaches could violate NLRB precedent.[91] For instance, in recommending that employers adopt robust policies protecting the confidentiality of internal investigations and consider enacting civility codes, the report recognized the potential for conflict between such policies and NLRB case law.[92] Separately, former acting NLRB General Counsel Jennifer Abruzzo stated that the two agencies should issue joint guidance to harmonize the NLRA and Title VII.[93] However, no joint guidance was issued before Abruzzo's retirement.

An EEOC process allows the public and other agencies to seek commentary on particular topics.[94] In response to one inquiry, the EEOC in 2015 issued an Informal Discussion Letter on the potential conflict between NLRA and Title VII obligations.[95] Though the requestor's inquiry was not included, the Letter indicated that the requestor sought a legal opinion or amicus brief concerning either *Cooper Tire* or *Consolidated Communications*.[96] The EEOC's Office of Legal Counsel limited its comments to stating: "The Commission has not considered

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89. *Id.* This author is also aware of anecdotal evidence of situations in which the NLRB General Counsel's Division of Advice consulted with other federal or state agencies about the applicability of other laws to charges pending before a NLRB Region. The Department of Justice, Department of Labor, the NLRB, and the EEOC also issued a joint "fact sheet" informing workers of protections against retaliation for exercising various statutory workplace rights and directing employees to specific agencies for more information or to initiate complaints or investigations. DEP'T OF LABOR, FACT SHEET: RETALIATION BASED ON EXERCISE OF WORKPLACE RIGHTS IS UNLAWFUL, (Dec. 10, 2015), https://www.dol.gov/dol/fact-sheet/immigration/RetaliationBasedExerciseWorkplaceRightsUnlawful.htm.

90. *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.

91. *See id.*

92. *Id.*

93. Hassan 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.

94. *See Informal Discussion Letters*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/foia/letters/index.cfm (last visited Aug. 17, 2018).

95. *Title VII and Other EEOC Enforced Laws: Harassment/Striking Employees/NLRA*, EQUAL EMP. OPPORTUNITY COMM'N (Sept. 11, 2015), https://www.eeoc.gov/eeoc/foia/letters/2015/title_vii_harassment_09_11.html (informal discussion letter in response to an inquiry from the public).

96. *Id.*

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this matter as your letters define it" and that "relevant Title VII questions, which include union liability under Title VII, merit careful consideration."[97] The Letter also noted that both cases were pending at the time, one at the Board and the other at a court of appeals.[98]

The NLRB apparently does not have an equivalent process—the closest perhaps being General Counsel Memoranda and publicly available Advice Memos.[99] However, the EEOC's Informal Discussion Letters and some NLRB memoranda provide less guidance or clarity than likely desired by employees, unions, and employers. By its very language, an EEOC Informal Discussion Letter "is an informal discussion of the issues . . . raised and should not be considered an official opinion of the EEOC."[100] Likewise, an Advice Memo is limited in its applicability to the facts of the particular case.[101] Some General Counsel Memoranda known as "Mandatory Submissions to Advice" may signal to parties that the General Counsel is encouraging the Board to revisit a specific case or doctrine.[102] Other General Counsel Memoranda are much closer to guidance (especially those specifically characterized as "guidance") or the General Counsel's analysis of a particular Board or Court decision, or area of law.[103] However, no General Counsel guidance exists on the conflict between the NLRA and other statutory obligations. Absent joint guidance from the EEOC and NLRB, the employees, unions, and employers are left on their own to resolve possible tensions between the NLRA and other laws.

III. Best Practices in the Face of Overlapping Laws

Absent coordinated interagency direction, how do lawyers representing employees, unions, or employers help clients address these tensions and attempt to minimize potential pitfalls? Luckily, we need not reinvent the wheel. These tensions are not new, and some existing tools already address these problems.

A. Training

Employers should continue to train supervisors and employees on compliance with Title VII, HIPAA, the ADA, the NLRA, and other relevant statutes. Unions should conduct similar training for their members and their own employees. And, under Title VII, such trainings

97. *Id.*

98. *Id.*

99. *See, e.g.*, *Advice Memos*, Nat'l Lab. Relations Bd., https://www.nlrb.gov/cases-decisions/advice-memos (last visited Aug. 17, 2018).

