"Sapphire Summit"
Montana Arbitration & Labor Relations Conference
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DEEP DIVE INTO COMPLICATED UNFAIR LABOR PRACTICE CHARGES

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I. Fundamental Concepts to all Unfair Labor Practice Charges.

What is an unfair labor practice? Unfair labor practices refer to a variety of actions by an employer or a labor organization that violate federal or state labor law by interfering with the ability, and right, of individuals to engage in or refrain from unionization or collective bargaining. These actions can take the form of discrimination, retaliation, and refusing to bargain in good faith, among other things. These rights are established by the National Labor Relations Act and the Montana Collective Bargaining for Public Employees Act. Most unfair labor practice cases involve charges filed by labor organizations or individual employees against employers, but a growing area of cases demonstrate that employees are filing charges against labor organizations with respect to duty of fair representation cases.

Purpose of the Act: "To promote collective bargaining when freely chosen without coercion by either side" and provide for "industrial peace based on a balanced bargaining relationship." *See* 29 U.S.C. §§ 141, 151; *see also*, Mont. Code Ann. § 39-31-101.

II. The National Labor Relations Act.

The National Labor Relations Act (NLRA) is the primary federal law that recognizes the

rights of employees to engage in collective bargaining and protects employees rights. The National Labor Relations Board (NLRB), an independent federal agency, enforces the NLRA. The NLRA safeguards employees' right to organize, bargain collectively, and engage in other protected concerted activities, or to refrain from such activities. The NLRA developed in stages, as pushed by historical events, and can be referred to in different ways:

1. NLRA (Wagner Act) 1935.
   a. Legally enforceable right to organize (Section 7).
   b. Required employers to bargain collectively in good faith.
   c. Right to engage in collective action, including right to strike.

2. Taft-Hartley Amendments (Labor-Management Relations Act) 1947.
   a. Union unfair labor practices added.
   b. Employee rights to refrain from organizing activities added to Section 7.
   c. Secondary boycotts prohibited.

3. NLRA as Amended by the Labor Management Relations Act and Labor-Management Reporting and Disclosure Act, cited as 29 U.S.C. §§ 141-187.

III. The Federal and State Statutes that Establish ULPs are Similar.

1. Section 7 of the NLRA (codified as 29 U.S.C. § 157) and Mont. Code Ann. § 39-31-201 are substantively similar in wording. Both protect employee's rights to "self-organization," "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing," and "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

2. Section 8 of the NLRA (codified as 29 U.S.C. § 158) and Mont. Code Ann. § 39-31-401 are substantially similar. Both define actions that constitute unfair labor practices by employers (although the Montana law applies only to public employers,) which include "interfere[ing] with, restrain[ing,] or coerce[ing] employees in the exercise of" their rights, "dominat[ing]" or "interfere[ing]" with "the formation or administration of any labor organization," "discriminat[ing] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," "to discharge or otherwise discriminate against an employee because" that employee has taken action under the NLRA/MPECBA, and " refus[ing] to bargain collectively" with the employee's representative.

3. Section 10(c) of the NLRA (codified as 29 U.S.C. § 160(c)) and Mont. Code Ann. § 39-31-406 (4) are substantially similar. Both require the Board in question to order any entity found to be committing a ULP to "cease and desist," and to "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." Both allow the order to "further require such person [found to have committed a ULP] to make reports from time to time showing the extent to which it has complied with the order," and both allow the Board to not "require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay," if such individual was "suspended or discharged for cause."

IV. Key Terms and Concepts of the Act (Labor Law).

1. **Duty of Fair Representation** ("DFR"). The Act requires an exclusive representative exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). A labor organization's duty of fair representation comes from its status as the exclusive representative. *Davidson v. VSEA*, 33 VLRB 60, 67 (2014).

2. "**Labor organization**" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose in whole or in part, of dealing with employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 29 U.S.C. § 152(5).

3. **Unfair Labor Practices** ("ULP"). Defined as a complaint filed by an employee, group of employees, labor organization, or an employer alleging an employer or labor organization has violated the Act. [Sec. 8] 29 U.S.C. § 158.

4. **Unfair labor practices by labor organizations**. Section 8(b)(1)(A): Unlawful for an employee organization/union to restrain or coerce employees in the exercise their Section 7 rights. Examples are bad faith management of member's grievances; discriminatory representation of membership; arbitrary or deliberate mismanagement of dues or dues check off. Breaches of the DFR.

5. **Employee Protection** Under the NLRA, Section 7. Section 7 of the Act confers upon employees the right: "To self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . the right to refrain from any or all of such activities…" 29 U.S.C. §157. *See also,* Mont. Code Ann. § 39-31-201.

-To fall under Section 7, employee activity must be "protected" and "concerted."

a. "**Protected"** activity – generally encompasses "peaceful" employee activity in the exercise of their rights set forth in the text of Section 7, (the right to organize; the right to form, join, or assist unions; the right to engage in collective bargaining; and the right to engage in "other mutual aid or protection."). John E. Higgins, Jr. THE DEVELOPING LABOR LAW 197 (5th ed. 2006); 29 U.S.C. § 157.

· Activities such as threats, sit-down strikes, violence, and breaches of contract and other unlawful conduct are not "protected." *Id*.

