

# ***NLRB NEWS:***

## ***NEW ENGLAND***

### ***REGION 1 (BOSTON)***

### ***SUBREGION 34 (HARTFORD)***

**December 2014**

*Third Edition*

Subregion 34 – Hartford

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#### *A Very Successful Fuchs Conference*

On October 23, 2014, Region One co-hosted the 41<sup>st</sup> Annual Robert Fuchs Labor Law Conference at Suffolk Law School. The conference, which is also hosted by the Labor and Employment Law Concentration at Suffolk Law School and the Labor and Employment Law Sections of the Massachusetts, Connecticut, Rhode Island, Maine, Vermont, New Hampshire and Boston Bar Associations, is named for its founder, former Region One Director Bob Fuchs. NLRB General Counsel Richard Griffin was the featured speaker, almost one year to the day that he was sworn in as General Counsel for a four year term. Mr. Griffin holds a B.A. degree from Yale and his J.D. degree from Boston's own Northeastern School of Law. In addition to his many years of service as General Counsel for the International Union of Operating Engineers, he served as counsel to NLRB Board members for several years in the early 80's.

Prior to the conference, Mr. Griffin met with the combined staffs of the consolidated Boston and Hartford offices to update them on the latest doings in Washington. At the conference, Mr. Griffin addressed several pending matters in his office, including the Board's "joint employer" standard which is at issue in a host of cases involving McDonalds and its franchise operators. A spirited discussion ensued during the question and answer period following his remarks, which was followed by an excellent panel discussion moderated by Professor Karl Klare of Northeastern University Law School (whose former students also include five field attorneys from Region One) addressing "Workplace Laws for Vulnerable Populations", including Protected Activities in Nonunion Workplaces, Domestic Service Workers and the New DOL Regulations, and Union Reps for Employees in Nonunion Workplaces on OSHA Inspections.

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## *NLRB NEWS: New England*

### Contact the Region:

There is always an information officer available between 8:30 am and 5:00 pm at the Boston Regional Office or the Hartford Subregional office, by phone at 617-565-6710 (Boston) or (860) 240-3522 (Hartford) or in person at 10 Causeway St. in Boston or 450 Main St. in Hartford, to answer general workplace questions or to discuss a specific workplace problem. The information officer can offer information about the NLRA and advice as to whether it appears to be appropriate to file an unfair labor practice charge or an election petition. If filing a charge or petition appears to be appropriate, the information officer will assist you in completing the charge or petition form.

Information is also available on the Board's website at [www.nlr.gov](http://www.nlr.gov), which has a link to the Boston Regional Office and Hartford Subregional Office webpages featuring newsletters, news releases and local cases and decisions.

Effective Dec. 1, 2014, hearing impaired callers should contact the Federal Relay Service at <http://www.federalrelay.us/tty>, calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-866-667-NLRB.

### Fuchs Conference Speakers



The distinguished speakers and panelists who participated in the Fuchs Conference included, seated from left, Professor Karl Klare (Northeastern University School of Law); Attorney Peter Bennett (The Bennett Law Firm); Attorney Shelly Kroll (Segal Roitman LLP); Attorney Sarah Leberstein (National Employment Law Project); Attorney Richard Wayne (Hinckley Allen & Snyder LLP); and standing from left, Professor Marc Greenbaum (Suffolk University Law School); General Counsel Richard Griffin; Region One Director Jonathan Kreisberg; Regional Solicitor Michael Felsen, USDOL; and Solicitor of Labor M. Patricia Smith, USDOL.

**How to File an Unfair Labor Practice (ULP) Charge:**

- Anyone may file a ULP charge within 6 months of the ULP by submitting a charge form to any Regional Office. The form identifies the parties to the charge and includes a brief statement of the basis for the charge, and must be signed by the charging party. Although charges may be filed by mail or fax, they may not be filed electronically.
- Forms are available on the NLRB website, or may be obtained from any NLRB regional office. The Boston Regional Office and the Hartford Subregional Office have information officers available to assist with the filing of charges.

**When a Charge is Filed:**

- The NLRB Regional Office will investigate. As the charging party, be prepared to provide a sworn affidavit in support of the charge within 7 to 14 days of the filing, and arrange to promptly present additional witnesses and any documents relevant to your case.
- The Region will ask the charged party to present a response to the charge, and will further investigate the charge to establish all facts.
- After a full investigation, the Region will determine whether or not the charge has merit.

