The Interplay Between Free Speech Rights and Union Self-Governance: The Free Speech Rights of Elected Union Officers Under Title I of the LMRDA
Elizabeth A. Roma

Personal Electronic Devices in the Workplace: Balancing Interests in a BYOD World
Julie A. Totten & Melissa C. Hammock

Employee-Owned Devices, Social Media, and the NLRA
Raphael Rajendra

Finding Franchisors Liable in Discrimination Cases: Many Theories, But Few Successes
Geoffrey A. Mort

De Facto Gag Clauses: The Legality of Employment Agreements That Undermine Dodd-Frank’s Whistleblower Provisions
Richard Moberly, Jordan A. Thomas, & Jason Zuckerman

Whose Privilege Is It Anyway: How the Fiduciary Exception to the Attorney-Client Privilege Protects ERISA Participants and Beneficiaries
Tyrone Crawford

Expanding the Integration Mandate to Employment: The Push to Apply the Principles of the ADA and the Olmstead Decision to Disability Employment Services
Brittany S. Mitchell
EDITORIAL STATEMENT: The ABA Journal of Labor & Employment Law is a journal of ideas and developments in all areas of labor and employment law designed to provide balanced analysis for practitioners, judges, administrators, and the interested public. The journal provides an opportunity for members of the labor and employment bar to share insights and perspectives on practical issues of current interest while encouraging discussion of their broader policy implications. The ABA Journal of Labor & Employment Law may be cited as follows, by volume and page: 30 A.B.A. J. LAB. & EMP. L. __ (2014).

EDITORIAL GUIDELINES FOR AUTHORS: The ABA Journal of Labor & Employment Law welcomes contributions from all interested persons. Articles preferably should be submitted electronically as a Microsoft Word document attachment to abajlel@umn.edu, or by mail to the ABA Journal of Labor & Employment Law, University of Minnesota Law School, Walter F. Mondale Hall, 229 19th Avenue South, Minneapolis MN 55455. Questions may be directed to the faculty co-editors: Professor Stephen F. Befort (befor001@umn.edu, 612-625-7342) and Professor Laura J. Cooper (lcooper@umn.edu, 612-625-4320). Articles should be informal and direct. Footnotes should be confined to useful documentation. Manuscripts should generally be shorter than forty pages with text and footnotes double-spaced. Absent appropriate disclosure in connection with the article submission, the ABA Journal of Labor & Employment Law will rely on the author’s belief that the article’s subject matter has not been preempted.

STUDENT SUBMISSIONS: The ABA Journal of Labor & Employment Law does not accept direct submission of articles from law students. We do, however, publish the winning article in the American Bar Association Section of Labor and Employment Law and College of Labor and Employment Lawyers Annual Law Student Writing Competition, which is open only to U.S. law students. For competition rules, see http://www.law.umn.edu/abajlel/2012-13-national-student-writing-competition.html.

PERMISSIONS: Request to reproduce portions of this publication should be addressed to Director, Copyrights and Contracts, American Bar Association, 321 North Clark Street, Chicago IL 60654-7598; phone: 312-988-6102; fax: 312-988-6030; e-mail: copyright@abanet.org; website: www.abanet.org/reprint.

DISCLAIMER: The material contained herein represents the opinions of the authors and does not express the views or the positions of the American Bar Association or the Section and so indicated. © 2014 American Bar Association. All rights reserved. Printed in the United States of America. Produced by ABA Publishing.

SUBSCRIPTION PRICES: Any member of the American Bar Association may join the Section upon payment of its annual dues of $50.00, $10.00 of which is for a subscription to the ABA Journal of Labor & Employment Law. Law Student Division members of the American Bar Association may join the Section without charge. Institutions and individuals not eligible for Association membership may subscribe to the ABA Journal of Labor & Employment Law for $45.00 ($51.00 for Alaska, Hawaii, U.S. possessions, and foreign countries). Membership dues in the American Bar Association are not deductible as a charitable contribution for federal income tax purposes. However, such dues may be deductible as a business expense.

ORDER INFORMATION: Subscriptions for non-ABA members and orders of current issues of the ABA Journal of Labor & Employment Law ($16.95 per copy, plus $3.95 for handling) are available from the ABA Service Center, American Bar Association, 321 North Clark Street, Chicago IL 60654-7598; phone: 800-285-2221; fax: 312-988-5528; e-mail: abasvcctr@abanet.org. Back issues of the ABA Journal of Labor & Employment Law, or its predecessor title, The Labor Lawyer, published two years ago and earlier may be purchased from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, NY 14209; phone: 800-828-7571.

FREQUENCY AND POSTAGE: The ABA Journal of Labor & Employment Law (ISSN: 8756-2995) is published three times per year by the American Bar Association, Section of Labor and Employment Law. Third-class postage is paid at Chicago, IL, and additional mailing offices.

ADDRESS CHANGES: Send all address changes to the ABA Journal of Labor & Employment Law, ABA Service Center, American Bar Association, 321 North Clark Street, Chicago, IL 60654-7598; phone: 312-988-5522; fax: 312-988-5528; e-mail: abasvcctr@abanet.org.

With this first issue of Volume 30, the University of Minnesota Law School commences its sixth year as the editorial home of the ABA Journal of Labor & Employment Law. Our mandate from the ABA Section of Labor and Employment Law is to provide the Section’s members and other journal subscribers with the best legal writing on current issues with practical utility to labor and employment lawyers. Readers might wonder how we identify which articles to publish and how we prepare them to assure that they are reliable sources for our readers.

We find articles for publication in diverse ways, as illustrated by the articles in this issue. Many authors submit manuscripts directly to the Journal. Submissions are reviewed by the faculty co-editors and only the few that satisfy our mandate are accepted for publication. Articles in this issue on union free speech, franchisor liability, contractual limitations on whistleblowers, and ERISA benefit determination transparency were direct submissions to the Journal. We encourage all attorneys writing on current labor and employment law topics to submit their manuscripts to us at abajlel@umn.edu at any time during the year to be considered for possible Journal publication.

Other articles published in the Journal are derived from papers presented at the Section’s Annual Labor and Employment Law Conference and the many Midwinter Conferences of the Section’s committees. We invite all speakers at these events to prepare their conference papers in a style and form to facilitate their future consideration for Journal publication. Our student Note and Article Editors and the faculty co-editors review all the papers presented at these conferences to select the very best for the Journal. The two articles in this issue on the legal implications of employees using their own phones and personal electronic devices were originally papers presented at a Midwinter Conference.

One of the articles in this issue, on state-sponsored employment programs for persons with disabilities, was written by a student member of our Journal staff. The nine second-year law students who serve as Journal staff members each write a note for possible publication in the Journal under the guidance of a faculty editor and a student Note and Article Editor. Editors assist students in topic selection and research strategy and provide feedback on an outline and multiple drafts of each student’s note. Each year, the editors of the Journal select, from among these notes, the articles that we believe can make a significant contribution to our readership of practicing attorneys.

All of the articles we accept go through a rigorous process of editing and authority checking prior to publication. Second-year students, under the direction of our three student Managing Editors and the Lead
Managing Editor, make sure that every statement of fact in an article has an identifiable reliable source, and each citation to an authority is checked against the original source for substantive accuracy and for the correct citation form. The student Lead Managing Editor and Editor-in-Chief, along with the two faculty co-editors, review the work done by the other staff members and editors, and also edit all of the articles. We send a manuscript with all of our proposed editorial changes to the authors for their approval before articles go to print.

In this issue, we are pleased to offer articles touching on multiple areas of labor and employment law practice from diverse perspectives that we have found to meet our mandate.

Rules governing union officer speech must balance individual free speech rights with unions’ institutional needs. In The Interplay Between Free Speech Rights and Union Self-Governance: The Free Speech Rights of Elected Union Officers Under Title I of the LMRDA, union-side attorney Elizabeth A. Roma discusses the history of Title I of the Labor-Management Reporting and Disclosure Act of 1959, the union members’ bill of rights. The author examines restrictions on union officer free speech and the critical distinction between the rights of appointed and elected union officers. She encourages courts deciding Title I cases broadly to consider the nature of the speech, the extent of the officer’s duties, and the rules of the organization.

Technological developments present new legal challenges for employers and new contexts for familiar issues. In Personal Electronic Devices in the Workplace: Balancing Interests in a BYOD World, management attorneys Julie A. Totten and Melissa C. Hammock outline the legal issues raised when employers adopt bring-your-own-device (BYOD) policies, allowing or requiring employees to use personal devices for work purposes. The authors outline the diversity of potential problems arising from BYOD practices and suggest model provisions for BYOD policies. In Employee-Owned Devices, Social Media, and the NLRA, union attorney Raphael Rajendra focuses on the National Labor Relations Act (NLRA) implications of BYOD policies. The author applies existing analytical frameworks to disputes arising from the workplace presence of new electronic technologies and personal devices.

Franchises employ millions of American workers. When franchise employees seek to remedy suspected violations of employment laws, who is their employer? In Finding Franchisors Liable in Discrimination Cases: Many Theories, but Few Successes, plaintiffs’ attorney Geoffrey A. Mort explains the most common theories potentially available for extending liability for employment claims to franchisors and identifies each theory’s advantages and challenges.

The Dodd-Frank Reform and Consumer Protection Act created a new whistleblower program within the Securities and Exchange Commission. In De Facto Gag Clauses: The Legality of Employment Agreements
That Undermine Dodd-Frank's Whistleblower Provisions, Professor Richard Moberly and plaintiffs' attorneys Jordan A. Thomas and Jason Zuckerman describe company efforts to limit SEC whistleblowing by employment contracts. The authors analyze the three dominant categories of contractual restrictions and explain why they believe that each type is ultimately unenforceable.

Does the fiduciary exception to the attorney-client privilege under the Employee Retirement Income Security Act (ERISA) apply to insurance companies making benefit determinations? In Whose Privilege Is It Anyway: How the Fiduciary Exception to the Attorney-Client Privilege Protects ERISA Participants and Beneficiaries, benefits attorney Tyrone Crawford examines the circuit split on this question. The author surveys the history of the attorney-client privilege and its fiduciary exception, evaluates the analyses of the Third and Ninth Circuits, and concludes that the Ninth Circuit’s approach is more faithful to ERISA’s goals and will better promote transparency in benefit determinations.

Numerous persons with disabilities spend their days hidden from society in sheltered workshop employment programs. In Expanding the Integration Mandate to Employment: The Push to Apply the Principles of the ADA and the Olmstead Decision to Disability Employment Services, Brittany S. Mitchell, the Journal’s Editor-in-Chief, explains why integrated employment models provide greater benefits to society and to individuals than traditional sheltered workshops. The author predicts that disability advocates will be able to successfully rely on existing disability services jurisprudence to demand that states adopt more integrated employment programs for persons with severe disabilities.
American Bar Association Section of Labor and Employment Law and
The College of Labor and Employment Lawyers
Annual Law Student Writing Competition for 2014–2015

The ABA Section of Labor and Employment Law and The College of Labor and Employment Lawyers are pleased to announce their 2014-2015 writing competition. This competition is open to articles written while the author is a student at an accredited law school in the United States. Authors may not have graduated from law school prior to December 1, 2014. Graduate students in law school (LLM candidates) are not eligible. Entries may address any aspect of public or private sector labor and/or employment law relevant to the American labor and employment bar. Students are encouraged to discuss a public policy issue, practical implications of a leading case or doctrine, a statute or the need for statutory modification, or a common law doctrine. Articles may address U.S. law, international law of relevance to U.S. labor and employment attorneys, or how a legal topic is treated in states across the country, but papers limited to the law of a single state will not be considered. Papers must be analytical in nature, not merely a summary of the law. Students must present and discuss competing points of view with respect to the issue presented and must distinguish their conclusions from opposing positions with sound logic and reference to multiple sources. Entries will be evaluated on topic selection, legal analysis, quality of research, frequency of detailed and helpful footnotes identifying primary source materials wherever available, grammar, spelling, usage and syntax, clarity, structure, overall appearance, strength of writing, strength of advocacy of competing viewpoints, and relevance to the practicing labor and employment law.

The following prizes may be awarded by the College of Labor and Employment Lawyers: First Place: $1500, Second Place: $1000, Third Place: $500. The first-place winning article will be published in the ABA Journal of Labor & Employment Law, and its author will be a guest at the annual CLE program of the ABA Section of Labor and Employment Law and honored at the Annual Induction Dinner of the College of Labor and Employment Lawyers. The College and the Section reserve the right not to select any article for publication or award any prizes if, in their judgment, the submissions do not meet their standards for publication.

To be considered, articles must be submitted by midnight (EDST) on May 15, 2015, to swan@laborandemploymentcollege.org using the subject line “Writing Competition.” The manuscript should be submitted as attachments in both Microsoft Word and PDF documents. The text should be Times New Roman font, 12 point pitch, double-spaced and the footnotes single-spaced with double-spacing between footnotes on 8½ x 11 inch paper with one-inch margins on all sides. The manuscript, exclusive of the cover page, may not exceed twenty pages. All citations should conform to The Bluebook: A Uniform System of Citation (19th ed). Do not submit endnotes, a table of contents or table of cases. A separate cover page must also be submitted which includes the paper’s title, author’s name, law school, graduation date, e-mail, street address and telephone number. Although personal information should not appear on the manuscript itself, the title should be clearly visible on at least the first page. Manuscripts must be the original work of a single author, may not have been written for paid employment, and may not have been submitted for publication elsewhere. Competition rules are also available at http://www.law.umn.edu/abajlel/national-student-writing-competition.html.
Web Access to Journal Issues and Indexes

The website of the ABA Section of Labor and Employment Law includes cumulative indexes (author, title and subject matter) of all issues of the *ABA Journal of Labor & Employment Law* and its predecessor title, *The Labor Lawyer*. The website also includes PDFs of all issues, commencing with Volume 12. Articles listed in the indexes are linked to the PDFs. Members of the Section may access the indexes and issues at:

The Interplay Between Free Speech Rights and Union Self-Governance: The Free Speech Rights of Elected Union Officers Under Title I of the LMRDA

Elizabeth A. Roma*

I. Introduction

The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA or Landrum-Griffin Act)\(^\text{1}\) governs the internal management of labor unions and provides safeguards to protect against potential abuses of union power by strengthening transparency and democratic rights within unions. Title I of the LMRDA, commonly referred to as the union members’ “bill of rights,”\(^\text{2}\) was hastily appended to the original Senate bill during floor debate. Title I outlines provisions specifically designed to protect individual members’ rights within the union, such as the rights to freedom of speech and assembly. These rights are not without limits, however, and the final provisions of Title I represent a congressional balance between two frequently conflicting policies: protecting the obligations and rights of individual union members while also protecting the rights of the union as an institution.\(^\text{3}\) Accordingly, while union members are generally afforded broad free speech rights under the LMRDA’s bill of rights, these rights are not unlimited and are not as broad as, for example, the First Amendment.\(^\text{4}\) Indeed

\* Elizabeth A. Roma is a principal with the union-side labor law firm of Guerrieri, Clayman, Bartos & Parcelli, P.C., located in Washington, D.C. The author thanks her colleagues, Jeffery A. Bartos and Carmen R. Parcelli, for their thoughtful comments and suggestions during the drafting process.

4. See United Steelworkers v. Sadlowski, 457 U.S. 102, 109, 111 (1982) (“Congress modeled Title I after the Bill of Rights . . . however, there is absolutely no indication that Congress intended the scope of § 101(a)(2) to be identical to the scope of the First Amendment.”).
under the plain language of the LMRDA, free speech rights are limited by a union’s ability to “adopt and enforce reasonable rules” related to the conduct of meetings, “the responsibility of every member toward the organization as an institution,” and a union’s ability to protect against “conduct that would interfere with [the union’s] performance of its legal or contractual obligations.”

While the free speech provisions of Title I clearly protect union members, courts have struggled with applying these provisions to elected union officers, who are, on the one hand, union members and elected by the membership and, on the other hand, also representatives and frequently employees of the institution. Moreover, not all union offices are the same and, like most organizations, unions have divisions of power and internal hierarchies (president, vice president, etc.) that some courts have failed to recognize when examining officer speech. The resulting muddled legal standard pertaining to union officer speech leaves both officers and unions at risk: officers risk potential discipline, including removal from office, for engaging in conduct that may not be covered by the LMRDA, while unions risk unlawfully penalizing officers for protected behavior. This Article reviews the relevant statutory framework and case authority to discern when, and to what extent, union officers are protected by the free speech provisions of Title I. It focuses on the nexus between officer speech and member rights and suggests guiding principles to consider when officer speech issues arise.

Part II reviews the legislative history of the LMRDA bill of rights, particularly the free speech protections of section 101(a)(2) of the


6. For a discussion of the philosophical views behind the debate over whether and to what extent union officers should be protected by the free speech provisions of Title I and the role of labor unions generally, see James Gray Pope, Free Speech Rights of Union Officials Under the Labor-Management Reporting and Disclosure Act, 18 HARV. C.R.-C.L. L. REV. 525, 525–26 (1983) (“Should unions serve primarily as labor’s equivalent of the corporation, as vehicles of worker self-expression, as responsible interest groups, or as instruments of rank-and file power?”).

7. In deciding officer removal cases, courts have had to make value judgments between union democracy on the one hand and strong unions and bargaining representatives on the other without the benefit of clear statutory guidance. See id. at 527–28.

The clash between democracy and labor policy is reflected in the Act itself. The initial supporters of Title I believed that union democracy was a value originating outside the union context from sources more exalted than mere labor policy, such as the Constitution and “fundamental principles” of American society. The consequences for union bargaining power and effectiveness were of secondary importance to the advocates of this view. Indeed, some of them were openly anti-union. Opponents of Title I, on the other hand, feared that governmental protection of union democracy would weaken the ability of unions to play a responsible and effective role in the national labor policy. Both of these views are embodied in the final language of Title I, the first in the broadly-worded guarantees of free expression, the second in the “reasonable rules” provisos.

Id. at 528.
LMRDA. Part III describes the relevant case law, examining how courts have interpreted the LMRDA’s free speech provisions in the fifty-five years since its enactment, including how courts distinguish the speech of union officers from that of union members. Part III also examines the courts’ distinctions between elected and appointed officer speech, focusing on the Supreme Court’s decisions in *Finnegan v. Leu*\(^8\) and *Sheet Metal Workers International Association v. Lynn.*\(^9\) Part IV looks at the case law applying section 101(a)(2) in the twenty-five years after *Lynn* and analyzes the issues still unresolved, particularly those regarding the precise scope of LMRDA protection for elected officer speech. Finally, Part IV discusses what is or should be the appropriate standard for free speech rights afforded to elected officers in light of the LMRDA’s dual purposes of promoting both union democracy and internal self-governance. This section argues that courts must be mindful of the nexus between officer speech and member rights and should closely consider the nature of the speech at issue, whether the speech conflicts with any duties properly imposed on the officer as a representative of the union as an institution, and, finally, whether speech that would otherwise be protected is permissible limited by a reasonable organization rule.

II. Passage of the Labor-Management Reporting and Disclosure Act of 1959

Congress enacted the LMRDA in 1959 in response to public concern over weaknesses and failures in internal union governance and the need to protect democratic rights within labor unions.\(^10\) Between 1957 and 1960, a Senate committee led by Senator John L. McClellan (McClellan Committee) investigated alleged internal abuses of power within labor organizations and revealed widespread corruption and embezzlement within certain unions.\(^11\) In March 1958, the McClellan Committee issued an interim report finding a “significant lack of democratic procedures in the unions studied” and recommending legislation requiring pe-

---

10. In the “Congressional declaration of findings, purposes, and policy” section of the LMRDA, Congress found that “it continues to be the responsibility of the Federal Government to protect employees’ rights to organize, choose their own representatives, bargain collectively and otherwise engage in concerted activities for their mutual aid or protection.” 29 U.S.C. § 401(a) (2012). Congress also observed, based on “recent investigations in the labor and management fields, that there have been . . . failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.” Id. § 401(b).
periodic union elections, the use of the secret ballot for internal and other important union elections, and rules regulating union trusteeships.  

As a result of these findings, in early 1959, then-Senator and McClellan Committee Member John F. Kennedy introduced a labor reform bill, known as the Kennedy-Ervin Bill, providing for labor management reforms such as financial reporting and disclosure requirements, democratic systems of intra-union government, and protections against dishonest or improper practices by union officials. In April 1959, a report of the Senate Committee on Labor and Public Welfare noted that the bill was “primarily designed to correct the abuses which have crept into labor and management,” as revealed by the recent McClellan Committee investigations, and to implement the labor reforms recommended by the McClellan Committee. The Committee Report also noted, however, that the “shocking abuses revealed by recent investigations [were] confined to [] few unions. The overwhelming majority are honestly and democratically run. In providing remedies for existing evils the Senate should be careful neither to undermine self-government within the labor movement nor to weaken unions in their role as bargaining representatives of employees.”  

13. See Kennedy-Ervin Bill, S. 505 (later S. 1555), 86th Cong. (1st Sess. 1959), reprinted in 1 NAT'L LABOR RELATIONS BD., Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 29–79 (1959) [hereinafter 1 NLRB'S LMRDA LEGISLATIVE HISTORY]. An earlier version of the bill known as the Kennedy-Ives Bill had been introduced the previous year and, while it passed the Senate, it failed to pass the House of Representatives. See S. 3974, 85th Cong. (1958); 104 CONG. REC. 11,486–87, 18,287–88 (1958).  
14. See “Declaration of Findings, Purposes, and Policy” section of the Kennedy-Ervin Bill, S. 505, 86th Cong. (1st Sess. 1959) at 1–4, reprinted in 1 NLRB'S LMRDA LEGISLATIVE HISTORY, supra note 13, at 29–32. Some argue that federal authority to regulate the internal affairs of private labor organizations is based on the recognition of unions as exclusive bargaining representatives for employees under federal labor law. See Pope, supra note 6, at 570 (“It is frequently suggested that protection for union democracy is a corollary of governmental approval of unions as exclusive bargaining representatives.”).  
16. S. REP. No. 86-187, at 5–7 (1st Sess. 1959), reprinted in 1 NLRB'S LMRDA LEGISLATIVE HISTORY, supra note 13, at 401. Several principles guided the committee in acting on the bill. First, “[t]he committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization.” Id. at 403. Second, “[g]iven the maintenance of minimum democratic safeguards and detailed essential information about the union,” the committee found that “the individual members are fully competent to regulate union affairs” and therefore “strongly opposes any attempt to prescribe detailed procedures and standards for the conduct of union business.” Id. Finally, the committee found that “[r]emedies for the abuses should be direct.” Id. Some have argued that the principles of union self-government and minimal judicial interference in union affairs outlined in Senate Report 187 were negated with the later passage of the bill of rights amendments. See Michael J. Goldberg, Cleaning Labor's House: Insti-
The original Kennedy-Ervin Bill focused on financial disclosure requirements and the regulation of union trusteeships and internal union elections and did not contain a union members' bill of rights protecting individual member rights such as the right to freedom of speech. Fearing the bill did not go far enough to protect the rights of individual members, Senator McClellan first introduced an amendment on the Senate floor to insert a new Title I into the Kennedy-Ervin Bill called the “Bill of Rights of Members of Labor Organizations.” This unexpected amendment provided for broad member rights, including an “absolute” right to members’ free speech. As Senator McClellan explained, this amendment was based on the premise that “if you would give to the individual members of the unions the tools with which to do it, they would pretty well clean house themselves.”

After a brief debate, the McClellan Amendment passed the Senate by only one vote on April 22, 1959.

Shortly after the McClellan Amendment passed, however, many senators recognized the broad nature of the amendment and discussed

---

*constitutional Reform Litigation in the Labor Movement*, 1989 DUKE L.J. 903, 938 & n.183 (1989). However, a closer examination of the legislative history surrounding the later-added bill of rights, including the addition of tempering language to recognize unions’ institutional interests in sometimes limiting speech, reveals that these principles outlined in Senate Report 187 still guided Congress throughout the bill’s drafting, including the bill of rights provisions. See *infra* notes 22–34 and accompanying text. That is not to say, however, that the final version of the LMRDA did not impose stronger reforms than the original Kennedy-Ervin Bill reported out of the Senate committee. See *infra* notes 22–34 and accompanying text.


19. See DOL’s LMRDA LEGISLATIVE HISTORY, supra note 18, at 248. The amendment introduced by Senator McClellan provided, among other things:

FREEDOM OF SPEECH—Every member of any such labor organization shall have the right to express any views, arguments, or opinions regarding any matter respecting such organization or its officers, agents, or representatives, and to disseminate such views, arguments, or opinions either orally or in printed, graphic, or visual form without being subject to penalty, discipline, or interference of any kind by such organization.

Id. Additionally, the original amendment empowered the Secretary of Labor to seek injunctive relief in the federal district courts for violation of any rights protected by the proposed Title I. Id.

20. See *id.* at 249 (Statement of Sen. John McClellan).

21. The vote was 47 to 46. 105 CONG. REC. 5827 (1959), reprinted in 2 NAT’L LABOR RELATIONS BD., LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1119 (1960) [hereinafter 2 NLRB’S LMRDA LEGISLATIVE HISTORY]. See also R. ALTON LEE, EISENHOWER AND LANDRUM-GRIFFIN: A STUDY IN LABOR-MANAGEMENT POLITICS 109–10 (1990) (describing surprise passage of McClellan Amendment, stating that while “no one had had an opportunity to read the exact language of [t]his amendment,” many senators felt that they could not vote against something labeled a Bill of Rights or against Senator McClellan, “the nation’s premier authority on labor-management corruption”).
the need to temper Senator McClellan’s expansive bill of rights.22 Accordingly, two days after passage, Senator Thomas Kuchel introduced an amendment on the floor of the Senate to substitute Senator McClellan’s bill of rights entirely with a more balanced bill of rights drafted by a bipartisan group of senators.23 Among other things, the new bill of rights limited the expansive member’s speech rights originally proposed by Senator McClellan by allowing a labor union to establish rules pertaining to the conduct of union meetings and “to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to refrain from conduct that would interfere with its performance of its legal or contractual obligations.”24 The purpose of the substitution, Senator Kuchel explained, was to introduce the “rule of reason” by providing for “reasonable restraints on the right of free speech.”25 Senator John Cooper, a co-sponsor of both the Kennedy-Ervin Bill and the Kuchel Amendment, explained during the floor debate that the limiting language was designed to eliminate “the extremes raised by the [McClellan] amendment” and to recognize the right of private and

---

22. See Lee, supra note 21, at 112–16.
23. 105 Cong. Rec. 6693–94 (1959), reprinted in DOL’s LMRDA Legislative History, supra note 18, at 282–83. The amendment replaced Senator McClellan’s free speech language with the following language:

FREEDOM OF SPEECH AND ASSEMBLY—Every member of any such labor organization shall have the right to meet and assemble freely with other members and to express any views, arguments, or opinions, and to express at union meetings his views, upon candidates in a union election or upon any business properly before the union meeting subject to the organization’s established and reasonable rules pertaining to the conduct of meetings: Provided, That the foregoing is limited so that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to refrain from conduct that would interfere with its performance of its legal or contractual obligations.

Id. at 282. Additionally, the proposed amendment eliminated the authority of the Secretary of Labor to bring an action to enforce rights provided for under the Title and gave the authority instead to individuals to bring private rights of action in the federal district courts. Id. at 283.
24. DOL’s LMRDA Legislative History, supra note 18, at 282.
25. See 105 Cong. Rec. 6717–26 (1959), reprinted in DOL’s LMRDA Legislative History, supra note 18, at 286 (statement of Sen. Thomas Kuchel). In referring to the McClellan Amendment, Senator Kuchel said:

Thus, with some of my colleagues on this side of the aisle and with some of my colleagues on the other side of the aisle, I began to explore the possibility of keeping that which the Senator from Arkansas advocated, namely, a bill of rights for labor, but of writing those rights in clear, unmistakable, reasonable, and just terms. That is what we tried to do.

Id. at 284. See also Franz v. International Brotherhood of Teamsters, 869 F.2d 41, 47 (2d Cir. 1989) (“The Kuchel substitute was introduced not only to avoid the extremes of the McClellan Amendment, but also so as not to unduly harass legitimate unionism.”).
semi-private institutions to reasonably govern their own affairs while at the same time protecting the substantive rights of the members. The revised bill of rights that Senator Kuchel offered was adopted by a vote of 77 to 14 on April 24, 1959, with even Senator McClellan voting in favor of the Kuchel Amendment. The next day, the amended Kennedy-Ervin Bill passed the Senate by a vote of 90 to 1.

Shortly after the Kennedy-Ervin Bill passed the Senate, a similar labor reform bill, the Landrum-Griffin Bill, was introduced and ultimately passed in the House of Representatives. This bill contained a bill of rights provision substantially the same as the Senate version, the Kennedy-Ervin Bill. During the House debate, Congressman Ludwig Teller praised the limiting language of the otherwise expansive free

26. See 105 CONG. REC. 6717–26 (1959), reprinted in DOL's LMRDA LEGISLATIVE HISTORY, supra note 18, at 291–92 (statement of Sen. John Cooper) (the limiting language of the proviso introduced in the Kuchel Amendment “deals with the right of a private or a semiprivate organization to control its meetings by reasonable rules”); 105 CONG. REC. 6025 (daily ed. Apr. 25, 1959), reprinted in 2 NLRB'S LMRDA LEGISLATIVE HISTORY, supra note 21, at 1233 (statement of Sen. Frank Church) (the purpose of the Kuchel Amendment was to ensure that Title I would not “unduly harass and obstruct legitimate unionism”). See also “Democracy in Unions—An Aid to Management?,” introduced into the record by Representative Harlan Hagen, noting that the importance of the limiting language of free speech provisions “lies in the fact that it could be used by the union to discipline a member for advocating another union (dual unionism) or engaging in a wildcat strike.” 105 CONG. REC. A8249–50 (1959), reprinted in DOL'S LMRDA LEGISLATIVE HISTORY, supra note 18, at 366.

27. 105 CONG. REC. S6030 (1959), reprinted in 2 NLRB'S LMRDA LEGISLATIVE HISTORY, supra note 21, at 1239.

28. 2 NLRB'S LMRDA LEGISLATIVE HISTORY, supra note 21, at 1257 (Senator Barry Goldwater, who also served on the McClellan Committee, was the only senator to oppose the bill).

29. For a discussion of the House activity on the Landrum-Griffin Bill and other labor reform bills, see LEE, supra note 21, at 117–37 (in 1959 more than fifty labor reform bills were introduced in the House with the primary difference among the major bills being the scope of the Taft-Hartley amendments provided for in Title VII). The Landrum-Griffin Bill was supported by the Eisenhower administration, and on August 6, 1959, President Dwight Eisenhower addressed the nation on all major television and radio networks advocating labor reform and noting that while most union officials were honest, labor reform was necessary to protect against known corruption within some labor organizations, which had become a “national disgrace.” Id. at 135–36. President Eisenhower also expressed support for the Landrum-Griffin Bill, generating a large public response in favor of the bill after the speech. Id. at 135–37.

30. See H.R. 8400 (later H.R. 8342 and then substituted for S. 1555), 86th Cong. (1st Sess. 1959), 105 CONG. REC. 15,704 (1959), reprinted in DOL'S LMRDA LEGISLATIVE HISTORY, supra note 18, at 325–26. Specifically, the Landrum-Griffin Bill provided as follows:

FREEDOM OF SPEECH AND ASSEMBLY—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.
speech provisions of the Landrum-Griffin Bill as recognizing “the unique nature of the collective bargaining process.” He also warned against making direct analogies to the free speech provisions of the U.S. Constitution’s Bill of Rights, noting that those rights are more expansive due to the special role and powers of the federal government. The bill was ultimately passed by both houses of Congress and signed into law by President Eisenhower on September 14, 1959.

The final LMRDA as enacted regulates several areas of union administration and governance. Title I addresses member’s rights such as the right to freedom of speech and assembly, the right to sue, and the right to vote on dues increases; provides for safeguards against improper union discipline by establishing minimum due process standards; and creates a private right of action for members to enforce their Title I rights in the federal courts. Title II imposes financial re-

Id. at 326. The Landrum-Griffin Bill passed in the House by a vote of 303 to 125. 105 Cong. Rec. 14,540–41 (1959), reprinted in 2 NLRB’S LMRDA LEGISLATIVE HISTORY, supra note 21, at 1701–02.

31. See 105 Cong. Rec. 15,681 (1959), reprinted in DOL’S LMRDA LEGISLATIVE HISTORY, supra note 18, at 344–46 (statement of Rep. Ludwig Teller) (“[I]f the loud mouth, the subversive, or the neurotic were allowed to call the tune at union meetings or in the drafting of union demands or in the working out of fair collective bargaining settlements, the resulting industrial strife might well cause recurring crises in our economy.”).

32. DOL’S LMRDA LEGISLATIVE HISTORY, supra note 18, at 344 (statement of Rep. Ludwig Teller) (“[F]or example, would the proponents of this analogy give to a union the same right to invoke martial law when in the course of industrial strife it is threatened with destruction, as by war?”). Notably, even the First Amendment does not provide for unlimited free speech rights; for example, an individual can be disciplined for yelling “fire” in a crowded movie theater. See Schenck v. United States, 249 U.S. 47, 52 (1919).

33. The final LMRDA passed the Senate by a vote of 95 to 2, 105 Cong. Rec. 17,919–20 (1959), and the House one day later by a vote of 352 to 52. Id. at 18,153–54. While immaterial for purposes of the free speech provisions, which were essentially the same in both the House and Senate versions, in conference the language of the House version of the bill of rights provision was adopted over the Senate’s version. See H.R. Rep. No. 86-1147, at 31 (1959) (Conf. Rep.), reprinted in DOL’S LMRDA LEGISLATIVE HISTORY, supra note 18, at 363.


35. 29 U.S.C. §§ 411–415 (2012). During the first decade after enactment of the LMRDA, more than 8,000 private suits were brought under Title I alone. See Lee, supra note 21, at 160–61. Section 101(a)(4) of the LMRDA also provides for exhaustion of internal union remedies for a period up to four months before a member can file a civil action, 29 U.S.C. § 411(a)(4) (2012), giving the union the “initial opportunity to resolve internal disputes itself, if possible, avoiding both undue interference by the court in internal organization matters and the unnecessary allocation of public resources to disputes which can be resolved privately.” Geddes v. Chrysler Corp., 508 F.2d 261, 264 (6th Cir. 1979). Courts have held, however, that the exhaustion requirement is not jurisdictional and that a union member need not exhaust if it would be futile, for example, because the tribunal is biased or because the union’s remedies are inadequate. See Ver- ville v. International Association of Machinists & Aerospace Workers, 520 F.2d 615, 621 (6th Cir. 1975).
porting and disclosure requirements on unions and employers. Title III establishes standards and limits for imposing union trustee-ships. Title IV requires and regulates periodic internal union officer elections. Title V imposes fiduciary duties on union officers and employees and prohibits individuals with certain past criminal convictions from holding union office or employment. Finally, Title VI, among other things, empowers the Secretary of Labor with investigatory authority to enforce the provisions of the LMRDA, with the exception of Title I. As is relevant here, section 101(a)(2) of the LMRDA discusses a member’s freedom of speech and assembly:

FREEDOM OF SPEECH AND ASSEMBLY—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization’s established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

37. Id. §§ 461-466.
38. Id. §§ 481-483.
39. Id. §§ 501-504. Additionally, the LMRDA also provided for amendments to section 302 of the Labor Management Relations Act, 1947. Id. § 186(d)-(g).
40. 29 U.S.C. §§ 521, 529 (2012). With passage of the LMRDA, broad regulatory power was provided to the Department of Labor, which was “the first time in American history a federal agency was charged with refereeing the internal operations of private organizations.” LEE, supra note 21, at 160.
41. Section 102 of the LMRDA provides that any person whose rights under Title I have been “infringed” may bring any action for relief in the district courts. 29 U.S.C. § 412 (2012). An action may also be brought under section 609 of the LMRDA, which makes it unlawful “for any labor organization . . . to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter.” 29 U.S.C. § 529 (2012). The definition of “discipline” or “infringement” has been the subject of numerous court cases and is beyond the scope of this article. Compare United Steel Workers Local 12-369 v. United Steel Workers International, 728 F.3d 1107, 1117 (9th Cir. 2013) (“Because the alleged retaliatory actions directed toward [plaintiff] impinged only upon her status as a union officer, she may not seek redress for these actions under § 609.”) with Duffy v. International Brotherhood of Electrical Workers, 780 F. Supp. 1185, 1189 (N.D. Ill. 1991) (repetitive removal of an elected officer constitutes “discipline” under section 609 as well as a free speech violation under sections 101 and 102). While section 609 requires a showing of “unlawful discipline,” even in the absence of discipline, a member can still sue under section 102 for an “infringement” of Title I rights. See Finnegan v. Leu, 456 U.S. 431, 439 (1982).
42. 29 U.S.C. § 411(a)(2) (2012). For a rule that partially interferes with a protected interest to be valid it need only be reasonably related to one, not both, of the interests mentioned in the proviso. See Airline Maintenance Lodge 702 v. Loudermilk, 444 F.2d
Although Title I grants expansive free speech rights, the plain language of the LMRDA manifests that these rights are not unlimited and must be balanced against the rights of the union as an institution.

III. Free Speech Rights of Union Officers

While recognizing that the LMRDA was clearly designed to protect the rights of rank-and-file union members, courts have struggled to determine the proper protections, if any, afforded to union officers and employees in their capacity as union officials, as opposed to as union members, especially in light of the stated dual purposes of the LMRDA to encourage union democracy and protect union self-governance. Over the years, rather than engage in a balancing of these dual interests, many courts have issued decisions strongly favoring one interest over the other.

Although it was generally recognized by the courts that union officers and employees did not lose the free speech protections provided to them in their capacity as union members simply by accepting union office or employment, courts wrestled to determine whether or not the

---

719, 721–22 (5th Cir. 1971) (the interests in the proviso are separate and distinct). For example, it is sufficient to show that the rules at issue are “reasonably related to the protection of the organization as an institution,” without also showing that they are also related to the union’s legal and contractual obligations. See United Steelworkers v. Sadlowski, 457 U.S. 102, 103, 112 (1982); see also Aircraft Mechanics Fraternal Association v. Transportation Workers Union, 98 F.3d 597, 600 (10th Cir. 1996).

43. See Lee, supra note 21, at 164 (Congressman Griffin “observed that ‘to provide guarantees of democracy within the union while maintaining the effectiveness of the union as an institution,’ which was the purpose of the Landrum-Griffin Act, ‘is not an easy task’”); see also Sewell v. Grand Lodge of International Association of Machinists, 445 F.2d 545, 546 (5th Cir. 1971) (suits brought by union officers under the LMRDA bill of rights reflect the “recurring problem of accommodating two conflicting policies: the policy that the courts should abstain from interfering with the internal management of labor unions and the policy that the courts should protect fundamental rights of individual labor union members”); Meader v. District Lodge No. 4, Industrial Union of Marine & Shipbuilding Workers, 786 F. Supp. 95, 101 (D. Me. 1992) (“[T]he policies embodied in the LMRDA reflect an accommodation between democratization of unions and congressional deference toward a union’s reasonable rules for self-governance.”).

44. See, e.g., Ruocchio v. United Transportation Union, Local 60, 181 F.3d 376, 384 (3d Cir. 1999) (discussing the LMRDA’s goal of promoting union democracy but failing entirely to discuss the limiting language of the proviso to section 101(a)(2) in finding that a union is prohibited from disciplining an officer for circulating false or defamatory speech). See also Pope, supra note 6, at 560–61 (“[J]udicial decisions seem to depend more on the courts’ particular visions of unionism than on any analysis compelled by objective indicators.”); Marcia Greenblatt, Union Officials and the Labor Bill of Rights, 57 Fordham L. Rev. 601, 613 (1989) (noting that the Supreme Court’s decision in Sheet Metal Workers’ International Association v. Lynn, 488 U.S. 347 (1989), did not balance the need for union democracy against the goal of noninterference in union affairs and arguing that the Sheet Metal Workers decision is unclear regarding the appropriate balance between the Court’s decision in Lynn and its prior decision in Finnegan v. Leu, 456 U.S. 431 (1982)).

45. See Sewell, 445 F.2d at 551 (a member who is also a union officer has a cause of action only if his rights as a union member were affected); see also Harvey v. Hollenback, 113 F.3d 639, 643 (6th Cir. 1997) (appointed union officials generally do not have a cause
removal of a member from union office or employment for exercising free speech rights under section 101(a)(2) was protected by the LMRDA. During the first two decades after the passage of the LMRDA, some courts ruled that section 101(a)(2) only protected the union-membership relationship, not the union-officer or union-employee relationship, and that, in the interest of union self-government, the removal of a union officer or employee did not give rise to a cause of action under the LMRDA. Other courts ruled that the free speech provisions of Title I broadly protected democratic rights and extended these rights to union officers and employees, protecting them from retaliatory removal from union office or employment. Finally, some courts concluded that both union officers and employees were protected by Title I but only to the extent that their removal from office or employment was part of a “purposeful and deliberate attempt by union officials to suppress dissent within the union,” which would therefore implicate members’ democratic rights on the whole.

A. Finnegan v. Leu

In 1982, the Supreme Court first examined the scope of Title I, specifically the application of the section 101(a)(1) and (2) protections to appointed union officers. In Finnegan v. Leu, a newly elected union president dismissed, pursuant to his authority under the union’s bylaws, union business agents appointed by his predecessor during a hotly contested election. Their removal of action under Title I unless they can show that their membership rights were impacted); Newman v. Local 1101, Communications Workers, 570 F.2d 439, 444–45 (2d Cir. 1978) (“[a]s a member of the union a union official or employee, of course, enjoys the rights guaranteed by LMRDA”) (citing Schonfeld v. Penza, 477 F.2d 899, 904 (2d Cir. 1973)).

46. See, e.g., Wambles v. International Brotherhood of Teamsters, 488 F.2d 888, 889–90 (5th Cir. 1974) (appointed union officers cannot base a free speech claim on their removal from office); Schonfeld, 477 F.2d at 904 (“Title I of the Act protects the union-member relationship, but not the union-official or the union-employee relationship, and that hence removal from union office gives rise to no rights in the removed official as an official under the Act.”); Sewell, 445 F.2d at 550–51 (union officer cannot assert a free speech claim for his removal without discussing whether officer was appointed or elected); Sheridan v. United Brotherhood of Carpenters, 306 F.2d 152, 157 (3d Cir. 1962) (an elected union officer cannot assert a free speech claim because Title I protects “the union-member relationship, not the union-officer . . . relationship”).

47. See, e.g., Lamb v. Miller, 660 F.2d 792, 794 (D.C. Cir. 1981) (an elected “union official may not be dismissed for exercising [Title I] rights”); Gabauer v. Woodcock, 520 F.2d 1084, 1091 (8th Cir. 1975) (section 609 “provides a cause of action for wrongful removal from union office because of the exercise of rights granted union members in § 101(a)(2) of the Act”); Wood v. Dennis, 489 F.2d 849, 859 (7th Cir. 1973) (en banc) (an elected union officer cannot be removed for exercising free speech rights); Grand Lodge of International Association of Machinists v. King, 335 F.2d 340, 344 (9th Cir. 1964) (officers can bring a claim under section 609 for their removal from union office for exercising speech rights protected under section 101(a)(2)).

48. See, e.g., Schonfeld, 477 F.2d at 904.


50. Id. at 433–34.
dismissal did not affect their union membership rights. In the business agents’ suit the district court granted the union summary judgment, finding that the LMRDA does not protect a union employee from discharge if the employee’s rights as a union member are not affected. On appeal, the Sixth Circuit affirmed in an unpublished opinion, holding that the new president was authorized to hire and fire business agents under the union’s bylaws and that he should be allowed to appoint business agents who will carry out his programs and directives. The Supreme Court granted a writ of certiorari to settle the circuit split concerning Title I’s proper scope.

Writing for the unanimous Court, Chief Justice Warren Burger noted that the LMRDA’s intent was to ensure that unions were run by democratic processes and that Title I places “emphasis on the rights of union members to freedom of expression without fear of sanctions by the union, which in many instances could mean loss of union membership and in turn loss of livelihood.” The Court noted, however, that the business agents held a “dual status as both employees and members of the Union” and it was their status as union members, not as employees, that the LMRDA sought to protect. The Court ruled that the discharge of appointed officers did not constitute “discipline” within the meaning of section 609 because that term “refers only to retaliatory actions that affect a union member’s rights or status as a member of the union.” Additionally, the Court found that the discharge did not “infringe” on the agents’ membership rights—such as voting in union elections, attending union meetings, and speaking on union issues—which are protected by section 102 of the LMRDA. Specifically, the Court stated that “[i]t is readily apparent, both from the language of these provisions and from the legislative history of Title I, that it was rank-and-file union members—not union officers or employees, as such—whom Congress sought to protect.” The Court said that an elected union leader’s ability to choose a staff whose views were compatible with the leader’s own further “ensur[ed]
a union administration’s responsiveness to the mandate of the union election” and that, therefore, the discharges were consistent with the LMRDA’s overriding objectives.60

The Court’s holding in Finnegan left open the issue of whether the protections of section 101(a)(2) extended to elected union officers who, unlike appointed officers, are democratically chosen by the membership, not the union’s leadership.61 This is particularly important because the LMRDA also requires labor organizations to be governed by officers elected by the members every three to five years.62 Accordingly, unlike appointed positions that simply invoke the employee—employer relationship, elected positions have a foundation in the exercise of the members’ democratic rights. In the cases decided after Finnegan, some courts held that the Supreme Court’s reasoning applied equally to elected and appointed union officers and that, like appointed officers, elected union officers were not protected as officers

60. Id. at 441. The Court noted that it need not decide for purposes of the present case whether appointed union officers could ever assert a claim under section 102 for “infringement” of a section 101(a)(2) right when their removal is “part of a purposeful and deliberate attempt . . . to suppress dissent within the union.” Id. at 440–41 (quoting Schonfeld v. Penza, 477 F.2d 899, 904 (2d Cir. 1973)). Some courts, however, have recognized, at least in theory, a limited exception to the removal of an appointed employee when there is evidence of efforts to suppress dissent. See generally Adams-Lundy v. Association of Professional Flight Attendants, 731 F.2d 1154 (5th Cir. 1984); Harvey v. Hollenback, 113 F.3d 639, 644 (6th Cir. 1997) (an effort to show a deliberate attempt to suppress dissent within union is an “uphill” battle) (quoting Stroud v. Senese, 832 F. Supp. 1206, 1213 (N.D. Ill. 1993)); Schermerhorn v. Local 100, Transportation Workers Union, 91 F.3d 316 (2d Cir. 1996); Brett v. Hotel, Motel, Restaurant, Construction Camp Employees and Bartenders Union, Local 879, 828 F.2d 1409 (9th Cir. 1987); but see Vought v. Wisconsin Teamsters Joint Council No. 39, 558 F.3d 617, 622–623 (7th Cir. 2009) (removal of an appointed employee never states a cause of action under section 101(a)(2)); see also Pruitt v. United Brotherhood of Carpenters, 659 F. Supp. 1511, 1522, n.16 (N.D. Ga. 1987), vacated on other grounds, 893 F.2d 1216 (11th Cir. 1990) (“Finnegan’s reference to Schonfeld relates only to the potential exception for nonpolicy-making and nonconfidential employees”).

