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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CORNERSTONE HEALTH CARE GROUP

Respondent

and

Case No. 16-CA-154503

ROMAINE REEVES, an Individual

Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
TO THE NATIONAL LABOR RELATIONS BOARD**

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I. INTRODUCTION

There are no disputed facts in this case. Respondent admits that it promulgated and maintains the two rules alleged as unlawful in the Complaint — a mandatory arbitration agreement and a policy prohibiting work-related recordings — both are included in Respondent's June 1, 2015 Employee Handbook.

Respondent's arbitration policy falls squarely within the ambit of the Board's decisions in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part, 808 F.3d 1013 (5th Cir. 2015) and *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.2d 344 (5th Cir. 2013), which prohibit employers from imposing policies or agreements precluding employees from pursuing employment related collective claims as a condition of employment. Respondent's policy requires all employees to waive their rights to maintain class

or collective actions, whether arising during or after their employment, in any forum, arbitral or judicial.

Respondent's recording policy also infringes on rights protected by the Act. Unless an overriding employer interest is present, Section 7 protects the right of employees to photograph and record in the workplace when they are acting in concert for their mutual aid and protection. *Whole Foods Market, Inc.*, 262 NLRB No. 87, slip op. at 3 (2015), citing *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 4 (2015). Rules restricting such recordings are unlawful where their language and scope would reasonably lead employees to read the rules as prohibiting recording activity protected by Section 7. *Id.*, slip op. at 4.

Although Respondent retains the right to record employees it believes are potentially engaged in unethical or unlawful activities, Respondent prohibits its employees from likewise protecting themselves. It maintains an extremely broad prohibition on the recording of "any conversation which in any way involves the Company or employees of the Company" The prohibition is not limited by its terms to patient areas, to working time, or even to Respondent's property. Respondent's broad policy would reasonably be read by employees to restrict recording protected by Section 7 of the Act.

By requiring, as a condition of employment, employees to resolve disputes arising out of their employment relationships with Respondent on an individual basis, and by maintaining an overly broad rule prohibiting recording, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

II. FACTS

A. Respondent's Operations

Respondent is a Texas corporation with an office and place of business in Austin, Texas (Respondent's facility) and is engaged in the provision of healthcare services. (JM at 2).¹ Annually, Respondent derives gross revenues in excess of \$250,000 and purchases and receives at its facility goods valued in excess of \$5,000 directly from points outside the State of Texas. (JM at 3). At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (JM at 3).

B. Respondent's Employment Dispute Resolution Program

About June 1, 2015, Respondent issued a new employee handbook containing an "Employment Dispute Resolution" policy. (JM at 3; RE 2 at 64). The program includes four steps, culminating in binding arbitration. (RE 2 at 66–68). The policy states:

508 CLAIMS COVERED BY THE AGREEMENT

The Company and you mutually consent and agree to the resolution by arbitration of all claims or disputes (Claim(s)), whether or not arising out of your employment (or its termination), that the Company may have against you or that you may have against the Company or its officers, directors, members, owners, shareholders, partners, employees or agents, past or present, in their capacity as such or otherwise. However, the only Claims that are subject to arbitration are those that, in the absence of this Agreement, would have been justiciable under applicable state, federal or other law. The Claims covered by this Agreement include, but are not limited to, claims for wages or other compensation due; claims for breach of any contract or covenant (express or implied); tort claims; equitable claims; claims for discrimination (including, but not limited to, race, color, sex, religion, national origin, age, marital status, or medical condition, handicap or disability); claims for retaliation or harassment; all common law claims and claims for violation of any federal, state, or other governmental law, statute, regulation, or ordinance, except claims identified below.

¹ "JM" refers to the Joint Motion and Stipulations of Facts by the parties. "RE ____" refers to Record Exhibit followed by the exhibit number.

Further, the arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any question as to the arbitrability of a dispute and/or any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement. However, the preceding sentence shall not apply to the "Class Action Waiver" and "Representative Action Waiver" described below.