· "Other mutual aid and protection" encompasses very broad activities, including, but not limited to, employees' efforts to improve terms and conditions of employment through means outside the immediate employee-employer relationship. Thus, protection is afforded employees when they seek to improve working conditions through administrative and judicial forums or appeals to legislators. *Id*. at 208.

b. "**Concerted**" activity – generally means two or more employees acting together. However, action of single employee likewise is protected when undertaken "with or on the authority of" co-workers and not solely on the employee's behalf. See, e.g., *Meyers Indus.*, 281 NLRB 882 (1986), aff'd 835 F.3D 1481 (D.C. Cir. 1987). An example of such a "concerted" single-actor activity includes an employee's assertion of a right under a state law that fellow employees likewise enjoy. Id.

6. NLRB Coverage and Regions - The NLRB covers virtually all private-sector, non-supervisory employees – whether unionized or not. 29 USC § 152. The Regions is where the work gets done (Region 18 Minneapolis; Region 19 Seattle; Region 27 Denver; Region 28 Phoenix). Timelines are shorter (Grievances 15 to 30 days; ULP charges 180 days; Federal Court suits under the CBA are at least 3 years).

Prevention of Unfair Labor Practices [Sec. 10] 29 U.S.C. § 160.

Right to Strike preserved [Sec. 13] 29 U.S.C. § 163.

V. Unfair Labor Practices of Employers.

A. Unfair labor practice is defined as a complaint filed by an employee,

group of employees, labor organization, or an employer alleging an employer or labor organization has violated the Act.

1. Rights of Employees. Section 7 of the NLRA describes the rights of employees protected by the Act:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities [omit].

See 29 U.S.C. § 157.

2. Section 8 of the NLRA protects the rights provided in Section 7 of the Act by declaring certain actions against employees who exercise Section 7 rights "Unfair Labor Practices" ("ULP's"). See 29 U.S.C. § 158.

3. Unfair labor practices may be committed by an employer and its agents or a labor organization and its agents.

4. Sections 8(a)(1) – 8(a)(5) of the Act describe ULP's that may be committed by an employer. The corresponding statute for Montana public employees is Mont. Code Ann. § 39-31-401 (1)–(5).

5. Sections 8(b)(1)–8(b)(7) of the Act describe the ULPs that may be committed by a labor organization. The corresponding statute for Montana public employees is Mont. Code Ann. § 39-1-402 (1)–(3).

B. Section 8(a)(1): Unlawful for employer to interfere with, restrain, or coerce employees in exercise of Section 7 rights.

1. Two types of violations under §8(a)(1): Independent violation and Derivative violation.

Sample unlawful actions: interrogation about union action or membership; threats of reprisal, promise or grant of benefit, or plant closure; removal of a benefit to discourage section 7 rights; surveillance of employee violence or threats of violence to discourage union activity.

Whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959). Generally, violations of Section 8(a)(1) do not require that the employer have an anti-union motivation behind their actions.

· *Central Valley Meat Co*., 346 NLRB 1078 (2006) (the Employer's plant floor employees began to organize. The Board found that the employer

violated Section 8(a)(1) when it prevented the employee who contacted the union from waiting for his ride home from work in the parking lot. The Board found he was prevented from standing in the parking lot because of his union activity.)

· *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964) (After the NLRB ordered a union election, the employer held a dinner for its employees where it gave an anti-union speech and announced a new floating holiday and new overtime and vacation policies. The Board/Supreme Court held that the timing of the benefit showed that the employer was trying to induce employees to vote against the union in violation of §8(a)(1)).

-Remedies: Cease and desist order, Gissel bargaining order, ordering a new election, posting requirement, make whole

C. Section 8(a)(2): Unlawful for an employer to dominate/interfere with the formation/administration of any labor organization. (A "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose in whole or in part, of dealing with employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 29 U.S.C. § 152(5).

1. Employer solicits union members: Employer shows clear preference for one union over another in a multi-union petition/campaign process; Employer takes an active part in establishing a union.

2. Key Issue: Employer neutrality.

Electromation, Inc., 309 NLRB 990 (1992) (where employer created "action committees" comprised of employees to generate proposals on wage and attendance, the employer unlawfully supported/dominated a "labor organization").

3. Remedies: Cease and desist order, termination of any collective bargaining agreement, reimbursement of initiation fees/dues.

D. Section 8(a)(3): Unlawful for an employer to discourage or encourage membership in any labor organization by discrimination regarding hiring, tenure of employment, or any term or condition of employment.

1. Discharging or constructively discharging someone for their union activity; transferring business/work to avoid the NLRA; changing employment conditions to encourage or discourage union activity; discharging or discriminating against an employee engaging in a lawful strike; hiring/rehiring

employees on the basis of union membership.

2. Motivation is a key concept; not all discrimination is unlawful, but discrimination based on protected activity is unlawful.

3. Key Rules:

a. *Wright Line*, 251 NLRB 1083 (1980): General Counsel must show that the protected activity was a motivating factor for an adverse employment action, by a preponderance of the evidence, by establishing:

· Employee engaged in a protected activity;

· Employer had knowledge of the activity;

· Employer's animus toward the activity.