61. In a footnote, the Court in Finnegan also stated that its decision “leave[s] open the question of whether a different result might obtain in a case involving non policymaking and nonconfidential employees.” 466 U.S. at 441 n.11. Some courts have apparently adopted this “nonpolicymaking/nonconfidential” distinction, for example in Hodges v. Drivers, Local Union 695, 707 F.2d 961, 964–65 (7th Cir. 1983), the union secretary was not protected against removal from union office for not supporting the incumbent when she handled sensitive and confidential information. Other courts, however, have not. See Franz v. International Brotherhood of Teamsters, Local 671, 869 F.2d 41, 48 (2d Cir. 1989) (“The test is whether the employee is or is not in a policymaking position, rather the question is whether membership rights in the union were directly infringed by action taken with respect to a union member’s employment status.”); Lennon v. Walsh, 798 F. Supp. 845, 849–50 (D. Mass. 1992) (adopting the court’s holding in Franz); Nixon v. United Food & Commercial Workers International Union, Local 7, 751 F. Supp. 1491, 1494 (D. Colo. 1990) (same).

62. See 29 U.S.C. § 481 (2012). Local labor organizations must elect officers at least every three years, while intermediate-level bodies must elect officers at least every four years and national- or international-level bodies must elect officers at least every five years. Id.
against removal for engaging in otherwise protected speech.\textsuperscript{63} Other courts found that the officers’ election by the members created the necessary nexus to membership rights and union democracy to allow section 101(a)(2) to protect elected union officers as well.\textsuperscript{64}

\textbf{B. Sheet Metal Workers v. Lynn}

Seven years after Finnegan, in Sheet Metal Workers v. Lynn,\textsuperscript{65} the Supreme Court considered the application of the free speech protections of section 101(a)(2) to an elected union officer. Lynn was an elected local business representative who was an outspoken critic of the local’s spending policies and had actively advocated for a spending reduction instead of a proposed dues increase to remedy the local’s financial distress.\textsuperscript{66} Due to its troubled financial situation, the local was eventually placed under trusteeship by its parent union.\textsuperscript{67} After a month in trusteeship, the appointed trustee decided that a dues increase was necessary and advised Lynn that he expected Lynn’s support for the increase. Lynn asked that the trustee commit to reducing spending as well, but the trustee refused. At a union meeting, Lynn opposed the proposal and the dues increase was ultimately rejected.\textsuperscript{68} Five days later, Lynn was suspended “indefinitely” for his outspoken opposition to the dues increase.\textsuperscript{69}

Lynn sued the union, alleging violation of his rights under section 101(a)(2). Relying on Finnegan, the district court found that the LMRDA did not protect Lynn from removal from office.\textsuperscript{70} On appeal, the Ninth Circuit reversed, ruling that Finnegan did not apply to the removal of an elected business agent from union office because
the removal of elected officers “can only impede the democratic governance of the union.”

The Supreme Court affirmed the Ninth Circuit. The Court observed that it had, in Finnegan, “held that the business agents could not establish a violation of § 102 because their claims were inconsistent with the LMRDA’s ‘overriding objective’ of democratic union governance.” The Court stated that whether “interference with Title I rights gives rise to a cause of action under § 102 must be judged by reference to the LMRDA’s basic objective: to ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections.” When an elected official is removed from office for exercising free speech, the Court found that the removal hinders union democracy. First, the Court stated that when an elected union official is removed from office, “the union members are denied the representative of their choice.” Additionally, “the potential chilling effect on Title I free speech rights is more pronounced when elected officials are discharged” because “[n]ot only is the fired official likely to be chilled in the exercise of his own free speech rights, but so are the members who voted for him.”

Notably, while Lynn’s removal from office injured him in his official capacity, his removal was because of speech in his capacity as a union member, not a union officer. As an elected business representative, Lynn’s responsibilities were limited to administering the collective bargaining agreement. Accordingly, his opposition to the proposed dues increase was not related to any of his official duties. Moreover, in ruling that Lynn’s speech was protected and his removal

71. Id. at 1479. The Ninth Circuit in Lynn ruled that “at a minimum, a retaliatory removal from elective office violates § 102 of the LMRDA when it occurs as a purposeful and deliberate attempt . . . to suppress dissent within the union.” Id. at 1478 (quoting Schonfeld v. Penza, 477 F.2d 899, 904 (2d Cir. 1973)).
72. Lynn, 488 U.S. at 359.
73. Id. at 353 (citing to Finnegan v. Leu, 456 U.S. 431, 441 (1982)).
74. Id. at 354 (citations omitted). While Lynn’s complaint referenced section 609 of the LMRDA, the Ninth Circuit’s analysis only addressed section 102 and the section 609 claim was not before the Supreme Court.
75. Id. at 355.
76. Id.
77. Id. But see George Feldman, Effective Democracy and Formal Rights: Retaliatory Removals of Union Officers Under the LMRDA, 9 HOFSTRA LAB. & EMP. L.J. 301 (1992) (no distinction between elected and appointed officers; unions should not be allowed to remove either elected or appointed officers from office based on speech under section 101(a)(2)); Greenblatt, supra note 44, at 614 (courts should not focus on whether officers are appointed or elected in determining if speech is protected, but rather whether the officer’s removal was “part of a deliberate attempt to suppress dissent”).
78. Lynn, 488 U.S. at 359–60 (White, J., concurring) (in Finnegan, the union’s president had the discretionary authority to appoint and remove business agents, but the trustee’s authority in Sheet Metal Workers’ International Association was limited to removing officers for “cause,” such as incompetence or behavior that interfered with the ability to perform the duties of the office).
from office in violation of the LMRDA, the Court noted that Lynn’s speech did not “contravene[] any obligation properly imposed upon him as an elected business agent of the Local.”

IV. Officer Speech After Sheet Metal Workers v. Lynn

The Supreme Court’s 1989 decision, Lynn, left open a number of issues concerning the scope of protections afforded to elected union officers under Title I of the LMRDA. Because Lynn involved a pure member speech issue—a member speaking as a member at a union meeting—the Supreme Court only focused on one of the two purposes of Title I, promoting union democracy, rather than weighing this interest against the LMRDA’s dual and sometimes conflicting policy of promoting union self-governance. Indeed, the Court in Lynn specifically recognized that the speech at issue there did not contravene any of Lynn’s obligations as an elected officer of the union. The Court did not even discuss the reasonable rules proviso to section 101(a)(2).

Obviously, speech on a matter of general concern to members made during internal debate at a union membership meeting implicates the purest type of union free speech. How would the Court’s analysis have changed, however, if Lynn’s speech was on an unrelated topic, was inconsistent with his duties as an elected union officer, or was out of order or violent? These questions cannot be resolved simply by looking to the Supreme Court’s decision in Lynn.

The final section of this article addresses the nexus between protected speech under Title I and membership rights articulated in Lynn, and suggests that, when examining the free speech rights of union officers, courts should keep in mind the following guiding principles: first, not all officer speech is protected under the LMRDA; second, courts must properly account for the individual’s official role within the union; and third, even if officer speech falls within the LMRDA’s protections, the proviso to section 101(a)(2) expressly allows unions to place certain reasonable restrictions on otherwise protected speech.

A. Officer Speech Must Be of General Concern to the Members to Fall Within the Protection of Section 101(a)(2)

A threshold issue for any section 101(a)(2) speech case is whether the speech falls within the LMRDA’s protections. While section 101(a)(2) is broadly worded, the LMRDA’s free speech provisions only protect speech concerning matters of interest to the union membership, not all speech uttered in a union context or by a union member. Accordingly, when officer speech is not related to the democratic process of the union, has no relevance to the interests of the membership, or is not
communicated to the union membership—in other words, if there is no nexus between the speech and the membership—the LMRDA free speech protections do not apply.81

For example, in *Hylla v. Transportation Communications International Union*, an elected union officer was removed from office after he cursed at his superior officer and threatened the office secretary over a dispute concerning the union’s internal workplace attendance policy.82 The former officer sued the union, claiming that, as an elected officer, his speech was protected under the LMRDA. The district court dismissed the action, finding that the officer’s speech was not protected because it arose from personal concern (dislike of the union’s attendance policy), was unrelated to the union membership, and was never conveyed to the membership.83 On appeal, the Eighth Circuit upheld the district court’s decision, ruling that the free speech protection of the LMRDA is limited to speech that “relates to the general interests of the union membership at large.”84 The court further said that “[b]ecause a union’s democratic governance will not be undermined by speech that is entirely personal, it is appropriate that no cause of action would arise for such expression.”85

In a similar Fourth Circuit case, *Trail v. Local 2850 UAW United Defense Workers of America*,86 the court held that a local union officer lacked a viable free speech claim when she asserted retaliation by the local’s two highest officers for reporting to the union’s regional office their viewing pornography on union computers. Citing the Eighth Circuit’s *Hylla* decision, the Fourth Circuit observed that “[n]ot every issue that remotely relates to union affairs and governance, however, qualifies as a matter of union concern” and that “the test is whether the speech touches in some way the Act’s overarching concern for union democracy, or whether it is of purely tangential import to union governance.”87 The court held that the speech here was more

---

82. *Hylla*, 536 F.3d at 917.
84. *Hylla*, 536 F.3d at 917 (“[T]he threshold inquiry in the LMRDA context is whether the speech at issue may be fairly characterized as a matter of union concern.”) (quotations omitted); see also *Helmer v. Briody*, 759 F. Supp. 170, 176 (S.D.N.Y. 1991) (“The free speech provisions of [the LMRDA] are designed to protect speech in the context of the union democratic process, i.e., political speech primarily addressed to other union members, rather than free speech at large.”).
85. *Hylla*, 536 F.3d at 917–18.
87. Id. at 547 (If the alleged misuse of union computers for personal use were enough “to constitute a matter of union concern and thus to render [plaintiff’s] speech protected under Section 101(a)(2), nearly every criticism by a union member regarding an
akin to an employment matter and was only, at best, tangentially related to union governance and therefore was not protected speech.88

Similarly, in free speech claims involving rank-and-file members, courts have also concluded that the LMRDA’s free speech provisions were not implicated when members were denied the opportunity to post political messages about world politics in the union’s newspaper89 and when a member was disciplined for working for a non-signatory contractor.90 In both instances, the courts held that this speech had no relationship to any organizational interest of the union or its members.91

Considering the nature of the speech and whether the speech is of broader public concern are also factors courts evaluate when examining whether the speech of public employees is protected under the First Amendment.92 For example, in Connick v. Myers,93 the Supreme Court concluded that a public employee’s expressed disagreement with an internal office assignment was not related to a matter of public concern and was more akin to an employee grievance. Therefore, the Court held that the public employee’s speech was not protected under the First Amendment.94

Additionally, when examining the nature of the speech at issue, it is important to keep in mind that Title I of the LMRDA only governs the relationship between members and their own union, not other

88. Id. at 549.
91. Id.; Roman, 655 F. Supp. at 425.
92. While examining how courts have interpreted the free speech rights of public employees under the First Amendment is helpful, analogies to the free speech rights of public employees cannot define the LMRDA free speech rights of union officers because (1) Congress did not intend section 101(a)(2) to be as broad as the First Amendment; (2) labor unions are not public entities; and (3) unlike public employees generally, union officers are chosen by the members in periodic elections.
94. Id. at 154. Notably, the right to hold elected public office is not absolute either; many states and localities have their own procedures to discipline or remove elected officials who engage in misconduct. See Kuhn v. Thompson, 304 F. Supp. 2d 1313, 1337 (M.D. Ala. 2004) (voters had no cause of action to ask for reinstatement of the chief justice of the Alabama Supreme Court, whom they had voted for, after he was removed from office for refusing to take down the Ten Commandments from the State Judicial Building when ordered to do so by a court). With regard to federally elected officials, among other disciplinary provisions, Article II, section 4 of the Constitution provides that “[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” It also provides that “[e]ach House may determine the rules of its proceedings, punish its Members for disorderly behavior, and with the concurrence of two-thirds, expel a Member.” U.S. Const. art. I, § 5, cl. 2.
relationships. Indeed section 101(a)(2) of the LMRDA specifically provides that "[e]very member of any labor organization shall have the right to meet and assemble freely with other members . . . to express any views, arguments, or opinions." Generally, section 101(a)(2) “assur[es] rank-and-file members’ democratic participation in intra-union affairs, such as voting in union elections, standing for union office, and approving (or challenging) official union policies and decisions.” Accordingly, speech unrelated to intra-union affairs, such as officer speech or conduct in support of a rival union (or dual unionism), would arguably not be speech protected by the LMRDA.

Accordingly, for the speech of elected union officers to fall within the protections of Title I, it must first relate to a concern of the membership as a whole and not just the union officer as an employee or individual.

B. Officers Can Be Disciplined for Engaging in Speech Inconsistent with Official Duties

Unlike union members generally, union officers also have responsibilities as representatives of the union as an institution, duties that the membership elected them to perform. An analysis of union officers’ free speech protections must consider these duties and the role of the officer within the union’s structure.

Since the Supreme Court’s decisions in Finnegan and Lynn, courts recognize that union officers are directly protected by section 101(a)(2) to the extent they are personally affected as members, and are indirectly protected to the extent that their discipline implicates member’s

---

95. Brady v. International Brotherhood of Teamsters, 741 F.3d 387, 387 (2d Cir. 2014). Some courts have concluded that disciplining a union member or officer for engaging in dual unionism is also consistent with the free speech exceptions of the proviso to section 101(a)(2). See Ferguson v. International Association of Bridge, Structural & Ornamental Iron Workers, 854 F.2d 1169, 1175 (9th Cir. 1988).


97. Aircraft Mechanics, 98 F.3d at 600.

98. “Dual unionism” is a generic term and is “generally defined as any act by a union member, on behalf of a rival union to undermine, and/or substitute the member’s union.” Teamsters v. Local Union No. 2000 v. Hoffa, 284 F. Supp. 2d 684, 694 (E.D. Mich. 2003). For a discussion comparing “dual unionism” with “disaffiliation,” or when a subordinate body pursuant to its constitution or bylaws lawfully votes to disaffiliate from its parent union and perhaps affiliate itself with another union, see Local 1199, Drug, Hospital, & Health Care Employees Union v. Retail, Wholesale & Department Store Union, 671 F.Supp. 279, 285–86 (S.D.N.Y 1987).

99. Finnegan v. Leu, 456 U.S. 431, 437–38 (1982) (removal of appointed union officers did not implicate any membership rights, such as fines, suspensions, or expulsions, which are “punitive actions taken against union members as members”); see also Casumhang v. International Longshoremen’s and Warehousemen’s Union, Local 142, 269 F.3d 1042, 1055 (9th Cir. 2001) (union officer whose membership rights were suspended can assert a claim under section 101(a)(2)).
rights and has a negative impact on the union’s democratic process. A number of courts have also held that under Finnegan and Lynn, a union officer cannot state a claim under section 101(a)(2) based solely on the officer’s role as an officer. In other words, an officer speaking as a member is protected by the free speech provisions of Title I, but an officer speaking as a union officer is not.

The distinction between officer and membership speech was first articulated by the Eleventh Circuit in Dolan v. Transport Workers Union of America, a pre-Lynn decision, holding that an officer’s speech in her capacity as a member was protected, but her speech in her capacity as an officer was not. The court distinguished between membership and officer speech, saying that “membership” speech becomes “officer speech” if it “advance[s] her duties of office or interfere[s] with these duties.” The problem with adopting a hard distinction between officer and member speech, however, is that not all speech clearly falls in one category and any speech could arguably advance or interfere with an officer’s official duties.

Moreover, unlike appointed employees, an elected officer is chosen by the members to speak on their behalf on matters of concern to the membership and, therefore, such speech should not lose Title I protections simply because it falls into the category of officer speech rather than member speech. Protecting officer speech in this capacity is also consistent with the LMRDA’s policies and recognized by the Supreme Court in Finnegan and Lynn: promoting union democracy and ensuring that unions are responsive to the membership’s will as expressed through their choice of elected representative. For example,

---

100. See Yager v. Carey, 910 F. Supp. 704, 722 (D.D.C. 1995) (“Unless the disciplinary action against plaintiffs had the purpose or effect of suppressing or chilling their free speech rights, or the free speech rights of other union members, then the LMRDA does not make such discipline illegal.”), aff’d, 159 F.3d 638 (D.C. Cir. 1998).

101. See Coleman v. District Lodge 115 of the International Association of Machinists & Aerospace Workers, No. 88-2775, 875 F.2d 870, at *1–2 (9th Cir. May 24, 1989) (“In this circuit, the loss of leadership or employment rights by an elected official has formed the basis for title I liability, but only when the loss qualified as retaliation for the official’s exercise of membership rights.”); Commer v. Keller, 64 F. Supp. 2d 266, 273 (S.D.N.Y. 1999) (the statutory rights of “association and expression . . . are accorded only to union members acting as members and not to union officers acting solely in their official capacity as officers”) (quotation marks omitted). But see Casumpang, 269 F.3d at 1055 (elected business agent’s speech was not protected by Title I because it was made in his official capacity).

102. 746 F.2d 733 (11th Cir. 1984).

103. Id. at 742–44.

104. Id. at 742.

105. Lynn v. Sheet Metal Workers’ International Association, 804 F.2d 1472, 1479 n.5 (9th Cir. 1986) (“Any speech could arguably ‘advance,’ ‘interfere,’ or ‘affect’ an officer’s performance of her duties.”).

106. Dolan, 746 F.2d at 740 (recognizing the “dual spirit of LMRDA—the desire to democratize unions while resisting extensive and unnecessary invasion of their independence . . .”).
delegates elected by locals to represent their membership on a regional
council should be protected under the LMRDA against retaliation for
voicing opinions during a council meeting on matters properly before
the council and of concern to the members.

Conversely, a union could hardly function as an institution and as
an effective collective bargaining representative if all officers, simply
by virtue of being elected and without regard to their job functions
or official responsibilities, could do and say whatever they wanted at
any time without fear of repercussions.107 An organization speaking
with a dozen voices is clearly less effective than an organization speak-
ing with a united voice. Again, union officers are not directly protected
by Title I’s free speech provisions, but rather only derivatively pro-
tected if their discipline implicates the democratic rights of the rank-
and-file members.108 How then should officer speech be balanced
against officer responsibilities? A more tenable distinction, which ac-
counts for the required nexus between officer speech and membership
rights articulated in Lynn, and balances the provision’s dual purposes
of promoting internal union democracy with legitimate unionism,
would involve determining if the speech interferes with any obligations
properly imposed on the individual as a union officer of the union.109

Not all elected union officers are equal; some officers are elected
by the members as leaders responsible for establishing union policy,
while others are elected to hold subordinate roles and are responsible
only for implementing union policy.110 For example, a union’s presi-
dent, elected the union’s chief executive officer responsible for estab-
lishing official union policy, serves a different role than an elected
business agent, who may be elected to implement the policies as set
forth by the union’s president. Considering the officer’s role within

107. See Maciera v. Pagan, 649 F.2d 8, 14 (1st Cir. 1981) ("[A] union member, while
acting as the union’s agent, may not ‘sabotage or subvert its policies in the name of free
speech.’"); Newman v. Local 1101, Communications Workers, 570 F.2d 439, 445 (2d Cir.
1978) ("Unless the management of a union, like that of any other going enterprise, could
command a reasonable degree of loyalty and support from its representatives, it could
cannot effectively function very long.").

108. See, e.g., Schermerhorn v. Local 100, Transport Workers Union, 91 F.3d 316,
323 (2d Cir. 1996) ("Although the LMRDA’s rights of association and expression are lim-
ited to union members acting as members and not to union officers acting solely in their
official capacity as officers, we have held that the silencing of a union officer may
threaten the freedom of members to speak out.").

union’s argument that subordinate union officers could be disciplined for acting outside
the parameters of their job duties and finding that the provisions of the union’s consti-
tution were merely “job descriptions” that “do not spell out rights and responsibilities
that the Court could construe as reasonable rules”), aff’d, 618 F.3d 514 (6th Cir. 2010).

110. See Maceira, 649 F.2d at 15 (in examining free speech claims of union officers,
courts should consider “the role of the official within the union”); see Pope, supra note 6, at
531 (union officials have different roles within the union ranging from administrative and
subordinate roles to representative and leadership roles and noting that the first two
roles are subordinate functions while the latter two roles implicate democratic functions).
the union hierarchy is also consistent with the goal identified in Finnegan and Lynn to ensure that unions are “responsive to the will of the union membership” who elected the officer to serve in a particular union position. Accordingly, speech or conduct of union officers critical of union leaders and their policies may not be appropriate.

For example, in Air Wisconsin Pilots Protection Committee v. Sanderson, the Seventh Circuit examined the conflict between officers’ free speech and their obligations to the union as elected officials. In Sanderson, elected officers of a subordinate union council disagreed with the national union’s official position to defend a seniority list integration arbitration award. The council’s officers actively campaigned to undermine the award and the national union by distributing their own proposal to members along with “ratification” materials. The Seventh Circuit rejected the officers’ claims that their subsequent removal from office violated the LMRDA, holding the officers had no authority under the union’s internal structure to act as the collective bargaining representative or to pursue their own seniority list merger proposal. The court noted that union officers are generally free to “express their views, as vociferously as they care to do, concerning the seniority list.”

111. Sheet Metal Workers’ International Association v. Lynn, 488 U.S. 347, 354 (1989); see also Finnegan v. Leu, 456 U.S. 431, 441 (1982) (“[T]he ability of an elected union president to select his own administrators is an integral part of ensuring a union administration’s responsiveness to the mandate of the union election.”).

112. Teamsters Local Union No. 2000 v. Hoffa, 284 F. Supp. 2d 684, 697–98 (E.D. Mich. 2003) (local union executive board’s refusal to respond to a raid in a manner directed by the general president was not protected speech); Yager v. Carey, 910 F. Supp. 704, 722 (D.D.C. 1995) (“Although a union member does not surrender his right to free speech by accepting appointment or election to union office, a union official has certain duties toward the organization and its leadership.”), aff’d, 159 F.3d 638 (D.C. Cir. 1998); Meader v. District Lodge # 4, Industrial Union of Marine & Shipbuilding Workers, 786 F. Supp. 95, 101 (D. Me. 1992) (“[U]nion officials . . . may not claim the protection of Title I when [their] conduct violates their responsibility toward the union as an institution . . . .”). But see Babler, 618 F.3d at 523 (union’s claim that vice presidents had a duty to support the policies of the international president even if they personally opposed those policies contravene the Supreme Court’s reasoning in Lynn).

113. 909 F.2d 213, 219 (7th Cir. 1990).

114. Id. at 215.

115. Id. at 219. In reaching this conclusion, the court noted that collective bargaining under federal law generally “illustrates representative rather than participatory democracy” because the union negotiates the contract and the members vote for “whether to be represented . . . by [the] union and . . . whether to ratify the agreement negotiated by their representative.” Id.; see also Pope, supra note 6, at 531 (identifying four philosophical views as to the role of labor unions “characterized by their relative emphasis on democracy as opposed to administrative efficiency in the internal government and on conflict as opposed to cooperation in the external government”).

116. Sanderson, 909 F.2d at 219.

117. Id.
at that point “they passed out of the protective field of Landrum–Griffin’s free-speech clause even as broadly defined in Lynn.”\textsuperscript{118}

Like Sanderson, many union officer free speech cases involve political factions and infighting within the union. While some may say that this is exactly the type of speech and dissent that Congress sought to protect in enacting section 101(a)(2), infighting can go well beyond the realm of healthy internal debate, disrupting the union’s ability to function properly as an institution and denying members an effective bargaining representative. In such cases, it is particularly important for courts to focus on the nature of the speech and the roles and duties of the various officers within the organization to achieve the appropriate balance between the individual member’s rights and the rights of the union as an institution.\textsuperscript{119}

\textbf{C. A Union Officer Can Still Be Disciplined for Speech That Violates a Union’s Reasonable Rules or Its Legal or Contractual Obligations}

Finally, even if the officer speech is of general concern to the membership and is not in conflict with the officer’s union position, a union could still discipline an elected union officer if the speech falls within one of the exceptions established in the proviso to section 101(a)(2).

Although Congress sought to hold unions accountable to their members by encouraging healthy debate within the organization, it also recognized that unlimited free speech would undermine the union’s ability to perform its primary function to act as a strong collective bargaining representative for employees.\textsuperscript{120} Accordingly, to protect legitimate unionism, the proviso to section 101(a)(2) was added to provide that, notwithstanding member free speech rights, a union may “adopt and enforce reasonable rules” regarding the conduct of meetings, the responsibilities of members towards the organization, and the prevention of interference with the union’s legal or contractual obligations.\textsuperscript{121} Indeed, in United Steelworkers of America

\textsuperscript{118}Id.

\textsuperscript{119}See, e.g., Babler v. Futhey, 618 F.3d 514, 514 (6th Cir. 2010) (examining dispute among union’s highest officers over challenged merger with another union); Williams v. United Steel Workers, 234 F. Supp. 2d 542, 550 (M.D.N.C. 2002) (finding local was properly placed in trusteeship because it had ceased to perform its representational and contractual functions due to conflict between its president and members of its executive board); Gilvin v. Fire, 259 F.3d 749, 749 (D.C. Cir. 2001) (reviewing turmoil that followed the union president’s election from one slate and its secretary-treasurer’s election from a competing slate).

\textsuperscript{120}These limitations are also consistent with well-settled public policy recognized by the courts against interference in internal union affairs. See, e.g., Vestal v. Hoffa, 451 F.2d 706, 709 (6th Cir. 1971) (“Courts are reluctant to substitute their judgment for that of union officials in the interpretation of the union’s constitution, and will interfere only where the official’s interpretation is not fair or reasonable.”), \textit{cert. denied}, 466 U.S. 934 (1972).

the Supreme Court recognized that Congress did not intend the “scope of § 101(a)(2) to be identical to the scope of the First Amendment” and that “[u]nion rules . . . are valid under § 101(a)(2) so long as they are reasonable.”

Despite (1) clear statutory language expressly qualifying the free speech rights of union members under section 101(a)(2), (2) the LMRDA’s legislative history reflecting Congress’s intent to balance members’ free speech rights and the union’s institutional rights as a private entity, and (3) the Supreme Court’s decision in Sadlowski, some courts have incorrectly found the free speech rights afforded by the LMRDA to be as expansive as, or even broader than, free speech under the First Amendment. For example, in Ruocchio v. United Transportation Union, Local 60, the Third Circuit held that a union could not discipline an officer for intentionally and “willfully circularizing untrue statements” in violation of the union’s constitution. It is well-settled, however, that even the broadest reading of Congress modeled Title I after the Bill of Rights, and that the legislators intended § 101(a)(2) to restate a principal First Amendment value—the right to speak one’s mind without fear of reprisal. However, there is absolutely no indication that Congress intended the scope of § 101(a)(2) to be identical to the scope of the First Amendment. Rather, Congress’ decision to include a proviso covering “reasonable” rules refutes that proposition. First Amendment freedoms may not be infringed absent a compelling governmental interest. Even then, any government regulation must be carefully tailored, so that rights are not needlessly impaired. Brown v. Hartlage, 456 U.S. 45, 53–54 (1982). Union rules, by contrast, are valid under § 101(a)(2) so long as they are reasonable; they need not pass the stringent tests applied in the First Amendment context.

Id. See also Rosario v. Amalgamated Ladies’ Garment Cutters’ Union, 605 F.2d 1228, 1239 (2d Cir. 1979) (while Title I was designed to provide minimal safeguards to protect member rights, “Congress did not, however, desire to outlaw union discipline”).

122. 457 U.S. 102, 103 (1982).

123. Id. at 111 (union rule prohibiting nonmembers from contributing to the election campaigns of candidates for union office did not violate the free speech provisions of LMRDA). In Sadlowski, the Court held that the LMRDA’s legislative history reveals that Congress modeled Title I after the Bill of Rights, and that the legislators intended § 101(a)(2) to restate a principal First Amendment value—the right to speak one’s mind without fear of reprisal. However, there is absolutely no indication that Congress intended the scope of § 101(a)(2) to be identical to the scope of the First Amendment. Rather, Congress’ decision to include a proviso covering “reasonable” rules refutes that proposition. First Amendment freedoms may not be infringed absent a compelling governmental interest. Even then, any government regulation must be carefully tailored, so that rights are not needlessly impaired. Brown v. Hartlage, 456 U.S. 45, 53–54 (1982). Union rules, by contrast, are valid under § 101(a)(2) so long as they are reasonable; they need not pass the stringent tests applied in the First Amendment context.

124. See also Rosario v. Amalgamated Ladies’ Garment Cutters’ Union, 605 F.2d 1228, 1239 (2d Cir. 1979) (while Title I was designed to provide minimal safeguards to protect member rights, “Congress did not, however, desire to outlaw union discipline”).

125. See, e.g., Babler v. Futhey, 669 F. Supp. 2d 873, 885 (N.D. Ohio 2009) (examining the free speech rights afforded to union officers and mistakenly finding that “the issue presented to this Court involves Plaintiffs’ First Amendment right to speech,” although union speech is governed by section 101(a)(2) of the LMRDA—not the First Amendment), aff’d, 618 F.3d 514 (6th Cir. 2010); see also Pope, supra note 6, at 529 (applying a straightforward First Amendment analysis to union free speech fails to account for the “relationship between democratic goals and labor policy” and the “fundamental structural contrasts between unions and the public polity”).

126. 181 F.3d 376 (3d Cir. 1999). But see id. at 390–91 (Aldisert, J., dissenting) (illogical to conclude that false speech is protected under section 101(a)(2) when “[e]ven under the broader limitations of the First Amendment, our speech is restricted by the law of defamation and the criminal statutes that proscribe or punish lying under oath”).

127. Id. at 396–88 (majority opinion) (union’s treasurer intentionally misrepresented facts to membership regarding the union’s handling of reimbursement check for overpayment to a moving company).
the First Amendment does not protect false or defamatory speech.\textsuperscript{128} This failure to recognize and account for the reasonable limitations on the LMRDA’s speech protections undermines the union’s institutional rights and its ability to effectively perform its collective bargaining functions. As noted by the dissent in \textit{Ruocchio}, a “union is not an academic debating society” but rather “it is a formal democratic association of fellow workers founded to implement the ‘practice and procedure of collective bargaining.’”\textsuperscript{129}

Officer speech is subject to the limitations of the proviso to section 101(a)(2) related to the union’s adoption of reasonable rules pertaining to (1) the conduct of meetings, (2) the responsibility of every member toward the organization as an institution, and (3) the prohibition of interference with the union’s performance of its legal or contractual obligations.\textsuperscript{130} Accordingly, a union officer can be lawfully disciplined for otherwise protected speech that violates the union’s reasonable rules, as codified in its constitution or bylaws, or for interfering with its legal or contractual duties.\textsuperscript{131} For example, notwithstanding the free speech protections of section 101(a)(2), an elected business manager could be removed for the unauthorized use of official union letterhead to convey statements that would otherwise be protected.\textsuperscript{132} Similarly, a union’s financial secretary-treasurer could be disciplined for refusing to co-sign the union’s checks, as required under the union’s constitution, if the officer’s reason for refusing was

\begin{footnotes}
\item[128] See, \textit{e.g.}, \textit{N.Y. Times v. Sullivan}, 376 U.S. 254, 279–80 (1964) (even when discussing public officials, knowing or intentional falsehoods are not protected by the First Amendment against defamation claims).
\item[129] \textit{Ruocchio}, 181 F.3d at 392 (Aldisert, J., dissenting).
\item[130] See 29 U.S.C. § 411(a)(2) (2012). Unlike union members, union officers also have a federal fiduciary duty to the “organization and its members as a group” and have a “duty . . . to refrain from dealing with [the union] . . . as an adverse party or in behalf of an adverse party in any matter connected with his duties.” 29 U.S.C. § 501(a) (2012).
\item[131] Notably, most courts have concluded that for a union rule to be considered reasonable, if must be codified in the union’s written governing documents such as its constitution or bylaws, although the rule can be generally worded. See Falcone v. Dantinne, 288 F. Supp. 719, 726 (E.D. Pa. 1968) (general rules, such as rules prohibiting conduct contrary to the best interest of the union, are not unreasonable just because they are general), \textit{rev’d on other grounds}, 420 F.2d 1157 (3d Cir. 1970); Gordon v. Winpisinger, 581 F Supp. 234, 240 (E.D.N.Y. 1984) (“A union constitution need not specify with mathematical precision all conduct that is prohibited.”).
\item[132] Gulickson v. Forest, 290 F. Supp. 457, 464 (E.D.N.Y. 1968). See also \textit{NLRB v. Allis-Chalmers Mfg. Co.}, 388 U.S. 175, 181–82 (1967) (union could discipline member who engaged in illegal wildcat strikes); Ferguson v. International Association of Bridge, Structural & Ornamental Ironworkers, 854 F.2d 1169 (9th Cir. 1988) (members could be disciplined for forming a rival labor organization and attempting to undermine the union’s collective bargaining relationship with employer); Hart v. Local Union 1292, United Brotherhood of Carpenters & Joiners, 341 F. Supp. 1266, 1270 (E.D.N.Y. 1972) (threats against the life of the business representative not protected).\end{footnotes}
to protest unrelated union activities. Additionally, a union president could be removed from office for failing to enforce the terms of a collective bargaining agreement.

Accordingly, otherwise protected officer speech may lose the LMRDA's protections if it falls within a statutory exception related to the union's ability to function as an institution.

V. Conclusion

The statutory language of the free speech provisions of the LMRDA and the act's legislative history manifest Congress's intent not only to promote union democracy and members' rights, but also to protect legitimate unionism and foster union self-governance. Thus, one must recognize that speech does not exist in a vacuum. In examining officer speech cases, courts should first determine if the required nexus exists between the officer speech and the rights of rank-and-file members by assessing whether the speech implicates matters of general membership concern. If the court finds that it does, the court should next determine whether the speech conflicts with any duties properly imposed on the officer as an elected union representative or falls within one of the LMRDA's limitations on protected speech. This approach properly balances the LMRDA's sometimes conflicting principles articulated by the Supreme Court in both Finnegan and Lynn.

133. See, e.g., Gilvin v. Fire, 259 F.3d 749, 757 (D.C. Cir. 2001) (in dicta). Of course, if the officer felt that signing the checks would be improper or violate his fiduciary obligation to the union, he could lawfully refuse to sign the checks. Id. at 757 n.9.

134. Williams v. United Steel Workers, 234 F. Supp. 2d 542, 550 (M.D.N.C. 2002) (local was placed in trusteeship and officers removed from office because the local was failing to administer and enforce the terms of the collective bargaining agreement due to internal conflict, not because plaintiff had complained about the Confederate flag being displayed on cars in the employer's parking lot).
Personal Electronic Devices in the Workplace: Balancing Interests in a BYOD World

Julie A. Totten* & Melissa C. Hammock**

I. Introduction

The use of employee-owned devices—such as smartphones, tablets, and laptops, for both personal and professional use—has become increasingly common. While there may be some advantages for employers in having a “bring your own device” (BYOD) policy, such a policy will also raise a host of potentially thorny problems, such as issues related to data security, ownership, and preservation; e-discovery; privacy; safety; and wage and hour compliance. While employers want to protect their proprietary information, employees may view a BYOD policy as invasive of their privacy if the employer monitors their personal data or tracks their location via their own personal mobile devices. This Article addresses the tension created by the BYOD concept and discusses practical tips for implementing a BYOD policy. It includes, in Part II, a discussion of the reasons for adopting a BYOD program; in Part III, a description of some of the information security issues surrounding BYOD programs; in Part IV, a discussion of the legal issues that may arise with BYOD programs; and, in Part V, a summary of provisions that should be addressed in any BYOD policy.

II. Why Adopt a BYOD Program?

In recent years, employers are more frequently allowing, often encouraging and subsidizing, employee use of their own digital communication devices for work purposes. Employers are adopting BYOD programs for several reasons. First, some employees want the

---

* Ms. Totten is a partner in the Northern California offices of Orrick, Herrington & Sutcliffe, LLP. She has a national practice with extensive experience defending and advising employers in complex discrimination, harassment, wrongful discharge, privacy, and wage and hour matters. Ms. Totten is an active member of the Labor and Employment Law Section of the American Bar Association, where she currently serves as a council member.

** Ms. Hammock is an employment law career associate in Orrick’s D.C. office. She is an experienced litigator who has defended management in a broad range of claims, including discrimination, harassment, wrongful discharge, wage and hour violations, and other employment-related matters both in court and before federal and state administrative agencies.
flexibility and freedom to choose devices and means of access to those devices.\(^1\) This employee benefit can also serve to help recruit new employees, particularly those in the millennial generation who are typically more willing to spend their own funds on the newest technology. In addition, as smartphones become ubiquitous, employees are less willing to carry two devices (e.g., carrying a work BlackBerry and a personal iPhone). Employees who want to avoid the “two pocket” syndrome prefer BYOD programs. Indeed, a recent survey found that eighty-four percent of employees use the same smartphone for work and pleasure.\(^2\)

Finally, BYOD programs are touted as a way for employers to reduce expenses, on both hardware and operations of systems and services, because employees largely bear the expense. However, the cost savings are not as great as would first appear. Employers that provide employees with employer-owned devices are typically able to negotiate group discounts on devices and cellular services. Depending on how the employer structures its expense reimbursement for the BYOD program, it could end up paying more because the potential employer savings from a bulk purchase are lost when employees purchase devices and services on their own. In addition, employers can experience an increase in IT-related support costs if employees are using different platforms on different devices.\(^3\)

For these reasons, before adopting a BYOD program, an employer must determine the driving force behind its decision. If it is making the decision because it believes it will reduce costs, the employer should research and evaluate the hidden costs associated with a BYOD program. In addition to evaluating the benefits of a BYOD program, employers must also consider the challenges and risks that arise when employees use personal devices for work-related purposes. The risks of BYOD policies fall into two broad categories: information security and legal.

III. Information Security Issues

The increased prevalence of BYOD programs raises several security challenges.


A. Loss of Device

The most obvious risk associated with a BYOD program is the loss or theft of the employee’s device. The Juniper Networks’ Third Annual Mobile Threats Report outlines several areas of risk:

A lost or stolen device, especially those without security settings like passwords, can present a significant risk to enterprises and consumers, including:

- **Data breach:** Like a laptop, a lost or stolen mobile device with customer or employee information can result in a data breach that may carry significant legal and reputational costs.
- **Loss of intellectual property and trade secrets:** Mobile devices often hold sensitive information about projects, as well as intellectual property, that when in the wrong hands, could have devastating effects on business.
- **Loss of personal information:** Mobile devices hold significant amounts of personal information, which if stolen could be used for a variety of malicious purposes, including fraud and identity theft.4

While employers can adopt procedures that enable them to remotely wipe employer-owned devices in the event of a loss or theft, employers may not have the ability to remotely wipe an employee-owned device for several reasons. First, the remote wiping of a device will delete all information on that device, which would necessarily include the employee’s own personal data. Accordingly, as discussed below, an employer’s wiping of data without an employee’s consent could lead to a claim under the Computer Fraud and Abuse Act,5 the Stored Communication Act,6 or relevant state statutes.7 Moreover, even if an employer has included protocols in its BYOD program regarding the remote wiping of data, the employer’s actual ability to implement those procedures will hinge on several factors outside of the employer’s control, such as the employee’s knowledge and understanding of the BYOD policy, prompt notification to the employer of the loss, and cooperation in allowing the remote wiping of data from the device. These problems were highlighted in a recent survey, which found that:

More than half of the respondents said their company did not have the ability to wipe data from a phone if it is lost, while 28 percent

---

7. See, e.g., CAL. CIV. CODE § 1798.82 (West 2010) (notice is required for all individuals affected by data breaches).
said they were unsure if the company was able to remotely wipe data. . . . A majority of workers said they were not sure who to contact if they lost their phone, while 15 percent said they would call their service provider. Twenty-nine percent of workers said they would call their company in the event of losing their device.8

These statistics highlight the need for employers to have well-defined policies regarding what is expected of employees in the event a device is lost or stolen, including gaining written permission to track, locate, lock, and wipe devices remotely under clearly defined circumstances.

B. Malware/Virus Protections

Even if a device is not lost or stolen, malicious software (malware) that is downloaded to a device by the employee can compromise the employer’s data. The download is typically unintentional; employees think they are downloading harmless applications (apps) when in reality they have downloaded malware. Mobile malware is growing at a staggering pace. From March 2012 through March 2013, mobile malware grew 614%, compared with a 155% increase reported in 2011.9 The risk is greatest for employee-owned devices: “[t]hrough 2014, employee-owned devices will be compromised by malware at more than double the rate of employer-owned devices.”10

C. Mobility and Accessibility

The mobility and accessibility of devices raise additional security concerns because data are stored and transmitted on devices and networks over which the employer has no control. In the past, employees could only access the employer’s data over employer-controlled networks. When using their personal devices, employees can access networks that may not be secure, thus increasing the risk of compromising the employer’s data. Unintended circumstances can cause compromised or lost data, compounding the risk. Indeed, “[s]ensitive information on the device may be stored alongside personal videos of junior league soccer and Angry Birds, which the employee’s four-year-old daughter plays daily. One mis-swipe, or wrong button hit, and the work data could be corrupted, lost or accidentally transmitted to the entire junior league.”11 In addition, programs such as Dropbox and Google Drive allow employees to move data from secure employer networks to the cloud.12 This can raise serious concerns for employers

8. Mielach, supra note 2.
12. Id.
as employees may move information that contains sensitive information, such as personal customer data or employer trade secrets. Once in the cloud, an employer will have little control over what happens to the data.

D. Social Media

Social networking heightens the information security risks posed by a BYOD policy. Recent studies show that seventy-two percent of workers access social media on the job at least once per day, a majority access it multiple times, and twenty-eight percent spend an hour or more of each workday social networking. The prevalence of social media is one of the main reasons that the risk for a data breach on mobile devices is so great. Whether intentionally or unintentionally, employees can now distribute data to an untold number of people with a few swipes. In addition to the ease with which an employee can disclose the employer’s data to an employee’s entire social network, “active social networkers” (those who spend thirty percent or more of their workday on social networking sites) seem to be “more vulnerable” to problems such as being pressured to compromise employer standards and experiencing retaliation for reporting misconduct. A recent business ethics survey found that fifty-three percent of active social networkers “share information about work projects once a week or more, and more than one third of them share information about managers, coworkers and clients/customers.” Most troubling is that the survey revealed, “by almost every measure, active social networkers face greater ethics risks than their less active or non-networking peers.” Of active social networkers, fifty percent said they would keep a copy of confidential work documents and forty-six percent would take work software to use on their personal machine. However, training can diminish the risks from social networking. Specifically, the study found that “workers who receive training about social networking policies have a better understanding of the risks of social networking and are more likely to respect employer policies.”

14. Id. at 20.
15. Id. at 8.
16. Id. at 27, 42–43.
17. Id. at 23.
18. Id. at 27 (emphasis omitted).
19. Id. at 28.
20. Id. at 35 (emphasis omitted).
IV. Legal Issues

The legal contours of BYOD programs are anything but well-defined. There is very little guidance on these issues from courts or legislators. The law is attempting to keep up with a technology world that is moving at warp speed. Even so, there are potential areas of legal concern of which any employer adopting a BYOD program should be aware.

A. Privacy

The main legal issue underlying any BYOD program is privacy. Employees use their devices for both work and personal matters, which causes difficulty in determining privacy expectations. Generally, employees do not have a reasonable expectation of privacy in the communications and content on their employer-owned devices. The same may not be said when employees use their own devices. When employees own their devices, there are limits on an employer’s ability lawfully to access—or delete, if necessary—the employer’s data stored on the device. As often happens, technology is outpacing the law and the existing framework of privacy laws does not exactly fit the BYOD context because there are no laws drafted specifically for BYOD programs (nor were BYOD issues anticipated at the time these laws were enacted). Nevertheless, many laws are potentially implicated by BYOD privacy issues.

1. Computer Fraud and Abuse Act and the Stored Communications Act

One statute that is particularly troubling for an employer that wants to monitor, access, or wipe an employee-owned device is the Computer Fraud and Abuse Act (CFAA). The CFAA makes it a crime to gain unauthorized access to a computer and permits the recovery of civil damages when the unauthorized access results in damages exceeding $5,000. The CFAA (and its state counterparts) can be troublesome if the employer is taking action, such as wiping the device, without employee consent. Furthermore, the CFAA’s prohibition on unauthorized access includes accessing a device in a manner that exceeds authorization. For example, employees may authorize their employer to track the location of a device in the event of a loss or theft, but a CFAA violation occurs if the employer instead uses that information to track an employee’s location on a periodic basis. All fifty states have adopted comparable computer trespass laws.

22. Id.
23. Id.
Similarly, the Stored Communications Act (SCA)\(^{25}\) prohibits unauthorized access to email stored at an email service provider.\(^{26}\) Like the CFAA, the SCA is a criminal statute with civil remedies. The CFAA and SCA may also come into play when an employer attempts to access, without authorization, information that an employee has saved to a cloud-based storage app, such as Dropbox or Google Drive.\(^{27}\)

### 2. The Health Insurance Portability and Accountability Act and the Genetic Information Nondiscrimination Act

The Health Insurance Portability and Accountability Act (HIPAA)\(^{28}\) requires employers to develop and follow procedures that ensure the confidentiality and security of protected health information.\(^{29}\) In that regard, HIPAA requires that employers at least consider encrypting personal health information.\(^{30}\) In the BYOD context, employers have a much more difficult time complying with HIPAA when employees have access to personal health information on their devices. Some employers have had to learn the hard way. For example, one healthcare contractor spent $288,000 managing the fallout of a stolen laptop containing unencrypted patient information.\(^{31}\) In an effort to avert future issues, the contractor destroyed all patient data on mobile devices and mandated the encryption of patient data.\(^{32}\)

The Genetic Information Nondiscrimination Act (GINA)\(^{33}\) prohibits employers from requesting, requiring, purchasing, or disclosing “genetic information” of the employee or the employee’s family members.\(^{34}\) The following example illustrates the potential legal issues that could arise under GINA: Jane has diabetes and downloads an app that allows her to track her blood glucose levels. While placing some updates on Jane’s phone, her employer sees the data contained in the diabetes app. In this situation, the employer has potentially violated GINA. These types of situations will increase as web developers create more health and fitness apps.


\(^{27}\) See, e.g., 18 U.S.C. §§ 1030(a)(1), 2701(a) (2012).


\(^{29}\) See 45 C.F.R. § 164.502 (2012) for general rules regarding uses and disclosure of protected health information.

\(^{30}\) Id.


\(^{32}\) Id.


3. Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA)\(^{35}\) requires secure disposal of certain consumer credit report information.\(^{36}\) Many states have similar laws requiring the secure disposal of certain sensitive information.\(^{37}\) When this type of confidential information is on an employee’s personal device, FCRA issues could arise for the employer in ensuring secure disposal. This problem is exacerbated if employees have moved data to the cloud or elsewhere.