509 CLAIMS NOT COVERED BY THE AGREEMENT

Claims you may have for workers' compensation, unemployment compensation, or state disability insurance benefits are not covered by this Agreement. This Agreement does not apply to Claims for employee benefits under any benefit plan sponsored by the Company and covered by the Employee Retirement Income Security Act of 1974 ("ERISA") or funded by insurance; however, this Agreement does apply to any Claims for breach of fiduciary duty, for penalties, or alleging any other violation of ERISA, even if such claim is combined with a claim for benefits. This Agreement also does not apply to any Claim that an applicable federal statute expressly states cannot be arbitrated. Additionally, you or the Company may apply to a court of competent jurisdiction for temporary or preliminary injunctive relief in connection with an arbitrable controversy; provided, however, that all issues of final relief shall be decided in arbitration, and the pursuit of the temporary or preliminary injunctive relief shall not constitute a waiver of rights under this Agreement.

Additionally, and regardless of any other terms of this Agreement, claims and/or charges may be brought and remedies awarded before an administrative agency if, and only if, applicable law permits such notwithstanding the existence of an agreement to arbitrate. Such administrative filings include without limitation claims or charges brought before the Equal Employment Opportunity Commission, the U.S. Department of Labor, or the National Labor Relations Board. Nothing in this Agreement, however, shall preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill the party's obligation to exhaust administrative remedies before making a claim in arbitration. The Company will not retaliate against you for filing a claim with an administrative agency.

(RE 2 at 69).

The agreement also includes a "Class and Representative Action Waiver," stating:

THE COMPANY AND YOU HEREBY WAIVE ANY RIGHT FOR ANY CLAIM OR DISPUTE TO BE BROUGHT, HEARD, DECIDED OR ARBITRATED AS A CLASS AND/OR COLLECTIVE ACTION ("Class Action Waiver"). Nor shall the arbitrator have any authority to hear or arbitrate any such Claims. Notwithstanding any other clause in this Agreement, the Class Action

Waiver shall not be severable from this Agreement in any instance in which the dispute is brought as a class and/or collective action.

THE COMPANY AND YOU ALSO HEREBY WAIVE ANY RIGHT FOR ANY CLAIM OR DISPUTE TO BE BROUGHT, HEARD, DECIDED OR ARBITRATED AS A REPRESENTATIVE ACTION (“Representative Action Waiver”). Nor shall the arbitrator have any authority to hear or arbitrate any such dispute. However, this Representative Action Waiver may be severed if it is found to be unenforceable by a court of competent jurisdiction, and following severance the representative action may be brought in a court of law.

Notwithstanding any other clause or language in this Agreement and/or any rules or procedures that might otherwise apply by virtue of this Agreement or by virtue of any arbitration organization rules or procedures that now apply or any amendments and/or modifications to those rules, any claim that the Class Action Waiver or Representative Action Waiver, or any portion of the Class Action Waiver or Representative Action Waiver, is unenforceable, inapplicable, unconscionable, or void or voidable, shall be determined only by a court of competent jurisdiction and not by an arbitrator.

(JM at 3; RE 2 at 70).

C. Respondent’s Recording Policy

Respondent’s handbook issued June 1, 2015, contained the following policy regarding audio and video recordings:

219 POLICY AGAINST AUDIO AND VIDEO RECORDINGS

Without the prior written authorization of the Corporate VP of Human Resources in conjunction with a designated Company legal representative, no employee may openly or secretly tape or otherwise surreptitiously record, or videotape, any conversation, communication, activity, or event, which in any way involves the Company or employees of the Company, or any customers or clients, or any other individual with whom the Company is doing business or intending to do business in any capacity (i.e., vendors, suppliers, consultants, attorneys; independent contractors). This policy also applies to conversations and communications with any other third-party unrelated to the Company including, but not limited to, outside legal counsel, auditors and regulatory officials.

“Taping” and “Recording” under this policy includes the recording of any conversation or communications regardless of whether the conversation or communication is taking place in person, over the telephone, or via any other electronic communications device or equipment. This is also regardless of the method used to tape or record (e.g., as with a tape recorder, video recorder,

mechanical recording, or wiretapping equipment), and regardless of whether the conversation or communication takes place on or off the Company's premises. No employee may eavesdrop on the conversations or communications of other employees or non-employees in accordance with the same standards set forth above.