100. *Title VII and Other EEOC Enforced Laws: Harassment/Striking Employees/NLRA*, *supra* note 95.

101. *Advice Memos*, *supra* note 99.

102. *See, e.g.*, Nat'l Lab. Relations Bd., Office of the General Counsel, Memorandum GC 18-02 (Dec. 1, 2017).

103. *See, e.g.*, Nat'l Lab. Relations Bd., Guidance Memorandum on Representation Case Procedure Changes, Memorandum GC 15-06 (Apr. 6, 2015).

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could help an employer or a union-as-employer establish a defense under *Burlington Industries, Inc. v. Ellerth*[104] and *Faragher v. City of Boca Raton*.[105] The age of #MeToo,[106] #TimesUp,[107] and regular computer and server hacks[108] makes this an especially opportune moment for unions and employers to design and conduct updated training on anti-harassment, anti-discrimination, and protection of sensitive information.

Employers should be sure to train entire workforces. Trainings should remind all employees to avoid discrimination and harassment. Similarly, unions should train organizers and members to recognize that discriminatory and harassing comments risk the loss of Section 7 protection and may give rise to union liability.[109] In fact, trainings present an opportunity for management and unions to provide a consistent message by conducting joint sessions. Government agencies, including the NLRB,[110] EEOC[111] and its state equivalents,[112] and the Department of Health and Human Services,[113] offer training resources.

B. Consistent Application

Although it may seem obvious, employers and unions-as-employers should apply their policies—such as those on anti-harassment, anti-discrimination, and HIPAA compliance—consistently, without regard to employees' union membership and activity or other protected concerted activity.

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104. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765–66 (1998) (employers are vicariously liable when supervisors create hostile work environments but have an affirmative defense when they exercise reasonable care to prevent and correct promptly any sexually harassing behavior).

105. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 806–07 (1998) (employers are vicariously liable for supervisors' discrimination under Title VII but have an affirmative defense based on reasonable care to prevent and correct promptly any sexually harassing behavior).

106. *See generally* David W. Garland & Nathaniel M. Glasser, *The #MeToo Movement: Implications for Employers*, 32 No. 16 WESTLAW J. EMP. 14 (2018).

107. *See generally id.*

108. *Data Breaches in America—The Rise of the Hacker*, ECONOMIST (Nov. 5, 2015), https://www.economist.com/news/business/21677638-rise-hacker.

109. The union representing Cooper Tire & Rubber Company employees, in fact, had trained members to avoid racial remarks. Cooper Tire & Rubber Co. v. NLRB, 866 F.3d 885, 895 (8th Cir. 2017) (Beam, J., dissenting).

110. *See Request a Speaker*, NAT'L LAB. RELATIONS BD., https://www.nlrb.gov/news-outreach/request-speaker (last visited Aug. 17, 2018).

111. *See Outreach, Education & Technical Assistance*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/outreach/index.cfm (last visited Aug. 17, 2018).

112. *Equal Employment Opportunity Presentations & Training*, TEX. WORKFORCE COMM'N, http://www.twc.state.tx.us/businesses/equal-employment-opportunity-presentations-training (last verified July 13, 2018).

113. *Training Materials: Helping Entities Implement Privacy and Security Protections*, DEP'T OF HEALTH & HUM. SERVS. (Jan. 10, 2018), https://www.hhs.gov/hipaa/for-professionals/training/index.html.