4. State Laws

In addition to federal law, employers must be mindful of the patchwork of state privacy laws. California, in particular, has been quite progressive in the development of privacy laws. For example, Californians have a constitutional right to privacy from both public and private entities,\(^{38}\) and a state statute requires businesses to notify affected parties when a security breach occurs.\(^{39}\) In addition to laws aimed at protecting traditional privacy concerns, seventeen states have recently enacted laws that prohibit employers from requiring employees or applicants to turn over passwords needed to access private websites, including those used for social media.\(^{40}\) Employers should consult the specific laws of the states in which they have operations to ensure they are in compliance with any state-specific privacy laws.

5. International Laws

Employers with cross-border operations and employees who travel internationally face unique challenges. For example, under the European Union Data Privacy Protection Directive, individuals must give

---

37. See, e.g., CAL. CIV. CODE § 1798.81 (West 2009) (“A business shall take all reasonable steps to dispose, or arrange for the disposal, of customer records within its custody or control containing personal information when the records are no longer to be retained by the business.”).
38. CAL. CONST., art. 1, § 1.
39. CAL. CIV. CODE § 1798.82 (West 2010).
explicit and fully informed consent for any organization to access and process their personal data. If the employee does not give consent, or if the employee is not made fully aware of the implications (e.g., that the employer may wipe the employee’s personal data if the employee loses the device or enters the PIN incorrectly too many times), the employer is likely to be in breach of data privacy regulations and risks a lawsuit. Further, international travelers may be subject to search, and confidential information is not necessarily exempted from review. Employers with cross-border operations should consult with counsel to ensure that they are complying with all international privacy regulations.

B. Confidentiality and Trade Secret Protection

While privacy is likely the number one concern for employees using their own devices for work purposes, protection of trade secrets and confidential information is the number one concern for employers. Over the years, it has become easier for departing employees to take employers’ confidential information (e.g., by downloading information to a flash drive). The trend toward use of BYOD programs has only increased the risk to employers that employees will misappropriate confidential information.

According to a fall 2012 survey, half of employees who left or lost their jobs in the preceding twelve months retained confidential corporate data, and forty percent planned to use it in their new jobs. Furthermore, “[m]ost employees do not believe that transferring corporate data to their personal computers, tablets, smartphones, and cloud file-sharing apps is wrong.” Indeed, over half of those surveyed did not believe that it was a crime to use competitive data taken from a prior employer. The survey underscores the belief held by many workers that ownership belongs to the person who created the intellectual property. The following example is illustrative:

When given the scenario of a software developer who re-uses source code that he or she created for another company, 42 percent do not believe it is wrong and that the a [sic] person should have [an] ownership stake in his or her work and inventions. They believe that the

44. Id.
45. Id. at 2.
The developer has the right to re-use the code even when that developer does not have permission from the company.\footnote{Id.}
The study’s findings are more troublesome when layered on a BYOD program because, in that scenario, the confidential information is stored on the employee’s own device.

Employers can bring statutory and common law claims to address employee misappropriation; however, it will be increasingly difficult and expensive for employers to pursue such actions in a BYOD environment. For example, the Uniform Trade Secrets Act (UTSA)\footnote{UNIF. TRADE SECRETS ACT, 14 U.L.A. 539–40 (1985). Forty-eight states, the District of Columbia, and Puerto Rico have adopted a version of the Uniform Trade Secrets Act. See Legislative Fact Sheet—Trade Secrets Act, UNIFORM LAW COMM’N, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trade%20Secrets%20Act (last visited Oct. 3, 2014).} imposes liability for “misappropriation” of trade secrets.\footnote{See UNIF. TRADE SECRETS ACT §§ 1–2.} Under the UTSA, a trade secret includes any “information, including a formula, pattern, compilation, program, device, method, [or] technique,” the secrecy of which the employer has taken reasonable measures to protect.\footnote{Id. § 1(4).} A misappropriation requires the use or disclosure of the trade secret information or the acquisition by improper means of the trade secret.\footnote{Id. § 1(2).} It is significantly more challenging for an employer to prove misappropriation in a BYOD environment if it allowed the employee to store the employer’s trade secrets on the employee’s own device. Accordingly, in these situations, employers will focus more on the improper use or disclosure of the alleged trade secret.

In addition to the misappropriation of traditional data (e.g., customer lists, designs, etc.), employers must also consider how they will determine ownership of data such as social networking profiles and content created by employees but used for professional, as well as personal, purposes. For example, while employed by ABC Corp., a salesman creates a social networking account. He uses his ABC Corp. customer list to grow his list of followers. What happens to that profile when the employee moves to a different employer? Does the employer have an ownership interest in the account because it was created during the employee’s tenure and used for work purposes? Does the employee violate his non-solicitation agreement when he updates his profile and thereby notifies all of his followers that he has moved to a different employer? The answers to most of these questions remain uncertain. Indeed the ownership of these types of social networking profiles will likely turn on whether the employee and

46. Id.
48. See UNIF. TRADE SECRETS ACT §§ 1–2.
49. Id. § 1(4).
50. Id. § 1(2). “Improper means” includes “theft, bribery, misrepresentation, breach or inducement of a breach of duty to maintain secrecy, or espionage through electronic or other means.” Id. § 1(1).
employer had a prior agreement about account ownership, whether the account was initially created for business or personal use, or the provider’s terms of service.

C. Wage and Hour

Attorneys’ BYOD advice to employers must also address a host of wage and hour issues, such as off-the-clock allegations and claims for expense reimbursements. In addition, employers must consider issues related to joint employers, independent contractors, contingent workers, and third-party vendors.

Pursuant to the Fair Labor Standards Act (FLSA) and applicable state laws, employers must pay nonexempt employees for all time worked, including overtime. The BYOD trend is particularly problematic when it comes to nonexempt employees who are now able to access work-related content during nonworking hours. In the past, employers did not issue devices, such as smartphones, to nonexempt employees. But with BYOD programs, nonexempt employees are using their own devices. This may lead to employees performing work on personal time (e.g., reviewing and responding to work emails or making telephone calls). These types of acts create a potential claim for off-the-clock work and may be asserted as a proposed collective action.

The U.S. Department of Labor has even developed a timesheet app that helps employees track hours worked and determine wages owed.

In addition to off-the-clock claims, some states have day-of-rest rules and others require uninterrupted meal and rest periods. Employees can bring claims for violations of these laws (e.g., an employee who reads or responds to emails while eating lunch may have a claim). Employers can attempt to combat the connectivity problem by ensuring BYOD policies clearly state that employees should not be accessing work email outside of working hours. A blanket prohibition, however, can be problematic and difficult to enforce. As a result, employers should include in their BYOD policies a requirement that employees record and promptly report all after-hours work so that the employee can be properly compensated.

---

Reimbursement for expenses related to the use of an employee’s own device is another issue that employers must consider when adopting a BYOD program. In California, for example, employers are obligated to reimburse necessary business expenses. The question becomes, if an employer has implemented a BYOD program, does it then have to pay for the employee’s personal device? The answer likely depends on how the employer implements the BYOD plan. For voluntary programs, in which employees may choose to use their own devices or an employer-provided device, the employer may have an argument that reimbursement is not necessary. On the other hand, employers who require employees to use their own devices will likely need to reimburse employees. Accordingly, the manner in which the employer adopts the plan is important. When reimbursement is required, the employer must then determine the amount of the reimbursement. While it would be easy for an employer to pay the full cost of the employee’s device and monthly bill, this would likely result in an overpayment to the employee. Because the device is used for work and pleasure, the employer is not obligated to reimburse 100% of the costs. There may also be tax implications for the employee (i.e., to be an excludable fringe benefit, the employer must provide the device primarily for noncompensatory business purposes).

The actual expense method is the most accurate option, although it is usually not an option for reimbursement for smartphone or tablet usage. Under this method, an employer reimburses only the actual expense of using the employee’s device for work-related purposes. In the past, this method was easy to use because a cellular telephone bill showed every call made and it was easy to apportion the bill between work and personal usage. This method is increasingly less viable because employees have flat fee or unlimited data plans, making it impossible to calculate with any accuracy the amount of usage devoted to work.

Finally, the employer can use the existence of a BYOD program to establish that certain workers are not employees. Because the independent contractor test considers who supplies work equipment, worker-provided equipment makes it more likely for an individual to be deemed a contractor rather than an employee. However, an employer that allows contractors and temporary workers to use their own devices must be cognizant of issues such as security of data and ability to access the contractor’s devices when negotiating contractor and contingent worker agreements.

56. CAL. LAB. CODE § 2802 (West 2014).
D. E-Discovery

During litigation, employers must produce all nonprivileged, relevant information responsive to discovery requests. Generally, courts will hold employers responsible for recovering discoverable information, even if the material resides on employee-controlled devices. This is problematic because it is not just the information on the device that is discoverable, but also the data that were accessed. For employers with BYOD programs, litigation holds become much more challenging. Indeed, it may even be impossible for the employer to gain access to the device even to assess whether there is discoverable information present (e.g., an employee refuses to give consent to the employer to access the device). Even where employers obtain consent, they may have to overcome technical hurdles to effectuate a hold. Often, the most significant challenge is that the work-related data on employee-owned devices may completely avoid synchronization or backup on employer-controlled servers, thereby limiting the employer’s independent ability to preserve and access this information. At a minimum, litigation hold notices should clearly list that the hold covers employee-owned devices and emphasize the importance of preserving relevant material on personal devices and in mixed-use cloud environments.

These discovery issues raise the question of whether an employer can argue that it does not have possession, custody, or control of information stored on an employee’s personal device. The circuits are split on this issue, with some holding that a party must produce information that it has the legal right to obtain on demand, while others have held that a party must produce information that it has the legal right to demand, as well as the “right, authority or practical ability” to obtain from a nonparty. Based on these standards, discovery from

59. See Kiser v. Pride Commc’ns, Inc., No. 2:11-cv-00165-JCM-VCF, 2011 U.S. Dist. LEXIS 124124, at *10 (D. Nev. Oct. 26, 2011) (“a party may be ordered to produce a document in the possession of a non-party entity if that party has the legal right to obtain the document or has control over the entity who is in possession”); Flagg v. City of Detroit, 252 F.R.D. 346, 353 (E.D. Mich. 2008) (“a corporate party may be deemed to have control over documents in the possession of one of its officers or employees”).
60. Fed. R. Civ. P. 34(a)(1) (Rule 34 only requires production of documents and information in the possession, custody, or control of the responding party).
62. The Second, Fourth, Fifth, and Eleventh Circuits have ruled on the opposite side of the circuit split. See Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130,
employee devices may depend on the nature of the employer’s policy regarding access to work information on the personal device.

The issue of preserving information held by third parties or former employees is even trickier. Courts can find that employers have control of information even when the employer lacks actual possession of, or direct access to, the information. With third parties, a court’s finding of a direct relationship between the employer and the third-party provider (as established by the terms of the service agreement or payment arrangements, for example) often influences the determination that the employer controlled the information. Likewise, courts vary on whether an employer must obtain its work-product from a former employee. For example, if the employer issued a severance package to a former employee, and therefore is still paying the employee, that may be evidence sufficient for post-termination control over the employee to subject the former employee to the production demands of Rule 34. Even where an employer lacks the requisite control over a former employee, a court may still require the employer to ask the former employee to search for and produce relevant information before the employer can state that it does not control the information under Rule 34.

E. Workplace Safety

Today’s technological age means people can work anywhere and anytime, but this convenience comes at a price for employers, including increased risk of workers’ compensation and Occupational Safety and Health Act claims for work-related injuries, as well as tort and

138 (2d Cir. 2007); Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812, 821 (5th Cir. 2004); Morris v. Lowe’s Home Ctrs., Inc., No. 1:10CV388, 2012 U.S. Dist. LEXIS 44422, at *20 (M.D.N.C. Mar. 29, 2012); Exco Operating Co., 2011 U.S. Dist. LEXIS 138974, at *10 (“Rule 34’s definition of ‘possession, custody, or control,’ includes more than actual possession or control of the materials; it also contemplates a party’s ‘legal right or practical ability to obtain the materials from a nonparty to the action.’”).

63. See Kiser, 2011 U.S. Dist. LEXIS 124124, at *11 (an employer’s business with a third party payroll processor obligated it to obtain records from that processor); Flagg, 252 F.R.D. at 354 (the employer had sufficient control over employee text messages, given the direct contractual relationship between the employer and service provider).


65. Folding Carton, 75 F.R.D. at 423 (an employer may have sufficient control of a former employee if the individual is still receiving economic benefits from the employer).


negligence claims for accidents caused by employees who are driving while texting or otherwise distracted by mobile devices.

Before the advent of cell phones, courts applying the common law typically held that an employee driving to and from work was not acting in the course and scope of employment. As such, courts could not hold the employer liable for injuries to the employee under state workers’ compensation regimes, or liable to third parties under the doctrine of respondeat superior for accidents caused by the employee. But the law is changing and the lines between work and nonwork time are becoming so blurred that courts, in some instances, may now hold employers liable for injuries that occur during nonworking hours. For example, an employee is engaged in a conference call while driving to work and is involved in a car accident. The employee may file a workers’ compensation claim arguing the accident occurred in the course and scope of employment and the other driver may sue the employer under the doctrine of respondeat superior. The other driver may also sue the employer under a negligence theory, arguing the employer knew or should have known that the employee was using the device for work-related purposes while driving.

In addition to workers’ compensation and tort liability claims, employers may face an investigation from the Occupational Safety and Health Administration (OSHA). For example, in response to the problems related to distracted driving, OSHA and the Department of Transportation partnered to combat distracted driving on the job. As part of the initiative, OSHA will investigate and issue citations and penalties in cases in which it receives a credible complaint that an employer requires texting while driving or organizes work so that texting is a practical necessity.

F. Antidiscrimination Policies

Under federal and state antidiscrimination laws, employees are protected from harassment, discrimination, and retaliation based on protected characteristics such as race, sex, or disability. An employer’s equal employment opportunity and BYOD policies will typically

---

69. Id. at 571, 588.
70. See, e.g., Seabright Ins. Co. v. Lopez, 427 S.W.3d 442, 448 (Ct. App. Tex. 2014) ("[T]here is no bright line rule for determining if employee travel originates in the employer's business as each situation is dependent on the facts.").
71. See Occupational Safety and Health Act § 8 (codified at 29 U.S.C. § 657 (2012)).
73. Id.
intersect in two areas: hostile work environment and failure to accommodate claims. In the harassment context, an employee may not understand that policies relating to what is permissible conduct at work apply even if it occurs on a personal device. For example, employees who use their own devices to view sexually explicit photos or videos with others while at work can be creating a hostile work environment. Additionally, an employer might be held liable for harassing comments made on Internet message boards or blogs, even though the employer did not control the message boards. Employees with disabilities can also raise reasonable accommodation claims arguing that the employer is required to provide additional technology to enable them to perform the essential functions of their positions (e.g., a hearing-impaired employee may request special assistive software to use with a mobile device).

Finally, it is notable that active social network users (those who spend thirty percent or more of their workday on social networking sites) \(^{75}\) are significantly more likely to witness misconduct at work than their less active counterparts: fifty-six percent of active social networkers reported experiencing retaliation (compared with eighteen percent of other workers); seventy-one percent reported harassment online (compared with twenty-two percent of other workers); and seventy-one percent reported a supervisor or someone else in management verbally abused them (compared with fifty-eight percent of other workers). \(^{76}\) It will be interesting to see how these statistics change as technology evolves in the coming years and more workers become connected more often.

G. National Labor Relations Act

Neither the National Labor Relations Board (NLRB) nor the courts have issued any ruling interpreting the National Labor Relations Act’s (NLRA) \(^{77}\) application to BYOD programs. Nevertheless, regardless of whether the employer’s workforce is unionized, there is potential liability for all employers under the NLRA. \(^{78}\) All employers—whether unionized or not—should take care when drafting their BYOD policy and be mindful of the fact that a dual-use device may be used as an organizing tool; any policy must be narrowly tailored. The NLRB’s recent crackdown on overly broad social media policies serves as a sobering lesson on how strictly the agency is...
construing employer policies.\textsuperscript{79} For that reason, employers must carefully and thoughtfully word all BYOD policies so as not to run afoul of an employee’s section 7 rights.\textsuperscript{80}

Any employer that seeks to monitor employees’ usage must make sure that the monitoring does not infringe on employees’ rights under section 7 to engage in organizing activity or other protected concerted activity.\textsuperscript{81} In addition, when there is a grievance or investigation, employers must remember that the union will typically have the right to view or obtain a copy of any data the employer has gathered. If the workforce is unionized, an employer should review the applicable collective bargaining agreement prior to adopting any policy to determine whether such a policy is a mandatory subject of bargaining.

V. BYOD Policies

Any employer that adopts a BYOD program should consider having a comprehensive, written BYOD policy. The specific terms of any BYOD policy will vary depending on the employer’s goals. At a minimum, any effective policy must define the scope of covered devices, appropriate use, cost, and support issues; implement security protocols; outline the consequences for violations; contain a mechanism for monitoring employee access and appropriate use; and require employee training. In that regard, when drafting a BYOD policy, an employer should consider the following:

**Scope:**

- Will the policy apply to the entire workforce or just a segment (e.g., only exempt employees or only on-call employees)?
- What devices does the policy cover (e.g., smartphones and tablets, or all electronic devices)?
- Are there restrictions on the brand or age of devices that employees may use?
- Define who owns what information (e.g., the employer owns the information that the employee is accessing from the employer’s servers).

**Appropriate Use:**

- What servers and applications will the employer make accessible?
- What restrictions does the policy place on access?


\textsuperscript{80} NLRA § 7 (codified at 29 U.S.C. § 157 (2012)).

\textsuperscript{81} Id.
Cost and Support Issues

- Identify what expenses are reimbursable.
- Will the employer provide IT support to fix personal devices?

Implement Security Protocols

- Consider whether to implement a mobile device management platform to help with:
  - encrypting all data stored on the device;
  - remotely wiping data;
  - requiring complex passwords, and forcing a wipe after a set number of unsuccessful password attempts;
  - locating lost or stolen devices; and
  - prohibiting apps with malware.
- Outline what an employee should do if there is a security breach (e.g., the device is lost or infected with malware). This should include information on whom the employee should contact in the event of a loss or theft.
- Outline the procedures an employee should follow upon separation from employment (e.g., allowing the employer to wipe data from the device).
- Outline the process for employer inspection of the device if necessary for an investigation or litigation.

Monitoring and Consequences for Violations

- Will the employer monitor to ensure appropriate access and use (e.g., are employees using approved software and passwords)?
- What are the consequences for violations of the policy?

Training

- Any policy must not only be distributed to employees, but it is advisable to include training on the policy so employees are fully aware of their obligations under the policy.

VI. Conclusion

Given the many technical and legal issues that BYOD programs implicate, any employer considering adopting a BYOD policy should take its time and proceed in a methodical fashion to address the numerous complexities that can arise. Employers must give careful consideration to confidentiality and security issues and the manner in which they intersect with privacy concerns. In addition to the legal and security issues, employers must also be cognizant of ensuring that their BYOD policy is consistent with other corporate policies. This can be a difficult task that ultimately requires the editing of a myriad of other policies, including acceptable use of computer
resources, compliance and ethics, security policies, document retention policies, social media, harassment and discrimination, policies related to litigation holds, and employee privacy policies. Finally, once an employer is operating in a BYOD world, it will want to be sure it applies its policy consistently because failure to do so could give rise to claims of discrimination.
Employee-Owned Devices, Social Media, and the NLRA

Raphael Rajendra*

I. Introduction

Bring-your-own-device (BYOD) policies generally refer to arrangements in which an employer permits or requires employees to perform work functions—including accessing or creating employer data—using devices the employees themselves have purchased and own, and for which the employees alone are financially liable. 1 An increasing number of employers maintain formal or informal BYOD policies, and even in the absence of such policies, employees commonly use personal devices to perform work functions. An October 2013 survey of large employers in the United States and United Kingdom found more than eighty percent of organizations have a BYOD policy, 2 and another report projects that three years from now the majority of employers will require employees to use personal devices for work-related functions. 3

It is far too soon to know whether, as one analyst has suggested, “BYOD strategies are the most radical change to the economics and the culture of client computing in business in decades.” 4 Nevertheless, the rise of such policies requires lawyers to consider how—and whether—existing legal principles should apply to this new landscape. In many industries, it is already normal for employees to bring personal cellular phones or other devices (laptops, tablets, wearable technology) to work. These devices are widely available and affordable for many workers, and not only permit phone calls and text messages, but...

---

* Raphael Rajendra is an associate attorney at Bredhoff & Kaiser, PLLC, in Washington, D.C., where his practice focuses primarily on complex civil litigation on behalf of labor organizations and related institutions in the public and private sectors. The views expressed here do not necessarily represent the views of the firm or its clients. Many thanks to Roger Pollak and Devki Virk for insight and suggestions.

1. This Article uses term BYOD to mean either of two circumstances: (1) when employers permit employees to use personally owned devices to perform work functions, often in lieu of employer-provided devices, or (2) when employers permit employees to bring personally owned devices to the workplace, although not requiring (or even permitting) employees to use the device for work functions.


4. Id.
also offer many other capabilities, including high-resolution photographs, video and audio recording, Internet access, and connection to employer and personal email accounts. The proliferation of these devices has created uncertainty for employers, employees, and lawyers about the proper role of these devices in the workplace, and how decision makers will balance employees’ device use with employers’ legitimate managerial needs.

Even if these devices are technologically revolutionary, their workplace use does not necessarily call for a legal revolution to accommodate them. To a significant extent, the legal principles developed decades before there was a mobile-device revolution—or a social-media revolution—can be applied in a commonsense manner to situations involving electronic devices and media.

This Article focuses on the National Labor Relations Act (NLRA or Act), a statute that regulates most private-sector employers and employees—not simply those in or seeking to be in a labor union—and explores the application of the basic principles developed under the NLRA to the facts and circumstances increasingly common under BYOD policies. Part II discusses the basic framework to determine what constitutes “concerted activity” protected under the NLRA. Part III lays out significant changes that BYOD policies have wrought and explores how these changes relate to the analytical frameworks the National Labor Relations Board (NLRB or Board) has long used to resolve disputes under the Act. Specifically, section A notes the Board’s recent overturning of Register-Guard, a Bush-era decision that had restricted employees’ use of employers’ email systems; section B observes how, in BYOD workplaces, employees can use their own devices to bypass restrictions employers may try to impose and to access greater opportunities for engagement in protected concerted activity; and section C raises questions about employers’ surveillance of employees in an age when surveillance, even on employees’ own devices, can be just a click away.

II. Concerted Activity in the Workplace

Under the Board’s 1986 Meyers Industries decision, an employee’s activity will be found “concerted” if the conduct is “engaged in with or

5. It is important to recognize that not all statutes are as flexible as the NLRA in responding to technological change. See, e.g., Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 874 (9th Cir. 2002) (“[T]he [Electronic Communications Privacy Act (ECPA), Pub. L. No. 99-508, 100 Stat. 1848] was written prior to the advent of the Internet and the World Wide Web. As a result, the existing statutory framework is ill-suited to address modern forms of communication. . . . Courts have struggled to analyze problems involving modern technology within the confines of this statutory framework, often with unsatisfying results.”) (citations omitted).


on the authority of other employees, and not solely by and on behalf of the employee himself.”8 In the Board’s view, this definition “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.”9

The section 7 right of employees to engage in concerted activities under Meyers Industries is balanced, on a case-by-case basis, with what the Board has found to be legitimate employer rights, primarily property rights and the need for workplace order.10 In 1945, in Republic Aviation, the Supreme Court observed that the NLRB’s mission is to “work[] out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments.”11

If workers and elected labor unions believe that a section 7 right of employees is unlawfully restricted by an employer’s policy, they need not wait to challenge until an employer seeks to enforce a policy. In 1992, the Board summarized its rule:

[A]n employer may forbid employees to . . . talk about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to all other subjects not associated or connected with their work tasks. However, an employer violates Section 8(a)(1) when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced or enforced only in response to specific union activities in an organizational campaign.12

By 2004, in Lutheran Heritage Village-Livonia, the Board settled on the formulation it uses today to analyze facial challenges to policies claimed to be overbroad and to chill section 7 activity:

[O]ur inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.13

8. Id. at 885.
9. Id. at 887.
11. Id.
III. Technological Changes in the Workplace and the NLRA

Employees’ access to personal devices during the workday has led to three important changes to the employer-employee relationship that are significant to the NLRA. First, employees no longer need to use employer-owned devices and networks to communicate with one another and with third parties, which offsets employers’ abilities to use property-rights claims to restrict employee behavior. Second, personal devices make it easier for employees to capture recordings of events and communicate those recordings or other information about those events. Finally, personal devices increase employer concerns regarding information security, and potentially employer incentives for surveillance.

A. Communications Infrastructure and Employer Property Rights

For more than thirty years, the Board has taken the position that it is “unquestionably” employers’ “basic property right” to “regulate and restrict employee use of company property.” 14 This right encompasses employers’ prerogative to restrict use of company bulletin boards, or to prohibit union-related notices, so long as the rule is uniformly enforced. If employees, however, have access to the bulletin board for any purpose, they must also have access to the board to engage in section 7–protected activities. 15

The NLRB’s 2007 decision Register-Guard extended this doctrine to employer-provided email systems, reasoning, over vigorous dissent, that such email systems were analogous to company-provided bulletin boards, telephone systems, and television sets, all of which the Board had previously found within the employer’s regulatory prerogative. 16

The Board therefore held that if an employer had regularly enforced a prohibition on using its email system for solicitations of any kind, disciplining an employee for using the email system to send a union-related communication did not violate section 8(a)(1). 17 The dissent reasoned that precedents concerning bulletin boards, telephone systems, and television sets could not logically be applied to email

15. Id. at 660–61 (“[W]here, by policy or practice, the company permits employee access to bulletin boards for any purpose, section 7 secures the employees’ right to post union materials.”) (citations omitted); see also, e.g., Eaton Techs., Inc., 322 N.L.R.B. 848, 853 (1997); Container Corp. of Am., 244 N.L.R.B. 318, 321 (1979), enforced in pertinent part, NLRB v. Container Corp. of Am., 649 F.2d 1213 (6th Cir. 1981).
17. Id. at 1114. On appeal to the D.C. Circuit, the union chose not to challenge this central holding but obtained reversal on grounds that the employer had discriminatorily enforced its policy. Guard Publ’g Co. v. NLRB, 571 F.3d 53, 58–60 (D.C. Cir. 2009).
systems because “[n]one of those ‘equipment’ cases . . . involved sophisticated networks designed to accommodate thousands of multiple, simultaneous, interactive exchanges.” 18 The previous cases “involved far more limited and finite resources.” 19 Accordingly, the dissent stated that “[g]iven the unique characteristics of e-mail and the way it has transformed modern communication, it is simply absurd to find an e-mail system analogous to a telephone, a television set, a bulletin board, or a slip of scrap paper.” 20

In December 2014, in Purple Communications, the NLRB reversed the position it had staked out in Register-Guard. 21 It criticized Register-Guard for venerating employer property rights to the exclusion of employees’ section 7 rights, rather than striking a balance between them, and also for “fail[ing] to perceive the importance of email as a means by which employees engage in protected communications.” 22 The Board noted its long-held view that “communication among employees [is] a foundation for the exercise of their Section 7 rights” and found that email is a “critical means of communication” for both work- and non-work-related matters and employers often tolerate “[s]ome personal use of employer email systems.” 23 Based on these findings, the Board concluded that where email is accessible to employees, email communication should generally be considered within the set of tools available to employees seeking to exercise their rights under the NLRA. 24 In addition, following the Register-Guard dissent, the Board also found email to be different in kind, and not only degree, from the bulletin boards, telephone systems, and other media at issue in prior precedents because, unlike those media, each additional email sent or received adds only negligible cost or burden to the email system. 25 Thus, the Board imposed a “presum[ption] that employees who have rightful access to their

18. Register-Guard, 351 N.L.R.B. at 1125.
19. Id. at 1121 (Liebman, J., & Walsh, J., dissenting).
20. Id. Prior to the Board’s decision in Register-Guard, the NLRB Office of General Counsel (OGC) had, similarly, taken the view that for employees who “communicated with each other and with management primarily by e-mail and performed a significant amount of their work on the computer network[, in] a very real sense, the computer network constituted the employees’ ‘work area’ within the meaning of Republic Aviation and Stoddard-Quirk, 138 N.L.R.B. 615 (1962), because it was on this network that the employees were productive.” Associated Press, NLRB Div. of Advice, No. 9-CA-39211 (2002). Thus, the OGC concluded, “a flat ban on personal e-mail, the sole method of communication through this computerized ‘work area,’ also effectively banned protected solicitations as defined in Republic Aviation and was unlawfully overbroad.” Id. (describing and applying General Counsel’s analysis from Pratt & Whitney, NLRB Div. of Advice, No. 12-CA-18466 et al. (1998)).
22. Id. at 4–5.
23. Id. at 5–8.
24. Id.
25. Id. at 8–10.
employer’s email system in the course of their work have a right to use the email system to engage in Section 7–protected communications on nonworking time.”

Quite apart from the Board’s recent holding, however, BYOD workplaces operate in a different paradigm than the employer-owned communication systems addressed in Purple Communications. When employees bring their own devices to work and communicate by social media, personal email, text message, telephone call, or otherwise, employees are not using an infrastructure over which the employer could claim a property right, even if employees communicate while on the employer’s physical property. The device itself is employee-owned, and the data service is included as part of a bundle of rights the wireless carrier provides to the employee as the contract holder. The rules governing the BYOD workplace more properly look to the fundamental principle underlying Republic Aviation: that employees are entitled to engage in concerted activities even at the employer’s premises, so long as they do so while on non-work time and in non-work areas. As the Supreme Court noted:

[T]he Board has held that, while it was “within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours,” it was “not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property,” the latter restriction being deemed an unreasonable impediment to the exercise of the right to self-organization.

Further, in Eastex, Inc. v. NLRB, the Supreme Court clarified that the Act protects employees’ activities and communications appealing to and acting through third parties:

We also find no warrant for petitioner’s view that employees lose their protection under the “mutual aid or protection” clause when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship. The 74th Congress knew well enough that labor’s cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context. It recognized this fact by choosing, as the language of § 7 makes clear, to protect concerted activities for the somewhat broader purpose of “mutual aid or protection” as

26. Id. at 14.
27. Cf. id. (Board’s holding in Purple Communications does not “turn on the current availability of alternative communication options using personal electronic devices and other electronic media—e.g., Facebook, Twitter, YouTube, blogging, or personal email accounts—that the Respondent, its supporting amici, and our dissenting colleagues emphasize.”).
29. Id. at 802–03 & n.8, aff’g and quoting with approval LeTourneau Co. of Ga., 54 N.L.R.B. 1253, 1260 (1944) (quotations omitted).
well as for the narrower purposes of “self-organization” and “collective bargaining.”

Coupled together, these cases make the old new again: using their own devices, employees can gain access to one another and outside third parties—including union organizers—from within the employer’s premises, but without needing to use the employer-owned communications infrastructure that the Board has only just recently held employers cannot control to the exclusion of employees’ use for section 7 activities.

B. Increased Ease of Access to Technology

1. Challenges to Employer Policies Governing Photography and Other Forms of Recording

Virtually all smartphones and tablets today—as well as many other smart-devices that are or will soon be on the market—can record significant amounts of information. Notable are smartphones’ ability to take high-resolution pictures and to record video and audio.

Many employers have long had policies restricting or prohibiting photography on work premises—or even restricting use of a broad swath of devices employees may bring with them to work. So too, the NLRB has long held that an employer may not enforce a policy—even a policy that would be permissible on its face—in a discriminatory manner to prohibit protected section 7 activity. Although the NLRB’s view governing these policies does not appear to have changed, a dramatically larger set of employees now carry personal devices capable of engaging in activities that their employers’ policies prohibit. There is, therefore, an increased chance that employers may have occasion to seek enforcement of these policies.

---

31. Although this Article reviews the NLRA’s application to audio and video recordings, it is important to note that workers may use smartphones to record or otherwise track many kinds of data. For example, the Occupational Safety and Health Administration (OSHA) offers a “free app for mobile devices that enables workers and supervisors to monitor the heat index at their work sites.” Press Release, OSHA, Eaton Corp. Cited for Employee’s Heat-Related Kidney Failure at Kearney, Nebraska, Automotive Manufacturing Plant (Dec. 16, 2014), available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=27126. “The app displays a risk level for workers based on the heat index and reminders about protective measures that should be taken at that risk level.” Id. Results from the app can inform employers and workers alike when specific measures may reduce risks associated with excessive heat. In addition, many smartphone apps are now also available to track not only their users’ fitness activities and locations, but also their health conditions, such as heart rate, blood pressure, and body temperature. See, e.g., Ken Terry, A Physician’s Guide to Prescribing Mobile Health Apps, MED. ECON. (Oct. 8, 2014), http://medicaleconomics.modernmedicine.com/medical-economics/content/tags/2014-ehr-scorecard/physicians-guide-prescribing-mobile-health-apps?page=full.
33. In addition, even aside from the question of employer policies proscribing recordings, the ubiquity of smartphones and the ease with which they enable recording
In *Flagstaff Medical Center, Inc.*, the Board considered a hospital’s policy that provided: “The use of portable electronic equipment including, but not limited to CD players, iPods, MP3 players, or cameras during work time is not authorized. The use of cameras for recording images of patients and/or hospital equipment, property, or facilities is prohibited.” The administrative law judge (ALJ) found that the policy “was motivated by lawful business considerations designed to resolve . . . legitimate patient privacy concerns,” and further that facially the policy was not “likely [to] have a chilling effect on employees’ Section 7 rights, as the specific right to take photos in the workplace would not reasonably seem . . . an inherent component of the more generalized fundamental rights of employees set forth in Section 7 of the Act.” The Board agreed and, applying the *Lutheran Village* analysis, concluded that the policy did not “expressly restrict Section 7 activity” and that “employees would not reasonably interpret the rule as restricting Section 7 activity.” To the contrary, the Board continued, and particularly in light of laws like the Health Insurance Portability and Accountability Act (HIPAA), “[e]mployees would reasonably interpret [the employer’s] rule as a legitimate means of protecting the privacy of patients and their hospital surroundings, not as a prohibition of protected activity.”

Following *Flagstaff*, an ALJ rejected a facial challenge to a policy promulgated by Whole Foods Market prohibiting the recording of any “conversation”:

> It is a violation of Whole Foods Market policy to record conversations with a tape recorder or other recording device (including a cell phone or any electronic device) unless prior approval is received from . . . store or facility leadership. The purpose of this policy is to eliminate a chilling effect to the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed.39

also make it easier for union-sympathetic workers to communicate with their unions. See, e.g., Angelica Textile Servs., Inc., No. 12-CA-118367, 2014 WL 5237998, slip op. at 12, 18–19 (Oct. 15, 2014) (upon noticing employer’s anti-union postings on union bulletin board at workplace, worker sent a photograph of the board to the union business agent using an iPhone; employer’s postings ruled not to constitute unfair labor practice), adopted absent exception, 2014 WL 6722331 (N.L.R.B. Nov. 26, 2014).

35. *Id.* at 24.
36. *Id.* at 24–25.
37. *Id.*
38. *Id.* at 5.
The employer clarified that, although the rule’s text does not say so, “[t]he rule does not apply when the employee is not at work, or is on non-work time such as his break time,” and it applies to all employees and all levels of management.\textsuperscript{40} The ALJ noted that there are “no cases . . . in which the Board has found that making recordings of conversations in the workplace is a protected right,”\textsuperscript{41} and found the rule lawful, particularly because of the employer’s stated interest in “promot[ing] an ‘out front open dialogue’ with the workers” and its view that recordings “would ‘absolutely chill the dynamic’ of” meetings between employees and upper management about the performance of mid-level management.\textsuperscript{42} Exceptions to the ALJ decision were filed,\textsuperscript{43} but the parties settled\textsuperscript{44} before the Board ruled, so the Board’s view on such a policy remains unknown.

Even if a policy prohibiting photography is facially legitimate, however, employer enforcement infringing on protected rights may nonetheless be found unlawful. For example, in \textit{White Oak Manor},\textsuperscript{45} a long-term care facility maintained a dress code prohibiting employees from wearing hats during work.\textsuperscript{46} One female employee, Wright-Gore, dissatisfied with a haircut, wore a hat to work; when her supervisor instructed her to remove it to comply with the dress code, Wright-Gore complained that the employer discriminatorily enforced the policy against women. Frustrated by the policy’s inconsistent enforcement, in which many of her male colleagues wore hats without being disciplined, Wright-Gore “began talking to other women employees and telling them of the issuance of the written warning she had received for wearing a hat on the premises, and the disparity of this discipline.”\textsuperscript{47} She used her cellphone camera to document employees wearing hats and otherwise disobeying the dress code, with the intent to document the employer’s inconsistent enforcement.\textsuperscript{48}

\textsuperscript{40} Id. at 3.
\textsuperscript{41} Id. at 6.
\textsuperscript{42} Id. at 4.
\textsuperscript{43} General Counsel’s Exceptions to the Decision of the Administrative Law Judge and Brief in Support of Exceptions, Whole Foods Mkt., Inc., Case No. 01-CA-096965 (Sept. 20, 2013).
\textsuperscript{44} See Settlement Agreement, Whole Foods Mkt., Inc. (NLRB 2013) (obtained via a Freedom of Information Act request).
\textsuperscript{45} 353 N.L.R.B. 795 (2009), enforced, 452 F. App’x 374 (4th Cir. 2011). The NLRB originally delegated \textit{White Oak Manor} for decision by two members of the board. After the Supreme Court held in \textit{New Process Steel, L.P. v. NLRB}, 560 U.S. 674, 674 (2010), that the NLRA required a quorum of at least three NLRB members, the Board convened a three-member panel, which followed the decision originally issued by the two-member panel. See \textit{White Oak Manor}, 355 N.L.R.B. 1280 (2010). The NLRB’s decisions adopted the ALJ’s decision. Id. at 1280 (hewing to the reasons stated in \textit{White Oak Manor}, 353 N.L.R.B. at 795).
\textsuperscript{46} \textit{White Oak Manor}, 353 N.L.R.B. at 796 (2009).
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 797.
terminated Wright-Gore for “‘[s]tealing or misappropriating (misus-
ing) property belonging to the facility, residents or other employees. [Wright-Gore] took a picture of another employee without his/her per-
mission and in turn, showed it to other employees.’” The NLRB
agreed with the ALJ’s conclusion that Wright-Gore’s termination con-
stituted an unfair labor practice: “The taking of cell phone pictures of
employees and the showing of them to others was a protected con-
certed activity under the Act and Respondent’s admission at the hear-
ing that it discharged Wright-Gore solely because she took and showed
the pictures of [a co-worker] to other employees, establishes a violation
of Section 8(a)(1) of the Act.” The Fourth Circuit enforced the Board’s
order, emphasizing these facts:

Wright-Gore’s complaints about White Oak’s disparate enforcement
of its dress code are protected under the NLRA. . . . As part of the res-
gestae of her overarching grievance about dress-code enforcement,
Wright-Gore’s documenting of the problem through photography is
similarly protected conduct. . . . Wright-Gore’s activities moreover
were the product of concerted action. Wright-Gore spoke with
roughly ten employees about uneven enforcement of White Oak’s
dress code. . . . At least one employee, Hawkins, assisted Wright-
Gore with her efforts to document the problem, encouraging Roberts
to pose for a picture and sharing pictures with Henson. Indeed,
Hawkins felt a sense of ownership in the enterprise, remarking to
Henson “look what we got” when showing her a photograph.

The Fourth Circuit observed that White Oak had, at best, enforced
its ban on photography irregularly. It noted that “[e]mployees rou-
tinely took pictures of each other,” both at work and off-site, but that
“Wright-Gore’s termination was the first time that White Oak had en-
forced the policy.” Thus, even if the employer did have a preexisting
policy prohibiting photography, it did not enforce it regularly or consist-
tently, and so it could not rely on that policy to discipline an employee
engaged in protected concerted activity.

White Oak Manor and Flagstaff involve straightforward applica-
tions of basic principles. They are noteworthy here, however, because
they reflect a fact pattern likely to occur with increasing frequency
as a greater percentage of workers obtain sophisticated personal de-
vices that enable behavior that employers may prohibit, or may wish
to prohibit. The spread of such devices—enabled and encouraged by
BYOD policies—will cause more frequent tension between employer

49. Id. at 798.
50. Id. at 801.
52. Id. at 376; see also White Oak Manor, 353 N.L.R.B. at 800.
53. White Oak Manor, 452 F. App’x at 382.
interests in limiting behavior like photography or audio recordings, and employee rights to communicate about workplace issues.

2. Reduced Barriers to Communication

Perhaps the most common NLRA consequence of BYOD policies is that workplace device use—regardless of whether such devices are required, or even permitted, to be used for work purposes—has increased employees’ opportunities to engage in concerted activity protected under section 7. The proliferation of smartphones dramatically lowers the barriers confronted by employees who wish to access the Internet, trade emails, make and share audio or video recordings, and post to social networks, even while on the job.

Thus, the sort of policies or supervisor behavior that workers might have griped about in person may now result in the creation of electronic records. Similarly, employer policies that may always have existed—or that employers will now establish to protect interests they may previously have had less reason to worry could be violated—may now apply to behavior that employees can engage in much more easily and frequently. These policies may seek to govern employee contact with customers, clients, vendors, or the general public; or they may, for example, seek to prohibit disclosure of private employer information, trade secrets, or other confidential information.

The application of such policies to modern workplace communication raises numerous questions under the NLRA. As an initial matter, can engagement on social media constitute protected concerted activity? And given the informal—sometimes profane or hyperbolic—manner of communication regularly found on social media, how does the NLRB’s longstanding law on disruptive, disparaging, or malicious activity from protection apply?

54. In 2011 and 2012 the NLRB General Counsel issued three memoranda addressing which social-media policies may survive facial challenges. This Article does not intend to cover the ground addressed in these memoranda. See Div. of Operations Mgmt., Off. of the Gen. Couns., NLRB, Mem. OM 12-59, Rules on Using Social Media Technology and on Communicating Confidential Information Are Overbroad (2012); Div. of Operations Mgmt., Off. of the Gen. Couns., NLRB, Mem. OM 12-31, Discharge for Facebook Comments and for Violation of Non-Disparagement Rule Was Unlawful (2012); Div. of Operations Mgmt., Off. of the Gen. Couns., NLRB, Mem. OM 11-74, Employees’ Facebook Postings About Job Performance and Staffing Were Protected Concerted Activity (2011). The analysis often follows Lutheran Heritage Village-Livonia. See supra note 13 and accompanying text. See generally The NLRB and Social Media, NLRB, http://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media (last visited Oct. 18, 2014). In the years since the General Counsel issued these memoranda, ALJs have applied a similar Lutheran Village analysis to restrictions on social-media communications. See, e.g., Alternative Living, Inc., No. 07-CA-099976, slip op. at 28 (July 25, 2014) (rule captioned “Facebook, Blogs, Twitter, and any other Social Networks” that prohibited any “derogatory remarks” was overbroad).
A. ENGAGEMENT ON SOCIAL MEDIA CAN CONSTITUTE PROTECTED CONCERTED ACTIVITY

Since 2011, the Board has considered Facebook to be a forum in which employees can engage in protected concerted activity. Though some management-side advocates have voiced concern, the Board has long taken the position that “[t]he specific medium in which the discussion takes place is irrelevant to its concerted nature.” One ALJ explained: “It is not a defense to the unfair labor practice allegation that [the employee’s] posts [to Facebook] were accessible to customers or others outside of [the employer]. . . . ‘Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute.’” The Board itself has made clear that Facebook posts can constitute concerted protected activity. In Bettie Page Clothing, employees initially complained in person to their supervisor that the store’s late closing time created personal safety issues. When the supervisor remained unresponsive, the employees posted their complaints on Facebook, where they discussed whether their situation violated labor laws. One employee posted that she would bring in a labor-rights handbook, and did so the next day. The ALJ found that the Facebook posts were protected because they continued the discussion of the


60. Id. at *10–11.

61. Id. at *11.
complaints initially raised by the employees in person. Although the Board agreed with this rationale, its decision went further:

[W]e also find that the Facebook postings would have constituted protected concerted activity in and of themselves. The Facebook postings were complaints among employees about the conduct of their supervisor as it related to their terms and conditions of employment and about management’s refusal to address the employees’ concerns. The employees also discussed looking at a book about the rights of workers in California so that they could determine whether the Respondent was violating labor laws. Such conversations for mutual aid and protection are classic concerted protected activity, even absent prior action.

Given this context, it is perhaps unsurprising that the Board would today find the question inarguably settled: “the use of modern communication technologies such as social media to pursue unionization is obviously protected, regardless of whether workers during the Depression had access to Facebook.”