From time to time the Company may record, videotape, or otherwise monitor conversations or other communications between employees and/or between employees and non-employees for legitimate business purposes, such as customer service training, to protect the integrity of certain business transactions. Generally, employees and non-employees will be notified when such taping or recording occurs, in accordance with applicable laws and sound employee relations principles. Under certain circumstances, however, notice may not be given, as in the case where the Company, in conjunction with regulatory or other enforcement authorities, is conducting an investigation into alleged unlawful or unethical activities.

Violations of this policy may result in disciplinary action against the offending employee(s), up to and including an unpaid suspension or termination of employment. Where the conduct engaged in is deemed to be illegal, violators may also be subject to criminal prosecution under applicable federal, state, or local laws.

If any employee has questions or concerns regarding whether a contemplated taping or recording would violate this policy, he or she should discuss the Matter with their supervisor, facility compliance administrator (CEO) or Corporate Compliance Officer before engaging in any such activity.

(JM at 4-5; RE 2 at 38-39).

III. ARGUMENT

A. The Maintenance of Respondent's Mandatory Arbitration Agreement

1. The Legal Framework

In *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 1-7 (2012), the Board set forth the appropriate legal framework for considering the legality of employers' policies and agreements which limit collective and class legal activity in non-union settings. The Board has reaffirmed its *D.R. Horton* decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 slip op. at 2 (2014). In *D.R. Horton*, the Board held that a policy or agreement precluding employees from filing

employment-related collective or class claims against the employer restricts the employees' Section 7 right to engage in concerted action for mutual aid or protection, and therefore violates Section 8(a)(1) of the Act. *D.R. Horton*, 357 NLRB No. 184, slip op. at 4-6. Thus, Section 7 vests employees with the right to invoke — without employer coercion, restraint, or interference — procedures generally available under state or federal law for concertedly pursuing employment-related legal claims. *Id.*, slip op. at 10. See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566-68 (1978) (commenting that “it has been held that the ‘mutual aid or protection’ clause protects employees when they seek to improve working conditions through resort to administrative and judicial forums”). Accordingly, an employer violates Section 8(a)(1) by compelling employees, as a condition of employment, to waive their right to “collectively pursue litigation of employment claims in all forums, arbitral and judicial.” *D.R. Horton*, slip op. at 12. The fact that such a policy expressly permits employees to file employment claims or charges with the Board and other federal administrative agencies does not render the policy lawful. *Solarcity Corp.*, 363 NLRB No. 83, slip op. at 3 (2015).

2. Respondent’s Arbitration Policy Violates Section 8(a)(1) of the Act Because It Interferes with Employees’ Section 7 Right to Participate in Collective and Class Litigation

Respondent’s mandatory arbitration agreement violates Section 8(a)(1) of the Act because it interfere with employees’ Section 7 right to engage in collective legal activity, and because of ambiguities which interfere with an employee’s ability to engage in protected concerted activity. The agreement limits the resolution of all employment-related disputes to the procedures under the arbitration policy. Once executed, the agreement limits or extinguishes employees’ Section 7 right to choose to act concertedly or individually in any future legal dispute with Respondent.

Even if the arbitration policy were not a condition of employment, it still would be unlawful. What is at stake here is employees' Section 7 right to decide for themselves among the options that the law affords them to address their employment-related concerns. Section 7 does not impose collective activity on any employee. Instead, the Act protects each employee's "freedom of association" — or ability to choose concerted action — if, in the employee's judgment, that course appears warranted. Section 7 has long been understood to protect not only the filing of lawsuits, grievances, or administrative charges, but also participation in the adjudication of the same, such as attending hearings, providing affidavits, and/or testifying. See, e.g., *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 296-97 (5th Cir. 1976) (executing affidavits supporting lawsuit); *Dick Gidron Cadillac*, 287 NLRB 1107, 1110 (1988) (testifying at arbitration hearing); *Supreme Optical Co.*, 235 NLRB 1432, 1432-33 (1978) (testifying at discharged employee's unemployment hearing), *enfd.* 628 F.2d 1262 (6th Cir. 1980); *El Dorado Club*, 220 NLRB 886, 887-88 (1975) (attending arbitration hearing, participating in arbitration). Consistent with those principles, the Board held in *D.R. Horton* that Section 7 vests employees with the right to invoke — without employer coercion, restraint, or interference — procedures generally available under state or federal law for concertedly pursuing employment-related legal claims. *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 10, fn. 24. For all these reasons, an irrevocable waiver of employees' prospective Section 7 rights eliminates employees' choice as to whether to engage in protected conduct or not, and necessarily interferes with employees' exercise of their statutory rights and violates Section 8(a)(1) of the Act.

