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STATEMENT TO THE RECORD

"Legislative Reforms to the National Labor Relations Act: H.R. 2776, Workforce Democracy and Fairness Act; H.R. 2775, Employee Privacy Protection Act; and, H.R. 2723, Employee Rights Act."

U.S. House Committee on Education and the Workforce

Health, Education, Labor & Pensions Subcommittee

June 14, 2017 – 10:15 a.m.

Good morning, Chairman Walberg, Ranking Member Sablan and distinguished Members of the Subcommittee. It is a great honor and privilege to appear before this Subcommittee as a witness. My name is Seth Borden. I am a partner in the New York office of the law firm McGuireWoods LLP.

My testimony today should not be construed as legal advice as to any specific facts or circumstances. I am not appearing today on behalf of any clients. My testimony is based on my own personal views and does not necessarily reflect those of McGuireWoods or any of my individual colleagues there.

I have been practicing traditional labor and employment law for 19 years. During that time, I have represented employers of all types and sizes, in a variety of industries, throughout the United States and Puerto Rico before the National Labor Relations Board ("the Board" or "NLRB"). In 2010, I authored a chapter regarding new technologies and traditional labor law in the Thompson publication *Think Before You Click: Strategies for Managing Social Media in the Workplace*, the first treatise of its kind. Finally, since 2008, my team and I have maintained the *Labor Relations Today* blog, which has received numerous accolades and has been archived by the U.S. Library of Congress. A copy of my firm bio is provided with the written version of my testimony.

Mr. Chairman, I request that the entirety of my written testimony, and the attachments thereto, be entered into the record of the hearing.

In December 2014, the National Labor Relations Board announced a Final Rule, implemented in April 2015 ("2015 Rule"), effecting a sweeping overhaul of its longstanding representation election procedures. These changes were designed purely to facilitate private sector union organizing. They followed soon after the Board's decision in *Specialty Healthcare*, 357 NLRB 934 (2011), which established new unit definition criteria by which unions have sought to organize "micro-units" – smaller, gerrymandered groups of employees within a larger workplace. These actions by the Board cast aside standards and procedures that had operated for decades without significant complaint. To turn the phrase – the Board here sought to "fix" what was never "broke." Passage of H.R. 2776, the Workforce Democracy and Fairness Act; and, H.R. 2775, the Employee Privacy Protection Act, would be a significant step toward reversing

these unnecessary and misguided policy changes, and restoring the proper balance of rights and interests that had worked sufficiently for decades.

Workforce Democracy and Fairness Act (H.R. 2776)

A. Restoring Pre-Election Due Process and Free Speech Rights

The Board's 2015 Rule altering the procedures around elections significantly limits the time available to an employer to communicate with its employees in advance of a Board run representation election. In its effort to drastically abbreviate the time between the filing of a petition and the conduct of an election, the Board all but eliminated pre-election resolution of significant eligibility, unit inclusion, and other important legal issues, deferring their litigation until after the election. In addition, the Board implemented new time targets, reducing the pre-election period during which the employees may learn about and contemplate their decision to as few as 13 days, down from a fairly consistent annual median of 38-39 days.

The changes in the 2015 Rule changes were, at best, a proposed solution in search of a problem. To the extent they were intended simply to increase union success in organizing, they did so by limiting employer free speech rights protected by Section 8(c) of the National Labor Relations Act ("the Act" or "NLRA"), and infringing on the Section 7 rights of employees to refrain from union representation. Postponing resolution of important legal issues until after an election only serves to enhance union electoral success by allowing them to leverage employer uncertainty and risk. Take, for example, the issue of whether an individual or group of individuals are "employees" covered by the NLRA or rather "supervisors" exempted by Section 2(11). How is an employer to communicate lawfully with these purported supervisors without

knowing whether or not the Board will ultimately find them to be covered or exempt? The employer's choice is either (a) to decline to communicate with these individuals to the maximum extent allowed, and thereby deny these workers, and the workers they supervise, the fullest array of information and discourse protected by Section 7 of the Act; or (b) to risk potentially unlawful communications with them which could have the consequence of overturning the results of an election. It is the lack of certainty *at the outset* of the process that creates these untenable options – all of which create legal exposure for the best-intentioned employers and infringe upon the rights of the employees to seek a prompt, conclusive determination on the issue of representation.