The burden of persuasion then shifts to the employer to show that the same adverse action would have taken place in the absence of protected conduct. See also General Counsel's Memorandum GC 06-09. The General Counsel's Burden under Wright Line (Oct. 12, 2006).

b. *Atlantic Steel Co.*, 245 NLRB 814 (1979) (where despite knowledge that the Employer was motivated by animus in taking a negative employment action, an employee's egregious conduct removes him or her from the protection of the Act.)

c. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963) (unlawful intent may be found where the employer's actions are inherently destructive, the case does not turn on the employer's motivation for the unlawful action.)

d. Remedies: Reinstatement, back pay, cease and desist order, notice posting, removal of discipline or its products, make whole remedy.

E. Section 8(a)(4): Unlawful for employer to discharge/discriminate against an employee who has filed charges under the NLRA or participates in a Board proceeding.

1. Harassing or implementing a negative employment action against an employee because they filed ULP charges, intend to file charges, because they talked to the Board, because they testified at a Board hearing, because they attended a Board proceeding.

2. Key Rule: To provide immunity to individuals who initiate charges or assist the Board.

3. Remedies: See § 8(a)(3)

F. Section 8(a)(5): Employer's refusal to bargain with a union/exclusive representative of its employees.

1. *See also,* Mont. Code Ann. § 39-31-305 (good faith bargaining for Montana public employees and unions.

2. Intent: Fostering an ongoing relationship where both parties meet and confer in good faith.

a. Certain topics the parties must meet and confer upon.

· Mandatory subjects of bargaining.

· Unions have a reciprocal responsibility to employer's (See Section 8(b)(3)).

· Deferral and arbitration.

3. Unilateral change to a condition of employment; directly dealing with an employee on a mandatory subject of bargaining; refusing to bargain/meet about a mandatory subject of bargaining; meeting with union without good faith (surface bargaining); refusing to provide the union with relevant information requested about the bargaining unit.

4. Key rule: To bargain collectively is the performance of the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions…but such obligation does not compel either party to agree to a proposal or require the making of a concession. 29 U.S. C. § 158(d).

· *NLRB v. Katz*, 369 U.S. 736 (1962) (Where employer was in the process of bargaining with union in good faith but made 3 unilateral changes to employment conditions, the employer was found to have committed a per se violation of the Act.)

- *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967) (Employer violated section 8(a)(5) where it failed to provide the union with information about the bargaining unit the union requested and needed to evaluate pending grievances "intelligently"). See also *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

5. Remedies: Cease and desist order, bargaining order, order to supply information.

VI. Unfair Labor Practices of Labor Organizations.

A. Section 8(b)(1)(A): Unlawful for an employee organization/union to restrain or coerce employees in the exercise of their Section 7 rights. *Compare* Mont.

Code Ann. § 39-31-402(1).

1. Sample unlawful actions: Bad faith management of member's grievances; discriminatory representation of membership; arbitrary or deliberate mismanagement of dues or dues check off.

2. Key Issue: Duty of fair representation.

3. The Act requires an exclusive representative to "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

· *Pattern Makes' League of North America v. NLRB*, 473 U.S. 95 (1985) (The union had an internal rule preventing its members from resigning just before or during a strike/lockout. The court found the union's refusal to accept letters of resignation from its members and its imposition of fines on members who worked during a strike violated 8(b)(1)(A)).

· *Electrical Workers IBEW Local 2088 (Lockheed Space Operations)*, 302 NLRB 322 (1991) (where an employee initially signed a due checkoff authorization, the union violated Section 8(b)(1)(A) by continuing to take dues from the employee's paycheck after he submitted a letter of resignation from union membership).

4. Remedies: Cease and desist order, notice posting, restitution/refund of any fines owed.

B. Section 8(b)(2) Prohibits a union from causing, or attempting to cause, an employer to discriminate against any employee. *See also*, section 8(a)(3).

1. Putting pressure on an employer to demote, discharge, or cause a loss of status/benefit to targeted employee (union or non-union); discriminating against an employee who filed charges against the union.

2. Exception: Union may force an employer to act against an employee where there is a compulsory union membership agreement and the employee has failed to pay proper union dues.

· *General Motors Corp.*, 272 NLRB 705 (1984) (A union may violate 8(b)(2) by causing an employer to discriminate against an employee for protesting the union's policies, questioning the official conduct of union agents, or incurring the personal hostility of a union official. Here the union asked the employer to change an employee's start time because he opposed a union initiative).

3. Remedies: Cease and desist order, notice posting, hold union and employer jointly and severally liable for back pay, refund of union dues, make whole remedy.

C. Section 8(b)(3): A union violates this section by failing to bargain with the employer in good faith. *See also,* Mont. Code Ann. § 39-31-402(2); *compare,* section 8(a)(5).

· *Teamsters Local 500 (Acme Markets)*, 340 NLRB 251 (2003) (Board held that the union violated 8(b)(3) by failing to provide the employer with information requested which provided background on the interpretation of a particular collective bargaining agreement clause).

2. Remedies: Cease and desist order, execution of contract, compliance with contract, make whole remedy (to employer/employees).

D. Section 8(b)(4):

1. Section 8(b)(4)(A) – Aimed at addressing secondary boycotts.

· Section 8(e), "hot cargo agreements."

· Different types of picketing/primary vs. neutral.