The fact that employees have a Section 7 right to refrain from engaging in collective legal activity cannot justify Respondent's arbitration policy. The essential element of the Section 7

right to refrain from engaging in collective legal activity is the protection of employee choice. Thus, while employees have the right to bring collective and class legal actions, they also have a right to arbitrate any particular claim on an individual basis if they so choose.² But the Arbitration Policy and the Agreement to Arbitrate bind employees to an irrevocable waiver of their prospective Section 7 rights to engage in collective legal activity and, thus, preclude their making such choices as to any future claim. Such irrevocable waivers of employees' prospective Section 7 right to collective legal activity are unlawful, just as individual employment contracts that interfere with other prospective Section 7 rights are unlawful, because they are "a continuing means of thwarting the policy of the Act," and present an unjustifiable obstacle to the free exercise of the right to engage in concerted activity for mutual aid and protection. *National Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940), quoted in *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 4. The arbitration policy seeks "to erect 'a dam at the source of supply' of potential, protected activity" and "thereby interferes with employees' exercise of their Section 7 rights." *Parexel International*, 356 NLRB No. 82, slip op. at 4 (2011), quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941). To permit Respondent to so limit its employees' rights to act collectively, in the guise of protecting employees' right to refrain from engaging in collective legal activity, would be to stand Section 7 on its head.

In the instant case, as in *D.R. Horton* and *Murphy Oil*, Respondent's mandatory arbitration agreement expressly requires employees to arbitrate disputes with Respondent, and

² Nothing herein, or in the Board's decision in *D.R. Horton*, should be read to preclude: (1) an employer from requiring an employee to arbitrate an individual claim on an individual basis, where no collective legal activity is sought by the employee, as long as the employee retains the right to bring any class or collective claim on a class or collective basis; or (2) employers and employees from lawfully agreeing to individually arbitrate a particular claim in dispute, or otherwise to forego bringing a particular claim to a judicial forum or arbitration on a class or collective basis. Rather, it is the interference with employees' prospective right to choose to act individually or concertedly as to class or collective claims in future labor disputes that unlawfully interferes with employees' Section 7 rights here.

prohibits representative, collective, and class actions in any forum. Therefore, Respondent has violated Section 8(a)(1) of the Act by maintaining a policy that restricts employees' right to bring class or collective actions.

B. The Maintenance of Respondent's Policy Against Audio and Video Recordings

1. The Legal Framework

Under the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the mere maintenance of a work rule may violate Section 8(a)(1) of the Act if the rule has a chilling effect on employees' Section 7 activity. Even if a rule does not explicitly prohibit Section 7 activity, it will still be found unlawful if: 1) employees would reasonably construe the rule's language to prohibit Section 7 activity; 2) the rule was promulgated in response to union or other Section 7 activity; or 3) the rule was actually applied to restrict the exercise of Section 7 rights. *Id.* at 646–47.

Employees have a Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings, unless an employer can demonstrate an overriding interest. See *Whole Foods Market, Inc.*, 262 NLRB No. 87, slip op. at 3 (2015), citing *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 4 (2015); *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 1 (Feb. 14, 2011), enforced sub nom. *Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012); *White Oak Manor*, 353 NLRB 795, 795 (2009), incorporated by reference, 355 NLRB 1280 (2010), enforced mem., 452 F. App'x 374 (4th Cir. 2011). Rules restricting such recordings are unlawful where their language and scope would reasonably lead employees to read the rules as prohibiting recording activity protected by Section 7. *Whole Foods*, above, slip op. at 4. Rules placing a total ban on photography or recordings, or banning the use or possession

of personal cameras or recording devices, are unlawfully overbroad where, for example, they would reasonably be read to prohibit the taking of pictures or recordings on non-work time.