***Region One/Subregion 34 at the Forefront of Recent Groundbreaking NLRB Decisions***

***Triple Play Sports Bar***, 34-CA-012915 and 012926, 361 NLRB No. 31, Watertown, CT, August 22, 2014.

The Board unanimously found that the Respondent violated Section 8(a)(1) of the Act by discharging two employees for their protected, concerted participation in a Facebook discussion in which they complained about perceived errors in the employer's tax withholding calculations. One of the discharged employees was terminated for selecting the "like" option in responding to a Facebook posting. The other referred to the company co-owner with an expletive. The unanimous panel also found that the Respondent unlawfully threatened employees with discharge, interrogated them about their Facebook activity, and threatened one of the discharged employees with legal action because of his protected post. In finding the unlawful discharges, the Board stated that the test set out in *Atlantic Steel*, by which the Board determines whether an employee loses the Act's protection for opprobrious workplace conduct occurring during otherwise protected activity, is not well-suited to address statements involving employees' off-duty, off-site use of social media to communicate with other employees or with third parties, as in the instant case. Instead, the Board assessed the comments under the Supreme Court cases *Jefferson Standard* and *Linn* and concluded that the statements were neither disloyal nor defamatory under those standards and did not lose the Act's protection.

***Hitachi Capital America Corp.***, 34-CA-013011; 361 NLRB No. 19, Norwalk, CT, August 8, 2014.

A Board Panel majority consisting of Members Hirozawa and Schiffer affirmed the Administrative Law Judge's finding under *Wright Line* that the Respondent violated Section 8(a)(1) of the Act when it discharged an employee. The majority held that the employee engaged in protected concerted activity when she sent several emails to the Respondent's supervisors questioning the Respondent's new Inclement Weather Day policy, that the Respondent knew that the employee was raising a group complaint, and that the Respondent demonstrated animus towards the employee's activity by giving her a warning regarding the emails.

**After the Region Makes a ULP Determination:**

- If the Region determines that a charge has no merit—that the charged party has not violated the Act—it will dismiss the charge after giving the charging party the opportunity to withdraw. The charging party has the right to appeal a dismissal.
- If the Region determines that a charge has merit—that the charged party has violated the Act—it will attempt to settle the case. Unless there is a settlement, the Region will issue a formal complaint and proceed to trial to obtain a finding of a violation and an order directing the charged party to undertake remedial actions. The charged party has appeal rights, including a right to a hearing, with a final decision subject to a United States Circuit Court of Appeals.

**Groundbreaking NLRB Decisions (continued)**

***Pressroom Cleaners***, 34-CA-071823, 361 NLRB No. 57, Hartford, CT, September 30, 2014.

The Board adopted the Administrative Law Judge’s findings that the Respondent violated Section 8(a)(3) by discriminatorily refusing to hire six employees of its predecessor because of their union affiliation; and that, as a statutory successor, it violated Section 8(a)(5) by unilaterally imposing new terms and conditions of employment on the employees it hired. In accordance with *Planned Building Services*, 347 NLRB 670 (2006), the judge ordered a remedy allowing Respondent to limit its liability in compliance by showing that, even absent its unfair labor practices, it would not have agreed to the monetary provisions of its predecessor’s Union contract. A Board majority consisting of Chairman Pearce and Members Hirozawa and Schiffer overruled this portion of *Planned Building Services*, instead returning to the approach set forth in *State Distributing*, 282 NLRB 1048 (1987), holding that the predecessor’s terms and conditions of employment should continue until the successor bargained to agreement or impasse.

***FedEx Home Delivery***, 34-CA-012735 and 34-RC-002205, 361 NLRB No. 55, Windsor, CT, September 30, 2014.

A Board panel majority consisting of Chairman Pearce and Members Hirozawa and Schiffer found that drivers who operate out of the Respondent’s Hartford, Connecticut terminal are not independent contractors but rather are employees covered by the Act. In reaching this decision, the Board restated and refined its approach for assessing independent-contractor issues. First, it reaffirmed that in evaluating independent-contractor status “in light of the pertinent common-law agency principles,” “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” Second, the Board more clearly defined the analytical significance of a putative independent contractor’s entrepreneurial opportunity for gain or loss. The Board stated that it will give weight to actual, but not merely theoretical, entrepreneurial opportunity, and it will necessarily evaluate constraints imposed by a company on the individual’s ability to pursue this opportunity. The Board also stated that it will evaluate – in the context of weighing all relevant common-law factors – whether the evidence tends to show that the putative contractor is, in fact, rendering services as part of an independent business.