E. Section 8(b)(4)(D): Jurisdictional disputes arising over what union employees should perform work.

1. Unlawful for a union to cause a strike to compel an employer to assign work to the employees it represents.

2. Remedies: Injunction, cease and desist order, notice posting, reimburse employees for fines.

F. Section 8(b)(5): Prohibits excessive or discriminatory union initiation fees.

G. Section 8(b)(6): It is unlawful to cause an employer to pay or agree to pay for services that are not going to be done ("featherbedding", union insisting that worker get paid for doing nothing).

H. Section 8(b)(7): Prohibits organizational picketing.

I. Mont. Code Ann. § 39-31-402 prohibits using union dues for political contribution.

J. Mont. Code Ann. § 39-31-406 defines remedies for ULPs in Montana, which must include a statement of the findings of fact, an order to cease and desist the ULP, and an order to take affirmative action to "effectuate the policies of this chapter." Such an order can include re-instatement of an employee with or without backpay (unless terminated for cause,) and a requirement to make follow up reports to demonstrate compliance.

VII. Applying Unfair Labor Practices Law, Selected Deep Dives.

A. The NLRB's interpretation of protected concerted activities expands and contracts with changes in executive branch administrations.

1. Expanding what are considered protected concerted activities tends to occur under Democratic administrations.

(a) An employer action will violate an employee's right to engage in concerted activity if the employer's action is clearly work related and if it will plausibly have the effect of discouraging employees from exercising their rights. An employer may not threaten retaliation against employees for union activity, give employees the impression that their union activity is under employer surveillance, or communicate to employees that their attempts to unionize will be futile.

i. In NLRB Nos. 27-CA-278463, 27-CA-278592 & 27-CA-279117:

-An employer asking an employee if the employee knew anything about union organization didn't create a feeling of surveillance. However, the employer's subsequent request to the employee to keep that conversation confidential violated the employee's right to engage in concerted activity, specifically discussing "terms of employment," and "working conditions."

ii. In *Garten Trucking LC v. NLRB*, Nos. 24-1571, 24-1614, 2025 U.S. App. LEXIS 13365, at *1 (4th Cir. June 2, 2025) the court held:

-The employer's assertion that "if it wasn't for [the union] trying to steal money out of your paychecks you would already have your raises," when combined with the employee's understanding of the discretion that the owner had in dispensing raises, could be rationally understood as a threat to withhold raises in the future if the employees supported the union. This was considered a coercive quid-pro-quo inducement.

(b) Whether employee rights to engage in concerted activity were violated, or "chilled," is determined by a "totality of the circumstances" test:

i. In NLRB, Board Decision, *Stericycle, Inc.*, 372 N.L.R.B. No. 113, 2023 BL 265407, the NLRB stated to establish that employee rights to engage in concerted activity were chilled, a party must first establish that the employer's policy could have a reasonable tendency to restrain, coerce or interfere with an employee who contemplates exercising such rights. That showing creates a presumption that the policy is unlawful, and the burden of proof falls upon the employer to "rebut [that presumption] by proving that it advances legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule."

-In applying the "totality of the circumstances" test "the Board will interpret

the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity."

-If an employee could reasonably interpret the employer's policy as curtailing employee rights to engage in concerted activity, it is immaterial that "a contrary, noncoercive interpretation of the rule is also reasonable."

ii. *Solo Cup Co.*, 144 NLRB 1481, 1481-1482 (1963) contains language to the effect that the rule applied in Stericycle is true "even if [the rule in question is] interpreted lawfully by the employer in practice."

iii. In NLRB, ALJ Decision, *RCL Mechanical, Inc.*, No. CA-336276, under the "totality of the circumstances test," actions that could be reasonably interpreted as discouraging employee rights included:

-A manager's comment that they were segregating employees based on how management thought the employees would vote on the union, trying to keep the "yes" votes away from the "undecided" votes, impermissibly created the impression that union activities were under surveillance.

-Owner's questioning an employee about "why this [union organization] was happening," and "if there was anything the employer could do better," at a visit to the jobsite (where there was no established practice of soliciting such feedback before union organization.) "The Board has held that absent a previous practice of doing so, an employer violates the [NLRA] by soliciting grievances during an organizational campaign when the solicitation is accompanied by a promise, expressed or implied, to remedy the grievances."

iv. However, comments from an employer that amount to predictions of the disadvantages of unionizing that are outside the employer's ability to control are not found to discourage employee's rights to engage in concerted activity, such as:

-A manager commenting that bargaining with unions took on average 421 days, during which time employees could not legally get a pay raise.

-A manager's comment, that a unionized employer in a similar business had recently had layoffs, and that skilled laborers who used to work there were unemployed.

v. The Board stated that anti-union animus is necessary to show that an employee's rights to engage in concerted activity were restricted by an employer's discriminatory practices. Anti-union animus can be demonstrated by: the timing of the employer's action in relation to the union's or other protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons offered for the action; failure to conduct a meaningful investigation; departures from

past practices; and disparate treatment of union employees.

vi. In NLRB, Board Decision, *RAV Truck & Trailer Repairs, Inc. and Concrete Express of NY, LLC, a Single Employer*, 372 N.L.R.B. No. 25, there was bi-partisan agreement on the NLRB that the Court's Darlington decision controlled what constituted chilling employee rights to engage in concerted activity.