Section 2 of the Workforce Democracy and Fairness Act would restore the pre-election hearing process. This would allow a robust opportunity for early resolution of issues with the potential to impact the election process. This bill would, among other things, require a hearing absent agreement of the parties; provide at least 14 days following the filing of the petition to prepare; and, allow for the creation of a complete evidentiary record on any relevant and material pre-election issues which might reasonably be expected to impact the outcome of the election. This 14 day time period should be sufficient to permit employers – particularly small businesses who may not enjoy the luxury of counsel with subject-matter expertise – to obtain the proper representation and guidance; to properly explore whatever pressing legal issues may exist; and, to present those issues and all relevant evidentiary support at a hearing aimed at resolving any that might impact the parties' conduct during the time period up to and including the election.

Moreover, it would require a period of at least 35 days between the filing of the petition and the holding of the election. All parties can benefit from an efficient determination process, without unnecessary delay. But the rights of employees to seek union representation and the

equal rights of employees to refrain from such representation must be properly balanced. For decades the Board ensured that employees had sufficient time to make this important decision in a fully informed manner. This bill's 35-day minimum provision will not ensure the same timeframe that worked suitably for decades prior to April 2015, but it goes a long way to restoring the appropriate balance between all interests involved.

B. Enhancing Stability and Certainty in Unit Composition

Another effort to facilitate union organizing, the Board's *Specialty Healthcare* decision, 357 NLRB 934 (2011), announced new standards for determining whether the bargaining unit proposed by a petitioning union is appropriate. This Board decision casually cast aside presumptions which were the result of decades of practical experience and case law development, and opened the door to so-called "micro-unit" organizing, whereby unions can gerrymander a large workforce and cherry-pick small units best suited to organizing success.

Section 9(b) of the NLRA provides that

> [t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for purposes of collective-bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

29 U.S.C. § 159 (b).

For decades prior to 2011, the Board satisfied this statutory obligation by analyzing a number of factors to determine whether the employees in a petitioned-for unit shared a sufficient "community of interest" to make their representation in a single bargaining unit reasonable and effective. The factors that the Board generally considered in unit determinations included:

> whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and

> perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Specialty Healthcare, 357 NLRB at 942, quoting *United Operations, Inc.*, 338 NLRB 123 (2002). In 1989, the Board engaged in formal rulemaking to set forth an industry-specific exception to this traditional approach, and promulgated specific rules for the determination of appropriate units in acute care hospitals. *See* 29 CFR §103.30; *American Hospital Ass'n v. NLRB*, 499 U.S. 606 (1991). Following implementation of this rule, the Board sought in *Park Manor Care Center*, 305 NLRB 872 (1991), to clarify and differentiate its standards for determining units in non-acute health care facilities. The decision added a few industry-specific factors to be considered, in addition to the traditional community of interest factors, when considering units in these facilities. 305 NLRB at 877.

Specialty Healthcare involved just such a non-acute care facility. The employer challenged the bargaining unit proposed by the union, and.before the Board, the employer simply argued that the Regional Director had failed to properly apply the *Park Manor* standard. Both parties – the employer and the union – agreed that *Park Manor* standard was the controlling principle in the case. *Specialty Healthcare*, 356 NLRB 289, 292–294 (2010). (Hayes, B., dissenting). Nevertheless, the Board unilaterally sought briefing on whether or not *Park Manor* should be overruled in connection with unit determinations in non-acute healthcare facilities. *Id*. at 289.

The resulting decision discarded entirely the *Park Manor* analysis for determining units in non-acute healthcare facilities, and announced a new standard: where the employees in the petitioned-for unit are a readily identifiable group who share a community of interest, they

constitute a statutorily appropriate unit unless it can be demonstrated that other excluded employees share an "overwhelming community of interest" with the petitioned-for group. *Specialty Healthcare*, 357 NLRB at 947.