By the same token, though, employee communications do not automatically obtain protection simply because they are posted on social media. Many of the circumstances first considered by the NLRB and by the General Counsel involved social media posts that did not

---

62. *Id.* at *15.
63. *Id.* at *1 (citing Rhee Bros., Inc., 343 N.L.R.B. 695, 695 n.3 (2004)) (emphasis added).
64. Murphy Oil USA, Inc., 361 N.L.R.B. No. 72, 2014 WL 5465454, at *19 (Oct. 28, 2014) (emphasis added); *see also* Three D, LLC, No. 34-CA-12915, 361 NLRB No. 31, 2014 WL 4182705, at *1, slip op. at 2 (Aug. 22, 2014) (“In this case, there is no dispute that the Facebook communications at issue constituted ‘concerted activities’ and that they were ‘for the purpose of . . . mutual aid or protection.’”), *aff’g* 2012 WL 76862, slip op. at 8–9 (N.L.R.B. Div. of Judges Jan. 3, 2012) (Facebook posts and responses not only constitute concerted protected activity, but one user’s selection of the ‘Like’ option, so that the words ‘Vincent VinnyCenz Spinella . . . like[s] this’ appeared on the account, constituted, in the context of Facebook communications, an assent to the comments being made, and a meaningful contribution to the discussion.”); Miklin Enter., Inc., 361 NLRB No. 27, 2014 WL 4161776, at *10 (Aug. 21, 2014) (employer’s encouragement that employees use Facebook to harass and disparage pro-union co-worker was unlawful retaliation for union activity). Thus, the Board adopted an ALJ’s conclusions that when a senior paramedic and field training officer set up a pro-union Facebook page “to provide a forum for employees to discuss the Union,” his employer’s subsequent discipline was unlawfully in retaliation for the employee’s protected section 7 activity. Metro-W. Ambulance Serv., Inc. & Teamsters Joint Council #37, Int’l Bhd. of Teamsters & Teamsters Local #223, Int’l Bhd. of Teamsters, 360 NLRB No. 124, 2014 WL 2448663, at *1, *16, *41–42 (May 30, 2014). In addition, when a union seeking to organize certain workers at Cablevision used Facebook, among other means, to communicate with workers, the ALJ found Cablevision’s monitoring and knowledge of this activity—one of the employer’s internal reports noted that “the Union is getting in touch with employee using Facebook, Twitter, etc. to voice their opinions”—important in concluding that its subsequent promises of wage increases and other benefits were unlawfully motivated by an effort to thwart union-organizing activity. *See* CSC Holdings, LLC & Cablevision Sys. N.Y.C. Corp., A Single Employer, No. 02-CA-085811, 2014 WL 6853881, slip op. at 184 (Dec. 4, 2014); *see generally id.* at 182–90.
constitute protected concerted activity because they did not fall within the longstanding *Meyers Industries* definition. Two General Counsel advisory opinions reflect this position.65 *Children’s National Medical Center* involved a Facebook posting made while an employee and her co-worker were in an ambulance to pick up a patient.66 In response to her co-worker’s behavior, an employee twice posted to Facebook from her iPhone, rather than discussing the issue with her co-worker.67 She posted: “REALLY!!!! Must you suck your teeth every 30 seconds. It is driving me nuts. . . . Actually they are about to get, (sic) beat senseless with a ventilator. It’s in the back of an ambulance and I can’t get away from them. UGH!!!”68

Similarly, in *Public Service Credit Union*, the charging party used his smartphone to post a complaint to Facebook about a work encounter he had just experienced:

Some clown comes in today and asks if he can change his debit card PIN at the ATM. I tell him ours can’t, but the closest one that can is about 10 minutes away. He mentions the city of Ft. Collins. I tell him their machines can change the number. He calls an hour later and bitches about me saying I sent him to Ft. Collins and he is going to close his account.69

The employee admitted he had “posted this out of frustration” with the customer and his supervisor and that he “was not trying to get other employees to act and was just venting.”70 A conversation occurred over the next few hours on Facebook following the employee’s original post:

Friend 1: “**LOL** oh wow.”
Charging Party: “I’m in rare form today. He has been with us a month. I’m like *f*%#k him, then.”
Friend 2: “How dare you make people drive all over Colorado to change their PIN? Bad bad man.”
Coworker 1: “Don’t forget to charge him the fee to close the checking.”
Charging Party: “[Coworker 1], [M.] said the same thing, haha. I most certainly will if he follows through.”
Charging Party: “[Friend 2], the $3.95 just isn’t enough. If it doesn’t cost at least a tank of gas, it just isn’t worth it.”
Coworker 1: “People are morons. Not to be mean.”71

67. *Id.*
68. *Id.*
70. *Id.*
71. *Id.*
On a separate occasion, the employee also posted about his supervisor: “I am doing my job, getting acclimated with our loan/new accounts system and doing part of your job too. Remember how shitty things were the four days I was in the hospital? You really don’t need me getting more pissed off.”72 A friend, who was also a customer, responded, and another friend “liked” the post.73

The General Counsel determined that the Facebook posts were not protected section 7 activity in either case.74 Indeed, in 2010 and 2011, the General Counsel issued a number of memoranda concluding that Facebook posts were not protected concerted activity under a Meyers Industries analysis: the employee’s post did not relate to the terms and conditions of employment, did not seek to initiate or induce group action, and did not intend or expect that the post would cause third parties to take action affecting the employment situation, and the employee had posted what amounted to a mere individual gripe.75 In more recent years, the Board, too, has also found several instances in which Facebook posts were not protected concerted activity.76

### B. Egregious Outbursts and Opprobrious Conduct Within the Workplace

In NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard),77 the Supreme Court held that an

---

72. Id.
73. Id.
75. See, e.g., Helser Indus., NLRB Div. of Advice, No. 19-CA-33145, at 33 (2011) (employee’s Facebook posts stating he was very angry that a co-worker reported him for causing an accident with work equipment were not protected concerted activity, and were merely “an expression of an individual gripe”); Rural Metro, NLRB Div. of Advice, No. 25-CA-31802, at 2–3 (2011) (employee’s Facebook post on senator’s page that discussed wages and terms and conditions of employment was, nonetheless, not protected concerted activity because she did not intend to initiate or induce group action, did not discuss her post with other employees, and did not expect the senator to take action that would affect her employment); Monmouth Ocean Hosp. Serv. Corp. (MONOC), NLRB Div. of Advice, Nos. 22-CA-29008, 22-CA-29083, 22-CA-29084, & 22-CA-29234 et al., 2010 WL 6162573 (May 5, 2010); see also, e.g., JT’s Porch Saloon & Eatery, Ltd., NLRB Div. of Advice, No. 13-CA-46689 (July 7, 2011); Martin House, NLRB Div. of Advice, No. 34-CA-12950 (July 19, 2011); Copiah Bank, NLRB Div. of Advice, No. 15-CA-061204 (Dec. 1, 2011) (employees’ Facebook posts that related to providing inadequate patient care did not involve section 7 concerns and were not related to other postings on the employees’ Facebook page that did involve section 7–protected activity); Tasker Healthcare Grp., NLRB Div. of Advice, No. 04-CA-094222 (May 9, 2013).
76. See, e.g., Hills & Dales Gen. Hosp., 360 N.L.R.B. No. 70, at 6, 6 n.5 (2014); World Color (USA) Corp., 360 N.L.R.B. No. 37, at 2 (Feb. 12, 2014) (in the absence of specific evidence of the Facebook post’s content and context, Board “will not infer that employee’s posts amounted to protected concerted activity”); Richmond Dist. Neighborhood Ctr., 361 N.L.R.B. No. 74, at 6 (Oct. 28, 2014) (employer did not violate Act for failing to rehire employees based on their Facebook posts expressing intent to engage in insubordination and cause disorder).
77. 346 U.S. 464 (1953).
employer had discharged employees for cause and had not committed an unfair labor practice, when employees who, “at a critical time in the initiation of the company’s television service,” made “a sharp, public, disparaging attack upon the quality of the company’s product and its business policies, in a manner reasonably calculated to harm the company’s reputation and reduce its income.” The employees’ actions were not protected even though the employees’ purpose—undisclosed until after their termination—was to improve the terms and conditions of their employment, and even though the union was at that time picketing the employer and engaged in a bona fide labor dispute. In the sixty years since, the Board has followed Jefferson Standard’s rule “that employees may engage in communications with third parties in circumstances where the communication is related to an ongoing labor dispute and when the communication is not so disloyal, reckless, or maliciously untrue to lose the Act’s protection.”

Further, in some circumstances, the outrageousness of an employee’s conduct, even if undertaken concertedly and for protected purposes, can deprive him of NLRA protection. As the Board has said, “communications occurring during the course of otherwise protected activity remain likewise protected unless found to be so violent or of such serious character as to render the employee unfit for further service.” In Atlantic Steel Co., the Board announced a four-part test for such situations:

The decision as to whether the employee has crossed that line [to unprotected opprobrious conduct] depends on several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.

As the Board explained, “the Act allows some latitude for impulsive conduct by employees in the course of protected concerted activity, but, at the same time, recognizes that employers have a legitimate need to maintain order.”

---

78. Id. at 471.
79. Id. at 472, 476 (quoting Jefferson Standard Broad. Co., 94 N.L.R.B. 1507, 1511 (1951)).
81. St. Margaret Mercy Healthcare Ctrs., 350 N.L.R.B. 203, 204 (2007), enforced, 519 F.3d 373 (7th Cir. 2008) (quoting Dreis & Krump Mfg. v. NLRB, 544 F.2d 320, 329 (7th Cir. 1976)).
82. 245 N.L.R.B. 814 (1979).
83. Id. at 816.
Employees’ social-media use engages both the Jefferson Standard and Atlantic Steel lines of authority, particularly because it often involves spontaneous action and communicates moment-to-moment reactions to unfolding events. Social-media communications may contain personal attacks or profanity—as the Facebook posts quoted above from Children’s National Medical Center and Public Service Credit Union did—triggering Atlantic Steel arguments. Similarly, because employees’ social-media communications are frequently accessible by people outside the workplace, such communications potentially trigger application of Jefferson Standard.

Indeed, in Three D, LLC, the Board held that, at least in relation to the facts present in that case, Atlantic Steel was inapplicable to employees’ use of social media. 85 In Three D, a former employee, Jamie LaFrance, posted a complaint regarding additional taxes she owed and the employer’s bookkeeper (one of the co-owners). 86 One then-current employee “liked” LaFrance’s post, and another then-current employee noted that she owed taxes and called the co-owner “[s]uch an asshole.” 87 LaFrance posted that she would “call[] the labor board to look into it.” 88 The ALJ held that the employees’ Facebook postings did not lose protection under Atlantic Steel, noting that because “[t]he comments occurred during a Facebook conversation, and not at the workplace itself, . . . there is no possibility that the discussion would have disrupted Respondent’s work environment.” 89 The ALJ further found that Jefferson Standard did not strip the employees’ Facebook posts of their protection under the Act, inasmuch as they were not false factual statements, were not made during a critical time in the employer’s business, and were not gratuitous attempts to injure the employer’s business. 90 The Board agreed with the ALJ that the employees’ Facebook posts did not lose their protection under Jefferson Standard or other doctrines, and that the employer had committed an unfair labor practice by discharging them, but held Atlantic Steel inapplicable to the case. 91 The Board explained that the “multifactor framework” of Atlantic Steel “enables the Board to balance employee rights with the employer’s interest in maintaining order at its workplace.” 92 The Board noted that the Atlantic Steel factors are “tailored to workplace confrontations with the employer,” and would therefore not apply in this case, which involved “a social media discussion

86. Id. at 2.
87. Id.
88. Id.
89. Id. at 17 (quoting ALJ decision); see also id. at 17–18 (quoting ALJ decision applying Atlantic Steel).
90. Id. at 18–20 (quoting ALJ decision applying Jefferson Standard).
91. Id. at 3–5.
92. Id. at 4.
among offsite, off-duty employees, as well as two nonemployees,” in which “[n]o manager or supervisor participated in the discussion, and there was no direct confrontation with management,” and which therefore did not implicate the “employer’s interest in maintaining workplace discipline and order.”

Given the nature of cyberspace, however, it can be difficult to determine when social-media discussions take place at a worksite. The ALJ decision in Pier Sixty, LLC illustrates the intersection of Atlantic Steel with social-media use that takes place during a work event. Pier Sixty involved a smartphone Facebook posting made by a catering company employee, Perez, during a work break at an event the day before the union election. Perez was one of three union-supportive workers at the event. The workers were frustrated about how a manager had spoken to and treated them. One employee told the manager “that he needed to learn how to talk to the staff,” but the manager did not respond. While in the past the employees might have vented to one another during a break or over a beer after the event—and their ephemeral discussion might never reach a wider audience or the employer’s attention—here, Perez, “very angry” about the encounter, took a short break, went outside, and posted the following to his Facebook page from his smartphone: “Bob [the supervisor] is such a NASTY MOTHER FUCKER don’t know how to talk to people!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!100 Perez then returned to the event, which continued uninterrupted.

According to Perez, his Facebook post could be viewed only by those he had “friended,” a group that included ten employees and some nonemployees. By the next day, other employees—some of whom had gotten immediate notification of Perez’s Facebook post—had “liked” or otherwise indicated support for his post and agreement with his support for the union. The employer terminated the employee for harassment, “based upon the egregiousness of his language,
which was inappropriate for the workplace, disrespectful, and potentially defamatory, and the fact that Perez did not take the posting down immediately.”

The timing of the post influenced the ALJ’s conclusion that the speech was protected. Perez posted his comment just after the complained-of managerial behavior, indicating that the post was “part of an ongoing sequence of events related to the servers’ dissatisfaction with the manner in which they were treated by Respondent’s managers.” More specifically:

Gonzalez, Perez, and Lora all testified that on October 25 McSweeney directed them to “spread out” twice, in a harsh and progressively louder tone of voice. McSweeney’s conduct was sufficiently similar to previous incidents the servers considered objectionable that Gonzalez took a moment to tell him, in words similar to the inoffensive portion of Perez’s Facebook post, that he “needed to learn how to talk to the staff.” There is no real dispute that McSweeney’s statements to Gonzalez, Perez, and Lora precipitated Perez’s Facebook posting. In addition, because several other servers were “friends” with Perez on Facebook, Perez could anticipate that other employees, also concerned regarding demeaning treatment by managers, would see it. It is well-settled that concerted activity “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action.” The specific medium in which the discussion takes place is irrelevant to its concerted nature. As a result, I find that Perez’s Facebook posting was part of an ongoing sequence of events involving servers’ complaints regarding the manner in which they were treated by Respondent’s managers, and was therefore protected concerted activity.

The fact that Perez had access to a smartphone and posted his complaint to Facebook affects the analysis in several ways. First, Perez simply could not have submitted a Facebook post while at a catering worksite without a smartphone or other Internet-enabled device small enough to carry while serving food at an event. The immediacy of Perez’s post likely made it even more evident than the post’s text alone that the manager’s treatment of Perez “precipitated” the post.

Second, the nature of the social network—Perez knew that his “friends” could see his post and that some of them would receive immediate notification of anything he posted—distinguishes this from a non-social-media context. To find an audience of co-workers sympathetic to his position, Perez did not have to physically or individually seek them out and share with each his complaint about the manager’s

104. Id. at 17.
105. Id. at 29.
106. Id.
107. Id. (emphasis added) (citations omitted).
behavior. More specifically, Perez knew he was Facebook “friends” with some of the servers also subject to the same treatment of which he complained. Perez also did not need employer-provided email addresses to share his complaint. With a single post, without prearrangement, Perez could complain about behavior and “anticipate that other employees, also concerned regarding demeaning treatment by managers, would see it.”

In light of these dimensions, it is particularly interesting to note the ALJ’s observation that “[t]he specific medium in which the discussion takes place is irrelevant to its concerted nature.” The ALJ’s reference here was to the well-established rule that concerted activity does not lose its protection merely because the communication or behavior is on social media, rather than face-to-face or shared with a small group of people. Indeed, the ALJ cited NLRB decisions finding concerted conduct on Facebook and in email. It would seem, though, that the fact that Perez’s conduct occurred on Facebook strengthened the argument that his conduct was protected concerted activity.

The employer also challenged Perez’s posting under Atlantic Steel, claiming that it was so opprobrious as to lose NLRA protections. The ALJ rejected this argument. The ALJ first noted that Atlantic Steel is designed “to permit ‘some latitude for impulsive conduct by employees’ during protected concerted activity, while acknowledging the employer’s ‘legitimate need to maintain order.’” The ALJ also considered the Board’s twenty-eight-year-old observation that “the protections of Section 7 must ‘take into account the realities of industrial life and the fact that disputes over wages, bonuses, and working conditions are among the disputes most likely to engender ill feelings and strong responses.’”

The ALJ next considered the individual Atlantic Steel factors. First, with respect to the “location of the discussion,” the ALJ found that there was no possibility of an immediate disruption to the work environment because the comments were contained in a Facebook post made while on a work break, rather than in a heated face-to-face encounter at the event site; that “no other employees participat[ed] at the time”; and that “there is no evidence that Perez’s comments interfered with or disrupted Respondent’s relationships with its customers,
or that customers even saw them.” Under Atlantic Steel, disruptive confrontation may result in the loss of protected status because of “the immediate, contemporaneous disruption of workplace discipline, managerial authority and customer service caused by the employee outburst in question.” But a Facebook posting—even a profane one—that replaces direct confrontation does not have the same “immediate contemporaneous” disruptive effect; indeed, those at the workplace (co-workers or customers alike) may not even be immediately aware of the outburst at all.

Second, the Pier Sixty facts also implicated Atlantic Steel’s fourth prong: “whether the outburst was, in any way, provoked by an employer’s unfair labor practice.” Smartphones allow employees to react swiftly to workplace incidents. Although the speed of the employee’s posting was not dispositive in Pier Sixty, it was suggestive of a causal relationship between the supervisor’s behavior and Perez’s response, and, indeed, under Atlantic Steel the close proximity of managerial behavior and concerted activity is one method to establish proximate cause between the communication and the employer’s unfair labor practice.

Pier Sixty may well be heard by the NLRB. The employer has filed exceptions to the ALJ’s conclusions that Perez’s Facebook post was protected concerted activity under Meyers Industries, and its progeny, and that his conduct did not lose its protection under an Atlantic Steel analysis.

C. Personal Data Subject to Employer Surveillance

Perhaps the most significant development within BYOD, especially for employees who may or must use their personal devices to perform work functions, is that employees’ personal and professional lives can become intertwined on a single device, and even within a single application. For example, employees may receive and send emails using both personal and work-provided email addresses; may use text messages sent from their personal number for work purposes; may use the same application to keep track of ideas concerning both their personal lives and professional responsibilities; may use a program to maintain access to both personal and professional documents; and may generally create, view, and save on their devices documents related to both professional responsibilities and personal lives. As employer data migrates to personal devices, employers may wish to

116. Id.
117. Id. at 31 (citing Fresenius USA Mfg., 358 N.L.R.B. No. 138 at 5 (2012); Datwyler Rubber & Plastics, 350 N.L.R.B. 669, 670 (2007); Crowne Plaza LaGuardia, 357 N.L.R.B. No. 95, at 6 (2011)).
118. Id. at 30.
protect their legitimate interest in maintaining control over work-related data, even when the data resides on employees’ personal devices. Employers may, for example, be concerned about the amount of data usage for which they reimburse employees, wish to investigate claims of harassing or threatening behavior that can now take place on social media or with personal devices, protect their trade secrets or other confidential information, and regulate and monitor their employees’ working hours. Further, electronic surveillance tools available to employers to protect these interests are sophisticated and may enable employers to see and even control employees’ personal data as well as work-related data. Moreover, employers may be interested in learning about what their employees say online, including through social media. Employer attempts to obtain information about employees’ behavior, however, can implicate the NLRA’s prohibition of employer surveillance of concerted activity.

The Board has long held that an employer violates the Act not only by engaging in actual surveillance of its employees’ section 7 protected activities, but by creating “an impression of surveillance,” even if no actual surveillance is undertaken:

The idea behind finding “an impression of surveillance” as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. We have never required . . . evidence that management actually saw or knew of an employee’s union activity for a fact, nor do we require evidence that the employee intended his involvement to be covert or that management is actively engaged in spying or surveillance. Rather, an employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee’s union involvement. 120

An employer creates such an impression when it “tells employees that it is aware of their union activities but fails to tell them the source of that information” because that limited information leaves employees “to speculate as to how the employer obtained the information, causing them reasonably to conclude that the information was obtained through employer monitoring.” 121

Employers have the capacity to conduct surveillance using electronic tools. For example, in implementing its recent BYOD policy for

121. Target Corp., 359 N.L.R.B. No. 103, at 12–13 (2013) (citations omitted); see also Stevens Creek Chrysler Jeep Dodge, Inc., 353 N.L.R.B. 1294, 1296 (2009) (an employer’s failure to identify a source of knowledge about union activities “is the ‘gravamen’ of an impression of surveillance violation” and violates the Act even if the source of knowledge was, in fact, not from actual surveillance) (citation omitted).
its own employees, the Equal Employment Opportunity Commission (EEOC) noted that, to solve its need to deploy mobile device management software (MDM), it had engaged the services of a “cloud provider to configure the exchange of electronic mail between the providers’ host and the EEOC’s email gateway”; to “assist with setup, configuration and end-user support”; and to “conduct[] all technical support for pilot participants with iOS devices (iPhone and iPads), as well as all Android devices (smartphones and tablets).”\(^\text{122}\) That cloud provider, NotifyLink, advertises that its MDM services offer a striking array of powers to employers.\(^\text{123}\) The EEOC policy does not specify which elements of NotifyLink’s offerings it has deployed, but a perusal of its products suggests the depth of control employers may obtain over employees’ devices. For example, an employer can whitelist or blacklist apps available to its employees; remotely control app installation; prevent use of the browser or camera; track a device’s location; record phone conversations and text messages; or remotely wipe the entirety of a device.\(^\text{124}\)

Some companies also offer software designed to divide a single device into two separate parts walled off from one another, one for personal use and data and the other for professional use. Advertisement for some of this software offers similar MDM capabilities, but also the possibility of allowing intrusive surveillance on the professional, but not the personal, side of the device.\(^\text{125}\)

This author is not aware of any NLRB cases or General Counsel analyses addressing MDM issues, but employers should consider the NLRA’s application to these issues.\(^\text{126}\) An employer can violate the


\(^{126}\) For example, in Purple Communications, Inc., the Board stated, in response to employer concerns, that a rule permitting union-related communication on email would leave employers who regularly monitored all email systems “vulnerable to allegations of unlawful surveillance” and that “[w]e are confident, however, that we can assess any surveillance allegations by the same standards that we apply to alleged surveillance in the bricks-and-mortar world,” such that “[a]n employer’s monitoring of electronic communications on its email system will similarly be lawful so long as the employer does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign or focusing its monitoring efforts on protected conduct or union activists.” 361 N.L.R.B. No. 126, slip op. at 15–16 (Dec. 11, 2014).
NLRA even if it has an otherwise facially nondiscriminatory MDM policy that does not expressly prohibit section 7 activities, and even if it has its employees’ consent to monitor their devices. This is so for three reasons, each grounded in basic NLRA principles. First, employers may not maintain a policy that, on its face, would reasonably lead an employee to believe that it prohibits protected section 7 activity. Second, even facially lawful policies cannot be discriminatorily enforced against section 7 activity, for example, against union activity, such as monitoring only around the time of a union election, or only against union sympathizers or workers who bring group complaints to management’s attention. Third, employers are barred from engaging in actual or attempted surveillance of union activity or creating an impression of such surveillance.

The depth of surveillance and control that MDM software offers may significantly challenge employers. Employees may, for example, rightfully feel chilled in their exercise of their section 7 rights to post to social media, or call, text, or email co-workers or third parties—even if they use their own devices, their own email accounts, and their personal social-media profiles—if they know their employer can access their historical usage in such detail. Thus, even if employee device use implicates legitimate employer interests, difficult questions arise when employers’ efforts to protect those interests impinge on the privacy workers rightfully expect when using their own devices.

IV. Conclusion

Personal “smart” devices are a technological revolution offering a significant change in how people relate to one another. But within the context of the NLRA, personal devices and social media—and their intersection in BYOD policies—do not present a blank landscape, devoid of guidance or regulatory predictability. They offer new fact patterns to which existing law must be applied and may present nuances requiring careful and thoughtful analysis. But the NLRA was structured from the outset to evolve. As the Supreme Court observed almost seventy years ago:

The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary that Act left to the Board the work of applying the Act’s general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms.

127. See discussion supra Part IV.D.
128. Id.
129. See supra notes 103 & 104 and accompanying text.
Technologies will continue to develop, but common sense and basic NLRA principles will still govern workplace uses of such technologies. The NLRB will balance workers’ rights to employ those technologies to better working conditions and for “mutual aid and protection,” with employers’ rights to protect their data, wherever it resides, and reasonably to regulate employee conduct.
Finding Franchisors Liable in Discrimination Cases: Many Theories, But Few Successes

Geoffrey A. Mort*

I. Introduction

Franchisees employ millions of American workers.1 Franchise networks, to name a few, include Hampton Hotels, Supercuts, Subway, McDonald’s, Anytime Fitness, and Dunkin’ Donuts. Frequently, a large corporation—the franchisor—will operate, and to one degree or another control, a far-flung network of franchisees. Franchised businesses are usually managed by individual entrepreneurs or small local or regional companies that own a group of franchised businesses in a particular city or area.

Currently, there are approximately 3,500 franchises in the United States.2 In 2013 alone, the franchise sector of the U.S. economy created an estimated 11,000 new businesses and more than 150,000 new jobs.3 The reason for this remarkable expansion was well summarized by Forbes Magazine: “[F]ranchising offers anyone the promise of becoming an instant entrepreneur. . . . [B]uying a brand-name franchise lets anyone gain access to iconic symbols like McDonald’s ‘golden arches.’”4

Franchising has been described as a “breeding ground for litigation” in part because “the unique relationship between the parties” creates disputes between franchisors and franchisees over such issues as earnings, claims, and covenants not to compete in franchise

---

* Geoffrey Mort is of counsel to Kraus & Zuchlewski LLP in New York City. The firm represents employees in a wide variety of employment law matters and specializes in the representation of executives and professionals. Thanks in particular to Courtney Laster, a legal assistant at Kraus & Zuchlewski LLP, who assisted with this article.


relationships. Employment law claims by franchisee employees against franchisors are also a large source of litigation.

Like employees of any business, employees of franchisees sometimes believe they have been subjected to discrimination or other adverse action and commence legal proceedings. But which party is liable for the conduct at issue? This dilemma confronts every plaintiff who is an employee of a franchised business. These individuals and their attorneys must choose among several choices: sue the franchisee, the franchisor, or both.

Employees see obvious advantages to pursuing litigation against a large corporate franchisor such as Pizza Hut or 7-Eleven. These entities have vastly deeper pockets than a small local franchisee that may only own two or three retail franchise businesses employing as few as fifteen or twenty employees. However, bringing a successful action against a franchisor can be problematic. It can be exceptionally difficult in some jurisdictions to persuade a court that a corporation is vicariously or otherwise liable for the actions of a supervisor at an individual franchised business. Also, the employee’s attorney must carefully examine under what legal theory the case should be brought to ensure it not only fits the particular facts, but also has the best chance of a positive outcome.

There are multiple legal theories available for determining whether a franchisor can be considered the employer of a plaintiff. Plaintiffs may argue that a franchisor should be held liable based on several theories, arguing that if one is found not to apply, another will. The matter is further complicated because of the fact that different jurisdictions weigh the same theories differently. Standards also are applied inconsistently. For example, facts that one court relies on to find a franchisor liable for actions by a franchisee may produce a contrary result in another jurisdiction.

As a general rule, courts are reluctant to hold franchisors liable for unlawful adverse actions taken against employees of franchisees, and efforts to hold franchisors responsible for their franchisees’ employment decisions are predominantly unsuccessful. As one court declared, “a franchisor is not the employer of employees of the franchisee.” Nonetheless, attorneys for employees sometimes do obtain favorable decisions when suing franchisors in addition to franchisees. Often, these outcomes result from using the right theory in a jurisdiction where the courts are not highly protective of franchisors’ interests.


This article explores the theories and concepts most commonly used by employees of franchisees in employment lawsuits that name a franchisor as a defendant. It also reviews cases where the various theories have been employed and assesses the arguments most commonly advanced in support of or in opposition to each, and the extent to which such arguments have been successful.

II. Theories of Franchisor Liability

A. Common Law Agency Theory and the “Degree of Control”

Perhaps the most commonly employed principle used by employees attempting to make a franchisor vicariously liable for the acts of its franchisee is common law agency theory. Determining whether a franchisee is the agent of a franchisor under agency principles is not complicated: “if a franchise agreement gives the franchisor the right of complete or substantial control over the franchisee, an agency relationship exists.”

Courts vary in their perceptions of when the degree of control exercised over a franchisee is sufficiently substantial for it to be considered an agent. A minority of cases are as straightforward as Walker v. Pacific Pride Services, Inc., in which the court found no agency relationship because the franchisor “exerted only enough control necessary to protect and maintain its trademark, trade name and goodwill.” Similarly, in Reed v. YMCA USA, the franchisor lacked control or authority to oversee or direct the franchisee’s operations in any way, and the court held that “mere use of a company logo or trademark in no way imputes liability to the holder of the mark.”

More typical of franchise cases decided on the basis of agency law are Nickola v. 7-Eleven Inc. and Martinez v. Higher Powered Pizza, Inc. In Nickola, the plaintiff failed to show that the franchisor “exercised a high degree of control over the franchisee.” The court granted summary judgment to the franchisor because it had “demonstrated that it neither hired [the plaintiff], controlled the franchisee’s hiring practices, nor maintained the right to direct and control the manner of performing the work.”

The plaintiff in Martinez, a pizza delivery driver, sought to impose vicarious liability on the franchisor, Papa John’s International, Inc. The court found that Papa John’s control of its franchisee included

---

8. Id.
10. Id. at *7 (citing Pona v. Cecil Whittaker’s Inc., 155 F.3d 1035 (8th Cir. 1998)).
14. Id. at *7.
15. 43 A.D.3d at 671.
“enforcement of standards in areas such as food quality and preparation, hours of operation, menu items, employee uniform guidelines, and packaging requirements” in addition to the “right to perform inspections,” conduct audits, and observe interaction with customers.\textsuperscript{16} Nevertheless, the court ruled that Papa John’s had insufficient control over the franchisee’s operations because there was “no reservation of control over the delivery process or delivery personnel.”\textsuperscript{17} The Martínez court’s expansive definition of “control” has been used in many New York decisions to conclude that franchisees are not agents of their parents.\textsuperscript{18}

However, in a case with similar facts to Martínez, a different court reached the opposite conclusion. In \textit{Miller v. D.F. Zee’s, Inc.},\textsuperscript{19} a sexual harassment case brought by employees of a Denny’s franchisee in Oregon, the court examined the degree of control retained by Denny’s, Inc. and its parent, Flagstar Corporation, over a local Denny’s restaurant. Although it determined that Denny’s, Inc.’s and Flagstar’s motions for summary judgment should be denied on other grounds,\textsuperscript{20} the court observed that they had the right to train managers, decide the amount of discipline of franchisee employees, set mandatory discipline levels, conduct internal audits of franchisee operations, determine where operating efficiency could be improved, and ascertain whether the franchisee complied with franchise policies and procedures.\textsuperscript{21} The court suggested that these factors were sufficient to find Denny’s, Inc. and Flagstar liable for discrimination under agency theory had it not done so on another basis.\textsuperscript{22}

A New York court using a similar analysis reached a similar result in \textit{Repeti v. McDonald’s Corporation},\textsuperscript{23} a non-employment case, where a customer was injured when the automatic doors of a fast-food restaurant closed on him. The Repeti court was not persuaded by the insistence of McDonald’s that it lacked control over the doors that injured the plaintiff.\textsuperscript{24} Rather, the court focused on evidence that daily inspections of building maintenance and safety were conducted by franchisee managers pursuant to protocols established in part by McDonald’s.\textsuperscript{25} As a result, the court determined that McDonald’s had the required degree of control over the franchisee’s physical facility to support a

\textsuperscript{16} \textit{Id.}
\textsuperscript{17} \textit{Id.} at 671–72.
\textsuperscript{19} 31 F. Supp. 2d 792 (D. Or. 1998).
\textsuperscript{20} \textit{Id.} at 809.
\textsuperscript{21} \textit{Id.} at 807.
\textsuperscript{22} \textit{Id.} at 807–08.
\textsuperscript{24} \textit{Id.} at 1090–91.
\textsuperscript{25} \textit{Id.} at 1091.
finding of liability under agency principles and denied the motion for summary judgment.26

There is no bright line differentiating situations in which a franchisor exhibits a sufficient degree of control for its franchisee to be deemed an agent from those in which there is insufficient control for agency theory to apply. By definition, franchisees enjoy a substantial degree of autonomy over their own internal operations. At the same time, franchisors almost always direct their franchises to use their logos and slogans, follow corporate policies on matters such as customer interaction, require employees to wear uniforms or other apparel associated with the franchisor name, and submit to periodic audits or inspections. Franchisees, in almost all cases, have the discretion to hire, supervise, and terminate the employment of their employees. Cases deciding if a franchisee is an agent of a franchisor, thus making the latter liable for violations of employment and other laws, often hinge on just two or three factors. The first possible factor is whether the franchisor plays an active role—beyond simply distributing employee handbooks and procedure manuals—in the training of managers and line employees.27 The second factor assesses the degree of franchisor involvement, if any, in employee disciplinary decisions.28 The third factor is the extent of the franchisor’s direction of how franchisee employees perform work, so that an action by a franchisee manager or worker is likely to result from adherence to corporate rules and practices.29

Even in these areas, however, some courts will virtually always hold that no principal-agent relationship exists in franchise arrangements. The Eighth Circuit’s opinion in *Pona v. Cecil Whittaker’s Inc.*30 represents one such example. In *Pona*, a franchisee’s manager acted on the advice of the franchisor’s president to commit a discriminatory act.31 Although in some jurisdictions this would likely result in a finding that vicarious liability existed, the *Pona* court determined that it was insufficient to show that the parent operated “a place of public accommodation.”32

Unless an employee seeking to find a franchisor liable for the conduct of a franchisee is in one of the minority of jurisdictions where courts apply an expansive interpretation of “degree of control,” agency theory is likely to work to the advantage of franchisors.

26. Id.
27. See, e.g., Miller, 31 F. Supp. 2d at 807.
28. Id.
29. See Repeti, 49 A.D.3d at 1090.
30. 155 F.3d 1034 (8th Cir. 1998).
31. Id. at 1036.
B. Joint Employer Theory

Perhaps recognizing the obstacles to prevailing under agency theory, some franchise plaintiffs instead rely on the joint employer theory.33 As the Ninth Circuit in EEOC v. Pacific Maritime Association explained, “[t]wo or more employers may be considered ‘joint employers’ if both employers control the terms and conditions of employment of the employee.”34 Although such an arrangement may seem somewhat improbable, it is not uncommon, particularly in a circumstance where an employee technically works for a staffing agency but actually carries out work duties and is supervised at the workplace of an agency client. As summarized in Pacific Maritime Association, “the ‘joint employer’ concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment.”35

Another decision addressing the application of the joint employer theory to franchises is Courtland v. CGEP-Surprise, LLC.36 The franchisor in Courtland was Buffalo Wild Wings International Inc. (BWWI), a corporation with more than 450 franchisee restaurants across the country.37 There was no doubt that the local franchisee restaurant hired, trained, supervised, and terminated the plaintiff.38 To determine whether BWWI and the franchisee were joint employers, the court looked at several factors: the nature and degree of control of the employees; who supervised their work; who determined their compensation and paid them; and who had the right to hire, fire, and alter their working conditions.39

The court concluded that “[a] franchisor is not a joint employer unless it has significant control over the employment relationship.”40 Observing that BWWI did not have the right to hire, train, supervise, pay, or fire employees, the court discounted evidence of some BWWI participation in restaurant operations by finding that “[e]mployee and operational supervision does not equate [to] joint employment if the franchisor exercises it for a specific purpose and it is different than the control exercised by an employer.”41 Thus, because the franchisee

33. In a 1997 Guidance on staffing agencies, the EEOC pointed out that two entities “qualify as joint employers of the worker [where] both have the right to exercise control over the worker’s employment.” 2 EEOC Compl. Man. (BNA) § 605, at No. 915.002(2)(b) (Dec. 1997).
34. 351 F.3d 1270, 1275 (9th Cir. 2003) (citations omitted).
35. Id. at 1276–77 (emphasis in original).
37. Id. at *2.
38. Id. at *3–4.
39. Id. at *7–8.
40. Id. at *8–9.
41. Id. at *10.
“had independence in making employment decisions related to Courtland,” the court found no joint employer relationship. 

_McFarland v. Breads of the World_ reached the same result by focusing on “whether separate entities jointly control each others’ employees.” Because the franchisor showed that “it played no role at all in [the franchisee’s] employee relations issues,” there was no joint employer relationship.

The district court in _Myers v. Garfield & Johnson Enterprises, Inc._ found sufficient ties between the franchisor and franchisee to deny the franchisor’s motion to dismiss a claim asserting a joint employer relationship. The standard used in _Myers_ for determining when a joint employer relationship exists was essentially the same as that in _Courtland_ and other cases, looking to whether two companies “handle jointly important aspects of their employer-employee relationship.” The franchisor’s assertion that the franchisee had the responsibility to hire, train, pay, and fire its employees did not persuade the _Myers_ court to reject a joint employer argument.

Instead, the court looked at all aspects of the franchisor-franchisee relationship and observed that the franchisor could require franchisee managers to undergo training and played a role in daily employee supervision. Noting that joint employer relationships had been found where one employer did not pay the employees’ salaries, the court found enough of a role in employee management by both the franchisor and franchisee to rule against the franchisor.

Notably, the _Myers_ court found that the franchisee and its parent had sufficiently “apportioned the various duties of employer between themselves” such that a joint employer relationship existed, notwithstanding that the franchisee carried out such responsibilities as hiring, firing, and compensation. Clearly, the key to attaching liability to a franchisor using the joint employer theory is to identify as many functions of franchisee management that the franchisor carries out as possible to reach the threshold of “dual apportionment.”

The joint employer theory gained additional legitimacy when the National Labor Relations Board (NLRB) Office of the General Counsel

---

42. _Id._ at *15.
44. _Id._
45. _Id._
47. _Id._ at 611.
48. _Id._ at 607 (quoting NLRB v. Browning-Ferris Indus., 691 F.2d 1117, 1123 (3d Cir. 1982)) (internal quotation marks omitted).
49. _Id._ at 609.
50. _Id._ at 609–10.
51. _Id._ at 610.
52. _Id._
in late July 2014 ruled that McDonald’s—and presumably other franchise operations—“could be named as a joint employer respondent” in complaints related to employee protests. The controversial decision will almost certainly lead to a decision by the full NLRB, and possibly review by the Supreme Court. It may be several years before the full implications of the NLRB general counsel’s ruling regarding the joint employer doctrine are known.

C. Single Employer Theory

Frequently confused with the joint employer theory is its sibling, the single employer theory. Indeed, the defendant in Myers confused the two and the court had to point out the difference. Under the single employer test, a franchisor and franchisee are a single employer when they are interconnected to such a degree that they are deemed to be essentially the same entity. Thus, this principle applies when “two entities are so interrelated that they may be considered a ‘single employer’ or an ‘integrated enterprise.’” In determining whether two entities are a single employer, courts look to such factors as whether they have common offices and record keeping, shared bank accounts, common management, or centralized control of labor relations and human resources functions. The NLRB’s version of the test looks at (1) interrelationship of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.

The indicia of single employer status are somewhat relaxed in the Second and Sixth Circuits but still require substantial control by the parent over employment and financial matters. Although at least one circuit has deemed the single employer test to be “lenient,” its requirement of a very close relationship between the parent and affiliated entity is difficult to satisfy in a case involving a franchise

55. See id.
56. Myers, 679 F. Supp. 2d at 607; see also Sanford v. Main St. Baptist Church, 327 F. App’x 587, 592–93 (6th Cir. 2009) (“[T]he single employer and joint employer doctrines are analytically distinct.”).
58. Id.
59. Id. at 993–94.
60. McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 933 (11th Cir. 1987).
62. E.g., Swallows, 128 F.3d at 993.
63. Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1070 (10th Cir. 1998).
relationship. For the most part, attempts to attach liability to a franchisor under the single employer theory have not been successful.  

As the Tenth Circuit stated in *Frank v. U.S. West, Inc.*, a case involving the single employer theory, “[t]he critical question is, ‘what entity made the final decisions regarding employment matters related to the person claiming discrimination?’” In the great majority of cases involving franchise employees, the answer will be that such decisions were made at the franchisee level. Despite its relatively frequent use in cases where an employee seeks to sue a franchisor, the single employer theory is usually best used in situations involving a parent and a subsidiary.

**D. Apparent Authority**

Perhaps the most successful theory used by plaintiffs’ attorneys in employment cases against a franchisor is apparent authority, sometimes referred to as apparent agency or the ostensible employer theory. Apparent authority is recognized in states including Arizona, New York, North Carolina, and Oregon.

Apparent authority exists where “words or conduct of the principal, communicated to a third party . . . give rise to the appearance and belief that the agent possesses authority to enter into a transaction.” As a result, “agency itself may be imposed by law on legal relations . . . though no actual agency exists” when a party “has been held out by the other to be [the agent] in a way that reasonably induces reliance on the appearances.” In many cases where a court found that evidence of actual authority—whether through agency theory, the joint employer doctrine, or some other principle—was insufficient to hold a franchisor vicariously liable, it did determine that a franchisor possessed apparent authority to act on behalf of its franchisee.

*Miller* provides a typical example. In *Miller*, where the franchisee was a small company that owned several Denny’s restaurants, the

---

65. 3 F.3d 1357 (10th Cir. 1993).
66. Id. at 1363 (quoting Trevino v. Celanese Corp., 701 F.2d 397, 404 (5th Cir. 1983)).
67. See, e.g., Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1240–41 (2d Cir. 1995) (parent and subsidiary companies were “single employer” for employment discrimination purposes).
70. Crinkley v. Holiday Inns, Inc., 844 F.2d 156, 166 (4th Cir. 1988).
71. See id. at 166–67.
72. 31 F. Supp. 2d 792. See discussion supra Part II.
court found it significant that in the restaurants there were no indications that they were connected to the franchise.\textsuperscript{73} Rather, the Denny’s trademark was displayed prominently inside and outside of the restaurants, was on the servers’ uniforms, and appeared on the menus.\textsuperscript{74} Moreover, “[n]one of the plaintiffs realized that the restaurant was owned by [the franchisee].”\textsuperscript{75} Each of the plaintiffs believed they were “Denny’s employees.”\textsuperscript{76} Based on these facts, the court denied the motion for summary judgment from Denny’s.\textsuperscript{77}

The court in \textit{Thomas v. Freeway Foods, Inc.},\textsuperscript{78} which was not an employment case, used a similar analysis. The \textit{Thomas} plaintiffs were African Americans who alleged that they were not served because of their race at a Waffle House restaurant.\textsuperscript{79} Finding that Waffle House was not liable under agency theory, the court reached the opposite conclusion when it assessed the facts using the apparent authority principle.\textsuperscript{80} Again, the court noted that the name and logo of Waffle House appeared on signs throughout the restaurant, on employees’ uniforms and name tags, and on the menus.\textsuperscript{81} Further, Waffle House’s website made no distinction between restaurants owned by the parent and those that were franchised.\textsuperscript{82} Waffle House’s argument that there was no apparent authority because of several small signs in the restaurant identifying the franchisee as the owner and operator was unsuccessful, and the plaintiffs defeated Waffle House’s summary judgment motion.\textsuperscript{83}

Apparent authority, however, is a more effective argument in some jurisdictions than in others. In \textit{Courtland}, the plaintiff relied on many of the same facts regarding the franchisor’s presence in the workplace as employees in similar cases, including her belief that she was an employee of the franchisor.\textsuperscript{84} The court first observed that “signage and advertising, without more, is not sufficient manifestation by the franchisor to establish apparent agency.”\textsuperscript{85} It then turned to the plaintiff’s assertion that she believed herself to be an employee of the parent, noting that the plaintiff must show that her view was objectively reasonable and based on the franchisor’s actions.\textsuperscript{86} In deciding that her

\textsuperscript{73} Id. at 807–08.
\textsuperscript{74} Id. at 808.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 808–09.
\textsuperscript{78} 406 F. Supp. 2d 610 (M.D.N.C. 2005).
\textsuperscript{79} Id. at 614.
\textsuperscript{80} Id. at 617–18.
\textsuperscript{81} Id. at 618–19.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 619.
\textsuperscript{85} Id. at *27.
\textsuperscript{86} Id. at *30.
belief failed the test, the court pointed out that the plaintiff’s employee information card contained a heading with the franchisee’s name and that her W-2 forms also identified the franchisee as her employer.\(^{87}\) The court in *Cha v. Hooters of America, LLC* also found no apparent authority, despite considering much the same evidence involving corporate logos and signs referring only to the franchisor as did the courts in *Thomas* and *Miller*.\(^{88}\) The *Cha* court provided little reasoning for its determination, other than to conclude that widespread use of trademarks was not enough to establish apparent authority.\(^{89}\)

E. Other Tests and Approaches

The array of tests used by courts in cases involving franchises is not limited to those discussed above. Although agency theory, joint and single employer tests, and apparent authority are the most common theories in cases where franchisors are defendants, courts apply other tests and principles. To some degree, the large number of tests employed in franchise cases is a question of semantics. When closely examined, some tests do not—in any meaningful way—differ from the agency and joint employer tests.

One example is the “economic realities test” used in the Tenth Circuit, which focuses on “whether the individual is economically dependent on the business to which he renders service.”\(^{90}\) The Fifth Circuit recently applied a strict interpretation of the economic realities test in *Orozco v. Plackis*.\(^{91}\) The Fifth Circuit’s application of this test focuses on whether the alleged employer has the power to hire and fire employees, supervise and control work schedules, determine compensation, and maintain employment records.\(^{92}\) The court found that the plaintiff, who sought to establish the franchisor as his employer, satisfied none of these elements.\(^{93}\) That the plaintiff was able to show that the franchisor “had at least a certain degree of control over [the franchise where he worked]”\(^{94}\) and that the franchisee was required to adhere to “policies and procedures promulgated by the franchisor for selection, supervision, or training of personnel”\(^{95}\) were insufficient to meet the Fifth Circuit’s strict application of the test. Perhaps recognizing the difficulty of prevailing using its application, the court pointed...
out that “[w]e do not suggest that franchisors can never qualify as the . . . employer for a franchisee’s employees.”

Another example is the “integrated enterprise test” that analyzes, as does the single employer test, whether the parent and franchisor’s operations are sufficiently integrated with those of the franchisee for them to be considered as, in effect, one employer.

With the exception of the apparent authority analysis, other tests used by courts to decide franchise cases have more similarities than differences. Notwithstanding variations among them, the tests used in franchise cases usually examine the extent to which the franchisor directs some combination of the franchisee’s operations, finances, policies, and, particularly, employee relations. The ability of most franchisees to hire, train, discipline, and terminate their employees—perhaps more than any other factor—is responsible for the widespread failure of employees to hold franchisors liable in employment law cases.

III. Selecting Which Theory or Theories Under Which to Litigate a Franchise Case

Attorneys planning an employment law action on behalf of franchisee employees need to decide early which theory to use. Because attorneys cannot be certain which of these theories will best resonate with a court, there is little to be lost by asserting a claim under several theories. For example, plaintiffs’ counsel in *Thomas* argued that the franchisor was liable under both the agency and apparent authority theories. Although use of the first theory did not persuade the court that the franchisor was liable, the second did. So long as there is a valid basis for employing more than one theory, plaintiffs’ attorneys are well advised to do so.

In determining how to frame a case against a franchisor, two factors in particular should be considered. The first is the history and inclination of the courts in a particular district that have dealt with franchise cases. In districts where the bench is highly conservative, any theory used is highly unlikely to persuade a court to hold a franchisor liable in an employment law case. But in districts where at least some judges may be sympathetic to one theory or another, there is no substitute for conducting an exhaustive search of all employment law decisions that address the question of franchisor liability. The theory that has been accepted more than others in cases related to franchisor liability should be considered as the approach with which to lead.

96. *Id.*
99. *Id.*
The facts of one’s own case are equally important in assessing which theory or theories to use. If a franchisor has an unusually high degree of control over its franchisees, particularly with regard to shaping their employment policies and even playing a role in individual disciplinary cases, then agency theory may be the most promising approach. On the other hand, if the franchisor and its franchisees are highly integrated entities with the franchisor acting in concert with its franchisees to address employment issues and problems, then the joint employer theory is more likely to succeed.