-Under Darlington, evidence of an actual chilling effect doesn't need to be found, only evidence, even circumstantial evidence, that a chilling effect was a foreseeable consequence of the employer's actions.

vii. In NLRB, Board Decision, *McLaren Macomb*, 372 N.L.R.B. No. 58, 2023 BL 54078, the NLRB ruled that the inclusion of illegal terms restricting rights in a severance contract offered to employees will chill an employee's inclination to exercise those rights because there exists a legally enforceable remedy for their exercise.

(c) Parties filing a ULP must also consider the "totality of the circumstances" test to determine if they have a valid claim.

i. If there is a legally cognizable (legitimate and substantial,) business reason for the employer to have acted as they did, then the party claiming the ULP is responsible for demonstrating that the employer's legitimate business ends could have been achieved by a method that would have been less restrictive, or a method with less broad restrictions, of employee's rights to collective action.

(d) In order for a "savings clause" to have its intended effect, it must specifically vindicate each right that the document might otherwise ambiguously curtail, and the savings clause must be physically close in the document to the clause it is meant to modify. (See NLRB, ALJ Decision, *Meta Platforms, Inc.*, No. CA-312724, 2024 BL 248327)

2. Contracting what are considered protected concerted activities tends to happen under Republican administrations.

(a) This approach emphasizes not violating an employer's rights above protecting an employee's rights, for example:

(b) A "past practice" that is enforceable against an employer under the "status quo" doctrine should not be found if there is any identifiable inconsistency or vagary in the practice. (See dissent NLRB, Board Decision, *Airgas USA, LLC*, 373 N.L.R.B. No. 102, 2024 BL 327443: giving dollar denominated raises can't establish a "past practice" if those raises don't also correspond to a fixed percentage of the employee's pay; 91% of employees receiving a benefit isn't enough to establish a "past practice;" written records of a past practice only establish that practice if they are followed exactly.)

(c) A "savings clause" can be vague or not address the employee rights to engage in concerted activity curtailed elsewhere in the document and still function to make the document enforceable. (See dissent NLRB, Board Decision, *Airgas USA, LLC*, 373 N.L.R.B. No. 102, 2024 BL 327443, as long as a "savings clause" can be tangentially related to the mandatory bargaining subject, the employer's specific statements of being unwilling to bargain on mandatory bargaining subjects are redeemed.)

(d) This approach rejects the "totality of the circumstances" test for violations of an employee's right to engage in concerted activity, in favor of a "practical effects" test that asks, did the employer's actions actually discourage any employees from exercising their right to engage in concerted activity? (See dissent NLRB, Board Decision, *McLaren Macomb*, 372 N.L.R.B. No. 58, 2023 BL 54078; most employees don't "ever" think about their rights, so their actual exercise of those rights can't be negatively impacted by any statement.)

(e) Rights to engage in concerted activity can only be chilled if a "reasonable employee" would have felt those rights were restricted. (See NLRB, Board Decision, *Nicholson Terminal & Dock Company*, 369 N.L.R.B. No. 147, 2020 BL 285150; "a reasonable employee does not view every employer policy through the prism of the NLRA.")

B. Pecuniary Damages and Their Limits.

1. In the *Thryv* decision, the NLRB sought to create something closer to the NLRA's stated goal of "make whole" remedies by holding employers responsible for pecuniary damages.

(a) In NLRB, Board Decision, *Thryv, Inc.*, 372 N.L.R.B. No. 22, 2022 BL 444427, the Board ordered that the affected employee be compensated for "all direct or foreseeable pecuniary harms suffered as a result of the respondent's unfair labor practice." The board specifies that pecuniary damages "must be specifically calculated and require[]... demonstrating the amount of pecuniary harm, the direct or foreseeable nature of that harm, and why that harm is due to the respondent's unfair labor practice."

(b) In *Int'l Union of Operating Eng'rs v. NLRB*, 127 F.4th 58, 70 (9th Cir. 2025), the 9th Circuit upheld an ALJ's award of pecuniary damages for "reasonable search-for-work and interim employment expenses." Stating "The [NLRB] may take any 'affirmative action' that 'will effectuate the policies' of the [NLRA]. Within this limit the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay."

2. Although they lack a unifying legal theory, various members of the bench and the

NLRB seek to end *Thryv's* influence on the law.

(a) In NLRB Nos. 27-CA-278463, 27-CA-278592 & 27-CA-279117, the dissent states *Thryv* should be overturned. They assert, without support, that making an employer pay for any damages beyond backpay would be punitive, therefore not permitted.

(b) In NLRB, Board Decision, *Airgas USA, LLC*, 373 N.L.R.B. No. 102, 2024 BL 327443, the dissenting board member argued that *Thryv* was no longer good law because the decision had been overturned by the 5th Circuit on appeal.

i. This contradicts the majority opinion which found that the 5th Circuit's decision to overturn the *Thryv* decision doesn't change its precedential value, because it wasn't overturned for any faults in the logic of the decision.

ii. Further, even if the 5th Circuit had found fault in the logic of that precedent, the NLRB argues that would not be impactful because only the Supreme Court can tell the NLRB how to read the NLRA, and the NLRB has a long history of "nonacquiescence in adverse appellate court decisions."