This new standard reflects a drastic departure from the traditional standard employed by the Board for decades. In 2010, the Board itself explained its historical approach thus:

> the Board's inquiry "never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another. Numerous groups of employees fairly can be said to possess employment conditions or interests 'in common.' Our inquiry—though perhaps not articulated in every case—necessarily proceeds to a further determination whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit."

Wheeling Island Gaming, Inc., 355 N.L.R.B. 637, at n.2 (2010) *quoting Newton-Wellesley Hospital*, 250 NLRB 409, 411–412 (1980). *See also, Swift & Co.*, 129 N.L.R.B. 1391 (1961); *U.S. Steel Corp.*, 192 N.L.R.B. 58 (1971); *Publix Super Markets, Inc.*, 343 N.L.R.B. 1023 (2004); *Casino Aztar*, 349 N.L.R.B. 603 (2007).

Yet just one year later, without any explanation of a compelling need, in a case where neither party requested or argued for it, the Board announced a new standard under which any "readily identifiable group" proposed by the petitioning union will be deemed appropriate unless the employer satisfies a new significant burden – proving there is an "*overwhelming* community of interest" between that group and any excluded employees. *Specialty Healthcare*, 357 NLRB at 947 (emphasis supplied).

This course of conduct would be troubling and problematic in itself, had the Board genuinely sought to limit the impact of its decision. The conclusion of the Specialty Healthcare projected limited effect:

> (1) We overrule one decision, Park Manor, which had created a unique test for unit determinations in nonacute health care facilities (the "pragmatic or empirical community of interests" test).
>
> (2) We hold that the traditional community of interest test—to which we adhere—will apply as the starting point for unit determinations in all cases not governed by the Board's Health Care Rule (including cases formerly controlled by Park Manor)

Id.

An August 30, 2011 NLRB press release entitled "Board issues decision on appropriate units in non-acute health care facilities," likewise sought to convince observers that the impact of the decision was limited to one particular type of operation in one particular industry:

> In a decision made public today, the National Labor Relations Board has adopted a new approach for determining what constitutes an appropriate bargaining unit in health care facilities other than acute care hospitals (which are covered by the Board's Health Care Rule).
>
> In addition, the Board clarified the criteria used in cases where a party argues that a proposed bargaining unit is inappropriate because it excludes certain employees. ***The Board did not create new criteria for determining appropriate bargaining units outside of health care facilities.***

NLRB Press Release, August 30, 2011, https://www.nlrb.gov/news-outreach/news-story/board-issues-decision-appropriate-units-non-acute-health-care-facilities, last accessed June 11, 2017 (emphasis supplied).

These proclamations were inaccurate at best. Since issuance of the *Specialty Healthcare* decision, the National Labor Relations Board has applied the new standard in a wide variety of industrial settings beyond non-acute healthcare facilities. *See, e.g., First Aviation Services - Teterboro*, NLRB Case No. 22-RC-061300 (private aviation services); *Odwalla, Inc.*, 357 NLRB 1608 (2011) (beverage manufacturing); *T-Mobile USA, Inc.*, NLRB Case No. 29-RC-012063

(telecommunications); *DTG Operations*, 357 NLRB 2122 (2011) (car rental); *Bread of Life, LLC dba Panera Bread*, NLRB Case No. 07-RC-072022 (bakery); *Nestle Dreyer's Ice Cream*, NLRB Case No. 31-RC-066625 (ice cream manufacturing); *Volkswagen Group of America, Inc*., Case No. 10-RC-162530 (auto manufacturing); *Constellation Brands, U.S. Operations, Inc., d/b/a Woodbridge Winery*, NLRB Case No. 32-RC-135779 (winery); *Northrop Grumman Systems Corp*., NLRB Case No. 31-RC-136471 (military equipment); *see also*, U.S. Chamber of Commerce, *Trouble With The Truth: Specialty Healthcare and the Spread of Micro-Unions* (October 31, 2016). In a fairly well-known case challenging the application of *Specialty Healthcare* outside the non-acute healthcare industry, the retailer Macy's is challenging the Board's approval of a micro-unit consisting only of the 41 cosmetic and fragrance salespersons working at a store in Saugus, Massachusetts, and excluding over a hundred other salespersons working in the various other departments throughout the store. 361 NLRB No. 4 (2014). In its decision, the Board expressly confirmed that *Specialty Healthcare* would indeed trump the longstanding retail industry presumption in favor of store-wide bargaining units. *Id*. at 16.