Apparent authority may be the most advantageous theory to use if a franchise business is devoid of any signs that there even is a franchisee. In such a workplace, use of a corporate logo such as golden arches on the franchise building, employee uniforms, menus, or price lists is commonplace. If employees are unaware that they work for a franchisee, there are no signs or written materials anywhere at the business with the franchisee’s name, and the franchisor’s website and annual report do not distinguish those locations that it owns outright and those that are franchisees, plaintiffs can make a strong apparent authority argument.

The alternative theories may have practical differences affecting the scope of discovery and methods of proof. Counsel needs to be aware of these differences because a majority of franchise plaintiffs use more than one theory.

The most significant effect of proceeding under an apparent authority or joint employer theory is in the nature of discovery. Discovery to support a claim under the apparent authority theory needs to focus on the franchisee’s workplace to ascertain whether the franchisee identifies its existence in any manner and, if so, how prominently. With a joint employer claim, discovery should center on connections between the parent and its franchisees. The degree and kind of control exercised by a franchisor will be the centerpiece of discovery in most cases, particularly those where the plaintiff uses agency, joint employer, or single employer theories.

IV. Conclusion

The large and growing number of American workers employed by franchise operations ensures that the issue of franchisor liability will continue to be frequently litigated. Although dismissal of claims against a franchisor is likely to continue to be the result in the majority of cases brought by employees of franchisees, successes are possible. Many franchisees are not single, struggling retail operations, but rather are part of a group of franchise businesses owned by a small or mid-sized local or regional company that has the financial resources to pay judgments in employment law cases. Nonetheless, those plaintiffs who succeed in defeating motions by franchisors to dismiss
the claims against them clearly have a greater likelihood of leveraging a more favorable settlement or prevailing in litigation in those few cases that are actually tried.

Because litigants relying on agency, joint employer, or related theories will likely face an uphill fight to demonstrate a sufficient degree of franchisor control and influence over a franchisee, employment lawyers bringing franchise cases who seek to hold a franchisor liable should first explore whether the facts will support an apparent authority theory. Showing the ubiquitous nature of a corporate logo in a franchise business, employee handbooks and policies that make no mention of the franchisee, the belief by plaintiffs that they are employees of the franchisor, and the fact that the employees have never heard of the franchisee may—in many cases—not be enough to establish franchisor liability. Still, apparent authority, particularly in situations where the franchisee maintains a low profile, currently offers the best prospect for convincing a court to deem a parent company potentially liable. That, of course, could change if the federal courts uphold the NLRB ruling that franchisors and franchisees are joint employers.
De Facto Gag Clauses: The Legality of Employment Agreements That Undermine Dodd-Frank’s Whistleblower Provisions

Richard Moberly,* Jordan A. Thomas,** & Jason Zuckerman***

I. Introduction

In 2010, in the wake of the financial crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act1 (Dodd-Frank or Act), which established a new whistleblower program for the U.S. Securities and Exchange Commission (SEC or Commission) to more effectively detect, investigate, and prosecute the kind of financial misconduct that has caused repeated and substantial harm to investors.2 Dodd-Frank’s whistleblower provisions implement

---

* Richard Moberly is the Associate Dean for Faculty and Professor of Law at the University of Nebraska College of Law, where he teaches employment law. He has spoken extensively and published numerous articles on whistleblowing and retaliation. The Secretary of Labor appointed him to serve on OSHA’s Whistleblower Protection Advisory Committee in 2012 and reappointed him in 2014.

** Jordan A. Thomas is Chair of the Whistleblower Representation Practice at Labaton Sucharow LLP, New York, NY. He represents federal securities laws whistleblowers internationally. Previously, he served as an Assistant Director in the Enforcement Division of the U.S. Securities and Exchange Commission, where he had a leadership role in the development of the SEC Whistleblower Program.

*** Jason Zuckerman is the founder of Zuckerman Law, where he represents employees and whistleblowers. Previously, he practiced employment law at a national law firm, served as Senior Legal Advisor to the Special Counsel at the U.S. Office of Special Counsel (the federal agency charged with protecting whistleblowers in the federal government) and was appointed by the Secretary of Labor to serve on OSHA’s Whistleblower Protection Advisory Committee.


three incentives to encourage whistleblowers to report securities fraud to the SEC: the availability of substantial monetary awards for reporting, the ability to remain anonymous when reporting to the SEC, and broad protection from employment retaliation. The basic idea of this incentive structure is simple: rewarding and protecting whistleblowers will motivate more individuals to report potentially relevant information about securities violations.

In response, some companies are now seeking to counteract Dodd-Frank by drafting and enforcing a variety of agreements with employees that significantly reduce or eliminate the congressional incentives promoting SEC whistleblowing. These agreements—which seek to alter the statutory risks and rewards of whistleblowing—may have profound consequences not only for current and prospective whistleblowers, but also for the success of the Dodd-Frank whistleblower program itself. The stakes are just as high for employers, who may find themselves facing civil—or, in extreme cases, criminal—liability if they are too aggressive in attempts to shield information from government authorities.

This Article discusses the enforceability of these increasingly prevalent contractual restrictions on whistleblowing, which fall into three broad categories. First, some agreements require an employee to report possible misconduct internally before disclosing misconduct to the SEC. Second, some agreements require an employee to waive any monetary award received from blowing the whistle under Dodd-Frank’s whistleblower bounty provisions. Both of these types of agreements could significantly limit employees’ desire to communicate with the SEC regarding employer misconduct.

In a third type, employers impose general confidentiality provisions in agreements when employment commences or after receiving some benefit, such as a severance package. Although such confidenti-
ality agreements are usually not problematic and frequently serve legitimate corporate interests, the potential conflict with Dodd-Frank arises when companies use these types of agreements as the basis for a breach of contract claim against a whistleblower. Employers may argue that the whistleblower violated the confidentiality provision in the process of disclosing possible misconduct to the government. This use of a confidentiality agreement not only punishes an employee after the whistle is blown, but also chills the willingness of employees to blow the whistle in the future due to fear of being sued by a current or former employer.

We label these agreements “de facto gag clauses,” and courts, the SEC, and counsel on both sides of the employment bar are grappling with the question of whether they are lawful and enforceable in the face of Dodd-Frank’s statutory and regulatory requirements. This determination requires a careful balancing of public, personal, and business interests. While no court has ruled on the legality of de facto gag clauses in the Dodd-Frank whistleblower context, we argue that SEC rules and key principles of contract, qui tam, employment, and securities law strongly suggest that courts will, and should, refuse to enforce agreements that preclude voluntary cooperation with the SEC or materially diminish the whistleblower incentives created by Dodd-Frank.

Part II briefly explains the SEC’s Dodd-Frank whistleblower program. Part III examines whether the use of the three categories of contractual restrictions on whistleblowing violate Dodd-Frank’s public policy purpose. We conclude that courts would find many currently used provisions unenforceable as against public policy. Part IV proposes practical steps that both employers’ and employees’ attorneys can take to avoid the risks posed by these provisions and, even more importantly, the specific action that the SEC, as well as the Occupational Safety and Health Administration (OSHA), can take to ameliorate the problems these provisions pose to the effectiveness of the SEC’s Dodd-Frank whistleblower program. Given the immediate threat that de facto gag clauses pose to the whistleblower program—even if ultimately found unenforceable by courts—we argue that government agencies should not wait for courts to act. Rather, the SEC and OSHA should immediately act to protect the whistleblower program by clarifying its regulations invalidating agreements that, even indirectly, undermine employees’ willingness to disclose wrongdoing to the SEC.

II. The SEC Whistleblower Program

Section 922 of Dodd-Frank created the SEC’s current whistleblower program (the SEC Whistleblower Program) as part of Congress’s response to the sweeping financial crisis that came to the public’s attention
in 2008.\textsuperscript{10} The SEC Whistleblower Program is a unique blend of approaches taken in previous laws to encourage corporate insiders to report misconduct and to protect them when they do. First, Dodd-Frank adopted a “bounty” model by creating a reward program to incentivize reporting wrongdoing to the SEC.\textsuperscript{11} Whistleblowers are eligible to receive a monetary award when they “voluntarily” provide the SEC with “original information” that “leads to successful enforcement” by the Commission, resulting in the recovery of total sanctions in that enforcement action and any related actions that exceed $1 million.\textsuperscript{12} If all eligibility criteria are met, the Commission awards the whistleblower an amount equal to ten to thirty percent of the total sanctions collected.\textsuperscript{13}

Second, Dodd-Frank incorporates the more commonplace anti-retaliation model by providing a cause of action for corporate whistleblowers who suffer retaliation for disclosing securities violations.\textsuperscript{14} The Commission itself may also bring a retaliation action against an employer,\textsuperscript{15} a procedure that recently resulted in one company paying a settlement of more than $2.2 million.\textsuperscript{16}

Finally, Dodd-Frank incorporated a “structural” model to encourage whistleblowers to report by providing a defined reporting channel.\textsuperscript{17} To receive an award under the Act, employees must provide information directly to the SEC.\textsuperscript{18} The Act required the SEC to estab-

\textsuperscript{10} See S. REP. NO. 111-176, at 2 (2010) (the bill that would become Dodd-Frank “is a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008”).

\textsuperscript{11} See Richard E. Moberly, \textit{Sarbanes-Oxley’s Structural Model to Encourage Corporate Whistleblowers}, 2006 BYU L. REV. 1107, 1108–09 & n.5 (2006) (the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley or SOX) utilizes several models to encourage whistleblowing, including a “bounty” model, an “anti-retaliation model,” and a “structural” model). Prior to Dodd-Frank, the bounty model had been used only to reward whistleblowers who reported misconduct that affected the government. See id. at 1108 n.5. Dodd-Frank, by contrast, rewards whistleblowers who report wrongdoing directed at private corporations and shareholders.

\textsuperscript{12} 17 C.F.R. § 240.21F-3 (2013). “Voluntarily,” “original information,” and “leads to successful enforcement” are defined terms. See id. § 240.21F-4.

\textsuperscript{13} Id. § 240.21F-5.


\textsuperscript{15} 17 C.F.R. § 240.21F-2(b)(2) (2013).


\textsuperscript{17} See Moberly, supra note 11, at 1131–41 (the structural model of many whistleblower laws requires the identification and provision of a specific disclosure channel for whistleblowers). Other laws use the structural model, including Sarbanes-Oxley, which requires corporations to implement a channel for whistleblowers to report misconduct directly to independent directors on the corporation’s audit committee of the board of directors. See 15 U.S.C. § 78j-1(m)(4)(A) (2012). Also, the Civil Service Reform Act of 1978 created the Office of Special Counsel to receive whistleblower disclosures from federal employees. See 5 U.S.C. § 1101 (2012).

\textsuperscript{18} Dodd-Frank defines a “whistleblower” as one who provides “information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.” 15 U.S.C. § 78u-6(a)(6) (2012). The SEC’s
lish a new office to fulfill this obligation and to administer the reward program. Subsequently, the SEC created the Office of the Whistleblower, which receives whistleblower disclosures, works with the SEC’s enforcement staff regarding those disclosures, and determines whether to make awards for eligible enforcement actions. The Act and its regulations also explicitly provide for anonymous whistleblowing.

The SEC promulgated extensive regulations to implement section 922. In addition to detailing the three whistleblower models incorporated into Dodd-Frank, the regulations also expressly preclude parties, including employers, from interfering with those whistleblower programs. Specifically, Rule 21F-17(a) states:

No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.

While the SEC has not yet brought an enforcement action based on Rule 21F-17, the chief of the SEC’s Office of the Whistleblower, Sean McKessy, publicly warned that “we are actively looking for examples of confidentiality agreements, separ[ation] agreements, employee agreements that . . . in substance say ‘as a prerequisite to get this benefit you agree you’re not going to come to the commission or you’re not going to report anything to a regulator.’” McKessy further cautioned that “if we find that kind of language, not only are we going to go to the companies, we are going to go after the lawyers who drafted it,” possibly by revoking those attorneys’ right to practice before the Commission.

McKessy’s remarks and Rule 21F-17 make it clear that employers may not compel employees to waive their whistleblowing rights in exchange for a monetary payment or other benefit. Yet, despite Rule 21F-17, whistleblowers and their counsel continue frequently to

regulations further acknowledge that a whistleblower who reports wrongdoing internally before reporting to the SEC may still be eligible for a reward, if the whistleblower ultimately discloses the misconduct to the SEC within 120 days of the whistleblower’s initial internal report. See 17 C.F.R. § 240.21F-4(c)(3) (2013).

23. See ADOPTING RELEASE, supra note 6.
24. 17 C.F.R. § 240.21F-17(a) (2013).
26. Id.
encounter agreements limiting or discouraging whistleblowing in more subtle, yet often equally pernicious, ways, including the three types of de facto gag clauses identified above.\(^ {27} \)

These agreements raise the important question of how far Rule 21F-17 extends. Does it merely prohibit confidentiality agreements purporting to completely restrict all communications with the SEC, or does it also prohibit agreements technically allowing communications with the SEC, but indirectly *impeding* whistleblowing by making it harder, riskier, or otherwise less desirable?

Absent any SEC enforcement actions under Rule 21F-17, or private litigation directly addressing the enforceability of such clauses, courts are very likely to rely on existing contract law to balance the public and private interests that these agreements implicate. This reliance is particularly likely in private litigation between whistleblowers and their employers (as opposed to SEC enforcement actions brought under Rule 21F-17), because—although a court is very likely to find that any contract that violated Rule 21F-17 would be unenforceable—Rule 21F-17 does not supply employees with a private right of action.\(^ {28} \)

Accordingly, the next part of this Article examines whether the types of de facto gag clauses companies use would be enforceable under existing law. Specifically, we conclude that such agreements should not be enforced in the SEC whistleblower context because they violate Dodd-Frank’s public policy. Additionally, while preexisting law does not define the limits of Rule 21F-17, a court could find a contract void based on the plain language of the Rule.

### III. De Facto Gag Clauses Violate Dodd-Frank’s Public Policy

**A. The Public Policy Limitation on Contractual Enforcement**

The most logical starting point for analyzing the enforceability of agreements affecting an employee’s ability to participate in the SEC Whistleblower Program, or to obtain benefits for doing so, is the bedrock principle that contracts between private individuals may be void if they violate public policy.\(^ {29} \) In *Town of Newton v. Rumery*, the

---

27. See Letter from Katz, Marshall & Banks, supra note 7, at 4 (“While companies and their counsel are largely avoiding attempts to prohibit outright an individual’s communicating with the SEC, our law firm and other [sic] that represent SEC whistleblowers are nonetheless seeing an increase in proposed settlement language that is intended to achieve the same result in a more roundabout and crafty manner.”).


Supreme Court provided a framework for applying this long-standing principle, concluding that contracts may not be enforceable under federal common law when the public policy considerations against enforcement outweigh any interests supporting enforcement. Accordingly, it is not enough merely to establish that an agreement is contrary to some public policy; instead, *Town of Newton* requires identifying the public interests that militate both for and against enforcement, and comparing those interests to each other.

Courts have applied *Town of Newton*—or the common law principles upon which *Town of Newton* is based—to numerous types of contracts purporting to prohibit individuals from communicating with government authorities about violations of law. They have repeatedly found such blanket bans unenforceable. Courts have rarely hesitated to strike down contracts that conceal crimes, which many SEC violations also are, or suppress evidence. The normal justifications for contractual enforcement—facilitating economic activity and meeting party expectations by encouraging reliance on promises—do not overcome the powerful public desire for law enforcement. In fact, a contract that conceals a crime not only is unenforceable, but also may constitute the state law crime of “compounding” or the federal crime of obstruction of justice.

Even outside the criminal context, courts have often rejected agreements purporting to prohibit voluntarily reporting to the government possible civil violations. For example, in *EEOC v. Astra U.S.A., Inc.*, the First Circuit invalidated provisions in settlement agreements prohibiting employees from communicating with the Equal Employment Opportunity Commission (EEOC). The court explicitly

---

30. See 480 U.S. at 392 (“The relevant principle is well established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.”); Garfield, supra note 29, at 295; *Restatement (Second) of Contracts* § 178(1).

31. 480 U.S. at 392.

32. See Garfield, supra note 29, at 307–08.


35. Generally, “compounding” is defined as accepting consideration for a promise not to report a crime. See Garfield, supra note 29, at 307–08.


37. 94 F.3d 738 (1st Cir. 1996). See also *EEOC v. Cosmair, Inc.*, L'Oreal Hair Care Div., 821 F.2d 1085, 1091 (5th Cir. 1987).

38. See *Astra*, 94 F.3d at 743.
balanced the impact of those agreements on the EEOC’s ability to investigate systemic discrimination against the impact that invalidating the provisions would have on private dispute resolution, concluding that limiting the ability of employees to communicate with the EEOC would “sow[] the seeds of harm to the public interest.” Similar decisions have been reached when employers use contractual promises of silence to impede government investigations of securities violations, unfair labor practices, and investment advisor misconduct.

These cases confirm that there is a strong public policy in favor of reporting possible violations of the law to the government, which can outweigh competing interests in protecting confidential information and promoting private dispute resolution. Certainly, these cases indicate that any provision designed to prevent an employee from making “any complaint” about the company—as some general releases do—should not and would not be enforced to block communications about possible unlawful activity with the SEC or other law enforcement agencies. They also suggest that courts should give heightened scrutiny to provisions that make reporting to the SEC more onerous to ensure that they do not indirectly pursue a goal that could not be sought directly.

But, as instructive as these cases are, they do not fully answer the question of whether, and to what extent, companies can use agreements that allow whistleblowing, but decrease or eliminate congressional incentives for doing so. To answer that question, it is necessary to look not only to the broad public policies animating Astra and its progeny, but also to the specific public policy underlying, and supported by, Dodd-Frank.

39. See id. at 744.
40. Id.
43. See Cariveau v. Halferty, 99 Cal. Rptr. 2d 417, 423–24 (Cal. App. 2000) (“The use of confidentiality agreements that purport to restrict a registered member’s customers from reporting improper conduct to the [National Association of Securities Dealers (NASD)] serves to perpetuate the improper conduct and is condemned by NASD policies.”).
44. Courts have repeatedly rejected contract interpretations that allow parties to do indirectly what they could not do directly. See, e.g., Century Marine Inc. v. United States, 153 F.3d 225, 230 (5th Cir. 1998) (“To allow such recovery would permit Century to do indirectly what it could not do directly.”); Safran v. United Steel Workers of Am., AFL-CIO, 678 F. Supp. 1178, 1181 (W.D. Pa. 1988) (“We decline to permit the plaintiffs to do indirectly what they could not contractually do directly.”); Ables v. United States, 2 Cl. Ct. 494, 501 (1983), aff’d, 732 F.2d 166 (Fed. Cir. 1984) (“What they could not do directly they certainly should not be allowed to do indirectly under the guise of an intended third party beneficiary.”).
1. Identifying Dodd-Frank’s Public Policy

Dodd-Frank’s text and legislative history make clear that one of its primary public interests is better protection for investors and the financial markets themselves following the financial crisis in 2008. In particular, the whistleblower provisions’ purpose is to assist the SEC in detecting, investigating, and prosecuting serious securities violations to further the public policy goal of protecting investors and the markets. In this respect, Dodd-Frank also evinces a strong public policy interest in whistleblowing and private cooperation with public law enforcement.

As the First Circuit’s decision in Astra indicates, however, an analysis of a statute’s public policy aims encompasses more than evaluating its general purpose; it also requires a court to assess the specific statutory scheme designed to further that purpose. In Astra, the court examined not just the public policy behind Title VII but also how Congress intended to protect and advance that public interest by giving the EEOC the power to investigate both individual and systemic discrimination.

Dodd-Frank’s statutory scheme reflects an important public policy judgment: incentives are needed to promote whistleblowing because “whistleblowers often face the difficult choice between telling the truth and the risk of committing ‘career suicide.’” The SEC, too, recognized that incentives are an integral part of Dodd-Frank’s investor-protection scheme:

[T]he broad objective of the whistleblower program is to enhance the Commission’s law enforcement operations by increasing the financial incentives for reporting and lowering the costs and barriers to potential whistleblowers, so that they are more inclined to provide the Commission with timely, useful information that the Commission might not otherwise have received.

In particular, Congress developed three primary incentives to counterbalance the profound personal and professional risks that whistleblowers often face, and to support the public policy of encouraging whistleblower reports to the SEC. First, of course, is the provision of financial awards to whistleblowers. As the Senate Committee

---

46. Id.
47. EEOC v. Astra USA, Inc., 94 F.3d 738, 743–44 (1st Cir. 1996).
48. Id. at 744.
49. S. REP. NO. 111-176, at 111.
50. ADOPTING RELEASE, supra note 6, at 105.
51. See id. at 197 (“The Congressional purpose underlying Section 21F of the Exchange Act is to encourage whistleblowers to report possible violations of the securities laws by providing financial incentives, prohibiting employment-related retaliation, and providing various confidentiality guarantees.”).
on Banking, Housing and Urban Affairs noted in its report on Dodd-Frank, “the minimum payout that any individual could look towards in determining whether to take the enormous risk of blowing the whistle in calling attention to fraud” is “the critical component of the Whistleblower Program,” particularly because it helps counter the economic harm that whistleblowers may face as a result of employment-related retaliation or blacklisting.52

Second, Dodd-Frank and the SEC Whistleblower Rules allow whistleblowers to report possible misconduct to the SEC anonymously.53 The importance of anonymity can be seen throughout Dodd-Frank’s statutory provisions and the implementing regulations. Both the statute and regulations prohibit the SEC from “disclos[ing] any information . . . which could reasonably be expected to reveal the identity of a whistleblower,” except in narrow circumstances.54 Whistleblowers also benefit from the fact that all SEC investigations remain confidential until the Commission files a complaint or begins an administrative proceeding.55 The anonymity continues even after the SEC issues an award; none of the fourteen whistleblower awards issued as of December 2014 have identified the recipients or provided potentially identifying information.56

These anonymity safeguards are significant because they dramatically decrease the risk that whistleblowers will become known to others, in turn decreasing the risk that they will face retaliation or blacklisting. Moreover, the SEC has emphasized that the anonymity protection provides essential encouragement for a whistleblower to come forward, and that fewer people would blow the whistle without

52. S. REP. NO. 111-176, at 111. Indeed, although the Program’s results still cannot fully be assessed because of the program’s relative newness and the length of time before an award can be issued, it seems to be successfully encouraging whistleblowers to provide tips to the SEC. The SEC has received thousands of complaints under the program each year since it began in 2011. See U.S. SEC. & EXCH. COMM’N, 2013 ANNUAL REPORT, supra note 21. As of December 1, 2014, the Program has made awards to fourteen whistleblowers, including one award the SEC estimates will be between $30 and $35 million. See Final Orders of the Commission, U.S. SEC. & EXCH. COMM’N, OFF. OF THE WHISTLEBLOWERS, http://www.sec.gov/about/offices/owb/owb-final-orders.shtml (last visited Dec. 1, 2014).


54. 15 U.S.C. § 78u–6(h)(2) (2012); 17 C.F.R. § 240.21F-7(a) (2013). Pursuant to 17 C.F.R. § 240.21F-7(b), whistleblowers reporting anonymously must file their complaint through an attorney, follow prescribed certification procedures, and disclose their identities to the Commission only for verification before receiving any award.

55. See, e.g., ADOPTING RELEASE, supra note 6, at 126 (“As a general matter, it is the Commission’s policy and practice to treat all information obtained during its investigations as confidential and nonpublic.”). The SEC is entitled to disclose nonpublic information in narrow circumstances, including to other government entities, self-regulatory organizations, and bankruptcy trustees. See 17 C.F.R. § 240.24c-1(b) (2013).

Common sense and social science research also support the conclusion that "individuals are more willing to state a dissenting viewpoint if they can do so anonymously." 58

Third, Dodd-Frank provides robust remedies to whistleblowers who face retaliation for reporting suspected violations to the SEC. 59 In particular, the statute gives whistleblowers who experience retaliation the right to seek reinstatement, double back pay, and legal fees. 60 The Dodd-Frank protections have procedural advantages as well because a whistleblower can bring a retaliation claim directly to federal court for up to six years after retaliation occurs, 61 while many other federal anti-retaliation provisions require whistleblowers to bring an administrative claim before filing a court action, often within 180 days. 62 These enhanced remedies are particularly important because according to a recent survey, more than twenty percent of employees reporting workplace misconduct experience some form of retribution. 63

In short, in Dodd-Frank Congress identified a strong public interest in protecting investors and determined that this interest is advanced by (a) protecting from retaliation whistleblowers who report securities violations, (b) allowing whistleblowers to report anonymously, and (c) giving whistleblowers the chance to obtain significant monetary awards. Thus, any balancing of public policy interests under Town of Newton must take into account the role that Dodd-Frank’s incentives play in protecting investors and, conversely, the potential impact that removing or undercutting these incentives would have on investors.

57. See Adopting Release, supra note 6, at 198 (whistleblowers would be “less inclined to report possible securities law violations” if they believed the SEC would disclose the whistleblower’s identity to the corporation being investigated).


59. See Richard Moberly, Sarbanes-Oxley’s Whistleblower Provisions: Ten Years Later, 64 S.C. L. Rev. 1, 14–16 (2012) (Dodd-Frank was one of several new anti-retaliation provisions that “take Sarbanes-Oxley as a baseline and improve upon it”).


61. See 15 U.S.C. § 78u-6(h)(1)(B)(i) (2012) (whistleblowers may file claims in federal district court); 15 U.S.C. § 78u-6(h)(1)(B)(iii) (2012) (claims must be filed within six years after retaliation occurs or within three years of when the employee should have reasonably known about the facts material to the right of action, but not more than ten years after the date of the violation).


2. Contracts That Undermine Dodd-Frank’s Whistleblower Program

With this analytical framework in mind, we turn to the various contractual provisions companies use that may interfere with the SEC Whistleblower Program. As noted above, many of these provisions do not directly bar whistleblowing to the SEC—which would be a clear violation of Astra and Rule 21F-17—but instead alter the costs and benefits of whistleblowing, thus changing the likely behavior of prospective whistleblowers. In particular, we will analyze the competing public and private interests raised by three types of commonly observed clauses: (1) provisions that require employees to disclose their communications with the SEC to employers in some manner, (2) provisions waiving employees’ ability to obtain an award under the SEC Whistleblower Program, and (3) general confidentiality provisions that may be used to bring a breach of contract claim should a whistleblower disclose confidential information or documents to the SEC.

A. Contracts Requiring Disclosure of SEC Communications

The first general category of contractual provision is designed to elicit information about whether employees have, or plan to, report possible wrongdoing to the SEC or other government authorities. One particularly common variant allows employees to blow the whistle to the SEC but provides that they must first report the wrongdoing internally, or otherwise alert the company that they have disclosed, or plan to disclose, information to the SEC. Applying Town of Newton,64 it is clear that some legitimate interests weigh in favor of enforcing such provisions. Employers may contend that, because information derived through the course of a party’s employment generally belongs to the employer, they should be able to control this information, provided they do not use a confidentiality agreement to conceal unlawful conduct from the government.65 In particular, obtaining the relevant information before the whistleblower discloses it to the SEC allows the employer to self-report violations, which can minimize the sanctions it faces in any SEC enforcement action.66 It also helps the company

65. See Diamond v. Oreamuno, 248 N.E. 2d 910, 912 (N.Y. 1969) (“As a general proposition, a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit, but must account to his principal for any profits derived therefrom.”); see also RESTATEMENT (SECOND) OF AGENCY § 388 (1958).
66. See, e.g., Press Release, Sec. & Exch. Comm’n, SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (Apr. 22, 2013) (“When they found a problem, Ralph Lauren Corporation did the right thing by immediately reporting it to the SEC and providing exceptional assistance in our investigation,’ said George S. Canellos, Acting Director of the SEC’s Division of Enforcement. ‘The NPA in this matter makes clear that we will confer substantial and
understand the problem, prepare for a possible SEC investigation, and take quicker remedial action. Indeed, because of these reasons, some commentators suggest that internal whistleblowing is preferable to external whistleblowing.67

Additionally, employers may argue that such provisions pose relatively few risks to whistleblowers in light of SEC Rule 21F-4(c)(3), which provides that a whistleblower may be considered the source of “original information,” and therefore remain eligible for a monetary award, when that information is first reported internally by the whistleblower and then self-reported to the SEC by the company.68 In other words, the whistleblower can still reap the monetary benefits of the SEC Whistleblower Program, even by reporting internally first.

Whistleblowers, on the other hand, are likely to argue that these provisions impede whistleblowing and, in so doing, undercut Dodd-Frank’s public policy. Most significantly, these provisions take direct aim at the statutory anonymity protections.69 Employees cannot remain anonymous if they have to inform the company of their plan to report, or that they have reported, to the SEC. Even if employees need only internally disclose the violation and not their intention of reporting to the SEC, the employer can easily trace any subsequent SEC inquiry back to the internal reporter, making Dodd-Frank’s guarantee of anonymity an empty promise.

For this and other reasons, the SEC considered, but rejected, mandating internal reporting as a prerequisite for the recovery of a monetary award, concluding that any internal reporting requirement would undermine Dodd-Frank’s anonymity mandates.70 Likewise, the SEC found that “a general requirement that employees report internally . . . would impose a barrier that in some cases would dissuade potential

---

67. See Dworkin & Callahan, supra note 33, at 190. Dworkin and Callahan suggest that the law should enforce confidentiality agreements that require internal reporting first:

The employer could fashion an agreement which requires that the employee first disclose any information internally. This gives it the advantage of correcting the situation without the confidence being breached. The company can also designate the appropriate recipient to ensure that the information is handled correctly. Since these measures do not thwart whistleblowing and have the advantage of allowing for earlier correction of any wrongdoing, the courts are likely to uphold these promises.

Id.

68. 17 C.F.R. § 240.21F-4(c)(3) (2013).


70. See ADOPTING RELEASE, supra note 6, at 105–06 n.230 (“In some cases an anonymous whistleblower’s identity can be gleaned from the facts and circumstances surrounding the whistleblower’s complaint. . . . Requiring the whistleblower to report internally would be in tension with . . . Section 21F that we protect information that could reasonably be expected to reveal the identity of a whistleblower.”).
whistleblowers from providing information to the Commission, contrary to the purpose of the whistleblower provision.” Instead, the SEC included in the rules features designed to “incentivize whistleblowers to utilize their companies’ internal compliance and reporting systems when appropriate,” including expanding the definition of “original information” and treating internal reporting as a positive factor when determining monetary awards. These provisions reflect the SEC’s judgment that investor protection is best served by allowing, but not mandating, internal reporting.

Section 301 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley or SOX) reflects a similar public policy judgment in favor of confidential reporting. That provision requires employers to implement channels for employees to report illegal conduct to a corporate board of directors anonymously, without the knowledge of their direct supervisors or managers. In fact, the Department of Labor’s (DOL) Administrative Review Board (ARB) has recognized that a company that publicly identifies a whistleblower may have committed an adverse action against the whistleblower and be liable under Sarbanes-Oxley’s anti-retaliation provision. In Menendez v. Halliburton, the ARB noted:

The reason for requiring audit committees to create confidential and/or anonymous disclosure procedures is evident. Employee whistleblowers are one of the most effective sources of information concerning questionable accounting and auditing matters as well as fraud and corporate crime. Since employees are more willing to identify misconduct if they can do so anonymously, it stands to reason that anonymous and/or confidential reporting mechanisms encourage internal reporting of corporate misconduct. Furthermore, the confidentiality that Section 301 provides allows employees to report problems directly to the independent audit committee and thus effectively to their employer, while at the same time permitting the whistleblowing employee to avoid possible retaliation from supervisors or high-ranking company managers who may be defensive about wrongdoing.

---

71. Id. at 105.
72. Id. at 5.
73. See 17 C.F.R. § 240.21F-6(4) (2013).
74. See Brief of the Sec. & Exch. Comm’n, Amicus Curiae in Support of the Appellant, Liu Meng-Ling v. Siemens AG, No. 13-4385, 2014 WL 663875, at *2 (2d Cir. Feb. 20, 2014). (“Throughout the rulemaking process, the Commission considered the ‘significant issue’ of how to ensure that the whistleblower program does not undermine the willingness of individuals to make whistleblower reports internally at their companies before they make reports to the Commission.”); see also ADOPTING RELEASE, supra note 6, at 90–91 (“The objective of this provision is to support, not undermine, the effective functioning of company compliance and related systems by allowing employees to take their concerns about possible violations to appropriate company officials first while still preserving their rights under the Commission’s whistleblower program.”).
76. See id.
in which they might be implicated. Congress well recognized the im-
portance of encouraging the reporting of accounting irregularities
and potential fraud by means of confidential disclosures.

Since the purpose of confidentiality is to encourage employees to
come forward with information about SOX violations, permitting
an employer to indiscriminately expose the identity of an employee
who presents information concerning questionable accounting or au-
diting matters would most assuredly chill whistleblower-protected
activity.78

In addition to implicating Dodd-Frank’s anonymity provisions,
agreements purporting to require internal reporting may also under-
cut the statute’s anti-retaliation protections. Several courts, including
the Fifth Circuit, have held that the Act does not protect internal
whistleblowers because its statutory definition of “whistleblower” re-
quires a report to the SEC.79 This result is controversial, and several
other courts have reached the opposite conclusion for a variety of rea-
sons.80 However, to the extent the Fifth Circuit’s view prevails, it
would be anomalous to permit an employer to require a whistleblower
to report internally before reporting to the SEC because the employer
would then have a defined window in which it could retaliate without
facing any Dodd-Frank penalties.81 This result seems likely to dis-
suade prospective whistleblowers from coming forward, particularly
as reported retaliation rates remain strikingly high.82

The potentially profound effect of these “internal reporting” agree-
ments on Dodd-Frank’s anonymity and anti-retaliation protections—
and the corresponding centrality of these dual protections to the stat-
ute’s overall investor-protection scheme—indicates that they should,
and very likely will, be found unenforceable under Town of Newton.
An employer’s desire to learn of potential problems cannot justify
the risk that fewer whistleblowers will come forward if private con-

78. See id.
79. See Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 630 (5th Cir. 2013); see
also Banko v. Apple Inc., No. 13–02977, 2013 WL 7394596, at *1 (N.D. Cal. Sept. 27,
80. See, e.g., Bussing v. COR Clearing, LLC, No. 8:12-CV-238, 2014 WL 2111207,
at *12 (D. Neh. May 21, 2014); Rosenblum v. Thomson Reuters (Markets) LLC, No. 13
LLC, No. 12 Civ. 5914, 2013 WL 2190084, at *3–7 (S.D.N.Y. May 21, 2013); Genberg v.
Convention, Inc., 852 F. Supp. 2d 986, 993–95 (M.D. Tenn. 2012); Egan v. TradingScreen,
81. Sarbanes-Oxley clearly would protect this internal whistleblower from retalia-
tion, but as mentioned above, its procedures and remedies are not as favorable to
whistleblowers as Dodd-Frank’s provisions.
82. See ETHICS RES. CTR., supra note 63, at 9.
tracts can dismantle these two pillars of Dodd-Frank’s statutory scheme. Instead, public policy favors preserving the delicate balance that the SEC, after public comments and deliberation, struck with respect to internal reporting.83

This result would be consistent not only with congressional and administrative intent, but also with prior case law recognizing as unenforceable contractual provisions that burden, but do not completely bar, communications with the SEC.84 For example, in SEC v. Lipson, an Illinois district court refused to enforce a provision that would have limited the extent to which employees could communicate with the SEC without a subpoena, reasoning that

Neither the fact that [the] SEC remains free to subpoena the signatories to the agreement with Mr. Lipson, nor the possibility that the language of the agreement might be construed narrowly by the signatories to permit informal discussions with SEC personnel on certain topics, satisfies this court that the challenged provisions are harmless.85

As in Lipson, the question is not whether employees might still be able to communicate with the SEC despite their contractual restrictions, but instead whether those restrictions threaten material harm to the SEC’s investigative abilities. Here, as in Lipson, the answer is that they do, and therefore should not be enforceable.

B. CONTRACTS REQUIRING RELINQUISHMENT OF A DODD-FRANK REWARD

Equally common, and equally troubling, are contractual provisions that preserve employees’ right to report possible securities violations to the SEC, but mandate that the employee waive, decline, or agree not to seek a monetary award. Such a provision might state, for example, “[n]othing in this agreement is intended to prevent Employee from communicating or cooperating with a government agency, except Employee agrees that Employee will not be entitled to any individual monetary payment or relief resulting from any administrative claim or investigative proceeding.”

Some employers may argue that such provisions are voluntary waivers of a statutory right, which courts typically permit unless expressly prohibited by statute. Thus, these employers would contend, the provision is exempt from analysis under Town of Newton.86 Employers are likely to point to the fact that, while Dodd-Frank amended SOX to include such an express prohibition on statutory waivers, it

83. See generally ADOPTING RELEASE, supra note 6.
85. Id.
86. See United States v. Mezzanatto, 513 U.S. 196, 201 (1995) (“[A]bsent some affirmative indication of Congress’ intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties.”).
included no such prohibition with respect to Dodd-Frank’s own whistleblower provisions.87 In the face of the Sarbanes-Oxley amendment, employers may argue that congressional silence about waiver in Dodd-Frank whistleblower provisions implies that Congress intentionally permitted employees to waive their bounty right.

However, the Supreme Court has noted that the absence of an anti-waiver provision is not dispositive when “legislative policy would be thwarted by permitting” contractual waivers of statutory rights.88 The Court has applied a similar public policy test as described in Part III.A, supra, by voiding a contractual waiver provision when it was “inconsistent with the provision creating the right sought to be secured.”89 Thus, whether an agreement to relinquish a Dodd-Frank award is viewed as a waiver of a statutory right or a standard contract under Town of Newton, the relevant question remains the same: would enforcement of the agreement impermissibly undercut the public policy goals of the relevant statute?

Employers are likely to contend that the answer is no because such provisions allow whistleblowers to communicate with the SEC on a voluntary and anonymous basis. The employee does not face any punishment or penalty for whistleblowing; the employee simply cannot receive an award for doing so. Employers are also likely to argue that the potential harm to the SEC is low because the Commission retains its traditional investigative tools, including the ability to speak to witnesses without a subpoena.

In support of this argument, employers may analogize agreements waiving Dodd-Frank awards to similar provisions used in employment severance or settlement agreements. These typically permit an employee to file a discrimination claim with the EEOC but not to obtain personal damages or other monetary relief. In other words, employees could notify the EEOC of possible discrimination, allowing the EEOC to investigate potentially systemic or continuing discrimination, but would release individual claims to relief.

Although certain EEOC offices are beginning to challenge such provisions,90 they have so far been routinely enforced by

---

89. New York v. Hill, 528 U.S. 110, 116 (2000); see also Brooklyn Sav. Bank, 324 U.S. at 704 (in determining that the right to liquidated damages under the Fair Labor Standards Act is not waivable, the Court noted: “Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.”).
The Supreme Court considered a similar issue in *EEOC v. Waffle House*—whether an arbitration agreement can prevent the EEOC from litigating on an employee’s behalf in court—and concluded that the EEOC could bring claims in court despite the employee’s arbitration agreement, but that “[t]he employee’s conduct may have the effect of limiting the relief that the EEOC may obtain.”93 Employees are likely to argue that the same rule should apply in the Dodd-Frank context; that is, that agreements may not validly waive employees’ rights to make a Dodd-Frank disclosure, but they may waive employees’ rights to benefit personally from that disclosure.

This comparison, while superficially appealing, ignores the substantial differences between the public policy goals of Title VII and Dodd-Frank, and the two statutes’ enforcement schemes. The EEOC enforces antidiscrimination laws by investigating claims of alleged discrimination victims, who may prosecute their claims directly by intervening in an EEOC action or, when the EEOC declines to bring an action, by filing their own private lawsuits.94 Damages obtained by an employee in an EEOC action are based primarily on the EEOC’s vindication of the employee’s own rights.95 Therefore, failing to enforce the waiver in an EEOC action would typically result in a double recovery for the employee, who would receive both the consideration given for the waiver and the damages from the EEOC action.96 As the Supreme Court has made clear, “courts can and should preclude double recovery by an individual.”97

The same logic does not apply to Dodd-Frank’s unique statutory scheme, in which the SEC is not seeking to vindicate the personal rights of a whistleblower—who may not have suffered any injury as a result of the reported securities violations—but is instead bringing

---

91. See, e.g., *EEOC v. Cosmair, Inc., L’Oreal Hair Care Div.*, 821 F.2d 1085, 1091 (5th Cir. 1987) (“[A]lthough an employee cannot waive the right to file a charge with the EEOC, the employee can waive not only the right to recover in his or her own lawsuit but also the right to recover in a suit brought by the EEOC on the employee’s behalf.”); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987); EQual Emp’Y OpPortunity Comm’n, Enforcement Guidance on Non-Waivable Employee Rights Under EQual Employment Opportunity Comm’n (EEOC) Enforced Statutes (Apr. 10, 1997), available at http://www. eeoc.gov/policy/docs/ waiver.html (“[T]he Commission notes that even though an individual who has signed a waiver agreement or otherwise settled a claim subsequently files a charge with the Commission based on the same claim, the employer will be shielded against any further recovery by the charging party . . . .”).


93. Id. at 296 (citations omitted).


95. Id.

96. See *Waffle House*, 534 U.S. at 297; *Goodyear Aerospace Corp.*, 813 F.2d at 1543 (while injunctive relief against employer would serve the public good, any back pay awarded to EEOC would “go directly to [the employee]” and is therefore not recoverable if previously waived).

claims on behalf of the government, for the ultimate benefit of investors. Typically, the whistleblower only has the right to seek a Dodd-Frank award, which compensates the whistleblower for information, not injury. Therefore, a whistleblower award cannot be duplicative of the consideration that an employee may have received from the employer in exchange for a release of the claims that the employee could have brought directly against the employer.\textsuperscript{98}

Given these distinctions, the enforceability of Dodd-Frank award waivers should not rest on EEOC precedent. Instead, a more apt, though still imperfect, analogy for the SEC whistleblower program is the \textit{qui tam} regime of the False Claims Act\textsuperscript{99} (FCA). The FCA resembles Dodd-Frank by providing a reward for whistleblowers who report employer misconduct\textsuperscript{100} and by involving claims in which the injury being vindicated also belongs to the government rather than the whistleblower.\textsuperscript{101} Unlike Dodd-Frank, though, FCA whistleblowers, or “relators,” bring these claims by filing their own lawsuit against the company, in which the government may or may not intervene.\textsuperscript{102} FCA waiver cases typically arise when an employee signs an agreement releasing all claims against an employer, and then subsequently files an FCA complaint.\textsuperscript{103}

Consistent with \textit{Town of Newton}\textsuperscript{104} and \textit{Lipson},\textsuperscript{105} courts assessing the enforceability of FCA waivers have sought to balance the “public interest in having information brought forward that the government could not otherwise obtain” with the public interest in “encouraging parties to settle disputes.”\textsuperscript{106} Significantly, courts have recognized

\begin{itemize}
\item \textsuperscript{98} This rationale would also prevent an employer from suing a whistleblower under a more general release of claims against the employer. Because the SEC award is not based on any whistleblower claim against the employer, it should not be included in a general release.
\item \textsuperscript{100} See id. § 3730(d).
\item \textsuperscript{101} See id. §§ 3729–3733. See also Geoffrey Christopher Rapp, \textit{Mutiny on the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act}, 2012 BYU L. Rev. 73, 76–77 (2012) (“Dodd-Frank drew some of its inspiration from the False Claims Act,” but Dodd-Frank is inferior because it does not adopt the \textit{qui tam} aspect of the FCA that allows “whistleblowers to litigate cases independently from federal action”) (emphasis added); id. at 132–43 (differences between the reward programs of the False Claims Act and Dodd-Frank).
\item \textsuperscript{102} 31 U.S.C. § 3730(b) (2012).
\item \textsuperscript{104} 480 U.S. 386 (1987).
\item \textsuperscript{105} No. 97 C 2661, 1997 WL 801712 (N.D. Ill. Oct. 28, 1997).
\item \textsuperscript{106} Hall, 104 F.3d at 233.
\end{itemize}
that the dispositive question here is not whether an employee could still have the right to blow the whistle if the damage waiver or release were enforced, but whether enforcement of the waiver would substantially reduce the efficacy of the statute’s incentive structure.107 As the Ninth Circuit noted in *United States ex rel. Green v. Northrop Corp.*:

> [A]lthough, as Appellees maintain, enforcing the Release at issue in this case would not prohibit a relator from coming forward with information concerning Appellees’ alleged misconduct, our analysis of the structure and purposes of the Act demonstrates that this consideration is not dispositive. If the *qui tam* provisions never had been enacted, presumably whistleblowers still could come forward. The Act reflects Congress’s judgment that incentives to file suit were necessary for the government to learn of the fraud or to spur government authorities into action; permitting a prefiling release when the government has neither been informed of, nor consented to, the release would undermine this incentive, and therefore, frustrate one of the central objectives of the Act.108

Under *Green* and its progeny, a waiver of an incentive award would be invalid if it frustrated a statute’s central objectives.

As *Green* reflects, courts applying this reasoning in FCA waiver cases have typically refused to enforce prefiling releases when the government was unaware of the alleged misconduct until the relator filed the claim, on the theory that enforcing such releases would limit the government’s ability to detect wrongdoing. On the other hand, some courts have agreed to enforce FCA waivers when the government was already aware of the alleged misconduct before the filing of the complaint because “the public interest in having information brought forward that the government could not otherwise obtain [was] not implicated.”109

Applying this rationale to the Dodd-Frank context suggests that a similar, but not identical, outcome should prevail. First, given the centrality of monetary awards to the SEC Whistleblower Program, it seems clear that the “central objectives” of Dodd-Frank’s whistleblower provisions would be substantially frustrated if courts enforced award waivers executed when the SEC did not already know the underlying information. As in the FCA context, enforcement of such waivers would decrease willingness to report misconduct and decrease the flow of potentially valuable information to the SEC. Indeed, one of the key concerns behind the statute was that the SEC was not receiving or generating sufficient information about possible securities viola-

---


tions prior to Dodd-Frank. Significantly, allowing the waiver of Dodd-Frank awards would not only dissuade employees subject to the waiver from coming forward, but also decrease the SEC’s ability to use awards to build program awareness, encourage others to come forward, and deter future securities violations, all of which are crucial programmatic interests of Dodd-Frank and the SEC whistleblower rules.

Unlike the prevailing FCA rule, however, applying this rationale to the SEC Whistleblower Program suggests that Dodd-Frank waivers should not be enforced even if they are executed after the SEC has learned of the potential misconduct. First, there is a basic distinction between the mechanics of Dodd-Frank and the FCA. In an FCA case, the whistleblower brings a claim against the company in court and has an opportunity to receive a share of any resulting settlement or judgment. Thus, it makes more sense to allow for the private resolution of claims between the relator and the company, provided that it does not result in violations of law being concealed from the government. The SEC whistleblower, on the other hand, has no direct claim against the company and is not a party to enforcement actions. Likewise, the SEC whistleblower award is not paid by the company in any way, but instead is paid from a separate fund established by Congress. Therefore, there is no actual dispute or claim between the employee and the employer with respect to the award, and the public interest in promoting settlement of disputes is simply not implicated. It makes little public policy sense to allow employers to insert themselves into this award scheme, regardless of whether the SEC is aware of the misconduct.