2. Respondent's Recording Policy Would Reasonably Be Read to Restrict Recordings Protected by Section 7

Here, Respondent maintains a rule which not only restricts employee rights, but also creates an unjust asymmetry in the right to record. If Respondent suspects employees of unethical or unlawful behavior, by its policy, it may record the employee in any area at any time. Meanwhile, an employee suspecting other employees or Respondent agents of unlawful behavior is restricted from recording any other employee *anywhere*, even off premises. Because of the double standard and the breadth of the prohibition, the Employer cannot establish an overriding interest to justify the restriction.

The Board found a hospital's overriding interest rendered a recording rule lawful in *Flagstaff Medical Center*, 357 NLRB No. 65 (2011), *enfd.* in relevant part 715 F.3d 928 (D.C. Cir. 2013). The Flagstaff policy prohibited the use of electronic equipment, including cameras, during work time, as well as "[t]he use of cameras for recording images of patients and/or hospital equipment, property, or facilities." *Id.*, slip op. at 4–5, 25. The Board found that, given the weighty privacy interests of patients and the hospital's interest in protecting individually identifiable health information from wrongful disclosure, employees would reasonably interpret the rule as aimed at those interests rather than at conduct protected by Section 7. *Id.*, slip op. at 6.

The rule here is plainly distinguishable from that at issue in *Flagstaff*. Respondent's Policy Against Audio and Video Recordings is overwhelmingly broad. By its plain terms, the policy prohibits any recording, whether open or secret, of "any conversation, communication, activity, or event, which in any way involves the Company or employees of the Company, or any

customers or clients, or any other individual with whom the Company is doing business or intending to do business in any capacity ” The policy applies “regardless of whether the conversation or communication is taking place in person, over the telephone, or via any other electronic communications device or equipment,” and “regardless of whether the conversation or communication takes place on or off the Company’s premises.” The terms of the policy do not limit its applicability to working time or articulate any justification for its extremely broad scope.

Additionally, here, the Employer’s withholding to itself the unrestricted right to record evidence of what it perceives to be unlawful and unethical behavior shows that patient privacy is not at the heart of its concerns.

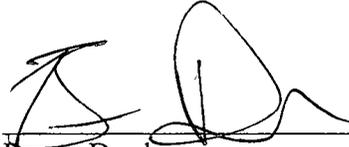
Because employees would reasonably read Respondent’s policy to prohibit recordings protected by Section 7, Respondent has violated Section 8(a)(1) of the Act by maintaining the policy.

IV. CONCLUSION

Based on the foregoing reasons and the record evidence considered as whole, Counsel for the General Counsel respectfully submits that Respondent has violated Section 8(a)(1) of the Act as alleged in the Complaint. The Board should so find and fashion an appropriate remedy which would require Respondent to: cease and desist from such unlawful conduct; rescind the unlawful provisions of the Arbitration Policy and Agreement to Arbitrate and notify the current and former employees of the rescission; post a notice (a proposed copy of which is attached) at all locations, including by electronic means, where the unlawful Arbitration Policy and Agreement to Arbitrate are or have been in effect; and order such other relief as may be necessary and appropriate to effectuate the policies and purpose of the Act.

DATED at Fort Worth, Texas this 6th day of May, 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Bryan Dooley', written over a horizontal line.

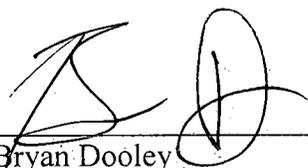
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CERTIFICATE OF SERVICE

I hereby certify that the Counsel for the General Counsel's Brief to the National Labor Relations Board has been served this 6th day of May, 2016 on the following:

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NOTICE TO EMPLOYEES

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT promulgate or maintain a mandatory arbitration agreement that requires you, as a condition of employment, to waive your right to maintain class or collective actions in all forums, whether arbitral or judicial, and **WE WILL** rescind or revise our Employment Dispute Resolution policies to make it clear that the policies do not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL NOT promulgate or maintain an overly broad rule restricting you from making work-related audio and video recordings, and **WE WILL** rescind or revise the handbook rule on this subject.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.