The proliferation of micro-units within a workplace threaten the very thing the National Labor Relations Act is intended to promote – industrial peace and stability. In the dissent from the Court's denial of Macy's petition for a rehearing en banc, Judge Jolly of the Fifth Circuit Court of Appeals explained:

> Peace and stability are weakened by the balkanization of bargaining units in a single, coordinated workplace. *NLRB v. R. C. Can Co*., 328 F.2d 974, 978–79 (5th Cir. 1964). In this case, the NLRB sacrificed considerations of promoting labor peace by using a rationale that approved a small, carved-out bargaining unit that contains no real limiting principle in future cases. For example, nothing in the NLRB's rationale prevents a dozen micro-units within a retail store's salesforce—all fraught with mini-bargaining at multiple times and the possibility of disputes and mini-strikes occurring continually over the working year. One is led to assume,

> as the amici suggest, that three bowtie salesman would be an appropriate bargaining unit if they sold bowties at a separate counter from other merchandise. So much for promoting labor peace and stability.

Macy's Inc. v. Nat'l Labor Relations Bd., No. 15-60022, 2016, at *2 (5th Cir., November 18, 2016)(Jolly, J., dissenting).

Moreover, the presence of multiple distinct bargaining units within a single facility is all but certain to greatly limit an employer's ability to meet operational demands via efficient, flexible staffing. Contract provisions limiting performance of so-called "unit work" by non-unit personnel are commonplace in collective-bargaining, and tend to limit cross-training, utilization, scheduling flexibility and promotional opportunities. In turn, these additional inefficiencies and inflexibility will lead to higher customer prices and budgetary pressures before factoring in the additional economic cost of more complex bargaining, grievance resolution, management training and legal assistance.

Section 3 of the Workforce Democracy and Fairness Act would reverse the misguided policy direction of the Board's 2011 *Specialty Healthcare* decision, by restoring the Board's traditional standards for determining whether a unit is appropriate for bargaining. This bill would provide additional stability and mitigate the ability of future Boards to abuse newly announced standards by expressly incorporating the "community of interest" factors into the body of the statute. Finally, it would avoid "proliferation or fragmentation of bargaining units" by restoring the traditional principle of ensuring employees are not excluded from a unit unless their interests are "sufficiently distinct" to warrant a separate unit. These standards are far more consistent with the express terms and intent of the National Labor Relations Act and effectively met expectations for decades.

Employee Privacy Protection Act (H.R. 2775)

The Board's 2015 Rule also forces the employer to turn over personal employee contact information, placing employee privacy at risk. For nearly five decades, employers were subject to the same set of post-petition obligations to provide the petitioning union with employee contact information. *Excelsior Underwear,* 156 NLRB 1236 (1966). Within seven (7) days after the Direction of Election, the employer was obligated to provide the Board with a list of all eligible voters, including for each a home address to allow for union outreach to the voters. The April 2015 rule changes shrank the employer's response time to just two days, required the employer to send the required employee contact information directly to the union, and expanded exponentially the amount of information the employer is forced to turn over – to include all "***available personal email addresses, and available home and personal cell telephone numbers.***" 29 CFR §102.67(l) (emphasis supplied).

These rule changes needlessly upset a delicate balance of employee rights during union organizing efforts which had been working for nearly fifty years. An oft-cited quote by Justice Brandeis proclaims that the "right to be let alone" is "the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). More specifically, Section 7 of the NLRA protects not only the right of each employee "to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing," but also the right of each employee "to refrain from any or all of such activities…." 29 U.S.C. §157. For almost fifty years, the Board struck a particular

balance between these important employee privacy and Section 7 rights. And notably, during the rulemaking process which gave rise to the 2015 overhaul, the Board failed to cite *any* evidence that the longstanding *Excelsior* list requirement was not working.

Employees who provide alternative contact information to their employers do so for specific, discrete operational reasons – e.g., to receive information about scheduling changes, emergency contact messages, etc. They do so with some expectation that their employer will hold such information for these specific, discrete operational reasons – and not to publicize, sell or share the information with outside organizations for other purposes.