(c) In *Int'l Union of Operating Eng'rs v. NLRB*, 127 F.4th 58 (9th Cir. 2025), Patrick Bumatay writes a dissent that lays out a roadmap for ending *Thryv's* influence.

i. Bumatay claims that foreseeability is the defining hallmark of tort damages, therefore, introducing a foreseeability element to pecuniary damages in labor law impermissibly intrudes into the exclusive realm of tort damages. Since a tort proceeding in a federal court implicates the 7th amendment's guarantee of a right to a jury trial, Bumatay alleges that by incorporating foreseeability the 7th amendment's guarantee of a right to a jury trial is triggered for pecuniary damages in a labor law case.

ii. Bumatay tries to distinguish public and private rights as mutually exclusive. He then asserts that because pecuniary damages have elements of private rights, they necessarily cannot vindicate public rights, and therefore pecuniary damages are never available as part of the public rights redressable under the NLRA.

C. The Overlap of Breach of Duty of Fair Representation and ULPs.

1. A breach of the duty of fair representation claim constitutes a ULP against the union. Accordingly, The district court and the BPA have concurrent jurisdiction to hear claims that a union has breached its. *Teamsters, Local No. 45 v. State ex rel. Bd. of Personnel Appeals*, 195 Mont. 272, 277, 635 P.2d 1310, 1313 (1981). The claimant may choose to file a DFR claim directly in district court or with the BPA.

2. DFR breach can lead to a "joint cause" of action against a union for breach of

the duty of fair representation and an employer for breach of contract as a "hybrid" suit. The failure to prove either claim "results in failure of the entire hybrid action"; *Stanton v. Delta Air Lines, Inc.*, 669 F.2d 833, 836 (1st Cir. 1982). *Bryan v. Am. Airlines, Inc.*, 988 F.3d 68, 71 (1st Cir. 2021).

2. An employee may not bypass union representation in a ULP claim "unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf." *Edwards v. Cascade Cnty. Sheriff's Dep't*, 2009 MT 451, ¶ 50, 354 Mont. 307, 319, 223 P.3d 893, 901.

3. Mont. Admin. R. 24.26.1201 (5) "If an individual employee is filing an unfair labor practice against an employer, the ULP complaint form shall include the signature of the employee's exclusive representative" or a statement that the employee does not have an exclusive representative, or an explanation of why that exclusive representative is not involved.

4. Mont. Admin. R. 24.26.1202 allows a plaintiff to file "a ULP claim… while the [plaintiff's] grievance proceeds," as outlined in the CBA. This statute allows a plaintiff to file "simultaneous, parallel actions:" a grievance under the CBA and a ULP with the Board of Personnel Appeals.

> -"If… the [B]oard [of Personnel Appeals] agent determines the charge may be resolved through the… arbitration provisions contained in the applicable CBA, the board agent may issue a recommended order staying the informal investigation."

D. ULP Charges Brought as a Result of Bargaining Conduct.

1. Maintaining the Status Quo after a CBA expires: In *NLRB v. Nexstar Broad., Inc.*, 4 F.4th 801 (9th Cir. 2021), the 9th Circuit overruled the NLRB's decision in MV Transportation which allowed an employer to make changes to employment conditions after the CBA expired if the CBA allowed the employer discretion in the changed area. The Nexstar court ruled that, unless a contract term has specific language stating that it will endure after the CBA expires, it cannot grant an employer the ability to modify conditions of employment after the CBA expires. This is because after the CBA expires, the requirement to maintain the status-quo is imposed by the stricter terms of the NLRA and any employer freedom in the CBA to make changes cannot overcome the status-quo rule unless the parties bargained for that freedom to exist after the CBA expires.

2. The "totality of the circumstances" test applies to employees and unions filing ULP claims. For a ULP claim to succeed, the aggrieved party must look at all relevant circumstances and demonstrate that, on the whole, those circumstances support the assertion that employee's rights to engage in collective action were violated or "chilled."

(a) It is not a ULP for an employer to discipline employees for engaging in concerted activity that violates the limits established by law. Examples include:

i. "the NLRA does not shield strikers who fail to take "reasonable precautions" to protect their employer's property from foreseeable, aggravated, and imminent danger due to the sudden cessation of work." *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Local Union No. 174*, 598 U.S. 771, 780, 143 S. Ct. 1404, 1413 (2023).

ii. Employee action that violates the terms of the employee's CBA is not protected under the NLRA even when it otherwise meets the definition of concerted activity. *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 837, 104 S. Ct. 1505, 1514 (1984) .

iii. Striking is generally a protected activity, but it is illegal for police officers in Montana to strike under Mont. Code Ann. § 39-31-501, so disciplining a police officer for striking is not a ULP.

3. Tentative agreements are binding! In *Corvallis Faculty Group v. Corvallis School District*, Case No. 256-2024 (Mont. 2024), the Board of Personnel Appeals was asked to consider whether a signed tentative agreement was binding on a school board. The parties agreed to negotiations ground rules which included that "all Tentative Agreements shall be documented and verified by both parties." Although it was not clear to the District bargaining team that certain stipends were still on the table, they signed the CFG's proposal that clearly included the "Matrix Stipend" language. When the Board met to ratify the agreement, a member of the Board who was not part of the District's bargaining team stated that the draft contained an error, specifically the inclusion of the Matrix Stipend. The Board voted to ratify the agreement, minus the Matrix Stipend language, and a ULP followed.