Moreover, a rule allowing the enforcement of waivers when the SEC has independently learned of the misconduct rests on the incorrect assumption that subsequent whistleblower assistance will not have significant investigative value to the SEC. In practice the SEC

110. See SEC & EXCH. COMM’N, PROPOSED RULES FOR IMPLEMENTING THE WHISTLEBLOWER PROVISIONS OF SECTION 21F OF THE SECURITIES EXCHANGE ACT OF 1934, RELEASE No. 34-63237 (Nov. 17, 2010) (“More frequent reporting of high-quality information promotes greater deterrence by enhancing the efficiency and effectiveness of the Commission’s enforcement program.”).

111. See 17 C.F.R. § 240.21F-6(a)(3)(ii) (2013) (a factor in any award amount determination is “[t]he degree to which an award encourages the submission of high quality information from whistleblowers by appropriately rewarding whistleblowers’ submission of significant information and assistance”).

112. See 15 U.S.C. § 78u-6(c)(1)(B)(III) (2012) (a factor in any award amount determination is “the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws”); 17 C.F.R. § 240.21F-6(a)(3) (“The Commission will assess its programmatic interest in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws.”).

often obtains valuable information and assistance from whistleblowers even after it has begun to investigate an alleged violation and the SEC actively solicits follow-up complaints from whistleblowers who have already filed complaints. In fact, an important factor that may increase the amount of a whistleblower’s award is the level of “[a]ssistance provided by the whistleblower.”

114. As chief of the SEC’s Office of the Whistleblower, McKessy noted in an SEC video for prospective whistleblowers, “People often call us to ask if they should submit something, or submit an update, and we will almost always suggest that you submit it. As I often tell people, you never know what information may be the last piece of a puzzle for an investigation.” SEC Office of the Whistleblower, What Happens to Tips (Transcript), available at http://www.sec.gov/about/offices/owb/owb-what-happens-to-tips.shtml (last visited Sept. 28, 2014).


116. Another similar and troubling practice, beyond the scope of this Article, is the use of a broad confidentiality agreement that prevents employees from consulting independent legal counsel, effectively eliminating their ability to file whistleblower complaints anonymously in accordance with SEC rules.

These commonplace confidentiality provisions implicate important interests on both sides. Employers have a strong interest in obtaining such agreements for legitimate employer concerns, such as promoting research and innovation, protecting trade secrets and corporate reputation, and facilitating communication between a principal and its agents.¹¹₈ For this reason, confidentiality agreements tailored to protect legitimate interests are enforceable when they are not contrary to public policy.¹¹⁹

It is equally clear that strictly enforcing such confidentiality agreements to prevent whistleblowers from reporting misconduct to the SEC would abridge important law enforcement interests. This would contravene Rule 21F-17, which expressly states that confidentiality agreements may not be used to impede individuals from communicating with SEC staff.¹²⁰ It would also be inconsistent with a long line of cases prohibiting secrecy agreements purporting to restrict individuals from reporting violations of law.¹²¹ Courts have also held that information about wrongdoing cannot be a trade secret warranting confidentiality protection.¹²²

A more difficult question arises when an employer accepts the whistleblower’s right to report misconduct but argues that the whistle-


¹¹₈. See O’Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 763 (9th Cir. 1996) (employer had “strong interest” in preventing employees from improperly taking and disclosing to other co-workers confidential documents); Dworkin & Callahan, supra note 33, at 174.

¹¹⁹. See, e.g., McGrane v. Reader’s Digest Ass’n, Inc., 822 F. Supp. 1044, 1046 (S.D.N.Y. 1993) (confidentiality agreements involving “matters of substantial concern to the public” are distinct from “trade secrets or other legitimately confidential information”).

¹²⁰. Similarly, the Commission has stated “we wish to clarify that confidentiality agreements or protective orders entered into in [Self-Regulatory Organization] arbitration or adjudicatory proceedings may not be used to prevent a party from reporting a possible securities law violation.” ADOPTING RELEASE, supra note 6, at 201 n.407.

¹²¹. See Chambers v. Capital Cities/ABC, 159 F.R.D. 441, 444 (S.D.N.Y. 1995) (“Absent possible extraordinary circumstances . . . , it is against public policy for parties to agree not to reveal, at least in the limited contexts of depositions or pre-deposition interviews concerning litigation arising under federal law, facts relating to alleged or potential violations of . . . law.”); EEOC v. U.S. Steel Corp., 671 F. Supp. 351, 357 (E.D. Pa. 1987) (agreements restricting former employees revealing violations of law to EEOC will “hinder[]” implementation of the “Congressionally mandated duty to enforce the provisions” of federal statutes), overturned on other grounds, 921 F.2d 489 (3d Cir. 1990).

¹²². McGrane, 822 F. Supp. at 1051–52; id. at 1046 (“Courts are increasingly reluctant to enforce secrecy arrangements where matters of substantial concern to the public—as distinct from trade secrets or other legitimately confidential information—may be involved.”); id. at 1052 (“Disclosures of wrongdoing do not constitute revelations of trade secrets which can be prohibited by agreements binding on former employees.”).
blower cannot take or use company documents that might support the claim. In this situation, does the employee's right to communicate with the government justify the taking and sharing of these confidential documents, or does the employer have a superior interest in maintaining the confidentiality of its proprietary information? Courts have long grappled with these questions in the FCA context, and are now beginning to face them in the SEC whistleblower context.

Employers are likely to argue that the federal interest in SEC whistleblowing cannot outweigh traditionally recognized property and intellectual property rights, and are likely to characterize employees' taking of documents for whistleblowing purposes as theft or conversion. Employers may also note that, once the SEC is alerted to wrongdoing, it can request or subpoena documents, reducing the need for employees to take confidential documents. This argument finds at least some support in existing case law, as some courts have taken an anti-whistleblower stance even when employees took documents to support a disclosure of illegality to the government. A prominent example is *JDS Uniphase Corp. v. Jennings*, in which an employee defended his former employer's claim for a breach of a confidentiality agreement by claiming that the agreement was unenforceable in violation of the public policy in favor of whistleblowing.

---


124. See, e.g., Ruhe, 929 F. Supp. 2d at 1038 (company claimed that the relator copied confidential documents and transmitted them to the government in violation of a non-disclosure agreement); *Head*, 668 F. Supp. 2d at 150 (D.D.C. 2009) (suit by former employer against a False Claims Act relator for fraud, libel, tortious interference with contract, and other associated claims arising from relator's disclosure of confidential employer documents to the government, in violation of the relator's non-disclosure agreement).


127. See id. at 701–02. Pursuant to the agreement's choice of law provision, the court analyzed this claim under California law, which has a provision that asserts a "generalized declaration of public policy in favor of whistle-blowing." *Id.* at 701. However, the court also noted that "Sarbanes-Oxley is itself an embodiment of a federal policy encouraging whistleblowers to come forward, and the effect of the California declaration, if any, is to encourage liberal construction of whistleblower statutes by California courts or other courts applying California law." *Id.* at 701 n.5.
Specifically, the employee argued that he needed to take proprietary documents “to function as an effective Sarbanes-Oxley whistleblower.” In rejecting this argument, the court concluded that a pro-whistleblower public policy cannot “authorize disgruntled employees to pilfer a wheelbarrow full of an employer’s proprietary documents in violation of their contract merely because it might help them blow the whistle on an employer’s violations of law, real or imagined.” The court pointedly concluded that “Sarbanes-Oxley is not a license to steal documents and break contracts.”

Many other courts, however, take a more nuanced approach, focusing on the nexus between the confidential documents in question and the misconduct alleged by the whistleblower. These courts have often found that an employer can bring a breach-of-contract claim against the employee, or successfully repel a retaliation claim by the employee, based on a confidentiality agreement if the purportedly confidential documents or materials taken by the employee bear little relationship to the reported violation. For example, in Cafasso, U.S. ex rel. v. General Dynamics C4 Sys., Inc., an FCA relator argued that the court should adopt a public policy exception to enforcement of her confidentiality agreement. The court determined that, even if it adopted such an exception, the exception would not protect the relator because of her “vast and indiscriminate appropriation” of the employer’s files. The relator had copied approximately “eleven gigabytes of data—tens of thousands of pages,” with little understanding or limitation on her choice of documents to take:

She decided which [employer] documents to copy by browsing through folders related to technology and technology development, and, she testified, “if I saw something that I thought actually could apply and should be investigated, I just grabbed the whole folder” (emphasis added). Further, she scanned only file names and “did not look at any individual documents at all.” Swept up in this unselective taking of documents were attorney-client privileged communications, trade secrets belonging to [her employer] and other contractors, internal research and development information, sensitive government information, and at least one patent application that the Patent Office had placed under a secrecy order.

The Ninth Circuit concluded that any employee asserting a public policy exception to a breach of confidentiality agreement claim must

128. Id. at 702.
129. Id.
130. Id. at 703.
131. 637 F.3d 1047 (9th Cir. 2011).
132. See id. at 1061–62.
133. See id. at 1062.
134. Id.
make a “particularized showing” that the “removal of the documents was reasonably necessary to pursue an FCA claim.”

When the relationship between the documents in dispute and the reported wrongdoing is close, courts typically will refuse to enforce the confidentiality provisions on public policy grounds. For example, courts have repeatedly found that an FCA relator’s taking of documents is not actionable if those documents could be used as evidence at trial or are “relevant to the alleged fraud” because the FCA reflects a “strong public policy in favor of protecting whistleblowers who report fraud against the government.” Otherwise, “[e]nforcing a private

135. Id. The Ninth Circuit did not rule out such an exception, but clearly limited its use:

The need to facilitate valid claims does not justify the wholesale stripping of a company’s confidential documents. Although courts perhaps should consider in particular instances for particular documents whether confidentiality pol-

136. See, e.g., Siebert, 2013 WL 5645309, slip op. at 13 (“[A]ny alleged obligation by Siebert not to retain or disclose the confidential documents that form the basis of this action is unenforceable as a matter of public policy because it would frustrate Congress’ purpose in enacting the False Claims Act . . . . But the Court cannot now conclude that the counterclaim in its entirety should be dismissed, because it is possible that Siebert also took confidential documents that bore no relation to his False Claims Act claim.”); United States ex rel. Wildhirt v. AARS Forever, Inc., No. 1:09-cv-01215, slip op. at 6 (N.D. Ill. Sept. 19, 2013) (refusing to dismiss a counterclaim based on confidentiality agreement when it was alleged that the relator took documents “with no intention of using” them in the qui tam suit and when the relator’s disclosure went beyond what was necessary for the suit).

137. See also Walsh v. Amerisource Bergen Corp., Civ. No. 11-7548, slip op. at 13 (E.D. Pa. June 16, 2014) (refusing to dismiss a counterclaim for breach of confidentiality agreement because it was too early to tell whether “the entirety” of the documents taken by the whistleblower were necessary for his FCA claim); Siebert v. Gene Sec. Network, Inc., 11-CV-01987-JST, slip op. at 13 (N.D. Cal. Oct. 16, 2013) (“The Court agrees that any alleged obligation by Siebert not to retain or disclose the confidential documents that form the basis of this action is unenforceable as a matter of public policy because it would frustrate Congress’ purpose in enacting the False Claims Act . . . . But the Court cannot now conclude that the counterclaim in its entirety should be dismissed, because it is possible that Siebert also took confidential documents that bore no relation to his False Claims Act claim.”); United States ex rel. Ruhe v. Masimo Corp., 929 F. Supp. 2d 1033, 1039 (C.D. Cal. 2012) (“Relators sought to expose a fraud against the government and limited their taking to documents relevant to the alleged fraud. Thus, this taking and publication was not wrongful, even in light of nondisclosure agreements, given ‘the strong public policy in favor of protecting whistleblowers who report fraud against the government.’”) (quoting United States ex rel. Grandeau v. Cancer Treatment Ctrs. of Am., 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004) (relator exempt from liability for breach of confidentiality agreement for disclosure to government of documents showing employer engaged in fraudulent healthcare billing)); United States ex rel. Head v. Kane Co., 668 F. Supp. 2d 146, 152 (D.D.C. 2009); X Corp. v. Doe, 805 F. Supp. 1298, 1310 n.24 (E.D. Va. 1992) (a confidentiality agreement would be void as against public policy if, when enforced, it would prevent “disclosure of evidence of a fraud on the government”).
agreement that requires a *qui tam* plaintiff to turn over his or her copy of a document, which is likely to be needed as evidence at trial, to the defendant who is under investigation would unduly frustrate the purpose” of the FCA.138

A similar rule prevails in the Sarbanes-Oxley context, in which courts also recognize that the federal interest in whistleblowing can trump employers’ otherwise legitimate desire to protect confidential documents when there is a reasonable connection between the documents and the alleged securities violation.139 For example, one court stated: “[T]he statute demonstrates the public policy in favor of allowing even current employees to assist in securities fraud investigations. It certainly does not establish a public policy in favor of allowing employers to muzzle their employees with overbroad confidentiality agreements.”140

Even more specifically, the DOL’s ARB, which hears appeals of Sarbanes-Oxley whistleblower retaliation claims, has indicated that employees should be able to take and share documents related to potential misconduct, despite the existence of a confidentiality agreement, if those documents represent “the kind of ‘original information’ that Congress intended be protected under either the Internal Revenue Service [(IRS)] or SEC whistleblower programs.”141 In *Vannoy v. Celanese Corp.*, an employee complained internally about his employer’s financial practices, and then reported the practices to the IRS under the Agency’s whistleblower reward program.142 As part of the IRS complaint, the employee attached numerous proprietary and confidential company documents in violation of the company’s general confidentiality agreement.143 The employee filed a Sarbanes-Oxley retaliation claim after the employer terminated his employment.144

Initially, a DOL administrative law judge (ALJ) rejected the employee’s claim, finding that the company properly discharged the employee for, among other things, copying confidential documents in violation of his confidentiality agreement.145 The ALJ also rejected the employee’s argument that he had an “informer’s privilege” to use the company’s confidential documents when reporting wrongdoing, asserting that “SOX allows for the reporting of violations but not for illegally obtaining documents.”146 On appeal, however, the ARB concluded

---

140. *Id.*
142. *See id.* at 4, 6.
143. *Id.* at 6.
144. *Id.* at 2.
145. *Id.* at 20–21.
146. *Id.* at 22 (citing JDS Uniphase Corp. v. Jennings, 473 F. Supp. 2d 697 (D. Va. 2007)).
that the confidentiality agreement did not necessarily prohibit the employee from providing documents to the government, even though they contained sensitive data such as social security numbers.\textsuperscript{147}

The ARB noted the difficulty of resolving the “clear tension between a company’s legitimate business policies protecting confidential information and the whistleblower bounty programs” and looked to the public policy supporting the bounty programs to resolve the tension.\textsuperscript{148} The ARB asserted that Congress created the IRS and Dodd-Frank programs:

\begin{quote}
...to encourage whistleblowers to disclose confidential company information in furtherance of enforcement of tax and securities laws. Passage of these bounty provisions demonstrate that Congress intended to encourage federal agencies to seek out and investigate independently procured, non-public information from whistleblowers such as Vannoy to eliminate abuses in the tax realm under the IRS Whistleblower program and now in the securities realm with the SEC Whistleblower program . . . . [T]he Dodd-Frank Act established the SEC Investor Protection Fund, which is to be used to pay whistleblower claims and is funded with monetary sanctions that the SEC collects in a judicial or administrative action, or through certain disgorgements under the Sarbanes-Oxley Act of 2002. Similar to the IRS Whistleblower bounty program that Vannoy pursued, Section 21F(b) of the Dodd-Frank Act provides that the SEC “shall pay” a whistleblower who voluntarily provides original information to the SEC that leads to the successful enforcement of a covered judicial or administrative action and results in certain monetary sanctions.

. . .

. . . Under the terms of the SEC whistleblower bounty program, Congress anticipated that the whistleblower would provide independently garnered, insider information that would be valuable to the SEC in its investigation.\textsuperscript{149}

Ultimately, the ARB remanded the case to the ALJ, noting that, in light of these public policy interests, “the crucial question for the ALJ to resolve . . . is whether the information [the employee] procured from the company is the kind of ‘original information’ that Congress intended be protected under either the IRS or SEC whistleblower programs, and whether . . . the transfer of information was protected activity.”\textsuperscript{150}

\textit{Vannoy} offers a guiding principle that documents may be lawfully taken by an employee, notwithstanding a confidentiality agreement, if those documents reasonably support or relate to a whistleblower complaint that is required, protected, or encouraged by federal or state law because the government has a compelling interest in receiving the doc-

\begin{footnotes}
\footnote{147. See \textit{id.} at 8.}
\footnote{148. \textit{Id.} at 16.}
\footnote{149. \textit{Id.}}
\footnote{150. \textit{Id.} at 17.}
\end{footnotes}
documents. Conversely, documents with no reasonably ascertainable relevance to a possible securities violation would be subject to the applicable confidentiality agreement.

As the ARB’s discussion of Dodd-Frank in Vannoy suggests, there is good reason to extend this guiding principle to the SEC Whistleblower Program because it comports fully with the public policy aims of the statute. Relevant documents taken from an employer not only can provide potentially valuable evidence of a possible securities violation, but also can help the SEC confirm the veracity of the whistleblower’s information and better distinguish between tips that warrant significant attention and those that do not. This is a critical function because the SEC received over 3,200 tips through the SEC Whistleblower Program in fiscal year 2013 alone, and receives tens of thousands of other tips and referrals through other means, such as investor complaints. Similarly, background documents such as organizational charts, compliance policies, and descriptions of relevant internal systems can save investigative time and resources by helping the SEC understand the facts of a case more quickly. Indeed, the SEC expects whistleblowers to provide documentary support. The SEC’s “Tips, Complaints and Referrals” form (Form TCR) specifically asks the whistleblower to “describe all supporting materials in the complainant’s possession . . .” and to “identify with particularity any documents or other information in your submission that you believe could reasonably be expected to reveal your identity.” These questions would make little sense if the SEC did not expect whistleblowers to include relevant documents in their submissions.

Finally, while employers would obviously like to avoid SEC scrutiny, the disclosure of documents to the SEC poses relatively little risk of harm to employers who have not engaged in wrongdoing. SEC policy mandates that all investigations—and all documents produced therein—must be kept confidential and nonpublic until the filing of a complaint or administrative order, giving employers a high level of assurance that any confidential documents will not be leaked

152. As the SEC’s Enforcement Manual indicates, the SEC cannot allocate the same level of resources to each tip and investigation, and instead must rank investigations based on a number of factors, including the scope of the misconduct and investor harm. U.S. SEC. & EXCH. COMM’N., ENFORCEMENT MANUAL § 2.1.1 (2013) (“Devoting appropriate resources to investigations that are more significant will help ensure high quality investigations and maximize desired program outcomes.”).
153. The ability to gain early access to documents is particularly significant because the SEC cannot subpoena documents without a formal order of investigation, which itself typically requires investigating attorneys to have some evidence that a securities violation is occurring or has occurred. See id. § 2.3.4.
to the public or third parties.\textsuperscript{155} In this way, SEC investigations offer greater confidentiality protections to employers than an FCA suit, in which relators may choose to attach supporting documents to public filings.\textsuperscript{156}

A rule that allows whistleblowers to provide the SEC with documents relevant to understanding and investigating a possible securities violation strikes an appropriate balance between employers’ legitimate interests in confidentiality and data security, while ensuring that the SEC retains access to potentially valuable sources of evidence and supporting background information. While employers and employees may disagree about whether certain documents are relevant to a possible securities violation, this rule also has the benefit of being relatively easy to understand and intuitive, reducing the risk that whistleblowers will inadvertently expose themselves to personal liability while making a good-faith effort to report possible misconduct.

**IV. Practical Steps to Reduce the Risks Posed by Agreements Restricting Whistleblowing**

This analysis of the three types of de facto gag clauses indicates that courts will, and should, refuse to enforce agreements that would significantly threaten the flow of potentially actionable information and documents about possible securities violations from whistleblowers to the SEC. If our prediction is correct, and courts do strike down such contractual clauses, they will become less common over time. In the meantime, even if courts refuse to enforce de facto gag clauses, the inclusion of such provisions in agreements continues to pose a danger to the SEC Whistleblower Program. Many individuals, particularly those who are unrepresented, may not understand that such provisions could be challenged, and may decide to forgo reporting as a result. Other potential whistleblowers may recognize that such provisions are likely unenforceable but decide that staying silent is preferable to acting as a “test case” and risking personal liability by blowing the whistle. Employees may also reasonably fear that challenging such provisions will flag them as a potential whistleblower, leading to retaliation. The widespread use of such agreements poses risks for employers, too, who may reflexively seek the broadest confidentiality and release provisions possible without recognizing the law’s substantial limitations.

\textsuperscript{155} Adverting Release, \textit{supra} note 6, at 126. Additionally, employers producing documents to the SEC can request confidentiality for those documents under the SEC’s Freedom of Information Act procedures. See 17 C.F.R. § 200.83 (2014).

\textsuperscript{156} The FCA provides that relators must first file their complaints under seal to give the government an opportunity to investigate. See 31 U.S.C. § 3730(b)(2) (2012). Unless the government seeks an extension, however, the complaint may be unsealed after sixty days. \textit{Id}.
Accordingly, our analysis suggests that the key stakeholders—employers, employees, and the SEC—should each take steps now to reduce the risks associated with these agreements. First, employers and their counsel should be aware that agreements that impede employees from reporting misconduct to the SEC or other government authorities may backfire. Although such agreements may dissuade some employees from reporting misconduct, other employees may challenge these provisions, resulting in uncertainty and added employer litigation costs. In such cases, employers may find that bargained-for contractual provisions are unenforceable, upsetting settled expectations.  

In addition to losing the benefit of their bargain, employers and their counsel may face substantial liability or sanctions for drafting agreements that purport to limit or condition communications with the SEC. Such agreements may put employers and their counsel in the SEC’s crosshairs for violating Rule 21F-17 or federal and state statutes prohibiting compounding and obstruction of justice. Such agreements also may subject employers’ counsel to professional sanctions under Rule 3.4(f) of the Model Rules of Professional Conduct, which, with limited exceptions, states that attorneys shall not “request a person other than a client to refrain from voluntarily giving relevant information to another party.”

Even if the SEC does not act, employees may be able to bring Sarbanes-Oxley or Dodd-Frank retaliation claims against employers based upon an employment-related agreement that purports to limit or condition their ability to communicate with the SEC, on the theory that they have suffered an adverse employment action as a result of trying to exercise or preserve statutory rights. Courts have previously allowed similar retaliation claims under other statutes where (1) the employee engaged in protected whistleblowing conduct prior to receiving the problematic agreement or (2) the employee did not engage in prior protected conduct, but the employer either “(i) attempt[ed] to

157. Employers should also be aware that anonymity provisions discussed above make it possible that employers may never learn when and if an employee has breached an agreement by, for example, accepting a whistleblower award.

158. As Professor Bauer points out in an article exploring the ethical implications of evidence-suppressing settlements, it is unlikely that a settlement prohibiting voluntary disclosures would be deemed criminal conduct, especially if it includes a carve-out for disclosures pursuant to subpoena or court order. See Jon Bauer, Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers’ Ethics, 87 OR. L. REV. 481, 506 (2008). Nevertheless, there is a risk that the SEC or a federal prosecutor might draw inferences from an agreement that aims to deter whistleblowing to the SEC. See id.


enforce the agreement against an employee who signed the agreement but nevertheless files or participates in an EEOC charge, or (ii) with[ei]ld benefits already promised or owed from an employee who refuses to sign the agreement.”162 An agreement that the employer intended to use as a shield from liability may become a sword in the hands of a sophisticated employee-side attorney. Thus, employers and their counsel should take proactive steps to ensure that their agreements do not directly or indirectly impede their employees’ ability to report misconduct to the government.

For their part, employees and their counsel should educate themselves about the legal ramifications of these provisions and take a firm stand against their enforceability and legality. In particular, employee-side counsel should understand both the relevant law, including SEC rules, ethical rules, and case law, and the available legal tools at their disposal, including public policy arguments to defend a breach-of-contract claim or bring a retaliation claim against the employer. Counsel can then argue against the inclusion of such provisions during negotiations or, if necessary, challenge their enforceability later. Likewise, employees and their counsel should seriously consider advising the SEC if a company is using agreements to block individuals from reporting possible securities violations, especially if the company is under investigation by the SEC for other possible misconduct. The SEC has expressed interest in receiving such information,163 and reports can be made anonymously. Employees’ attorneys also should inform clients about the potential risks of taking and disclosing documents—including the risk of a claim against the employee—to ensure that employees do not expose themselves to personal liability by indiscriminately taking documents that bear no reasonable relationship to a possible securities violation.

Finally, and perhaps most importantly, we believe that government agencies should take meaningful action to counter the chilling effect of de facto gag clauses on whistleblowing. First, the SEC should use its enforcement authority to sanction companies that run afoul of Rule 21F-17, as Sean McKessy has already warned.164 In addition, the

---

163. Mahoney, supra note 25 (quoting McKessy as stating that “we are actively looking for examples of confidentiality agreements, separation agreements, employee agreements that . . . in substance say ‘as a prerequisite to get this benefit you agree you’re not going to come to the Commission . . . ’”).
164. John A. Goldmark, SEC Warns In-House Counsel Against Using Incentives to Deter External Whistleblowing, DAVIS WRIGHT TREMAINE LLP (Apr. 14, 2014), available at http://www.dwt.com/SEC-Warns-In-House-Counsel-Against-Using-Incentives-to-Deter-External-Whistleblowing-04-14-2014 (quoting McKessy as stating that companies should “[b]e aware that this is something we are very concerned about. If you’re spending a lot of your time trying to come up with creative ways to get people out of our programs, I think you’re spending a lot of wasted time and you run the risk of running afoul of our regulations.”).
SEC could bring administrative actions against attorneys who require employees to enter into impermissibly restrictive agreements and could potentially suspend such attorneys from practicing before the SEC.  

Moreover, we believe the SEC should amend Rule 21F-17 to provide additional guidance on the type of contractual provisions that impede an individual from communicating with the SEC. Such guidance should clarify that an attempt to condition payment of severance or any other benefit on any limitation to an employee participating in the SEC’s whistleblower reward program (such as losing the ability to make an anonymous report or receive an award) violates Rule 21F-17. In addition, an amended Rule 21F-17 could provide examples of prohibited provisions, while also clarifying that the examples are not exclusive. Likewise, OSHA, which already reviews certain settlement agreements in Sarbanes-Oxley cases to ensure that they do not contain explicit gag clauses, should also modify its existing settlement review policies to clarify that any provision that bars or impedes participation in the SEC Whistleblower Program is invalid.

165. Under Rule 102(e)(1)(iii) of the SEC’s Rules of Practice, the SEC “may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.” SEC Rules of Practice, Rule 102(e)(1)(iii), 17 C.F.R. § 201.102(e)(1)(iii) (2013).

166. While this Article is focused on contractual provisions that deter SEC whistleblowing, such provisions also undermine the effectiveness of similar whistleblower reward programs. Accordingly, the CFTC and IRS should consider issuing guidance barring these types of provisions. Furthermore, the General Services Administration should consider amending the Federal Acquisition Regulations to bar these types of provisions in any agreement between a government contractor and an employee of the contractor.

167. For this reason, one of the authors of this Article, Jordan Thomas, along with the nonprofit whistleblower advocacy organization Government Accountability Project, has submitted a rule-making petition to the SEC seeking such an amendment to Rule 21F-17(a). See SEC File No. 4-676; SEC File No. 4-677 (July 18, 2014).

168. See OCCUPATIONAL SAFETY & HEALTH ADMIN., WHISTLEBLOWER INVESTIGATIONS MANUAL 6–11 (2011) (“OSHA will not approve a ‘gag’ provision that restricts the complainant’s ability to participate in investigations or testify in proceedings relating to matters that arose during his or her employment. When such a provision is encountered, the parties should be asked to remove it or to replace it with the following: ‘Nothing in this Agreement is intended to or must prevent, impede or interfere with Complainant’s providing truthful testimony and information in the course of an investigation or proceeding authorized by law and conducted by a government agency.’”).

169. For this reason, one of the authors of this Article, Jason Zuckerman, along with the Government Accountability Project, has submitted a rule-making petition to OSHA seeking such an amendment.
Such guidance from the SEC and OSHA would provide additional clarity for both employers and employees, and help protect the efficacy of the SEC Whistleblower Program. If the SEC Whistleblower Program is to fulfill its goal of better protecting investors, it must be allowed to function as Congress intended, without being constrained by private agreements. The public policy behind Dodd-Frank is too significant to allow for any other result.
Whose Privilege Is It Anyway: How the Fiduciary Exception to the Attorney-Client Privilege Protects ERISA Participants and Beneficiaries

Tyrone Crawford*

I. Introduction

The fiduciary exception to the attorney-client privilege renders discoverable certain documents otherwise protected from disclosure.1 As applied in the Employee Retirement Income Security Act of 19742 (ERISA) context, the fiduciary exception provides that “an employer acting in the capacity of ERISA fiduciary is disabled from asserting the attorney-client privilege against plan beneficiaries on matters of plan administration.”3 Litigation regarding the fiduciary exception in the ERISA context is nothing novel; however, a dispute has arisen over whether the fiduciary exception applies to insurance companies making benefit determinations.4 In Wachtel v. Health Net, Inc., the Third Circuit ruled that the fiduciary exception did not apply to insurance companies making benefit determinations,5 thereby protecting

---

* Tyrone Crawford is an attorney-advisor with the Federal Retirement Thrift Investment Board (FRTIB). The author thanks his colleagues, Charles Hughes, Vince Kan, Frances Smith, and Joan Smuda, for their helpful comments; Professors Julie Jagla and Mark DeBofsky for their guidance and suggestions for publication; and Sydney Hull for her love, support, and encouragement. Lastly, the author wishes to thank his mother, Sheila Crawford, for always being there no matter the circumstances. Thanks, Mom. The views and opinions expressed in this article are those of the author and do not reflect the official policy or position of the FRTIB, its employees or Board Members, or any contractor or any affiliate of any contractor that does business with the FRTIB.

5. See 482 F.3d at 225–26.
insurance companies from disclosure of documents needed by plaintiffs. Nevertheless, the Third Circuit’s reasoning is inconsistent with the aims of ERISA and indefensible when compared to ERISA’s legislative history.\(^6\) On the other hand, in *Stephan v. Unum Life Insurance Co.*,\(^7\) the Ninth Circuit reached the opposite conclusion, holding that the fiduciary exception does apply to insurance companies when making benefit determinations.\(^8\) The rationale of the Ninth Circuit’s holding is consistent with ERISA’s objectives. The fiduciary exception is necessary because it promotes transparency by insurance companies making benefit determinations.

Part II of this Article describes ERISA fiduciaries and their duties. Part III presents the history and purpose of the attorney-client privilege and a brief historical overview of the fiduciary exception. Parts IV and V discuss the *Wachtel* and *Stephan* decisions, and Part VI analyzes the reasoning of the Third and Ninth Circuits and explains why the Third Circuit reached the incorrect result. Part VII refutes the arguments of authors who desire eliminating or narrowing the fiduciary exception. Part VII also suggests guidance on when the fiduciary exception is likely to be applied based on the Third and Ninth Circuits’ legal conclusions and discusses two post-*Wachtel* and *Stephen* district court opinions.

### II. Who Is the ERISA Fiduciary?

Congress listed three instances in which ERISA classifies an individual or entity as a fiduciary:

\[\text{[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.}\(^9\)

However, “[f]iduciary status . . . is not an all-or-nothing-concept. . . . [A] court must ask whether a person is a fiduciary with respect to the particular activity in question.”\(^10\) Every benefit plan document subject to ERISA must designate a “named fiduciary” with the authority to con-

---

\(^6\) See *infra* notes 208–15.

\(^7\) 697 F.3d 917.

\(^8\) Id. at 931.


\(^10\) Maniace v. Commerce Bank of Kansas City, 40 F.3d 264, 267 (8th Cir. 1994) (quoting Kerns v. Benefit Trust Life Ins. Co., 992 F.2d 214, 217 (8th Cir. 1993) (quotation marks omitted)).
control and manage the operations of the plan.\textsuperscript{11} Congress defined the named fiduciary as

a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.\textsuperscript{12}

Nonetheless, ERISA regulations label other entities that act in a fiduciary capacity as fiduciaries, regardless of whether they are named in the plan documents. One author termed this type of fiduciary the “de facto fiduciary.”\textsuperscript{13} Additionally, two decades ago, the Supreme Court held that fiduciary status is a functional test that centers on a person’s action or authority, not solely on the formal designation.\textsuperscript{14}

Thus, ERISA may deem anyone a fiduciary who exerts or has any discretionary authority or control over plan administration or assets. In addition, ERISA may classify a person as a fiduciary with respect to certain matters, but not others.\textsuperscript{15} Since a functional test determines fiduciary status under ERISA, fiduciary status can become quite fact-intensive.\textsuperscript{16} Nonetheless, the Supreme Court has held that fiduciary status should be liberally construed.\textsuperscript{17} Moreover, a person need not

\begin{itemize}
  \item \textsuperscript{11} 29 U.S.C. § 1102(a)(1) (2012).
  \item \textsuperscript{12} Id. § (a)(2).
  \item \textsuperscript{13} José María Jara, What Is the Correct Standard of Prudence in Employer Stock Cases?, 45 J. MARSHALL L. REV. 541, 552 (2012) (ERISA can label an unnamed entity as a fiduciary).
  \item \textsuperscript{14} See Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993); Aetna Health Inc. v. Davila, 542 U.S. 200, 220 (2004) (reiterates the Mertens ruling eleven years later, stating, “any entity with discretionary authority over benefits determinations as anything but a plan fiduciary would thus conflict with ERISA’s statutory and regulatory scheme”).
  \item \textsuperscript{15} In re Citigroup ERISA Litig., 662 F.3d 128, 140 (2d Cir. 2011); Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co., 302 F.3d 18, 25 (2d Cir. 2002) (“We do not believe that ‘discretionary authority’ can be read to include any concession a plan administrator could gratuitously make to a plan’s trustee. We conclude instead that ‘[t]he “management or disposition” language in ERISA refers to the common transactions in dealing with a pool of assets: selecting investments, exchanging one instrument or asset for another, and so on.’”) (quoting Johnson v. Ga.-Pac. Corp., 19 F.3d 1184, 1189 (7th Cir. 1994)) (citing Siskind v. Sperry Ret. Program, Unisys, 47 F.3d 498, 505 (2d Cir. 1995)) (“O]nly when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration” does a person become a fiduciary under ERISA.).
  \item \textsuperscript{17} Mertens, 508 U.S. at 262; John Hancock Mut. Life Ins. v. Harris Trust & Sav. Bank, 510 U.S. 86, 96 (1993); see also Am. Fed. of Unions Local 102 Health & Welfare
possess final decision-making authority; the test only requires that the individual have some discretionary authority or control.\textsuperscript{18} Being an ERISA fiduciary means more than just having responsibility for matters of plan administration; it also means being bound to the express and implied ERISA duties.

A. Enumerated Fiduciary Duties

ERISA imposes four obligations on fiduciaries: (1) exclusive purpose, otherwise known as the duty of loyalty; (2) prudence, otherwise known as the duty of care; (3) the duty to diversify plan assets; and (4) the duty to follow the terms of the plan.\textsuperscript{19} First, the exclusive purpose rule requires fiduciaries to act for the sole purpose of providing plan benefits.\textsuperscript{20} It limits the use of plan assets to pay plan benefits and expenses that are reasonable and relate only to plan activities.\textsuperscript{21} That rule is further expanded by the ERISA ban on “prohibited transactions,” which codified a common law list of potential conflict-of-interest situations.\textsuperscript{22} As expressed by one author: “[t]his ‘exclusive benefit’ rule embodies the common law duty of loyalty.”\textsuperscript{23}

Second, the ERISA fiduciary must also satisfy the duty of prudence, a long-standing legal concept.\textsuperscript{24} Pursuant to ERISA, a fiduciary must act with the “care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”\textsuperscript{25} Courts have determined whether a person is prudent by examining conduct, and not by whether an investment succeeded or failed.\textsuperscript{26}

---

\textsuperscript{18} Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 113 (1989) (ERISA “do[es] not characterize a fiduciary as one who exercises entirely discretionary authority or control. Rather, one is a fiduciary to the extent he exercises any discretionary authority or control.”).


\textsuperscript{20} Id.

\textsuperscript{21} Id.

\textsuperscript{22} Jara, supra note 13, at 562; \textit{see also} Ershick v. United Mo. Bank of Kan. City, N.A., 948 F.2d 660, 671 (10th Cir. 1991) (“The court will not create a . . . conflict of interest where Congress and precedent have not indicated one.”).

\textsuperscript{23} Jara, \textit{supra} note 13, at 561–62.

\textsuperscript{24} \textit{Id.} at 564. The “prudent man” rule as it relates to funds entrusted to a fiduciary began in 1830 with \textit{Harvard College v. Amory}, 26 Mass. 446, 461 (1830) (“All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.”). \textit{Id.} (citing Hall v. Cushing, 26 Mass. 395 (1830)).


\textsuperscript{26} Keach v. U.S. Trust Co., 419 F.3d 626, 638 (7th Cir. 2005) (quoting DeBruyne v. Equitable Life Assurance Soc’y of the U.S., 920 F.2d 457, 465 (7th Cir. 1990) (ERISA’s fiduciary duty of care “requires prudence, not prescience“)).
Third, ERISA fiduciaries have an obligation to diversify plan assets “so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.”27 However, ERISA does not prescribe actual percentage limits for plan investments.28 Therefore, plan fiduciaries are expected to examine such factors as “(i) the amount of plan assets; (ii) the cash flow needs of the plan; and (iii) the composition of the plan’s investment portfolio as a whole.”29

Finally, the ERISA fiduciary must follow the plan document. ERISA fiduciaries must discharge their duties “in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA].”30 Therefore, an ERISA fiduciary must follow the terms of the plan document unless the plan is inconsistent with ERISA.31

B. The Implied Duty of Disclosure

A fiduciary also has a duty of disclosure, although Congress did not expressly identify this duty in ERISA. “[R]ather than explicitly enumerating all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility.”32 At common law, there is “an obligation on the part of the trustee to provide full and accurate information to the beneficiary on his management of the trust.”33 In fact, since the first Restatement of Trusts, there has existed a trustee’s obligation to disclose to beneficiaries the advice of counsel retained by the trust.34 That responsibility requires the trustee to provide the beneficiary, upon request, with “any communications with an attorney that are intended to assist in the administration of the trust.”35 This

28. Jara, supra note 13, at 566; see also Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1094 (9th Cir. 2004).
29. Jara, supra note 13, at 566 (quoting Howard Pianko, Elements of ERISA Litigation—Ps, Bs and Other Players, 526 PLI/Tax 197, 219 (2002)).
31. Wright, 360 F.3d at 1100 (“ERISA requires fiduciaries to comply with a plan as written unless it is inconsistent with ERISA.”); see also White v. Sundstrand Corp., 256 F.3d 580, 583 (7th Cir. 2001) (“The employer’s fiduciary duty, as plan administrator, is to implement faithfully the provisions of the plan as written.”); Sedlack v. Braswell Servs. Grp. Inc., 134 F.3d 219, 225 (4th Cir. 1998) (“[A]dherence to an ERISA controlled plan is not a breach of fiduciary duty.”).
34. Wachtel v. Health Net, Inc., 482 F.3d 225, 236 (3d Cir. 2007); see also Restatement (First) of Trusts § 173 (1935); Restatement (Second) of Trusts § 173 (1959); Restatement (Third) of Trusts § 82, cmt. a (Tentative Draft No. 4, 2005).
35. Martin, 140 F.R.D. at 322 (citing GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 961 at 11 (2d ed. 1993)).
duty requires the ERISA fiduciary to provide full and accurate information to the plan beneficiaries regarding plan administration.\textsuperscript{36} The duty to disclose becomes particularly challenging when the attorney-client privilege can bar disclosure of this information.

III. What Are the Attorney-Client Privilege and the Fiduciary Exception?

A. Attorney-Client Privilege

The attorney-client privilege is the oldest privilege for confidential communications created at common law.\textsuperscript{37} “Federal Rule of Evidence 501 provides that ‘the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.’”\textsuperscript{38} The privilege encourages full and frank communication between attorneys and their clients, to promote the broader public interests in the observance of law and the administration of justice.\textsuperscript{39} In \textit{Upjohn Co. v. United States}, the Supreme Court articulated the privilege’s underlying motivation: “The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”\textsuperscript{40} The rationale for the privilege dates back to 1888 in \textit{Hunt v. Blackburn}.\textsuperscript{41} In \textit{Hunt}, the defendant, claimed that her attorney’s advice misled her and left her ignorant of her rights as a defense in an underlying property dispute.\textsuperscript{42} At the time of the trial, she objected to her attorney testifying on account of the attorney-client privilege.\textsuperscript{43} The Supreme Court held that, by voluntarily testifying about what transpired between her and her attorney, she waived the attorney-client privilege and could not prevent her attorney from giving his “own account of the matter.”\textsuperscript{44}

\begin{footnotes}
\footnotetext[37]{8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (McNaughton Rev. 1961).}
\footnotetext[39]{Id. at 389.}
\footnotetext[40]{Id.; see also Trammel v. United States, 445 U.S. 40, 51 (1980) (“The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.”); Fisher v. United States, 425 U.S. 391, 403 (1976) (the purpose of the privilege is to encourage clients to make full disclosures to their attorneys).}
\footnotetext[41]{128 U.S. 464, 470 (1888) (privilege “is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure”).}
\footnotetext[42]{Id.}
\footnotetext[43]{Id.}
\footnotetext[44]{Id. at 470–71 (“[T]he privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets; and if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney.”).}
\end{footnotes}
The attorney-client privilege “prevents disclosure of communications between an attorney and client that [are] made while seeking or rendering legal services.” As explained by one district judge:

The elements necessary to establish that material is protected by the federal attorney-client privilege are: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made is (a) a member of a bar of a court, or his subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) or assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

The party asserting the privilege carries the burden of showing how each document meets the requirements of the privilege, including confidentiality and lack of waiver by breach of confidentiality. Moreover, the privilege contains an intent requirement and mandates that the communication actually remain confidential; a privileged communication loses its protection if it is shared with a third party who does not have a common legal interest.

The privilege, however, is not so broad and encompassing as to preclude discovery of all documents or communications between clients and their attorneys: “it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege.” The privilege only protects attorney-client communications, not information contained within the communications. Therefore, a client may not decline disclosure of documents or facts merely because they are deposited with an attorney. On the other hand.

---


46. Robinson, 214 F.R.D. at 438; see also United States v. El Paso Co., 682 F.2d 530, 538 (5th Cir. 1982); In re Grand Jury Proceedings, 517 F.2d 666, 670 (5th Cir. 1975).

47. Hodges, Grant, & Kaufmann v. U.S. Gov’t, Dep’t of the Treasury, IRS, 768 F.2d 719, 721 (5th Cir. 1985); In re Grand Jury Proceedings, 680 F.2d 1026, 1029 (5th Cir. 1982); see also Fed. R. Civ. P. 26(b)(5) (advisory committee note); Conkling v. Turner, 883 F.2d 431, 434 (5th Cir. 1989) (privilege can be waived by failing to include notice that documents are being withheld due to privilege).

48. Robinson, 214 F.R.D. at 439 (the intent that the communication remain confidential is essential); see In re Auclair, 961 F.2d 65, 69 (5th Cir. 1992); New Orleans Saints v. Griesedieck, 612 F. Supp. 59, 63 (E.D. La. 1985) (“the presence of [persons] who are neither partners nor clients, negate[s] the confidential element” necessary to the privilege).

49. Fisher v. United States., 425 U.S. 391, 403 (1976) (citing generally In re Horowitz, 482 F.2d 72 (2d Cir. 1973)).

50. See generally Paul R. Rice et al., Attorney-Client Privilege in the United States § 5.1 (2d ed. 2009).

hand, attorney-client communications do not lose their privilege because they contain nonprivileged facts or consist of otherwise nonprivileged documents.52 The attorney-client privilege serves as an important tool in the administration of justice; however, the privilege can also undermine the same administration of justice it was designed to uphold. Such an injustice may occur when a court applies the privilege to prevent ERISA plan participants from acquiring information held by ERISA fiduciaries.

ERISA fiduciaries can use the attorney-client privilege to impose a significant hurdle upon plan beneficiaries seeking documents necessary to overturn adverse benefit determinations. Courts, however, have warned that parties cannot use the attorney-client privilege to narrow the fiduciary duty of disclosure owed to plan beneficiaries.53 The defendants in Martin v. Valley National Bank of Arizona tried that tactic.54 There, the defendant bank retained two attorneys: one for the bank and one for the employee stock ownership plan (ESOP) trust.55 The bank’s plan was to consult with its own attorney to protect its own interests even as it served as ESOP trustee.56 Normally this practice would be acceptable; however, the bank’s private attorneys counseled the bank on private matters, as well as discussing matters of trust management.57 The Secretary of Labor stated if such an arrangement were permitted, a trustee would be able to avoid scrutiny “by the beneficiaries of the legal advice that it was seeking and obtaining in connection with the performance of its duties.”58 In other words:

[B]y retaining an attorney paid by the trust as nominal counsel while at the same time maintaining a separate relationship with another firm to which it actually looked for guidance in carrying out its fiduciary duties, the trustee could improperly shield the very communications that the law of trusts instructs must be available to the beneficiaries of the trust.59

Ultimately, the Martin court agreed with the Secretary.60

55. Id. at 324.
56. Id.
57. Id.
58. Id.
59. Id.
60. Id. (assertion of attorney-client privilege by a fiduciary that attempted “to protect its own interests by consulting in confidence its own privately hired attorneys” on matters of plan administration rejected).
In *Wachtel*, however, the Third Circuit permitted precisely what the Secretary of Labor feared in *Martin* and allowed the trustee improperly to shield communications from beneficiaries. Under ERISA, a plan participant or beneficiary is entitled to a full and fair review of an adverse benefit determination. Participants and beneficiaries cannot take advantage of their right under ERISA if they do not have all of the documents for a full and fair review. This is why the fiduciary exception to the attorney-client privilege is important: the exception makes critical documents available to the participant and beneficiary.

**B. The Fiduciary Exception**

The fiduciary exception to the attorney-client privilege has its genesis in an English trust law case, *Talbot v. Marshfield*. In the United States, the leading case is *Riggs National Bank v. Zimmer*. In *Riggs National Bank*, beneficiaries brought suit against their estate trustees for suspected breaches of the trust in regard to specific tax matters. During the court proceedings, the beneficiaries asked the trustees to produce a legal opinion pertaining to the potential tax litigation on behalf of the trust with the Delaware Division of Revenue. Eventually, the court ordered the trustees to produce the document, reasoning the trustees were not the “real clients.” However, the court was cautious to note that the legal advice “was prepared ultimately for the benefit of the beneficiaries of the trust and [n]ot for the purpose of the trustees’ own defense in any litigation against themselves.” Since *Riggs National Bank*, a number of circuits have adopted the fiduciary exception. In addition, the fiduciary exception has two distinct rationales in the ERISA context.