More importantly, these new eligibility list requirements have put employee privacy at risk. The Board's final rule included the vague and tepid warning:

> [P]arties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

29 CFR §102.67(l). But despite numerous comments seeking assurances about enforcement of this provision, the Board declined to include any specific mechanisms to protect against abuse. The more significant risks, however, go far beyond the prospect that a union might intentionally misuse this employee personal contact information. Nowadays, no one is immune from the dangers of data piracy. The risks of falling victim to hacking, "phishing" attacks, and/or identity theft are all increased by the volume of unwanted email or text message engagement directed at employees. Nothing in the rule dictates what measures should be taken to protect this information – for example, whether it might be stored on secured networks only, or whether it must be destroyed upon resolution of the petition, etc. The Board glossed over all these very real concerns. In sum, it acknowledged there were employee privacy risks exacerbated by the new

rules, but simply concluded that the increased ability of unions to communicate their campaign message to the employees outweighed the risks to individual employees.

Compressing the time within which an employer has to assemble and transmit all of this employee contact information from seven (7) to two (2) days has unnecessarily complicated the early stages of the election process. Many employers simply do not have all of the required information in one centralized location, or in a single common format for simply compiling and e-mailing. Dedicated legal and/or human resources staff – to the extent an employer has it -- will likely have been heavily occupied with the other important practical and legal considerations, some described above, required on a compressed timetable by the 2015 Rule.

The most significant problems with this new standard are perhaps illustrated by the Regional Director's Decision and Direction of Second Election in the *Danbury Hospital* case, NLRB Case No. 01-RC-153086 (October 16, 2015). On June 19, 2015, the Board conducted an election among a unit of 866 eligible voters. The tally of ballots showed that 346 employees voted for union representation, while 390 employees voted against. The union filed objections, blaming its election loss, in part, on the employer's failure to provide a "complete voter list," pursuant to the new rules. The undisputed facts were that the employer provided a complete list of names and home mailing addresses by running a report from its Human Resources database. This list, to the extent accurate, would have satisfied the *Excelsior* list requirements in effect during tens of thousands of representation proceedings from 1966 until April 2015.

The list also contained telephone numbers, either home or cell, for approximately 94% of the eligible voters, and whatever e-mail addresses were in the database. The employer thus provided significantly more opportunity for union outreach than was customary for almost 50 years. Yet, the Regional Director sustained this objection, discarding the employees vote against

union representation and ordering a re-run election, because the employer did not show that it made a diligent enough search of additional contact lists maintained by each separate department, the hiring office's recruiting system, and even perhaps, individual teams and managers, to determine if there were any additional employee telephone numbers or personal e-mail addresses not turned over to the union. In demanding this level of scrutiny of an employer, the Regional Director expressly rejected the employer's protest that obtaining additional e-mail addresses from the hiring system would have required sorting through 36,000 records – to *possibly* locate some additional information for some of the 866 eligible voters. This interpretation of the Voter List requirements thoroughly undermines the Board's pronouncement upon implementation that "assembling the information should not be a particularly time-consuming task." 79 Fed. Reg. 74308, 74354 (Dec. 15, 2014). By requiring this extreme level of evaluation, search and compilation of data in a 48 hour period -- and invalidating election results for the employer's failure to find and then turn over every single stone in search of a stray e-mail address -- the new rules are serving as a vehicle to impede, not protect, the Section 7 rights of employees.

The Employee Privacy Protection Act would restore the seven (7) day time frame for the careful compilation and transmittal of this information directly to the National Labor Relations Board -- which procedure worked sufficiently for nearly fifty years. Moreover, it would afford employees the choice of which single method of contact each would prefer for receipt of union campaign communications. This puts the choice of showing interest and sharing personal and private contact information – of choosing to engage or to refrain -- in the hands of the employees, where the statute properly places it.

CONCLUSION

For all the reasons set forth above, the Subcommittee should move expeditiously to passage of H.R. 2776 and, H.R. 2775, to fundamentally correct the unnecessary and misguided direction undertaken by the Board in this area during the past six (6) years.