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Lack of consistency in application has been one factor the Board has relied upon, or at least mentioned, in concluding that an employer's justification for disciplining or terminating an employee was pretextual or outweighed by Section 7 rights. As highlighted earlier, though the Board's analysis in *Cooper Tire* did not rest on this factor, the ALJ noted that the employer had not treated previous employee harassment as harshly as it did for the picketer.[114]

The Board's case, *Pier Sixty, LLC*,[115] although not directly raising a Title VII issue, is nevertheless instructive on the importance of consistent treatment of employee conduct. There, where a pro-union employee posted profane comments on Facebook, the Board reasoned that the employer's tolerance of employees' and managers' daily use of vulgar language severely undercut its argument that the pro-union employee's termination was for his violation of company policy and not his union support.[116]

The Board has ruled similarly when employers asserted HIPAA violations as justification for employee discipline or termination,[117] or when other laws made patient or health records confidential.[118] In such cases, the Board has found that employers that ignore some employees' use or disclosure of patient health records undermine their arguments that (1) such records cannot be used by employees or unions to grieve discipline or (2) the employer need not disclose the records for contract bargaining.[119]

C. Take the Middle Road

Employees, unions, and employers should consider compromise when facing potential conflicts between the NLRA and other laws. For instance, an employer arguing that employee conduct presumptively protected by the NLRA nonetheless subjects the employer to potential Title VII liability could make a statement to its workforce condemning the conduct and restating its commitment to a workplace free of discrimination and harassment, while refraining from disciplining or terminating the employee. A union and employee defending such conduct could agree to accept lesser discipline, rather than filing a grievance or ULP. Enforcing the Board's *Cooper Tire* decision, the Eighth Circuit commented: "Title VII does not require an employer to fire a harasser. . . . Rather, what an employer must do is to take prompt

114. *See Cooper*, 866 F.3d at 890; *supra* Section I.A.
115. *See* Pier Sixty, LLC, 362 N.L.R.B. No. 59 (Mar. 31, 2015).
116. *Id.* at 5–6.
117. *See, e.g.*, Veritas Health Servs., Inc, 359 N.L.R.B. 992 (2013).
118. *See, e.g.*, Olean Gen. Hosp., 363 N.L.R.B. No. 62, at *5 (Dec. 11, 2015); LaGuardia Hosp., 260 N.L.R.B 1455, 1455 (1982).
119. *See Olean Gen. Hosp.*, 363 N.L.R.B. No. 62, at *6–7.

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remedial action reasonably calculated to end the harassment."[120] One of those options includes warning the harassing employee.[121]

In the context of disclosure of patient information, employers need to know that the Board has permitted limited use of such information for grievances or, otherwise when relevant, to a union's representation despite an employer's claims that the information is protected or confidential. In *Veritas Health Services*, the ALJ noted that the employee received permission from supervisors prior to reviewing patient records and redacted the patient's name from all records used to support his grievance.[122] When the union requests information that may contain patient health information, ALJs and the Board have instructed the parties to balance the employer's confidentiality interests with the union's information need by, for example, providing the information but removing patient names.[123] Likewise, the union has been directed to share information only with those involved in grievances or bargaining.[124]

Prior to taking a dispute to the NLRB regional office, parties should consider fashioning a middle-ground solution. The usual benefits of a negotiated settlement are applicable here: Why risk time, money, or defeat when a more amicable solution is available?

Conclusion

Navigating situations when the National Labor Relations Act overlaps with other workplace laws is not amenable to quick solutions or easy answers. The National Labor Relations Board, other agencies, and the courts have struggled with these conflicts for years. Though there have been some instances of agencies collaborating to issue joint guidance, they have been few and limited in scope, leaving unions and employers to struggle with tensions between the laws.[125] It is unlikely that these conflicts will be resolved soon. However, by using National Labor Relations Board precedent, case law, and recommendations such as the Equal Employment Opportunity Commission Select Task Force Report,[126] clients can mitigate potential legal risks arising from clashes between the National Labor Relations Act and other laws.

120. Cooper Tire & Rubber Co. v. NLRB, 866 F.3d 885, 892 (8th Cir. 2017) (quoting Bailey v. Runyon, 167 F.3d 466, 468 (8th Cir. 1999)).

121. *Id.* (warning can be sufficient remedial action under Title VII).

122. *See Veritas Health Servs., Inc.*, 359 N.L.R.B. at 1006.

123. *See Olean Gen. Hosp.*, 363 N.L.R.B. No. 62, at *8.

124. *Id.*

125. Feldblum & Lipnic, *supra* note 90.

126. *Id.*