The Hearing Officer began his analysis with the premise that a party's obligation to bargain in good faith requires the parties to execute a written agreement based on the terms agreed upon during negotiations. There has to be a meeting of the minds, but in this case, the signed Tentative Agreement was clear and unambiguous – despite the testimony of the District's bargaining team that they did not know what was in the document they signed.

E. Public Employee Issues.

1. Greater Duties, Limited Rights.

(a) There are specific statutory limitations in Montana that apply only to public sector employees. Mont. Code Ann. § 39-31-303 establishes additional

managerial rights for public employers, which have the effect of limiting public employee's rights beyond those in the private sector.

i. "public employee unions and memberships must "recognize the prerogatives of public employers to operate and manage their affairs" in order to "maintain the efficiency of government operations,"" City of Great Falls v. Int'l Ass'n of Fire Fighters, 2024 MT 302, ¶ 10, 419 Mont. 262, 274, 560 P.3d 621, 627

ii. However, Mont. Code Ann. § 39-31-305 provides that public unions and employees have no obligation to concede any points, or agree to any proposals, in the collective bargaining process.

(b) In *Pickering v. Board of Education* (1968), 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 81, the Court established that the state's interest in regulating the speech of its employees "differs significantly from [the interest] that it possesses in connection with speech of the citizenry in general," necessitating a balance between the 1st amendment rights of the employee and the interest of a State employer in promoting efficient public service.

(c) In *State by Dep't of Highways v. Pub. Emps. Craft Council*, 165 Mont. 349, 355, 529 P.2d 785, 788 (1974), the Montana Supreme Court held that the Montana Act grants public employees the right to strike, referencing the right to engage in concerted activities. However, the right of public employees to strike can be limited or eliminated by statute. *See, e.g.*, Mont. Code Ann. §§ 39-31-501 through 505 (police officer strikes prohibited and requiring binding interest arbitration); Mont. Code Ann. §§ 39-34-101 through 106 (strikes prohibited and providing binding interest arbitration for firefighters); Mont. Code Ann. §§ 39-32-101 through 114 (notice periods and limits on nurses right to strike); Mont. Code Ann. § 2-18-301 (state employees prohibited from engaging in economic strikes to increase wages because state law prohibits unions from bargaining beyond what has been appropriated by the Legislature).

2. Punitive Damages in DFR Cases.

(a) In *Folsom v. Mont. Pub. Emples. Ass'n*, 2017 MT 204, ¶ 1, 388 Mont. 307, 310, 400 P.3d 706, 711, two justices (Sandefur and Wheat) wrote a concurring opinion that suggested Montana should follow New Mexico's lead in allowing punitive damages in breach of DFR cases brought against unions. This line of reasoning rests upon two controversial premises:

i. The concurrence claims that DFR is a common law claim, this is supported by *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S. Ct. 903, 910 (1967). However,

Mont. Code Ann. § 1-1-108 states that common law only exists where there is no controlling statute, and Mont. Code Ann. § 39-31-205 is a statute that defines and controls DFR claims.

ii. The concurrence claims that DFR is a Tort claim. While this has some support in federal law, the Montana Supreme Court in *Helvey v. Mont. Educ. Ass'n*, 2015 MT 190N, ¶ 8, 353 P.3d 508, contradicts this, stating that DFR does not sound in Tort law.

(b) The Court in *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 52, 99 S. Ct. 2121, 2128 (1979), recognized the remedial nature of damages created by the NLRA, and found that allowing punitive damages in federal ULP cases, including DFR cases, would undermine the goals of the NLRA.

i. The Montana Supreme Court "has looked previously to federal courts' construction of the NLRA as an aid to interpretation of the Montana Public Employees Collective Bargaining Act." *Small v. McRae*, 200 Mont 497, 502, 651 P.2d 982, 985 (1982).

F. Significant Unfair Labor Practices Cases.

NLRB v. Katz, 369 U.S. 736, 737, 82 S. Ct. 1107, 1108 (1962).
-Where an employer makes unilateral changes to policies that require collective bargaining, bad faith need not be demonstrated to show that the employer committed a ULP in violation of §8(a)(5).

Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903 (1967).
-After the Miranda Fuel decision, NLRA Section 7 establishes the DFR requirement for unions. A breach of DFR occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. If these standards aren't met, it is immaterial if an adjudicative body later finds that the union's decision was wrong or could have gone the other way. Additionally, "an employer who participates in such arbitrary union conduct violates [NLRA] Section 8 (a)(1)" and "the employer and the union may violate [NLRA] Sections 8 (a)(3) and 8 (b)(2), respectively, when a union causes or attempts to cause an employer to [detract or deviate from] the employment status of an employee."
-State and Federal courts lack jurisdiction, and the NLRB has sole jurisdiction in cases where Section 7 or Section 8 of the NLRA has been violated AND Congress has clearly expressed its intent that the NLRB should have sole jurisdiction. However, State remedies are not preempted when the "activity regulated was merely a peripheral concern to the

[NLRA,]" or for matters of pressing local concern that lack clear Congressional intent for the LMRA/NLRB to have sole jurisdiction.
-An employee who has been the victim of a ULP must attempt to "exhaust" his/her remedies under the CBA before turning to the courts for redress. (See *McBroom* for a Montana specific different rule.)