**How to File a  
Representation Petition:**

An NLRB Information Officer can assist you in completing a petition form. If you complete the petition yourself, keep in mind these helpful tips:

- Prepare your petition on our website at: [www.nlr.gov](http://www.nlr.gov) (filing instructions detailed).
- Know the job titles used by the Employer and the employee shift schedules.
- Provide the Region with authorization/membership cards (or other proof of interest) signed and dated by at least 30 percent of the employees in the petitioned-for unit.
- Be prepared to enter into a stipulated election agreement or to attend a hearing. The hearing is typically held within 7-10 days from the filing date of the petition.
- Be prepared for the election to be conducted promptly after the election agreement or the hearing.

**Groundbreaking NLRB Decisions (continued)**

***Macy's, Inc.***, 01-RC-091163, 361 NLRB No. 4, Saugus, MA, July 22, 2014.

A Board majority consisting of Chairman Pearce and Members Hirozawa and Schiffer found that, under *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), the petitioned-for unit of cosmetics and fragrances employees at the Employer's Saugus retail department store constitutes an appropriate unit for bargaining. The Board majority first found that the cosmetics and fragrances employees are readily identifiable as a group, share a community of interest, and that any differences among these petitioned-for employees are insignificant compared to the strong evidence of a shared community of interest. Next, the Board majority found that the Employer had not established that the cosmetics and fragrances employees share an overwhelming community of interest with the other employees at the Saugus store. In so finding, the majority emphasized that (1) there is virtually no record evidence concerning the non-selling employees, and (2) although there are similarities between the cosmetics and fragrances employees and other selling employees, there are clear distinctions between the two groups. The Board majority went on to hold that, while relevant, prior precedent regarding petitioned-for units in retail department stores does not warrant a different result. It stated that although the Board has at times referred to a storewide unit as "presumptively appropriate" in the retail department store industry, it has always permitted less-than-storewide units, and the standard for deviating from a storewide unit closely resembles the *Specialty Healthcare* standard for unit determinations. The majority also declined to revisit or overrule *Specialty Healthcare*. Finally, the Board majority emphasized that it was not reaching the question of whether other subsets of selling employees at this, or any other, retail department store may also constitute appropriate units.

**Region 1/Subregion 34  
Representation Statistics -  
FY 2014:**

- 111 Representation elections were conducted.
- 92% of elections were achieved by way of an election agreement between the parties.
- 97% of elections were held within 56 days from the filing of the petition.
- Elections were conducted in a median of 40 days from the filing of the petition.
- 10 Regional Director Decisions in contested representation cases issued in a median of 51 days.
- 2 post-election proceedings with a hearing issued in a median of 40 days.

***Significant Region One Cases involving Protected  
Concerted Activities***

***Amica Insurance Co., 1-CA-112976:*** Fran, a computer Help Desk employee for a large insurance company, volunteered to serve as a representative from her work area on a committee set up by the Company to look into issues that impacted upon employees' terms and conditions of employment. She was terminated after a series of events that resulted from her circulation and discussion of a questionnaire to her co-workers addressing those issues, and her insistence on tape recording a meeting with management when she was given a warning for her conduct in circulating the questionnaire. The Region issued a Complaint alleging that her termination violated Section 8(a)(1) because it was in retaliation for her protected and concerted distribution and discussion of the questionnaire that involved employees' terms and conditions of employment. The Complaint also alleged that the Company violated Section 8(a)(1) by prohibiting employees from surveying their fellow employees about their terms and conditions of employment, interrogating employees about the protected concerted activities of their fellow employees, and prohibiting employees from recording conversations in the workplace.

The case settled prior to hearing when the Company agreed to compensate Fran for her losses related to her discharge, and to post a Board Notice in which it agreed, among other things, to revise several of its workplace rules and policies, including the no-recording rule, that improperly restricted its employees' protected right to discuss their wages, hours and working conditions with their fellow employees and others, or which improperly restricted their right to engage in protected activities with their fellow employees and others concerning their wages, hours, and working conditions.