---

62. 12 L.T.R. 761, 762 (Ch. 1865) (The Court reasoned there were two items of legal advice—one dispensed to trustees prior to any threat of suit, advising them regarding the propriety of paying advances to the children of the testator, and one dispensed after the commencement of suit, aimed at advising them “how far they were in peril.” The English court required the trustees to produce the first item, but not the second.); see also *Restatement (Second) of Trusts* § 173, cmt. b (1959) (a trustee “is privileged to refrain from communicating to the beneficiary opinions of counsel obtained by him at his own expense and for his own protection”).
63. 355 A.2d 709 (Del. Ch. 1976).
64. Id. at 710.
65. Id.
66. Id. at 714.
67. Id. at 711.
In some courts the exception derives from an ERISA trustee’s duty to disclose all information to beneficiaries regarding plan administration. That rationale explains the fiduciary exception as the attorney-client privilege losing to a competing legal principle. In contrast, other courts focus on the role of the trustee and embrace the idea that “[a]s a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served.” Understood in this manner, the fiduciary exception is not really an “exception” to the attorney-client privilege, but instead it reflects the fact that a trustee is not the “real client” and never enjoyed the privilege in the first place with respect to advice related to plan administration. Nonetheless, federal courts did not begin to extend the fiduciary exception to ERISA fiduciaries until the 1980s. The fiduciary exception as applied to entities serving as ERISA fiduciaries is now the law in several circuits. Although the fiduciary exception appears to have very broad applicability, courts have recognized at least two situations inappropriate for the exception.

The first of these instances is the liability exception, in which a fiduciary is seeking the advice of counsel for its own personal defense in consideration of adversarial proceedings against its beneficiaries. Second, under the settlor exception, the courts must distinguish between settlor acts and fiduciary acts, with the former involving matters of adoption, modification, or termination of an employee benefit plan, the latter being discretionary acts of plan administration. Courts have determined that the fiduciary exception, which makes documents discoverable, does not apply to settlor acts because those functions are more akin to a nonfiduciary trust settlor than a

70. Id.
71. Id.
73. Mett, 178 F.3d at 1063.
74. See, e.g., Wash. Star Co., 543 F. Supp. at 909 (“When an attorney advises a fiduciary about a matter dealing with the administration of an employees’ benefit plan, the attorney’s client is not the fiduciary personally but, rather, the trust’s beneficiaries.”); Donovan v. Fitzsimmons, 90 F.R.D. 583, 585–86 (N.D. Ill. 1981) (if beneficiaries sue their fiduciaries alleging breaches of duty, the attorney-client privilege does not attach to legal advice rendered to the fiduciaries for assistance in the performance of fiduciary duties.).
75. Solis v. Food Emp’rs Labor Relations Ass’n, 644 F.3d 221 (4th Cir. 2011); Bland v. Fiattalis N. Am. Inc., 401 F.3d 779, 787–88 (7th Cir. 2005); Mett, 178 F.3d at 1062; Becher, 129 F.3d at 272; Wildbur v. ARCO Chem. Co., 974 F.2d 631, 645 (5th Cir. 1992).
trustee.\textsuperscript{78} Therefore, when the liability exception and the settlor exception apply, documents will not be discoverable. As the Third Circuit explained:

These two exceptions to the fiduciary exceptions share a common justification—both allow the attorney-client privilege to remain intact for an ERISA fiduciary when its interests diverge sufficiently from those of the beneficiaries that the justifications for the fiduciary exception no longer outweigh the policy underlying the attorney-client privilege. The beneficiaries are no longer the real clients, and disclosure of attorney-client communications is no longer an obligation.\textsuperscript{79}

The fiduciary exception to the attorney-client privilege is not without limits; however, its applicability to insurance companies was an issue of first impression in both the Third and Ninth Circuits, and those circuits reached opposite conclusions.

\textbf{IV. Wachtel v. Health Net, Inc.}

The Third Circuit was the first federal appellate court to consider whether the fiduciary exception applied to insurance companies making benefit determinations. In \textit{Wachtel}, the issue was whether the fiduciary exception applies to all fiduciaries under ERISA with equal force.\textsuperscript{80} Health Net of New Jersey (HN-NJ) sold and maintained health insurance policies for employee benefit plans.\textsuperscript{81} HN-NJ was a subsidiary of Health Net of Northeast, Inc. (HN-NE), which is part of the larger corporate parent Health Net, Inc. (HNI).\textsuperscript{82} When either subsidiary processed a claim, that subsidiary would, if appropriate, pay the claim from its own funds, not the parent’s funds.\textsuperscript{83} Analogously, within the context of the privilege issue, just as the entity responsible for covering the claim made the claim payment, the entity requesting legal advice paid for the legal advice.\textsuperscript{84} The employees filed a complaint alleging the insurance company relied on antiquated data and improper methods to define the usual, customary, and reasonable charges, thereby violating New Jersey law and Health Net’s fiduciary duties under ERISA.\textsuperscript{85} The plaintiffs sought to recover benefits, redress alleged violations of fiduciary duties, and penalize the defendant for failing to supply information to the beneficiaries.\textsuperscript{86} The district court appointed a special master to examine allegedly privileged discovery documents to determine if the plaintiffs could acquire the documents

\begin{itemize}
\item \textsuperscript{78} See, e.g., \textit{Spink}, 517 U.S. at 891; \textit{Bland}, 401 F.3d at 787–88.
\item \textsuperscript{79} \textit{Wachtel v. Health Net, Inc.}, 482 F.3d 225, 234 (3d Cir. 2007).
\item \textsuperscript{80} \textit{Id.} at 230.
\item \textsuperscript{81} \textit{Id.} at 227.
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} \textit{Id.}
\item \textsuperscript{84} \textit{Id.}
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{Id.}
\end{itemize}
The special master determined that the work-product and attorney-client doctrines protected some documents, and then considered whether the fiduciary exception applied. Although not then yet addressed in the Third Circuit, the special master applied the fiduciary exception to the defendants and ruled that some of the communications were related to fiduciary acts and were not prepared in anticipation of litigation against the plaintiffs. The defendants appealed the special master’s order to produce those documents. The district court accepted the special master’s report and recommendation and determined HNI was a fiduciary because it exerted sufficient control over the day-to-day operations of HN-NJ. HNI appealed the district court’s ruling arguing that “the fiduciary exception recognized at common law does not apply to every entity which is designated a fiduciary under ERISA.” Moreover, “an insurance company which contracts with multiple employee benefit plans to provide health insurance to employee-beneficiaries, processes and pays claims using its own assets, obtains legal advice using its own funds, and operates with an eye toward profits—falls outside the scope of the fiduciary exception.”

The Third Circuit agreed with HNI, concluding that the fiduciary exception does not apply to “an insurer like HN-NJ and its corporate parents because the plaintiff-beneficiaries are not the ‘real’ clients obtaining legal representation.” Additionally, the court pointed out that “[there are] significant differences . . . between insurance company fiduciaries, such as [the defendants] and other ERISA fiduciaries to whom the exception has been applied.” The Third Circuit’s decision hinges on who is the “real” client. As a result, the Third Circuit articulated four factors that weighed in favor of the insurer ERISA fiduciary, as the “real” client, being exempt from the fiduciary exception: (1) unity of ownership and management, (2) conflicting interests regarding profits, (3) conflicting fiduciary obligations, and (4) payment of counsel with the fiduciary’s own funds. After concluding that the defendants were the “real” clients, the court examined whether the fiduciary’s duty of disclosure would justify the fiduciary exception,

87. Id. at 227–28.
88. Id. at 228.
89. Id.
90. See id.
91. Id.
92. See id. at 230.
93. Id.
94. Id. at 226.
95. Id. at 234.
96. Id.
97. Id. at 234–36.
98. Id.
thereby allowing the employees to access the documents in discovery. The court acknowledged that “[s]ome courts have used language broad enough to suggest that every ERISA fiduciary has an obligation to disclose counsel’s statements to its beneficiaries.” Ultimately, however, the court concluded that this broad language did not represent an expansion of the fiduciary exception. The court reasoned that Congress did not intend to bind insurance companies transacting business with ERISA-regulated plans to the same disclosure obligations of trustees at common law.

The court cited two additional reasons for not applying the fiduciary exception to the insurance company. “First, the fiduciary obligations of insurers who contract with ERISA plans are not well-settled at law.” This uncertainty, according to the court, would cause the attorney-client privilege to depend on difficult substantive questions, and thus result in no privilege at all. “Second, an expansive and uncertain attorney-client privilege for insurer-fiduciaries will cause insurers to reevaluate their relationships with ERISA plans.” As a result of this reevaluation, the court predicted that some insurers may refuse to do business with ERISA-regulated plans or raise rates. The court concluded that “[n]one of these outcomes is desirable for ERISA beneficiaries.” Consideration of all of these factors led the Third Circuit to hold that the fiduciary exception should not apply to insurance companies acting as ERISA fiduciaries.

V. Stephan v. Unum Life Insurance Co.

Five years after Watchel, the Ninth Circuit addressed the same issue: whether the fiduciary exception applies to insurance companies making benefit determinations. In Stephan, a long-term disability plan participant challenged a benefit calculation. The plan based benefits on salary, but not bonuses. The plaintiff moved to compel discovery of internal memoranda that the defendant’s in-house counsel

---

99. Id. at 236.
100. Id. (emphasis omitted); see, e.g., Becher v. Long Island Lighting Co., 129 F.3d 268, 271–72 (2d Cir. 1997) (“An ERISA fiduciary has an obligation to provide full and accurate information to the plan beneficiaries regarding the administration of the plan.”).
101. See Watchel, 482 F.3d at 236.
102. See id.
103. Id. at 237.
104. Id. (“An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”) (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)).
105. Id.
106. Id.
107. Id.
108. Stephan v. Unum Life Ins. Co. of Am., 697 F.3d 917, 931 (9th Cir. 2012).
109. Id. at 922–23.
110. Id.
created at the request of the claims analyst making a determination on the claim. \(^{111}\) The plaintiff sought through discovery to determine whether a conflict of interest infiltrated the decision-making process. \(^{112}\) The district court initially ruled that, absent the attorney-client privilege, the plaintiff should have access to certain documents in discovery because they would be helpful in determining whether and to what extent the defendant was operating under a conflict of interest. \(^{113}\) The court decided the fiduciary exception was inapplicable because the plaintiff and the defendant had sufficiently divergent interests when its in-house counsel created the documents; therefore, the defendant need not produce the documents. \(^{114}\) The court subsequently granted the defendant’s motion for summary judgment on the merits and denied the plaintiff’s motion. The plaintiff appealed the decision on the merits as well as the adverse privilege ruling. \(^{115}\)

The Ninth Circuit reversed the district court’s holding and ruled the fiduciary exception applied to the defendant, thereby rendering the documents subject to discovery. \(^{116}\) The court held that “[t]he justifications [that except] ERISA fiduciaries from [the] attorney-client privilege apply equally to insurance companies.” \(^{117}\) The Ninth Circuit applied the standard reasoning for the fiduciary exception, noting that courts have given two reasons for applying an exception to the attorney-client privilege to ERISA fiduciaries. First, “the exception derives from an ERISA trustee’s duty to disclose to plan beneficiaries all information regarding plan administration.” \(^{118}\) Under that rationale, “the attorney-client privilege is subordinated to the fiduciary’s disclosure obligation.” \(^{119}\) Second, “[o]ther courts have’ reasoned that because the ERISA fiduciary is ‘a representative for the beneficiaries of the trust which he is administering,’ it is not the fiduciary, but rather the plan beneficiary that is the ‘real client.’” \(^{120}\) Therefore, the fiduciary exception is not really an exception at all. \(^{121}\) The “[a]ttorney-client privilege is maintained; there is only a different understanding of the identity of the client.” \(^{122}\)

Most importantly, the court reasoned that neither justification provides a basis for distinguishing insurance companies serving as

---

111. Id. at 930.
112. Id. at 934.
113. See id. at 923.
114. See id.
115. See id.
116. See id. at 932–33.
117. Id. at 931.
118. Id.
119. Id. at 932.
120. Id. (quoting United States v. Mett, 178 F.3d 1058, 1063 (9th Cir. 1999)).
121. Id.
122. Id.
ERISA fiduciaries from ERISA trustees serving in the same capacity.\textsuperscript{123} The court focused on ERISA’s broad disclosure obligations and found the requirements allow for every employee benefit plan to afford a reasonable opportunity to receive a full and fair review of the appropriately named ERISA fiduciary’s decision when companies deny participants benefits.\textsuperscript{124} That obligation does not change because of the identity of the fiduciary.\textsuperscript{125} Furthermore, the court found no principled basis for excluding insurance companies from the fiduciary exception.\textsuperscript{126}

The court then discussed the limit of the fiduciary exception.\textsuperscript{127}\textsuperscript{127} Although the fiduciary exception precludes an employer acting in the capacity of an ERISA fiduciary from asserting the attorney-client privilege against plan beneficiaries, it is limited to matters of plan administration.\textsuperscript{128} The court deduced, however, that in situations in which the company creates documents after the fiduciary and the beneficiary developed an adversarial relationship, the attorney-client privilege remained.\textsuperscript{129} The court further asserted that no binding precedent exists for when the fiduciary and the beneficiaries’ interests become sufficiently adverse to defeat the fiduciary exception.\textsuperscript{130} On the other hand, courts “have repeatedly rejected the argument that the prospect of post-decisional litigation is enough to overcome the fiduciary exception.”\textsuperscript{131} Alternatively, “[m]ost courts have held that it is not until after the final determination—that is, after the final administrative appeal—that the interests of the plan fiduciary and the beneficiary diverge for purposes of application of the fiduciary exception.”\textsuperscript{132} Only at this point does it follow that a party will proceed to the adversarial setting of court.

The Ninth Circuit acknowledged that several other federal district courts have considered the fiduciary exception’s applicability to insurance companies.\textsuperscript{133} The Ninth Circuit noted that every district court that considered that issue had rejected Wachtel’s approach and

\footnotesize{\textsuperscript{123} Id.  
\textsuperscript{124} Id.; see also 29 U.S.C. § 1133(2) (2012).  
\textsuperscript{125} Stephan, 697 F.3d at 932.  
\textsuperscript{126} See id.  
\textsuperscript{127} See id.  
\textsuperscript{128} Id. (quoting United States v. Mett, 178 F.3d 1058, 1064 (9th Cir. 1999)).  
\textsuperscript{129} Id. at 933 (quoting Mett, 178 F.3d at 1064).  
\textsuperscript{130} Id.  
\textsuperscript{132} Stephan, 697 F.3d at 933; see Klein, 806 F. Supp. 2d at 1132.  
held that the fiduciary exception applies to insurance companies.\textsuperscript{134} The Ninth Circuit followed suit and rejected the Third Circuit’s conclusion.\textsuperscript{135}

VI. Analysis: Why Was the Third Circuit’s Decision in Watchel Incorrect?

A comparison of the Ninth Circuit’s and the Third Circuit’s rationales reveals that, although they both considered some of the same issues, the Third Circuit made several errors when analyzing the applicability of the fiduciary exception. Those mistakes range from ignoring relevant facts and legislative history to crafting factors engineered to give the insurance company an advantage in retaining the attorney-client privilege. Those errors caused the court to incorrectly conclude that the fiduciary exception does not apply to insurance companies making benefit determinations. Below is a discussion of those errors, and how the Third Circuit’s reasoning compares to the Ninth Circuit’s analysis as both courts addressed similar issues.

A. Mistake #1: Incorrect Identification of Fiduciary Status

First, although the Third Circuit correctly identified the insurance company as a fiduciary generally, the court incorrectly determined that the insurance company was not a fiduciary with respect to plan administration.\textsuperscript{136} Yet, the insurance company processed claims, decided claims, and paid claims to participants in accordance with its policies.\textsuperscript{137} The Supreme Court held in \textit{Aetna v. Davila} that a benefit determination under ERISA is generally a fiduciary act.\textsuperscript{138} “At common law, fiduciary duties characteristically attach to decisions about managing assets and distributing property to beneficiaries.”\textsuperscript{139} The Court stated that “a benefit determination is part and parcel of the ordinary fiduciary responsibilities connected to the administration of a plan.”\textsuperscript{140} In addition, the Court explained that a “plan administrator ‘engages in a fiduciary act when making a discretionary determination about whether a claimant is entitled to benefits under the terms of the

\textsuperscript{134} See Stephan, 697 F.3d at 931 n.6.

\textsuperscript{135} See id.

\textsuperscript{136} See Wachtel v. Health Net, Inc., 482 F.3d 225, 230 (3d Cir. 2007) (“We need not examine the particulars of the fiduciary obligations of the Health Net companies, except to note that HN-NJ is not a plan administrator or trustee.”).

\textsuperscript{137} Id. at 227.


\textsuperscript{139} Aetna, 542 U.S. at 218 (quoting Pegram v. Herdrich, 530 U.S. 211, 231 (2000)); see also Bogert & Bogert, supra note 35, § 541.

\textsuperscript{140} Aetna, 542 U.S. at 219 (quoting Varity Corp v. Howe, 516 U.S. 489, 512 (1996)) (“[R]elevant plan fiduciaries owe a ‘fiduciary duty with respect to the interpretation of plan documents and the payment of claims.’”).
plan documents."141 That conclusion is consistent with ERISA, which clearly provides that a person or entity becomes an ERISA fiduciary by exercising discretionary control or authority over plan management or assets.142 In Watchel, the fact that the insurance company decided and paid claims indicates that it had discretionary authority or control over plan assets, thus making it an ERISA fiduciary.143 Consequentially, the insurance company engaged in benefit determinations—a matter of plan administration—and the court should have required the company to produce the documents pursuant to the fiduciary exception to the attorney-client privilege. What is more surprising about the court’s inaccurate conclusion is that the court correctly identified the role an insurance company plays with respect to an ERISA regulated plan:

[A]n insurer providing benefits to the beneficiaries of an ERISA-regulated plan is no differently situated than a plan administrator or an ERISA trustee. All are considered to be fiduciaries under ERISA, and all owe duties of loyalty and care to their beneficiaries. Because they are fiduciaries, they must act in furtherance of their beneficiaries’ interests.144

Despite making that accurate assessment, the Third Circuit created a fourth type of fiduciary under ERISA: the insurance company ERISA fiduciary. Other courts, however, have held there are only three types of fiduciaries under ERISA.145 Nonetheless, the court correctly pointed out that, unlike other ERISA fiduciaries who must adhere to the trust requirement, insurance companies do not need to hold assets in trust.146 Neither this trust exemption nor any other provision, however, statutorily exempts insurance companies acting as ERISA fiduciaries from fulfilling other

141. Id. at 220 (quoting Varity Corp., 516 U.S. at 511).
143. See Watchel v. Health Net, Inc., 482 F.3d 225, 230 (3d Cir. 2007); see, e.g., Bannister v. Ullman, 287 F.3d 394, 401 (5th Cir. 2002) (a person is a fiduciary under ERISA only with respect to those aspects of the employee benefit plan over which the person exercises authority or control); Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co., 302 F.3d 18, 28 (2d Cir. 2002) (a person may be a fiduciary with respect to certain matters but not others). But cf. Fechter v. Conn. Gen. Life Ins. Co., 800 F. Supp. 182, 197 (E.D. Pa. 1992) (the fact that a party qualifies as a fiduciary under an ERISA-qualified retirement plan does not necessarily mean the person is a fiduciary with respect to all fiduciary obligations under the plan).
144. Watchel, 482 F.3d at 234.
145. In re Fruehauf Trailer Corp., 250 B.R. 168, 204 (D. Del. 2000); Timmons v. Special Ins. Servs., 984 F. Supp. 997, 1005, aff’d, 167 F.3d 537 (5th Cir. 1998); see also 29 U.S.C. § 1002(21)(A) (2012) ("a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan").
146. Watchel, 482 F.3d at 234; see 29 U.S.C. § 1103(b)(1)–(2) (2012).
fiduciary obligations under ERISA. Additionally, the court correctly articu-
lated that not all ERISA fiduciaries are equal, but only considered for what aspects of an ERISA-sponsored retirement plan an entity or individual will be labeled an ERISA fiduciary. The court’s disregard of the statutory exclusivity of the three possible types of ERISA fiduciaries is the first reason why the Third Circuit’s rationale was flawed; but that is not the only problem with its analysis.

B. Mistake #2: Ignoring the Exceptions to the Fiduciary Exception

Second, the court failed to consider whether one of the two exceptions to the fiduciary exception applied to allow the attorney-client privilege to remain: the settlor exception or the liability exception. According to the special master’s findings of fact, some of the insurance company’s documents listed in their privilege logs related to the company’s fiduciary acts and the company did not prepare the documents in anticipation of litigation against the beneficiaries. Clearly, with respect to those documents, the insurance company, as an ERISA fiduciary, at a minimum had a duty to act in the best interests of the plan beneficiaries. Therefore, the court should not have allowed the company to claim the attorney-client privilege because those documents pertained to matters of plan administration. That court decision would preclude the use of either the liability or settlor exception to bar production of these documents. But the mistakes did not end there.

C. Mistake #3: Misidentifying the Client

Although a structured analysis for identifying the “real” client has some useful potential, a few of the court’s four factors are irrelevant. The factors articulated in identifying the “real” client are “unity of ownership and management, conflicting interests regarding profits, conflicting fiduciary obligations, and payment of counsel with the fiduciary’s own funds.”

1. Who Is the “Real” Client: Unity of Ownership and Management

The Third Circuit reasoned that because the defendant retained legal title to the assets and managed them, “convergence of management and ownership places an insurer like HN-NJ in a different position than other ERISA fiduciaries to whom the fiduciary exception has been applied.” The court further asserted that when the fiduciary exception applies, the fiduciary is “managing assets over which it
lacks ownership rights." The court thus correctly decided that HN-NJ is different from other fiduciaries to which the fiduciary exception applies, but that is only because this was the first time the exception was sought in a case before a federal appellate court involving an insurance company acting as an ERISA fiduciary. The one constant in all prior cases was that the fiduciary exception applied to fiduciaries when dealing with matters of plan administration, and the plan participants in the Wachtel case clearly sought documents related to matters of plan administration. The court's rationale that "[t]his convergence of management and ownership . . . demonstrates that HN-NJ has a substantial and legitimate interest in the management of its assets—even while it engages in fiduciary acts" is a poor justification for precluding discovery when pitted against ERISA's broad disclosure requirements in the context of plan administration. The court also failed to articulate how the unity of ownership and management factor changes the identity of the "real" client. All considered, the unity of ownership and management factor is not useful in determining who is the "real" client.

2. Who Is the "Real" Client: Conflict of Interest Regarding Profits

The second factor the Third Circuit analyzed is the conflict of interest regarding profits. The Ninth Circuit in Saffon v. Wells Fargo & Co. Long Term Disability Plan viewed this conflict as an inherent problem because if the insurance company is also a fiduciary with broad discretion: "it both decides who gets benefits and pays for them, so it has a direct financial incentive to deny claims." The Third Circuit, in Pinto v. Reliance Standard Life Insurance Co., adopted a sliding-scale approach to address the conflict of interest issue. Although the court designed the sliding scale to address the heightened judicial scrutiny for fiduciary discretionary acts, the scale could also affect the likelihood of the company retaining evidentiary privilege. As the conflict

151. Id.
152. See id.; see also United States v. Mett, 178 F.3d 1058, 1064 (9th Cir. 1999) (when an "ERISA trustee seeks an attorney's advice on a matter of plan administration and where the advice clearly does not implicate the trustee in any personal capacity, the trustee cannot invoke the attorney-client privilege against the plan beneficiaries"); Wash.-Balt. Newspaper Guild, Local 35 v. Wash. Star Co., 543 F. Supp. 906, 909 (D.D.C. 1982) (the fiduciary exception applied to employer as plan administrator to compel production of documents related to plan administration); Donovan v. Fitzsimmons, 90 F.R.D. 583, 585–86 (N.D. Ill. 1981) (the fiduciary exception applied to a union pension fund to compel production of documents related to fund administration).
153. See Wachtel, 482 F.3d at 227.
154. Id. at 234.
155. 522 F.3d 863 (9th Cir. 2008).
156. Id. at 868.
157. 214 F.3d 377 (3d Cir. 2000).
158. Id. at 378–79.
159. See Wachtel, 482 F.3d at 235.
increases, so does the possibility of keeping the privilege, making the fiduciary exception inapplicable. The Third Circuit’s reasoning suggested that even if the “real” client is the plan participant or beneficiary, this conflict factor would always favor the insurance company, resulting in retention of the privilege. If the court intended to favor the insurance company, this would cause serious injustice in every case involving an insurance company and a fully insured plan.

Now, consider a situation in which the insurance company has control over plan administration and has discretionary authority under the plan document. The default standard of review under ERISA, which is de novo, would not apply to the insurance company, but rather an abuse-of-discretion standard would apply. The potential conflict would heighten the standard of review. The insurance company interprets a term in the plan after reading a memorandum from counsel that adversely impacts plan participants. The plan participant asks to have this information produced during discovery. In such a scenario, although that memorandum concerns plan administration, the Third Circuit would bar discovery of the document because the insurance company has an inherent conflict of interest. This bar would prevent the court from serving justice, the opposite of Congress’s intent in drafting the full and fair review provisions of ERISA.

It is obvious from this hypothetical that the “real” client is the plan participant because the counsel used the memorandum to interpret a plan term, which clearly is a matter of plan administration. However, the Third Circuit’s rationale completely obviates this fact and precludes the document from discovery, knowing full well that the insurance company has a direct financial incentive to keep information from the plan participant. The Third Circuit’s reasoning creates a nonsensical result. This “profit conflict” factor can only weigh in favor of the plan participant or beneficiary if the insurance company is an ERISA fiduciary; however, if the insurance company is not an ERISA fiduciary, then this analysis is irrelevant. The second factor under the court’s four-prong test—conflict of interest regarding profits—creates an inequitable result and gives an insurance company carte blanche to withhold information from plan participants.

160. *Id.*


3. Who Is the “Real” Client: Conflicting Fiduciary Obligations

The third factor the Third Circuit analyzed, conflicting fiduciary obligations, is not really a factor at all; it is more akin to an obvious observation. Since insurance companies have multiple customers, the court stated that these companies have multiple conflicts of interest and thus multiple conflicting fiduciary interests. Therefore, insurance companies have “interests larger and distinct from those of its beneficiaries.” The problem with that rationale is that, like the first factor, it is inconsequential. The court correctly pointed out that insurance companies owe distinct duties to each of their customers, including the benefit plans they insure, because all of their customers are paid from the same pool of assets. Nonetheless, if the insurance company acts as an ERISA fiduciary to multiple plans, it naturally owes all plan participants or beneficiaries under their respective plans the same ERISA duties, even though the participants receive payment from the same funds. ERISA does not provide an exception to fiduciary disclosure obligations simply because fiduciaries pay participants or beneficiaries from the same pool of assets. The court further compounded its errors by drawing a fruitless comparison between corporate managers and ERISA fiduciaries.

The Wachtel court maintained that managing multiple ERISA benefit plans and other nonregulated ERISA customers is “different from that of a corporation whose shareholders have different interests because they hold different amounts or classes of stock.” The court further expounded on that difference by stating, “at least the corporate managers know that they owe their fiduciary obligations to a single, discrete group—the shareholders of the corporation.” That reasoning shows a lack of understanding of basic ERISA fiduciary law; it suggests an insurance company does not know whether it owes fiduciary obligations to its multiple ERISA plan beneficiaries. The solution to this problem is relatively simple: if you are a plan administrator making benefit determinations for any of the multiple ERISA benefit plans you insure, like HN-NJ, you are an ERISA fiduciary and owe a duty to disclose documents to the individual participants in that plan, unless the settlor or liability exception applies. Although the court correctly noted that HN-NJ must recognize the benefits of other customer plans due to the shared pool of assets, that fact should not be enough to absolve a company of its fiduciary duty to disclose, especially

163. See Wachtel, 482 F.3d at 235.
164. Id.
165. Id.
166. See id.
168. Wachtel, 482 F.3d at 235.
169. Id.
when making benefit determinations. Furthermore, this amorphous factor will always weigh in favor of the insurance company, as it is larger and has access to more capital than an average plan participant or beneficiary.

Analysis of this factor raises two points of emphasis. First, an insurance company operating a fully insured plan will always have other clients and other plans and one pool of assets, but this business model should not preclude the insurance company from fulfilling the fiduciary duties described in ERISA. Second, ERISA fiduciary law is simple: the duty owed is to the individual plan participant or beneficiary. Congress could have constructed ERISA to exempt fully insured plans from fiduciary duties, but it did not.

After reviewing two unhelpful factors (unity of ownership and conflicting fiduciary obligations) and one tilted in favor of the insurance company (conflicting interest regarding profits), the Third Circuit looked at who is paying for the legal advice.

4. Who Is the “Real” Client: Payment of Counsel with Fiduciary’s Own Funds

Finally, the Third Circuit considered payment of counsel.\footnote{Id. at 235–36.} This factor is difficult to evaluate. One court has observed “that when a trustee pays counsel out of trust funds, rather than out of its own pocket, the payment scheme is strongly indicative of the beneficiaries’ status as the true clients.”\footnote{Riggs Nat’l Bank v. Zimmer, 355 A.2d 709, 712 (Del. Ch. 1976).} If plan assets pay for counsel, it suggests that the client is the plan beneficiary or participant. On the other hand, if the insurance company pays from its own funds, more likely than not, the insurance company is the client. In Watchel, however, the court overlooked a pertinent inquiry: what if the insurance company uses its own funds to pay legal counsel on a matter of plan administration? At this point, who is the client? The insurance company used its own funds for the benefit of administering the plan for the participants and beneficiaries. The facts in Watchel indicated that although the company’s general assets paid for counsel, some of the matters involved fiduciary acts.\footnote{See Watchel, 482 F.3d at 228, 236.} This is another fact the court failed fully to consider in its analysis. Furthermore, the court provided no guidance on how to handle this particular situation.

Notably, a few authors have commented on this factor.\footnote{Mike W. Bartolacci et al., The Attorney-Client Privilege and the Fiduciary Exception: Why Frank Discussions Between Fiduciaries and Their Attorneys Should Be Protected by the Privilege, 48 REAL PROP. TR. & EST. L.J. 1, 30 (2013).} According to Watchel’s critics, this test is not only flawed, but it is also “losing its importance in the ERISA cases.”\footnote{Id.} The authors note that this factor
is being abandoned, especially if there is no mention of a corresponding trust.175 Furthermore, the critics assert that when there is no trust agreement, the plan sponsor or ERISA fiduciary pays for legal counsel from its own funds; however, “the fiduciary exception could not survive if the who pays test was important.”176 The problem with this factor, according to the commentators, is that the source of the payment has little to do with privilege in most situations; it is at odds “when compared to the numerous criminal and divorce arrangements in which a third party pays for the attorney”177 and inconsistent with the ethics rule “that allows a non-client to pay a client’s legal fees under appropriate circumstances without jeopardizing the privilege.”178

The critics have clearly elucidated their position that this factor should be completely abandoned. It is not important to determine who paid for legal advice; rather it is essential to establish what type of legal advice the fiduciary sought. If the fiduciary seeks guidance on a matter of plan administration, the clients are undoubtedly the plan participants and beneficiaries; on the other hand, if the fiduciary seeks advice pertaining to its personal liability to the plan participants and beneficiaries, the fiduciary is the client. Future decisions must abandon the Third Circuit’s analysis to prevent injustice towards plan beneficiaries and participants. On the other hand, in Stephan, the Ninth Circuit gave significant weight to ERISA’s broad disclosure requirements, which apply to every fiduciary.179 The Third Circuit misconstrued ERISA’s trust exemption requirement for insurance companies, and thus incorrectly concluded that the defendant, the insurance company, did not have the same disclosure obligations as other ERISA fiduciaries.

D. Mistake #4: Misinterpreting ERISA Provisions

The Third Circuit correctly pointed out that Congress specifically exempted insurance companies from keeping funds in a trust when plan assets are part of an insurance contract.180 The Third Circuit then concluded from this provision that Congress intended to exempt insurance companies from all of ERISA’s trustee-like obligations.181 The Third Circuit’s interpretation of this exception is too broad. It is

175. Id.
176. Id.
177. Id.
178. Id.; see also MODEL RULES OF PROF’L CONDUCT R. 1.8(f) (2013) (situations when it is appropriate for a lawyer to accept compensation from a third party).
179. Stephan v. Unum Life Ins. Co., 697 F.3d 917, 932 (“Neither the statute nor the regulations provide any reason why the disclosure of information is any less important where an insurer, rather than a trustee or other ERISA fiduciary, is the decisionmaker. Similarly, the obligation that an ERISA fiduciary act in the interest of the plan beneficiary does not differ depending on whether that fiduciary is a trustee or an insurer.”).
obvious from the plain language of the statute that Congress limited the exclusion to holding assets in trust, but this exemption should not absolve insurance companies of all trustee-like obligations. The Third Circuit pointed to no statutory authority, Department of Labor guidance, regulations, case law, or legislative history that illustrates that Congress intended a broader exemption. As a matter of fact, Congress envisioned quite the opposite.

Congress’s concern about the behavior of administrative entities in situations in which there is no trust (i.e., insurance company-run, fully insured plans) led Congress to strengthen the fiduciary and disclosure responsibility sections of ERISA. According to the legislative history of ERISA:

The underlying theory of the Welfare and Pension Plans Disclosure Act to date has been that reporting of generalized information concerning plan operations to plan participants and beneficiaries and to the public in general would, by subjecting the dealings of persons controlling employee benefit plans to the light of public scrutiny, insure that the plan would be operated according to instructions and in the best interests of participants and beneficiaries.

However, Congress found the limited data delivered to plan participants and beneficiaries under the Act insufficient, as it was then constituted. Therefore, the congressional committee noted the need to increase the information and data available to plan participants and beneficiaries, not only in scope, but also in detail. The heightened obligation would require those in control of benefit plans to disclose “what benefits [the participant or beneficiary] may be entitled to, what circumstances may preclude [the participant or beneficiary] from obtaining benefits, what procedures [the participant or beneficiary] must follow to obtain benefits, and who are the persons to whom the management and investment of his plan funds have been entrusted.” Additionally, to ensure the proper functioning of the fiduciary’s responsibility, fiduciaries must be “aware that the details of

182. See id. at 236 (“Section 1103(b)(1)–(2) excepts insurers from trustee-like obligations; we see no reason to impose trustee-like disclosure obligations upon an entity excepted from ERISA’s analogy to trust.”); but cf 29 U.S.C. § 1103(b)(1)–(2) (subsection (b) does not provide any exemption from any disclosure obligations and only refers to subsection (a)).
183. See Smith v. Jefferson Pilot Fin. Ins. Co., 245 F.R.D. 45, 51 (D. Mass. 2007) (there is a breadth of ERISA disclosure obligations and Department of Labor regulations regarding ERISA, and “the Watchel court pointed to nothing in the statute or in its implementing regulations” to support its reasoning).
185. Id. at 4649.
186. Id.
187. Id.
188. Id.
their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general.”

Moreover, the report indicated Congress was well aware of the functioning of insurance plans. The committee stated that “a number of plans are structured in such a way that it is unclear whether the traditional law of trusts is applicable. Predominantly, these are . . . insured plans, which do not use the trust form as their mode of funding.” The committee surmised that this could be a problem in the future and provided this as just one of the reasons why it included a fiduciary responsibility section in ERISA. Taken together, this constitutes overwhelming evidence in favor of requiring insurance companies to disclose information to plan participants, especially when the insurance company is an ERISA fiduciary making benefit determinations.

The Third Circuit acknowledged insurance companies have limited fiduciary responsibilities under ERISA but arbitrarily carved out an exception for avoiding disclosure obligations. Yet, the Third Circuit neither reconciled nor distinguished its conclusion with the congressional report. The Third Circuit made one more mistake that led to its conclusion that insurance companies do not need to be held to the same standards as other ERISA fiduciaries.

E. Mistake #5: Misunderstanding the Applicability of the Fiduciary Exception

The Third Circuit posited that a lack of clarity in determining fiduciary obligations of insurers who contract with ERISA plans will cause the attorney-client privilege to turn on difficult substantive questions. As the Ninth Circuit stated in Stephan and in United States v. Mett, the second rationale for exempting ERISA fiduciaries from the attorney-client privilege is because the fiduciary is the representative of the beneficiaries of the trust; therefore, the real client is the beneficiary. The latter court would not predicate applicability of attorney-client privilege upon difficult substantive questions, but upon a rather simple question: who is the real client? Moreover, the Third Circuit’s fear that the fiduciary exception would create uncertainty when applying the attorney-client privilege is unfounded.

189. Id.
190. Id. at 4650.
191. Id. at 4649 (“The fiduciary responsibility section . . . codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts. The section was deemed necessary for several reasons.”).
193. See id. at 237.
194. See Stephan v. Unum Life Ins. Co., 697 F.3d 917, 931 (9th Cir. 2012) (citing United States v. Mett, 178 F.3d 1058, 1063 (9th Cir. 1999)).
According to the Third Circuit, “an expansive and uncertain attorney-client privilege for insurer-fiduciaries will cause them to re-evaluate their relationship with ERISA plans.” First, the fiduciary exception would not expand the attorney-client privilege because it would apply equally to all fiduciaries, and the fiduciary exception is limited in scope. Second, the fiduciary exception would not make uncertain the attorney-client privilege because its applicability would hinge on who is the real client, based on the advice the fiduciary seeks.

As evidenced by *United States v. Jicarilla Apache Nation*, the Supreme Court relied on ascertaining the identity of the client to determine whether the fiduciary exception should apply to the United States when acting as a trustee to Native-American tribes. As discussed previously, if an insurance company is acting as an ERISA fiduciary dealing with matters of plan administration, the real client is the plan participant or beneficiary; on the other hand, if the ERISA fiduciary is assessing its personal liability against a plan participant or beneficiary, the real client is the fiduciary. Although this seems relatively simple, some authors unpersuasively take the position that the “real” client test is unworkable.

According to those commentators, “[t]he real client test shows a fundamental misunderstanding of trust arrangements and ignores the practical realities of the attorney-client relationship.” They argue that although a trustee owes a duty to the beneficiaries of the trust, the trustee is not an agent of all the beneficiaries. They further assert “this approach completely ignores the ethical problems presented in concluding that an attorney’s real clients may be individuals who never met him, who never retained him, and whose interests may very well be in conflict.” Ultimately, they deduce that this test only works in very simple trust arrangements in which all beneficiaries stand in the same position. The authors miss the point. When a fiduciary administers a plan, it manages the plan for the benefit of all eligible plan participants and beneficiaries, meaning that all eligible plan participants and beneficiaries would stand in the same position. The practical reality is that when a plan participant or beneficiary sues for benefits due under the terms of a plan document, all plan participants and beneficiaries are entitled to the same benefits, under

---

195. Wachtel, 482 F.3d at 237.
196. See supra notes 67–74, and accompanying text.
198. See id. at 2333.
199. See supra notes 194–200 and accompanying text.
201. Bartolacci, supra note 173, at 29.
204. Bartolacci, supra note 173, at 29.
similar facts, because they are all similarly situated individuals. Therefore, there will be no conflict of interest as the critics fear.

The mistakes made by the court in Wachtel led to the erroneous conclusion that HN-NJ, an insurance company making benefit determinations, retained the attorney-client privilege. Although other circuit authority is merely persuasive, the Third Circuit should have looked, in greater detail, at the Ninth Circuit’s decision in United States v. Mett. While that case was not on point in addressing the issue of whether the fiduciary exception applied to insurance companies making benefit determinations, it provides a workable starting point to analyzing the applicability of the fiduciary exception.

VII. Post-Wachtel and Stephan

A. Opposition to the Fiduciary Exception

Although the fiduciary exception ensures that the insurance company acting as an ERISA fiduciary is transparent and fair, opponents want Congress to narrow or completely eliminate the exception. Opponents of the fiduciary exception argue that the “exception discourages fiduciaries from seeking legal advice.” Moreover, they assert the need for the fiduciary exception is diminishing because other exceptions and limitations exist. A few of the exceptions opponents cite as requiring disclosure are (1) the crime-fraud exception, (2) the joint representation exception, and (3) the testator exception. In Wachtel, the Third Circuit made a similar contention and added a business purpose limitation. Examination of these exceptions, however, reveals that none would render the documents at issue discoverable when the insurance company acts as an ERISA fiduciary making benefit determinations.

First, the crime-fraud exception requires the party invoking it to gain disclosure to “make a prima facie showing: (1) that the client was engaged in (or was planning) criminal or fraudulent activity when the attorney-client communications took place; and (2) that the communications were intended by the client to facilitate or conceal the criminal or fraudulent activity.” Wachtel’s facts did not meet these requirements for permitting discovery.

205. 178 F.3d 1058, 1063 (9th Cir. 1999).
206. Bartolacci, supra note 173, at 32; see also Damian Capozzola et al., A Lesson in Hard Cases Making Bad Law: Insurers Acting as ERISA Fiduciaries May Be Required to Disclose Certain Attorney-Client Communications When Litigating Against Plan Beneficiaries, 29 J. COMP. & BENEFITS, no. 1, 2013, art. 2.
208. Bartolacci, supra note 173, at 32.
209. See Wachtel, 482 F.3d at 237 (“Other limitations and exceptions . . . apply. For instance, the communications must be for legal, not business purposes.”).
210. In re Grand Jury Proceeding (Gregory P. Violette), 183 F.3d 71, 75 (1st Cir. 1999); see also United States v. Jacobs, 117 F.3d 82, 87–89 (2d Cir. 1997) (abrogated on
Second, the joint client exception to the attorney-client privilege renders the privilege inapplicable to disputes between joint clients and compels disclosure. When the two clients are in disagreement “and become engaged in a controversy in which the communications at their joint consultation with the lawyer may be vitally material . . . it is clear that the privilege is inapplicable.”211 Once again, Wachtel does not present these facts. Furthermore, if the insurance company is acting as an ERISA fiduciary making benefit determinations, the plan participants and beneficiaries are the real clients and would rarely disagree. They would be suing for benefits due under the terms of the plan, benefits that are equally due to all plan participants and beneficiaries if they satisfy the eligibility requirements of the plan document. Therefore, the documents would not be discoverable under this exception.

Third, the testamentary exception to the attorney-client privilege allows for testamentary disclosure because the privilege, “which normally protects the client’s interests, could be impliedly waived in order to fulfill the client’s testamentary intent.”212 It is obvious from the title that the exception only applies to the validity and intent of a will. This rarely occurs in health and welfare benefit disputes. It is unlikely that a plan beneficiary or participant will be able to invoke this exception against an insurance company acting as an ERISA fiduciary making benefit determinations. Therefore, an insurance company would not be required to produce documents for plan participants or beneficiaries because the exception would rarely apply.

Finally, the Third Circuit asserted another limitation to the attorney-client privilege requiring the communication to be for legal rather than business purposes.213 The Third Circuit ignored the fact that the communications the special master ordered to be turned over were not for legal purposes, since the insurance company did “not prepare [the documents] in connection with adversarial proceedings against the beneficiaries.”214 Moreover, the communications related to the company’s fiduciary acts.215 That limitation, according to the Third Circuit’s own reasoning, should have precluded the insurance company from retaining the attorney-client privilege. What good is the limitation if the court is going to ignore the very fact that triggers it?


212. Swidler & Berlin v. United States, 524 U.S. 399, 405 (1998); see also 32 Am. Jur. 3d, supra note 210, § 2.3.

213. See Wachtel, 482 F.3d at 237.

214. Id. at 228.

215. See id.
B. Some Meeting of the Minds: The Third and Ninth Circuits

Although the Third Circuit’s conclusion conflicts with the Ninth Circuit’s, the courts agreed on some key elements. Both courts agreed that the fiduciary exception applies to communications between counsel and a fiduciary who administers the plan for the benefit of the beneficiaries.216 Both courts also found that when the interests of the fiduciary and beneficiary diverge, “the justifications for disclosing information to the beneficiary decline while the justifications for protecting the fiduciary’s privilege over the communications strengthen.”217 Lastly, the courts concurred that when fiduciaries assess their personal liability to beneficiaries, whether in the civil or criminal context, the fiduciary retains the attorney-client privilege.218

What is very noteworthy, though, is that the swing majority vote “in Stephan was cast by a judge sitting by designation: [a] Senior Circuit Judge for the Third Circuit.”219 Maybe there is some hope for the Third Circuit later to apply the fiduciary exception.

C. Federal District Court Decisions Since Wachtel and Stephan

Since Wachtel and Stephan, several federal district courts have addressed whether the fiduciary exception applied to insurance companies making benefit determinations.220 An analysis of the district

216. Capozzola, supra note 206; see Stephan v. Unum Life Ins. Co., 697 F.3d 917, 931–33 (9th Cir. 2012); Wachtel, 482 F.3d at 233–34.
217. Capozzola, supra note 206; see Stephan, 697 F.3d at 933; Wachtel, 482 F.3d at 234.
218. Capozzola, supra note 206; see Stephan, 697 F.3d at 932; Wachtel, 482 F.3d at 234–35.
219. See Capozzola, supra note 206.
220. Moyle v. Liberty Mut. Ret. Benefit Plan, No. 10cv2179-DMS (MDD), 2012 WL 4486269, at *4 (S.D. Cal. Sept. 27, 2012) (the fiduciary exception applied to certain documents because “[p]laintiffs’ administrative claim was pending review and there is no discussion in these documents of litigation or the personal liability of the fiduciary”); Hooper v. UNUM Life Ins. Co. of Am., No. 5:11-cv-624-Oc-10TBS, 2012 WL 1415585, at *2 (M.D. Fla. Apr. 24, 2012) (although the Eleventh Circuit has not applied the fiduciary exception in an ERISA case, it did not prevent the district court from finding that the fiduciary exception applied to the insurance company to compel production of communications that “concern UNUM’s discharge of its fiduciary duties”); Moore v. Metro. Life Ins. Co., 799 F. Supp. 2d 1290, 1293 (M.D. Ala. 2011) (the court also acknowledged that although there is no Eleventh Circuit opinion applying the fiduciary exception in an ERISA case, there “is no reason to not apply the [fiduciary] exception where it applies . . .”); Klein v. N.W. Mut. Life Ins. Co., 806 F. Supp. 2d 1120, 1129 (S.D. Cal. 2011) (The court declined to adopt the reasoning of the Third Circuit, reasoning that the Third Circuit has never adopted the fiduciary exception. “Accordingly, it would be illogical to accept the limitation from a Circuit lacking any jurisprudence as to the exception. More importantly, the Third Circuit’s holding would essentially negate the first rationale for the exception, that the ERISA fiduciary owes a duty of disclosure to plan beneficiaries.”); Harvey v. Standard Ins. Co., 275 F.R.D. 629, 634 (N.D. Ala. 2011) (“Unlike the Third Circuit, this Court . . . agrees with the reasoning of all the circuits which have spoken on the issue. Accordingly, the Court finds that communications between an [] attorney and an ERISA plan administrator that solely concern ERISA plan administration are an exception to the general shield of attorney-client privilege.”); Smith v. Jefferson Pilot Fin. Ins. Co., 245 F.R.D. 45, 49–51 (D. Mass. 2007) (contrary to the
courts reveals that most district courts agree with the Ninth Circuit’s holding in *Stephan*: the fiduciary exception applies to insurance companies making benefit determinations. However, two cases stand out: *Cottillion v. United Refining Co.* and *Krase v. Life Insurance Co. of America*.