-UNLESS the employer has repudiated the remedies under the CBA,
-OR the union has the sole discretion to pursue higher levels of grievance procedure and the union wrongfully fails to pursue such a remedy,
-OR the CBA does not offer any remedy for the grievance at issue.

-An award against a union for breach of DFR may not include damages attributable solely to the employer's breach of contract and may only contain damages that the union caused to accrue, (by its breach of the DFR,) on top of those caused by the employers breach. Such additional damages caused by the union should not be charged to the employer.

Sch. Dist. v. Bd. of Pers. Appeals, 214 Mont. 361, 365, 692 P.2d 1261, 1263 (1984).
-During the bargaining process for a new CBA, after the old CBA has expired, and in the absence of a bargaining "impasse," it is a ULP for an employer to unilaterally change the terms of the old CBA. This opinion proffers no requirement that the employer follow all the terms of the old CBA, only stipulating that those terms may not be changed unilaterally, and that the employer must "continue to pay the salaries of collective bargaining contracts."

Bonner Sch. Dist. No. 14 v. Bonner Educ. Ass'n, 341 Mont. 97, 2008 MT 9, 176 P.3d 262.
-"This Court [The Montana Supreme Court] has looked previously to federal courts' construction of the NLRA as an aid to interpretation of the Montana Public Employees Collective Bargaining Act."
- The NLRA broadly to requires collective bargaining on any topic that is "plainly germane to the working environment," and "not among those managerial decisions which lie at the core of entrepreneurial control" to support the goal of fostering industrial peace.
-Managerial prerogative, as defined in Mont. Code Ann. § 39–31–305, prerogative clause does not protect an employer from the duty to bargain in good faith (which applies to all subjects affecting employment,) it only protects the employer from making a forced concession at the bargaining table.
-Wherever a CBA contains ambiguous language, the employer has a duty to bargain in good faith to reach an understanding with the collective bargaining representative to resolve questions arising under the CBA.

McBroom v. Mont. Bd. of Pers. Appeals, 421 Mont. 243, 245, 2025 MT 64, ¶ 1, 566 P.3d 518. -Mont. Code Ann. § 39-31-404 provides a six-month statute of limitations for filing a ULP claim and Mont. Admin. R. 24.26.1202 contemplates that a ULP and grievance procedure can proceed simultaneously or the ULP can be stayed by the BOPA pending the resolution of the grievance. No public policy requiring exhaustion of CBA remedies before an ULP can be filed is recognized by the court. A ULP claim is not subject to any requirement to exhaust CBA remedies before pursuing a cause of action in court if that claim is not subject to resolution under the CBA.

NLRB v. UPS Supply Chain Sols., Inc., 2025 U.S. App. LEXIS 8058 (9th Cir. 2025). The National Labor Relations Board petitioned the 9th Circuit to uphold its Order against UPS Supply Chain (UPS Healthcare), which refused to recognize and bargain with the union as the exclusive representative of the employees of UPS Healthcare. In May 2022, the employees of UPS Healthcare conducted an election and voted to organize with the International Brotherhood of Teamsters. The Union was certified by the Regional Director on December 6, 2022. UPS Healthcare filed objections to the May 2022 election, and the Board overruled those objections. The objections were based on what UPS characterized as inappropriate conduct surrounding the election. The hearing officer determined that the alleged conduct did not rise to electioneering, and overruled the objections. UPS Healthcare continued to object, and the Board issued its original ULP Order in August 2023. UPS Healthcare refused to negotiate and the Board petitioned the 9th Circuit. The 9th Circuit had little trouble finding that UPS Healthcare committed an unfair labor practice by refusing to negotiate with the exclusive representative of the employees. The underlying factual issue was decided by the Regional Director and that decision would stand.

Int'l Longshore & Warehouse Union v. NLRB, 140 F.4th 1170 (9th Cir. 2025). A dispute arose between two different unions about who had the rights under CBAs to perform maintenance work for SSA Terminals in the Port of Seattle. Sometimes there are two competing bargaining units who believe they have the right to perform work for the same employer. This is known as a "jurisdictional dispute," and it is one of the few times employers can file ULPs against a union.

Pursuant to Section 8(b)(4)(D), SSA asked the Board to make a decision about which union should perform the work. The Board assigned the work to the International Association of Machinists and Aerospace Workers (IAM), and the International Longshore & Warehouse Union (ILWU) refused to accept that decision and filed a grievance against SSA for the value of the work. An arbitrator found in favor of the ILWU, so SSA filed an unfair labor

practice charge against ILWU, alleging it violated Section 8(b)(4)(D) of the Act by filing the grievance to try and force SSA to throw it some work. The ILWU argued the "work-preservation" defense, which protects primary union activity. The Board found that the work-preservation defense did not apply to jurisdictional arguments, like which union was primary, and ordered ILWU to cease and desist from pursuing the maintenance work. The 9th Circuit overruled the Board, finding that the work-preservation defense is a complete defense under the *Kinder Morgan* case from 2020. The case was remanded to consider the facts.

> Deep Dive: What is the work-preservation defense? Under this "work preservation" doctrine, a union's conduct is legal if it engages in "primary" activity aimed against the employer itself as opposed to "secondary" activity which is aimed at one employer with the goal of inducing that employer to take some action against a *third party* with whom the union has a dispute. This decision expands the work preservation doctrine beyond its traditional use and will impact employers in jurisdictional disputes.