***Durham School Services, 1-CA-106539:*** Steve, a school bus driver, was disciplined and subjected to a State court lawsuit because he allegedly tape recorded an anti-union captive audience meeting held by the Company on its premises. The Company maintains a no-recording rule, and a State statute arguably prohibits such conduct as well. After submission of the case to the Division of Advice, a Complaint issued alleging that the employee's alleged secret audio recording in the circumstances here constitutes arguably protected concerted activity, which subjects the State statute to preemption by the Act and renders the work rule unlawfully overbroad and the maintenance of the lawsuit unlawful as well. The case settled prior to hearing when the Company agreed to rescind the warning and to drop the lawsuit, and to revise its no-recording rule so that it does not prohibit tape recordings on its premises involving protected concerted activities.

**Region 1/Subregion 34  
Unfair Labor Practice  
Statistics - FY 2014:**

- 1003 unfair labor practice charges were filed.
- 40.4 % of the charges were found to be meritorious.
- 94.6% of the meritorious cases were settled prior to hearing.
- Unfair Labor Practice hearings were held in a median of 89 days from the issuance of Complaint.
- \$1.3 million in backpay distributed to employees
- 18 employees accepted reinstatement to their former jobs, and 46 declined reinstatement.

***Significant Protected Concerted Activity Cases  
(continued)***

***BUH Construction, 1-CA-103438:*** Three carpenters secured work at a non-unionized construction site in Eastern Connecticut at an agreed upon rate of \$20 per hour. When they subsequently complained to the Company owner about not receiving the \$20 rate, they were threatened with discharge and two of the employees were fired. A Complaint issued and an administrative law judge found that the Company violated Section 8(a)(1) by threatening and discharging the employees. The Board subsequently adopted the judge's decision, and the Board's Order was enforced by a Federal Circuit Court.

***Animal Rescue League of Fall River, 1-CA-116567:*** Victoria, a full-time veterinarian for an animal shelter, was terminated for "cost saving" reasons after repeatedly being disciplined over a one year period for discussing wages with her fellow employees in violation of Company rules prohibiting such conduct. The Region issued a Complaint alleging that the rules prohibiting wage discussions and the termination violated Section 8(a)(1), because the real reason for the termination was the Victoria's protected wage discussions with her fellow employees rather than the purported cost savings. The case settled prior to hearing when the Company agreed to compensate Victoria for her losses related to her discharge, and to post a Board Notice in which it agreed, among other things, to revise several of its workplace rules and policies, including the rule prohibiting wage discussions, that improperly restricted its employees' protected right to discuss their wages, hours and working conditions with their fellow employees and others, or which improperly restricted their right to engage in protected activities with their fellow employees and others concerning their wages, hours, and working conditions.

***Serve-U Brands - Insomnia Cookies, 1-CA-113910:*** After discussing among themselves their problems with their jobs, including lack of breaks and low pay, four employees in a retail cookie store ceased performing their work duties and engaged in a strike. The next day, they received phone calls from the Company's corporate office informing them that they had breached their contracts and were fired. The Region issued a Complaint alleging that the Company violated Section 8(a)(1) by terminating the employees for engaging in a protected work stoppage. The case settled prior to hearing when the Company agreed to compensate the four employees for their losses related to their discharges, and to post a Board Notice in which it agreed, among other things, to revise its workplace confidentiality rules so that they do not improperly restrict their employees' right to discuss their wages, hours, and working conditions with their fellow employees and others.

**Contacte a la Region:**

Siempre hay un agente de guardia disponible entre las 8:30 a.m. y las 5:00 p.m. en la Oficina Regional de Boston o en la Oficina Subregional de Hartford, por telefono al 617-565-6710 (Boston) o al 860-240-3522 (Hartford) o en persona en el 10 Causeway St. en Boston o en el 450 Main Street, Hartford, para contestar preguntas generales que se refieren al lugar de trabajo o para discutir algun problema especifico del trabajo. El oficial de informacion puede ofrecer informacion acerca del NLRB y aconsejar, si es que es apropiado; archivar un cargo de practica laboriosa injusta. Si se archiva una peticion que aparece inapropiada, el agente de informacion le asistira a llenar el formulario del cargo o la peticion.

Tambien hay informacion disponible en la pagina electronica de informacion de la Junta, al [www.nlr.gov](http://www.nlr.gov), la cual tiene una conexion a la Oficina Regional de Boston y a las paginas de la Oficina Subregional de Hartford, cuales paginas proporcionan notas de informacion, noticias y casos locales asi como decisiones tomadas.

**Region 1 Professional Staff Directory**

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