The *Cottillion* case is especially significant because it was decided in the Third Circuit and is the first case decided after *Wachtel* in that circuit expressly to hold that the fiduciary exception is applicable to ERISA fiduciaries, although it was a case not involving an insurance company. In *Cottillion*, the plaintiffs alleged that the “[d]efendants violated ERISA by attempting to reduce actuarially the amount of early retirement benefits paid to plan participants.” In litigation, the plaintiffs requested that the defendant produce certain documents. In response, the defendants produced three privilege logs. The defendants asserted that attorney-client privilege or work product doctrine protected each of the requested documents. The plaintiffs argued that many of the documents listed in the privilege logs either did not satisfy the requirements for the attorney-client privilege or fell within the scope of the fiduciary exception. The *Cottillion* court acknowledged that, although several other courts had adopted the fiduciary exception to the attorney-client privilege or fell within the scope of the fiduciary exception, the Third Circuit has yet to explicitly apply the fiduciary exception in the context of ERISA fiduciaries. The *Cottillion* court discussed the Third Circuit’s opinion in *Wachtel*; however, it concluded that the fiduciary exception was applicable to the defendants.

*Third Circuit’s contention, “this court is not persuaded that ERISA’s provision exempting insurance companies from holding plan assets in trust signals that Congress intended to exempt insurers from the disclosure obligations established by ERISA”; therefore, the court found no statutory basis for applying the fiduciary exception to all ERISA fiduciaries except insurers: Asuncion v. Metro. Life Ins. Co., 493 F. Supp. 2d 716, 721 (S.D.N.Y. 2007) (although the court was unable to determine whether the documents at issue were subject to the attorney-client privilege, the court concluded that even if the documents were subject to the privilege, “the fiduciary exception to the privilege would apply in this case”).*

222. 962 F. Supp. 2d 1033 (N.D. Ill. 2013).
224. *Id.* at 297.
225. See *id.*
226. *Id.*
227. *Id.*
228. *Id.* at 299.
229. *Id.* at 300.
230. See *id.* at 300–01.
231. *Id.* at 301.
that the defendants were not an insurance company was the court’s primary reason for applying the fiduciary exception.\textsuperscript{232}

In both \textit{Wachtel} and \textit{Stephan}, the defendants were insurance companies. In \textit{Cottillion}, the defendants were “United Refining Company, the United Refining Company Salaried Employees Pension Plan [(Plan)], and the Retirement Committee responsible for administering the Plan.”\textsuperscript{233} The \textit{Cottillion} court noted, “the [\textit{Wachtel}] Court took care to contrast the health care insurance plan in \textit{Wachtel} from a plan involving ‘actuarially determined benefit funds maintained by employees (especially in the pension area) that usually cannot be recouped by the employer or directly redound to its benefit.’”\textsuperscript{234} Therefore, even though a federal district court in the Third Circuit adopted the fiduciary exception and applied it to ERISA fiduciaries, the court never confronted the issue of determining the disclosure obligations an insurance company acting as an ERISA fiduciary must observe. More recently, however, a federal district court in the Seventh Circuit addressed that issue.

\textbf{2. \textit{Krase v. Life Insurance Co. of North America}}

In \textit{Krase}, the plaintiff, on behalf of his deceased wife,\textsuperscript{235} alleged the defendants breached their duty to notify the plaintiff’s wife that she could retain certain benefits and rights under her policy for an ongoing disability from a terminal illness.\textsuperscript{236} The lack of notice caused the decedent’s coverage to lapse before her death and prompted the defendants to deny the plaintiff’s claim for benefits.\textsuperscript{237} The plaintiff sought to recover the benefits he would have received had the defendant provided the required notice.\textsuperscript{238}

The court noted a split of authority on whether the fiduciary exception would apply to insurance companies acting as ERISA fiduciaries.\textsuperscript{239} The defendants relied on \textit{Wachtel} and asserted that the fiduciary exception does not apply to insurers.\textsuperscript{240} The plaintiff, not surprisingly, relied on \textit{Stephan} and maintained that the fiduciary

\begin{itemize}
  \item \textsuperscript{232} See \textit{id.} at 297, 300–01.
  \item \textsuperscript{233} \textit{Id.} at 297.
  \item \textsuperscript{234} \textit{Id.} at 300 (citing \textit{Wachtel} v. Health Net Inc., 482 F.3d 225, 234–35 (3d Cir. 2007)). Judge McLaughlin said, “[i]t is precisely the latter type of plan which is at issue in the instant case. Accordingly, I join with the majority of courts which have held that the fiduciary exception is applicable to ERISA fiduciaries such as Defendants and will consider its application to the documents at issue.” \textit{Id.} at 300–01.
  \item \textsuperscript{235} 962 F. Supp. 2d 1033, 1035 n.1 (N.D. Ill. 2013). Donald Krase, the husband of the decedent in this case, died after filing the lawsuit. Kenneth M. Krase, as special administrator of the estate, was substituted as plaintiff.
  \item \textsuperscript{236} \textit{Id.} at 1035.
  \item \textsuperscript{237} \textit{Id.}
  \item \textsuperscript{238} \textit{Id.}
  \item \textsuperscript{239} \textit{Id.} at 1036–37.
  \item \textsuperscript{240} \textit{Id.} at 1037.
\end{itemize}
exception was applicable.\textsuperscript{241} The court ultimately agreed with \textit{Stephan},\textsuperscript{242} explaining that “[t]he \textit{Wachtel} court relied heavily on the fact that insurers pay benefits from their own assets, and not from assets held in trust . . . [b]ut all ERISA fiduciaries are subject to the same disclosure obligations.”\textsuperscript{243} Moreover, the court reasoned, “all ERISA fiduciaries must ‘discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries.’”\textsuperscript{244} Therefore, the court stated that “the substantive duties that are most relevant to the fiduciary-exception apply equally to insurance companies and other ERISA fiduciaries.”\textsuperscript{245}

\textit{Krase}, the first federal district court case decided outside the Third and Ninth Circuits to consider the rationale of both federal appellate court decisions, agreed with \textit{Stephan}’s reasoning.

\textbf{VIII. Conclusion}

On the issue of whether the fiduciary exception should apply to insurance companies making benefit determinations, the Third Circuit’s holding in \textit{Wachtel} creates a precarious situation for plan participants and beneficiaries. It encourages a lack of transparency and bad behavior by insurance companies and is inconsistent with ERISA’s legislative purpose to protect plan participants. Moreover, it ignores well-settled law and offers no reasons for such a rejection. Although the “who is the real client” analysis is a helpful starting point in determining the applicability of the fiduciary exception, most of the factors the court considered are irrelevant, and at least one is biased toward the insurance companies retaining the attorney-client privilege and avoiding disclosure.

Courts should instead focus on who is the client, \textit{whether} the insurance company is acting in a fiduciary capacity, and \textit{what} type of advice is sought by the fiduciary. The Ninth Circuit’s analysis is consistent with the goals and aims of ERISA by recognizing that there is no distinction between types of ERISA fiduciaries and concluding that there is no reason to exempt insurance companies making benefit determinations from ERISA’s fiduciary duty requirements. Opponents have argued to limit or eliminate the fiduciary exception, but have failed to state what disclosure obligations are imposed on an insurance company making benefit determinations under ERISA. The answer, however, is clearly articulated in ERISA’s legislative history: Congress subjected all ERISA fiduciaries to the broad disclosure requirements.

\begin{itemize}
\item \textsuperscript{241} \textit{Id.}
\item \textsuperscript{242} \textit{Id.}
\item \textsuperscript{243} \textit{Id.} at 1037–38.
\item \textsuperscript{244} \textit{Id.} at 1038 (quoting 29 U.S.C.A. § 1104 (2013)).
\item \textsuperscript{245} \textit{Id.}
\end{itemize}
The Ninth Circuit’s unwavering focus on those disclosure obligations allows it to establish simple guidelines for other circuits to follow. Although there is no bright-line test, the Third and Ninth Circuits’ reasoning suggests that the fiduciary exception applies to allow access to documents in the following circumstances: (1) when advice solely relates to how companies should interpret the plan, (2) when advice clearly does not implicate the trustee in any personal capacity, (3) after the final determination (i.e., the final administrative appeal), and (4) when the prospect of post-decisional litigation arises (i.e., receiving correspondence from participant’s counsel). On the other hand, the fiduciary exception does not apply, and the attorney-client privilege precludes document production, for cases in which (a) a fiduciary personally retains counsel to defend against the beneficiary in either a criminal or civil proceeding or (b) advice relates to settlor functions. Finally, courts should recognize the fiduciary exception as important, consistent with the legislative history of ERISA, and necessary to ensure that plan participants and beneficiaries receive a full and fair review.
Expanding the Integration Mandate to Employment: The Push to Apply the Principles of the ADA and the *Olmstead* Decision to Disability Employment Services

Brittany S. Mitchell*

When the Americans with Disabilities Act (ADA) became law in 1990 it was heralded as an important step forward for the rights of people with disabilities.¹ One of the goals of the ADA was to address the historical isolation of people with disabilities and their segregation from the greater community.² To remedy this goal, Congress enacted the three ADA sections: Title I to address employment discrimination, Title II to provide equal opportunities within government-provided services, and Title III to ensure equal access to public accommodations.³

Increasingly, however, disability advocates have looked to Title II as a potential additional source of employment rights for people with disabilities. In the 1999 landmark Supreme Court decision *Olmstead v. L.C. ex rel. Zimring*, the Court found that Title II of the ADA requires states to provide services in a noninstitutional setting if community placement is medically appropriate for the individual.⁴ Following *Olmstead*, planning efforts commenced nationally resulting from both advocacy and litigation to push state governments to provide services for people with disabilities in smaller community-integrated settings. Many of these plans focus on residential programs.

---

State employment services have traditionally been provided in sheltered workshops, settings in which people with disabilities are isolated and paid sub-minimum wages. By applying the principles highlighted in *Olmstead*, advocates have begun to call for states to provide employment services in integrated settings. A recent class certification in a case against Oregon for failing to provide sufficient community-based employment support for people with disabilities appears to be the beginning of a trend of suing states to obtain more integrated employment policies. Part I of this Article examines the development of the ADA integration mandate through relevant judicial and executive ADA interpretations. Part II reviews existing employment services for people with disabilities. Part III explains why advocates are seeking to change the current system and, finally, Part IV looks at the movement toward more integrated employment services and considers why this change is most likely to occur through the courts.

I. Americans with Disabilities Act: Title II and Antidiscrimination

Congress framed the requirements of the ADA with eight findings regarding people with disabilities. These findings highlighted the traditionally marginalized social position resulting from discrimination, isolation and segregation, lack of legal recourse, and barriers to access. Congress also affirmed that it was in the country’s best social and economic interest to ensure that people with disabilities had access to “equality of opportunity, full participation, independent living, and economic self-sufficiency.” To this end Congress designed the ADA to protect employment rights and access to public entities and public accommodations.

Title II of the ADA specifically provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” While many aspects of the ADA were new and innovative, Title II expanded the existing Rehabilitation

---

6. Id. § 12101(2).
7. Id. § 12101(4).
8. Id. § 12101(5).
9. Id. § 12101(7).
10. A “public entity” includes state and local governments, and “any department, agency, special purpose district or other instrumentality of a State . . . or local government.” Id. § 12131(1)(A) & (B).
11. Id. § 12132. A “qualified individual with a disability” is one who, “with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” Id. § 12131(2).
Act of 1973.\textsuperscript{12} The Rehabilitation Act prohibits any “program or activity” that receives federal funding from excluding from participation, denying benefits to, or discriminating against any “otherwise qualified individual with a disability . . . solely by reason of her or his disability.”\textsuperscript{13} However, since the Rehabilitation Act only addressed entities receiving federal funding, Congress believed it necessary to expand the ADA’s definition to include any public entity receiving funds from any governmental level.\textsuperscript{14} Both the Rehabilitation Act and the ADA contain general antidiscrimination statements that no person with a disability shall be “subjected to discrimination,” with ambiguity as to how that phrase should be applied.

A. Legislative History of the ADA

Many courts have looked to the ADA’s extensive legislative history to clarify congressional intent and interpret Title II’s antidiscrimination scope. The legislative history supports a broad interpretation and an understanding that services that unnecessarily segregate people with disabilities from the greater community are discriminatory. Several witnesses testified to House and Senate committees regarding the ADA’s vision. U.S. Attorney General Dick Thornburgh testified on President George H.W. Bush’s behalf, noting that the ADA was necessary because “[d]espite the best efforts of all levels of government and the private sector . . . many persons with disabilities . . . still lead their lives in an intolerable state of isolation and dependence.”\textsuperscript{15} Other testimony noted that “[i]t is contrary to sound principles of fiscal responsibility to spend billions of federal tax dollars to relegate people with disabilities to positions of dependency upon public support.”\textsuperscript{16} The National Council on the Handicapped noted that the federal government was then spending $60 billion annually on disability benefits and programs.\textsuperscript{17} This testimony all supported the ideas, later written into the first section of the ADA, that segregation is a violation of the rights of people with disabilities and socially unproductive for society as a whole.

\begin{itemize}
\item \textsuperscript{12} 29 U.S.C. § 701, et seq. (2012).
\item \textsuperscript{13} 29 U.S.C. § 794 (2012).
\item \textsuperscript{14} H.R. REP. NO. 101-485, at 37 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 318–19 (people with disabilities faced inconsistent treatment if one agency received federal funding but another did not).
\end{itemize}
B. Executive Interpretations of the ADA

Congress gave the attorney general power to interpret and enforce Title II of the ADA.\(^{18}\) Department of Justice (DOJ) implementing regulations require public entities to provide programs “in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”\(^{19}\) The DOJ interprets the “most integrated setting” as “a setting that enables persons with disabilities to interact with non-disabled persons to the fullest extent possible.”\(^{20}\) Accordingly, the DOJ has warned that a public entity may violate the ADA if it “directly or indirectly operates facilities and/or programs that segregate individuals with disabilities.”\(^{21}\)

C. Olmstead and the Integration Mandate

Despite the ADA’s goals, people with disabilities remain unnecessarily segregated from the nondisabled community.\(^{22}\) In *Olmstead v. L.C. ex rel. Zimring*, two mentally disabled women sued Georgia for keeping them in an institutional setting even though they had been medically approved and were personally willing to move to a less-restrictive community-based setting for continued care and treatment.\(^{23}\) The Court held that “[u]njustified isolation . . . is properly regarded as discrimination based on disability.”\(^{24}\) The Court noted that “institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.”\(^{25}\) *Olmstead* created a standard that obligates states to provide services in the least-restrictive setting deemed medically appropriate that does not represent a “fundamental alteration” of the state’s services or programs.\(^{26}\)

\(^{19}\) 28 C.F.R. § 35.130(d) (2012).
\(^{20}\) Id. § 35 app. B.
\(^{24}\) Id. at 597.
\(^{25}\) Id. at 600 (citing Allen v. Wright, 468 U.S. 737, 755 (1984)).
\(^{26}\) Id. at 601–04. The Court noted that a state “may rely on the reasonable assessment of its own professionals” to find an individual qualified to live in a community setting. Id. at 602. Additionally the Court referenced the DOJ regulation in determining
Since *Olmstead*, the executive branch has promoted the “integration mandate.” In 2001, an executive order by President George W. Bush called for the implementation of *Olmstead* at the federal, state, and local governmental levels and committed the nation to community-based alternatives for people with disabilities.27 President Barack Obama declared 2009, the ten-year anniversary of *Olmstead*, the “Year of Community Living.”28 As part of this initiative, the DOJ launched an “aggressive effort” to enforce *Olmstead*.29 The DOJ became a party to eleven *Olmstead*-related cases, wrote letters of finding following investigations in seven states, and submitted amicus briefs or statements of interest in thirty-two cases.30

D. Post-*Olmstead* Litigation

*Olmstead* spurred additional lawsuits across the United States that forced states to provide services in more integrated settings.31 Eighty-seven percent of the 140 closed *Olmstead* or *Olmstead*-related lawsuits against state governments were either a win for the plaintiffs or a comprehensive settlement agreement in which the state agreed to reevaluate and alter its programs.32 *Olmstead* or *Olmstead*-related litigation occurred in all but five states.33 Thirty-three states developed plans that expressly seek to address *Olmstead* issues, and an additional twelve states developed alternative plans that also address community integration issues.34 Many of the states’ *Olmstead* plans, however, focus primarily or entirely on transitioning housing services from institutional to community settings, with no attention to other, nonresidential services.35

---

31. Close to 200 *Olmstead* or *Olmstead*-related lawsuits have been brought against state governments. Terence Ng et al., *Olmstead and *Olmstead*-Related *Olmstead*-Related Lawsuits, CTR. FOR PERSONAL ASSISTANCE SERVS. (May 2013), http://www.pascenter.org/state_based_stats/olmstead/olmsteadcases.php.
32. Id.
33. The Center for Personal Assistance Services’ analysis did not find an *Olmstead* or *Olmstead*-related case in Idaho, Iowa, North Dakota, South Dakota, or Vermont. Id.
35. See, e.g., ALA. MEDICAID AGENCY, GATEWAY TO COMMUNITY LIVING (2012), available at http://www.medicaid.alabama.gov/documents/4.0_Programs/4.3_LTC_Services/4.3.1_HCBS_Waivers/4.3.1_Olmstead_Plan_4-8-12.pdf; THE GOVERNOR’S INTEGRATED SERV. TASK...
Post-\textit{Olmstead} litigation developed a more refined test for state compliance with the integration mandate. Subsequent decisions have identified a six-element test \textit{Olmstead} plaintiffs need to satisfy to establish a prima facie case: (1) plaintiffs qualify as disabled under the ADA; (2) plaintiffs are institutionalized, or would have to become institutionalized to receive necessary services; (3) plaintiffs qualify for services in a less-restrictive setting, giving deference to the assessment of the state’s professionals; (4) plaintiffs’ request can be reasonably accommodated; (5) plaintiffs “do not oppose” community-based care; and (6) plaintiffs have nonetheless been denied community-based care.\footnote{Martin v. Taft, 222 F. Supp. 2d 940, 971–72 (S.D. Ohio 2002) (citing \textit{Olmstead} v. L.C. \textit{ex rel. Zimring}, 527 U.S. 581, 587 (1999)).} After plaintiffs have met this burden, the state asserts that the relief sought would require a fundamental alteration of the nature of the challenged program.\footnote{Id.}

\section*{II. Current Disability Employment Programs}

Despite Title I, many people with disabilities remain unemployed.\footnote{The unemployment rate for people with disabilities is twice the rate for people without disabilities. \textit{Economic News Release, Bureau of Labor Stat.}, Dep’t of Labor, Table A-6: Employment Status of the Civilian Population by Sex, Age, and Disability Status, Not Seasonally Adjusted (Nov. 8, 2013), available at http://www.bls.gov/news.release/empsit.t06.htm.} These individuals often turn to government programs, which can offer activities, treatments, and work opportunities. Currently, government work opportunities are most commonly provided in either sheltered workshops\footnote{Sheltered workshops are also referred to as segregated employment.} or integrated employment.\footnote{Integrated employment is also referred to as competitive employment and supported employment.}

Sheltered workshops generally combine training, rehabilitation, and employment for large numbers of people with disabilities.\footnote{\textit{NAT’L DISABILITY RIGHTS NETWORK}, \textit{SEGREGATED AND EXPLOITED: THE FAILURE OF THE DISABILITY SERVICE SYSTEM TO PROVIDE QUALITY WORK} (2011) [hereinafter NDRN].} Historically, sheltered workshops were created by parents of individuals with disabilities as a place to which their children could go during the day that would be safe, allow an opportunity to socialize, and provide parents respite from care duties.\footnote{Id.} Sheltered workshops are operated by both nonprofit and for-profit organizations.\footnote{Id. at 34.}
Workers in sheltered workshops typically have no contact with nondisabled individuals, except for the service support staff, and receive nominal wages. For example, one North Providence, Rhode Island, workshop, housed in a former school building, situates about ninety people with developmental and intellectual disabilities in cafeteria-style tables to perform tasks such as sorting and packaging products. Individuals will often spend decades performing the same tasks without job growth, raises, or development, contrary to the workshop’s name, Training Thru Placement (TTP). TTP workers make approximately $2 per hour. Other situations are even worse. At a meat processing plant in Iowa, approximately sixty men with intellectual disabilities lived in an “old cockroach infested, unheated, abandoned school turned bunkhouse,” for which each man had to pay $168 per week in rent, and worked in the same positions as nondisabled men in the plant but were paid approximately $0.41 per hour, compared to the $9 to $12 per hour paid to nondisabled men.

Most sheltered workshops receive the majority of their funding from diverse federal and state government sources. Most sources are designed to build the individual’s skills toward becoming or staying employed. Sheltered workshops also receive exemptions from typical legal requirements that protect workers, such as minimum wage laws. With government subsidies and sub-minimum wages, many sheltered workshops earn high profits, despite their claims that by employing disabled workers they incur higher costs than similar worksites with a primarily nondisabled workforce. Subminimum wage allowances, together with exemption from other standard labor protections and substantial government funding, create a system in which sheltered workshops thrive, at least for their owners and operators. Alternative systems that empower people with disabilities to be integrated into the community and treated equitably are less likely to succeed.

46. Id.
47. Id.
48. NDRN, supra note 41, at 12.
49. Id. at 35–36. Funding sources can include Medicaid (Home and Community-Based Services Waivers, Medicaid Rehabilitation Option, Targeted Case Management, Deficit Reduction Act), vocational rehabilitation, social services block grants, and local taxes. Id.
50. Id.
51. Id. at 11.
52. Id. at 9.
A. **Sub-Minimum Wage**

When the Fair Labor Standards Act was passed in 1938, it allowed employers of people with disabilities to receive a “special certificate” to pay workers less than minimum wage.\(^{53}\) This exemption persists and, under current law, the Secretary of Labor has the authority “to the extent necessary to prevent the curtailment of opportunities for employment” to provide special certificates to employers of people whose “earning or productive capacity is impaired by age, physical or mental deficiency, or injury.”\(^{54}\) The Wage and Hour Division (WHD) of the Department of Labor reviews and approves applications for new certificates and renewals.\(^{55}\) Employers with certificates must pay disabled workers related to their individual productivity and commensurate with the pay of any nondisabled workers doing the “same type, quality, and quantity of work.”\(^{56}\) Additionally, the employer must review the hourly rate of disabled employees every six months and, at least once a year, adjust wages in accordance with changes to wages paid to nondisabled workers doing similar work.\(^{57}\) In an employer’s application for a certificate or for renewal, the employer must measure the actual productivity of the disabled worker compared to the productivity of a nondisabled worker and calculate the sub-minimum wage based on a productivity percentage of the wages paid to nondisabled workers.\(^{58}\) In the most recent statistics available, there were over 5,600 employers paying sub-minimum wages to workers with disabilities.\(^{59}\)

B. **Exemption from Other Worker Protections**

In addition to exemption from minimum wage requirements, sheltered workshops can avoid providing disabled workers with other typically guaranteed protections, such as unemployment benefits and the right to unionize.

The Federal Unemployment Tax Act, which requires nonprofit organizations and government entities to pay unemployment contributions, does not apply to facilities whose purpose is either rehabilitative or “providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market.”\(^{60}\) Courts have held that this provision does

\(^{53}\) *Id.* at 11.


\(^{55}\) U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-01-886, SPECIAL MINIMUM WAGE PROGRAM: CENTERS OFFER EMPLOYMENT AND SUPPORT SERVICES TO WORKERS WITH DISABILITIES, BUT LABOR SHOULD IMPROVE OVERSIGHT 6 (2001), available at http://www.gao.gov/new.items/d01886.pdf. Work centers and hospitals must renew their certificates every two years, while businesses and schools must renew their certificates annually. *Id.*


\(^{57}\) *Id.* § 214(c)(2).


not violate the ADA or the Rehabilitation Act by discriminating based on disability.61 One district court supported this conclusion by saying that “temporary unemployment benefits are poorly suited to help the disabled individuals because these benefits may expire before these individuals might find alternative employment.”62

In regards to the right to unionize, the National Labor Relations Act (NLRA) does not provide an explicit exemption for sheltered workshop employees. The National Labor Relations Board (NLRB) and courts of appeals case law, however, have ruled that sheltered workshop employees may not exercise this important right. In 1960, the NLRB first considered whether a sheltered workshop was an “employer” under the NLRA.63 The NLRB applied its test for whether a nonprofit was an employer—whether the organization’s activities were “commercial in the generally accepted sense”—and found that the workshop’s purpose was “directed entirely toward rehabilitation of unemployable persons,” and therefore its commercial activities were merely “a means to that end.”64 The Board therefore dismissed the participants’ petition to unionize.65

More recently, the NLRB asserted jurisdiction over all employers, including nonprofits, regardless of whether their activities are primarily commercial. It has, however, continued to disallow unions in sheltered workshops. In 1977, the Board found that allowing unions at sheltered workshops risked “a harmful intrusion on the rehabilitative process by the Union’s bargaining demands.”66 To determine that a workshop’s purpose is primarily rehabilitative, the Board looks to the following factors: the manner in which disabled employees are disciplined; the performance standards to which employees are held; other services such as rehabilitation, social services, vocational, medical, and legal counseling, which the employees receive; and whether the long-term goal for employees is eventual employment in private competitive industry or continued sheltered employment. Since 1977, the NLRB and appellate courts have found that some workshops are industrial, rather than rehabilitative, and therefore unions have been allowed; however, the analysis still prevents unionization in most sheltered workshops.67

61. See Tyler v. Smith, 472 F. Supp. 2d 818, 827 (M.D. La. 2006) (the provision of rehabilitation services, not the disability status of the employees, determined an organization’s exemption status).
62. Id. at 824.
64. Id. at 963–64 (citations omitted).
65. Id.
67. See, e.g., Brevard Achievement Ctr., Inc., 342 N.L.R.B. 982, 983 (2004) (the provision of counseling, problem-resolution, crisis-intervention, and training programs made the relationship rehabilitative, not employer-employee); Davis Mem’l Goodwill
C. Funding

Sheltered workshops benefit financially not only from regulation exemptions; they also receive significant government funding. Most income of sheltered workshops with a sub-minimum wage certificate comes from state and county agencies.68 Forty-six percent of funds are from such agencies, while thirty-five percent come from production contracts and only nine percent from retail sales.69 Medicaid is a major source of government funding, specifically Home and Community-Based Services Waivers (HCBS). HCBS funds programs “designed to assist individuals in acquiring, retaining, and improving the self-help, socialization, and adaptive skills necessary to reside successfully in home and community based settings.”70 These programs can include “prevocational, educational, and supported employment services.”71 The Center for Medicare and Medicaid Services (CMS), which oversees HCBS waivers, has an official policy of not funding “vocational services (e.g., sheltered work performed in a facility) where individuals are supervised in producing goods or performing services under contract to third parties.”72 Sheltered workshops, however, still receive HCBS funds by classifying themselves as “pre-vocational services.”73 An individual can continue to receive prevocational services indefinitely and, although providers are required to develop an individual plan of services with measurable outcomes, CMS does not oversee this requirement.74

The other significant source of government funding is the federal Rehabilitation Services Administration (RSA). In 2001, RSA stated its purpose was to fund sheltered workshops as an “interim step in the rehabilitation process rather than an end point of the process.”75 Additionally, RSA supports “comprehensive rehabilitation centers,” which are typically “large segregated compounds” that provide a broad array of services such as educational, social, health, recreational,
and vocational rehabilitation, but also represent significant segregation from the community.  

III. Why Change Is Necessary: Sheltered Workshops vs. Integrated Employment

Sheltered workshops, the historical forum of government employment services for over a century, have roots dating back to the Middle Ages. In the past few decades, however, innovation and evidence-based practices have yielded alternatives to sheltered workshops, such as integrated employment, that have proven preferable for both people with disabilities and the greater community. Research shows that integrated employment successfully fulfills the ADA’s goals of preventing the historical isolation and dependence of people with disabilities and easing the societal economic burden of that dependency. Integrated employment also achieves the legally required objective to provide services in the most integrated setting appropriate.

Integrated employment is designed to offer people with disabilities work in a community-based workplace alongside nondisabled people. These jobs often pay wages comparable to those of nondisabled peers performing the same or similar work. The exact nature of integrated employment can vary. In one example, a woman with a mental illness was able to purchase an espresso maker through her customized employment program to partner with a small local bakery. The bakery owner assisted the woman with calculating costs and profits and the woman was able to attract customers to the store by selling coffee and small games and trinkets in the bakery’s corner. The services required to support people with disabilities in integrated employment vary from funding the purchase of equipment to assisting with job applications or making job connections, to personal occupational coaching.

A. Impact on Well-Being of Participants

A central consideration in the choice between sheltered workshops and integrated employment is the long-term effect on participants. Sheltered workshops were originally created as a protective environment, and a concern for protection still persists today. Many partic-

---

76. NDRN, supra note 41, at 38.
79. NDRN, supra note 41, at 31.
80. NDRN, supra note 41, at 31.
82. See supra Part II.
Participants even express anxiety about the prospect of integrated employment. Proponents of sheltered workshops also note that, to the extent that people view themselves in relation to others around them, integrated employment may cause people with disabilities to draw negative comparisons.

While many of the arguments for sheltered workshops are rooted in good intentions, their substance is often influenced by a misunderstanding of people with disabilities or a patronizing attitude toward them. For example, if integrated employment is presented as beyond an individual’s ability, the individual may experience increased anxiety once it is obtained. If employment is treated as it would be for a nondisabled person—as a necessity rather than a privilege—the individual may not feel undue pressure to succeed in the position. People with disabilities in employment programs are not a static or uniform group; some individuals do ultimately find day treatment programs and sheltered workshops a better fit. But the majority prefer supported employment, especially after the initial fear of change has been overcome.

Significant research demonstrates that employment in the community provides cognitive, emotional, and psychological benefits. One study of the difference between the cognitive abilities of individuals in an institutional setting (“stayers”) and “movers” (those who were more fully integrated into the community) found that movers were more likely to develop abilities for increased independence, such as household skills, while stayers suffered a significant loss in multi-cognitive competencies. Other studies focus on the less tangible benefits of integrated employment, such as quality of life, social life, and autonomy. Those in integrated employment were consistently found to have a higher quality of life compared to those who remained at home or participated in sheltered workshops. Additionally, they had greater psychological well-being and increased autonomy.

83. Stephen T. Murphy et al., People’s Situations and Perspectives Eight Years After Workshop Conversion, 40 MENTAL RETARDATION 30, 33 (2002).
85. Id.
86. Id. at 16.
87. Murphy et al., supra note 83, at 33.
89. See, e.g., Jahoda et al., supra note 84, at 1–21.
90. Jahoda et al., supra note 84, at 10.
91. Jahoda et al., supra note 84, at 10–14.
B. Costs of Differing Employment Models

Studies evaluating the costs and benefits of integrated employment consider many factors, from both the worker’s and the taxpayer’s perspectives. Studies evaluating the costs and benefits of integrated employment consider many factors, from both the worker’s and the taxpayer’s perspectives.92 Worker considerations include wages earned or for-gone, fringe benefits, reduced government dependency, and payment of increased taxes.93 Taxpayers consider government dependency and additional tax revenue, as well as saved operating costs and new tax credits given to employers.94 In a review of cost-benefit studies, eighty-three percent found that the economic benefits of integrated employment outweighed the costs for workers, regardless of the severity of the worker’s disability.95 Studies also found that, over time, integrated employment was cost-effective for taxpayers, although savings were greater for individuals with less severe disabilities.96 Receiving a sub-minimum wage promotes a cycle of dependency and poverty. Without sufficient wages, individuals must rely on Social Security Insurance and Medicaid.97

IV. Reaching the Alternative: Paths to Models of Integrated Employment

Sheltered workshops are legally, systemically, and psychologically embedded in existing programs and structures. Although evidence indicates that integrated employment is more beneficial to participants, more cost-effective in the long term, and more aligned with the rights of people with disabilities, shifting from the status quo is not simple. Various approaches have yielded mixed results. In Washington, a history of innovative approaches, strong leaders, and a community-empowering infrastructure produced state legislation and policies to mandate integrated employment. Elsewhere, as in Oregon, state policies proved inadequate to achieve integrated employment. In the latter context, litigation based on Olmstead is most likely the manner to achieve integrated employment.

A. Legislation: Washington’s Working-Age Adult Policy

Over the past five decades, Washington has developed a model prioritizing integrated employment in state-funded services for people with disabilities. In the late 1970s, state and local officials participated

---

93. Id.
94. Id.
95. Id. at 53–57. The studies reported mixed results regarding whether a person participating in supported employment received reduced, the same, or increased government subsidies. However, a significant majority of the studies still found that workers economically benefitted from supported employment, regardless of changes in subsidies. Id. at 54.
96. Id. at 59.
97. NDRN, supra note 41, at 6.
in Program Analysis of Service Systems trainings that developed a
generation of leaders focused on improved community living for people
with disabilities.98 In 1988, the state legislature declared that “all per-
sons . . . [are] personally and socially productive.”99 In accordance with
this policy, the legislature also declared that the state had an “obligation
to provide aid to persons with developmental disabilities through
a uniform, coordinated system of services to enable them to achieve a
greater measure of independence and fulfillment.”100 In 2006, Wash-
ington instituted a statewide integrated employment policy that
prioritizes state financing for day services that provide employment
support.101 Services that do not emphasize the “pursuit or mainte-
nance of employment in integrated settings can be authorized only
by exception to policy.”102

Analyses of the Washington program have identified several fac-
tors that led to Washington becoming the first state to mandate inte-
grated employment.103 In addition to Washington’s strong leadership
and history of commitment to and innovation in its developmental dis-
ability programs, its program’s funding structure significantly contrib-
uted to its redirection to integrated employment.104 In Washington,
employment services are contracted by counties, rather than by a cen-
tralized state or regional authority.105 This promotes innovation and
leadership.106 The bifurcated system also allows local leaders to main-
tain momentum in working toward integrated employment during
transitions in state administrations.107 Additionally, Washington en-

EMP’T, http://gowise.blob.core.windows.net/media/Default/Documents/wa_employment_
report_2010_2_18.pdf [hereinafter Employment in Washington State]. Program Analy-
sis of Service Systems trainings were values-based and focused on community integra-
tion for individuals with developmental disabilities. Id.
100. Id.
102. CNTY. SERVS. FOR WORKING AGE ADULTS, WASH. STATE DEP’T OF SOC. & HEALTH
policy4.11_07_04.pdf.
103. Disability Employment Policy and Practice in Washington State, ALLIANCE
FOR FULL PARTICIPATION, http://www.allianceforfullparticipation.org/success-stories/213-
Disability Employment Policy]; see also Don Lavin, Washington State’s Work-
ing Age Adult Policy, EMP. FIRST: FULL THROTTLE AHEAD! (Apr. 12, 2007), http://
employment1st.blogspot.com/2010/01/washington-states-adult-age.html.
104. Wash. Disability Employment Policy, supra note 103.
105. Wash. Disability Employment Policy, supra note 103.
106. Wash. Disability Employment Policy, supra note 103.
107. Allison Cohen et al., High-Performing States in Integrated Employment, 9 RE-
SEARCH TO PRACTICE, no. 1, Feb. 2003, at 3. The same study also pointed to Washington’s
comprehensive data collection and effective use of data as an important tool for future
employment planning and for maintaining consistency across administrations. Id.
courages innovation by funding small service providers in addition to larger, more established ones. The smaller, more pioneering providers spurred competition and offered choice of services to people with disabilities.

While integrated employment advocates can learn important lessons from Washington’s progress, such an examination may also prove disappointing. Washington’s effective transition to integrated employment “didn’t happen by a stroke of luck, it took 25 years.” While some states possess certain elements that have been key to Washington’s success, research shows that developing a holistic policy toward integrated employment takes a several-decade commitment across all levels of government and a state structure designed to foster community leadership and innovation.

**B. Litigation: Lane v. Kitzhaber**

Because most states have not successfully initiated the shift to integrated employment programs, disability advocates have turned to litigation to achieve change. *Lane v. Kitzhaber* is a federal class action lawsuit brought by people with intellectual or development disabilities against Oregon’s Department of Human Services (DHS). The plaintiffs claim that, although Oregon was one of the first states to adopt an integrated employment policy, its implementation lost momentum and the state began increasingly to rely on sheltered workshops. In granting class certification in *Lane*, the federal district judge followed the heightened standard from *Wal-Mart*, resulting in a decision that considered the merit of the plaintiffs’ arguments regarding the legality of sheltered workshops in his decision granting the plaintiffs certification.

The judge first found that the plaintiffs’ common question was “whether [the] defendants have failed to plan, administer, operate and fund a system that provides employment services that allow persons with disabilities to work in the most integrated setting.” The decision then focused on what specific changes the plaintiffs could demand. The judge rejected the defendants’ claim that the plaintiffs were

108. Wash. Disability Employment Policy, supra note 103.
110. Cohen et al., supra note 107, at 3.
111. For example, Michigan’s state leaders have also been participating in community integration trainings since the 1980s. See id. at 2.
114. Lane, 298 F.R.D. at 598.
115. Id.
requesting changes to two systems that received funding from different federal funding sources, finding that the issue was what options were available to individuals under either HCBS waiver.116

The judge also considered whether the plaintiffs’ request related to the level of service provided. According to other interpretations of Olmstead defenses, plaintiffs cannot bring claims requiring an increased level of care.117 The judge, however, agreed with the plaintiffs that their demand sought to “modify the planning, administration, operation and funding of DHS’s employment service program to ensure all class members have access to integrated employment” and that the specific level of services needed to accomplish this goal would be determined by treatment professionals rather than the court.118 To reach this conclusion, the judge relied on the Ninth Circuit’s Townsend v. Quasim decision, which clarified that “where the issue is the location of services, not whether services will be provided, Olmstead controls.”119 The judge also found that the plaintiffs were not requesting that Oregon fund a new service, but rather that the existing integrated employment services be offered to all qualified individuals in an integrated, not segregated, setting. The judge said: “[T]he claim involves not only what employment services are provided, but how, when and where they are provided. This is a permissible claim under Olmstead.”120 Finally, the judge found that Olmstead’s integration mandate required the provision of employment services in the most appropriate integrated setting.

C. Future Litigation

The Lane parties settled the case following class certification. The plaintiffs in Lane did not have to address the question of whether employment services are covered by the Olmstead mandate, nor did the state have an opportunity to raise defenses. In future litigation applying the six-element Olmstead test,121 as well as the state’s fundamental alteration defense, to employment services, plaintiffs may encounter a legal obstacle beyond those encountered by the Lane plaintiffs.

---

116. Id. at 600. Oregon provides services under two separate HCBS waiver programs: the Comprehensive Waiver provides individuals with Independent Support Plans (ISPs) and referrals to service providers through case managers, while the Support Services Waiver funds individuals living on their own and provides ISPs and referrals through personal agents employed by independent brokerage entities. Id.

117. Id.

118. Id. at 601.

119. Id. (emphasis in original) (quoting Townsend v. Quasim, 328 F.3d 511, 517 (9th Cir. 2003)).

120. Id. at 602.

121. See supra Part I.D.
1. Does *Olmstead* Apply to Employment Services?

Plaintiffs are unlikely to face significant difficulty proving that the members of their class are disabled under the ADA. Additionally, if an appropriate plaintiff class is chosen, plaintiffs should be able to demonstrate that they are qualified for, can reasonably be accommodated by, and do not oppose integrated employment, and that they have been denied the opportunity to participate in integrated employment. Plaintiffs may encounter states that claim that *Olmstead* applies only to individuals institutionalized in a state-run hospital. Courts have rejected this argument, however, and applied *Olmstead* broadly to all state-administered “services, programs and activities.” Courts have also found that the integration mandate applies even if a state uses private entities to provide services to people with disabilities. Finally, as noted in *Lane*, the state may not be responsible for the “specific act or policy” of a service provider, but it is responsible for the “administration of programs.” Therefore, plaintiffs are likely to succeed in proving that a state violated integration mandate principles by administering employment services that deny individuals the option of a community-integrated setting. Employment services easily fall under the broad umbrella of state-provided “services, programs and activities.” Additionally, by disregarding the distinction between public and private service providers, and between state-controlled or provider-controlled decisions, courts have prevented states from arguing that they do not have control over the conditions in which providers supply employment services.

2. Does Integrated Employment Represent a Fundamental Alteration of the State’s Services?

Many *Olmstead* cases are ultimately decided on whether a change to the contested program would fundamentally alter state services. Cases challenging states’ reliance on sheltered workshops are most likely to turn on this issue. The fundamental alteration defense calls for a case-by-case analysis of the specific facts presented, and some

---

122. *Lane*, 283 F.R.D. at 602. The first element that a plaintiff must prove in *Olmstead* litigation is that the “plaintiffs qualify as disabled under the ADA.” *Id.* (citing *Martin* v. Taft, 222 F. Supp. 2d 940, 971–72 (S.D. Ohio 2002)).

123. *See supra* Part I.D.


125. *Id.* (citing 28 C.F.R. § 35.130(d)); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003) (“[T]here is nothing in the plain language of the regulations that limits protection to persons who are currently institutionalized.”).

126. *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 316–17 (E.D.N.Y. 2009) (“immaterial” whether services were provided in a private facility); *see also Radoszewski v. Maram*, 383 F.3d 599 (7th Cir. 2004).

127. 283 F.R.D. at 601.

states may successfully convince courts that moving from sheltered workshops to integrated employment will be too burdensome.

The *Olmstead* majority did not agree on what would satisfy the fundamental alteration defense. Lower courts, however, have concluded that a majority of the *Olmstead* Court rejected that a purely cost-based argument was insufficient to sustain a fundamental alteration defense.\(^\text{129}\) The *Olmstead* plurality stated that a state was obliged to “maintain a range of facilities for the care and treatment of persons with diverse mental disabilities,” and that courts therefore must address “the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State’s obligation to mete out those services equitably.”\(^\text{130}\) The *Olmstead* plurality also held that a state’s obligation to provide a reasonable modification to a government service is met if “the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings.”\(^\text{131}\)

In applying the *Olmstead* plurality’s cost analysis, lower courts have differed on whether to consider possible savings from moving services from a more expensive segregated setting. Some courts have noted states’ need to offer segregated services for those not qualified or willing to participate in more integrated services, therefore finding that a cost analysis should look solely at the additional costs of increasing community-based services and not costs saved by shifting individuals from segregated settings.\(^\text{132}\) Other courts have concluded that the “relevant budget” is the states’ entire “mental health budget,” including “any money the State receives, allots for spending, and/or spends on mental health services and programs.”\(^\text{133}\) The latter approach allows integrated employment advocates to point to the lowered cost of providing integrated employment options, both in direct expenditures for employment services programs as well as savings in other parts of a state’s mental health budget, such as those resulting from decreased dependency on state and federal disability financial support and healthcare programs.\(^\text{134}\)


\(^{131}\) *Olmstead*, 527 U.S. at 584 (1999).

\(^{132}\) *Williams*, 164 F. Supp. 2d at 636–38.

\(^{133}\) *Disability Advocates*, 598 F. Supp. 2d at 350.

\(^{134}\) See supra Part III.B.
Courts have also differed on the necessary components of a state plan to satisfy the Olmstead plurality’s defense for states that already have a plan to desegregate services. The Ninth Circuit has considered the sufficiency of such a state plan in a series of cases. In Townsend, the court addressed a state program that offered services in the community only to people with disabilities who were under a specific income level. In Sanchez, the court found that the state “already ha[d] in place an acceptable plan for deinstitutionalization,” and therefore judicial intervention would amount to a “fundamental alteration of the State’s current policies and practices.” Finally, in Arc of Washington State Inc. v. Braddock, the court compared its previous holdings and distinguished between services that discriminated against a specific section of a population and services that are possibly inadequate, but open to any member of a population. The court also considered whether the state had applied for an increase in federal funding for its programs in the past, whether state expenditures for integrated services had increased over time, and whether fewer people were receiving services in segregated settings. The court concluded that “[s]o long as states are genuinely and effectively in the process of deinstitutionalizing disabled persons ‘with an even hand,’ we will not interfere.” Other circuits have emphasized slightly different factors in evaluating state plans. In Frederick L. v. Department of Public Welfare of Pennsylvania, the Third Circuit found that, to satisfy a fundamental alteration defense, the state must “specify the time-frame or target date for patient discharge, the approximate number of patients to be discharged each time period, the eligibility for discharge, and a general description of the collaboration required between the local authorities and the housing, transportation, care, and education agencies to effectuate integration into the community.” The Third Circuit emphasized the need for specific target benchmarks for which the state could be held accountable.

---

135. Arc of Wash. State Inc. v. Braddock, 427 F.3d 615, 620 (9th Cir. 2008) (citing Townsend v. Quasim, 328 F.3d 511, 520 (9th Cir. 2003); Sanchez v. Johnson, 416 F.3d 1051, 1063 (9th Cir. 2005)).
136. Id.
137. Id.
138. Id.
139. 422 F.3d 151, 160 (3d Cir. 2005).
140. Id. at 156. For example, the state had changed its plan from stating that it would “[c]ontinue downsizing state hospital census at minimum 250 beds annually,” to stating that it would close “up to 250 CHIPP beds a year.” Id. at 158. The court found the latter to be an amorphous, nonspecific goal. Id.
V. Conclusion

Civil rights for people with disabilities often implicate complex policy concerns. The three branches of the federal government—through the passage of the ADA, its interpretation in Olmstead, and its execution—have provided an overarching principle for providing services for people with disabilities. Programs must be offered in the most integrated setting appropriate. Implementing this objective, however, has not always been consistent. State governments have historically relied on sheltered workshops for employment services for people with disabilities. Due to inertia and the legal and financial structures that incentivize their operation, sheltered workshops continue to be states' default programs, despite the low pay, segregation, and conditions ranging from monotonous to abusive. Advocates and researchers, however, have proven that alternative options, including integrated employment, offer significantly better outcomes for people with disabilities and the greater community. Additionally, integrated employment more suitably fulfills the statutory and judicial integration mandate.

Existing support for sheltered workshops means change will be slow and hard-fought. Altering that structural support, such as removing exemptions from minimum wage and labor protection regulations, as well as different federal funding processes would disincentivize sheltered workshops. Although some states might follow Washington's lead and develop integrated employment policies on their own initiative, that change will most likely come through litigation. The Supreme Court's Olmstead decision has fostered successful litigation and settlements for people with disabilities obtaining improved services. Employment services are most likely to change when advocates pursue their cases against states in the courts, forcing states to adopt more integrated policies.