

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 20, 2016

TO: Olivia Garcia, Regional Director
Region 21

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Dupont Residential Care, Inc. 501-2875-4200
d/b/a Irvine Cottages 501-2887-5800
Cases 21-CA-161400, 161401, 161402 512-5030-0100
161404, 167781 512-5030-4000
512-5030-4090
512-5030-7000
512-5030-8025
512-5030-8080
512-5030-8090

The Region submitted this case for advice as to whether Dupont Residential Care, Inc. d/b/a Irvine Cottages (“the Employer”) violated Section 8(a)(1) of the Act by: (A) requesting that its employees sign declarations agreeing not to participate in a class action wage and hour lawsuit against the Employer, and to assist the Employer in defending against that lawsuit; and, separately, (B) requesting a copy of an employee’s confidential Board affidavit and interrogating the same employee about the content of [REDACTED] Board affidavit.

We conclude that the Employer’s requests that its employees sign the declarations were not accompanied by the required assurances against reprisal, and therefore constituted unlawful interrogations of their protected concerted activity in violation of Section 8(a)(1). We also conclude that the Employer’s request for one Charging Party’s confidential Board affidavit violated Section 8(a)(1), as did its subsequent questioning regarding the affidavit’s content.

FACTS

The Employer operates 13 residential care facilities in Orange County, California. The facilities, or “cottages,” are single-family homes that house up to six elderly residents and two to three live-in caregivers who work for the Employer. Each cottage is numbered (1 through 13) and identified by that number. The Employer is licensed by the California Department of Social Services and subject to various state healthcare regulations.

On May 22, 2014, a former employee filed a class action lawsuit against the Employer and its owner in Orange County Superior Court for alleged violations of California wage and hour laws, including failure to pay overtime and provide meal and rest periods for live-in workers. In early 2015, the Employer's then-current employees received notice of the class action lawsuit by mail.

Between late 2014 and May 2015,¹ the Employer's Executive Director spoke with many of the Employer's employees and asked their opinions on their working conditions and whether they would be willing to help the Employer with the lawsuit. The Executive Director initiated some of these conversations, and employees initiated others. The Executive Director states that during the conversations that [REDACTED] initiated, [REDACTED] began by stating that a lawsuit had been filed against the Employer and that [REDACTED] wanted to ask the employee some questions about how he or she felt about working for the Employer. Following these initial in-person interviews, the Executive Director arranged further interviews between employees and the Employer's attorney to discuss the suit. According to the Executive Director, these interviews were voluntary, and several employees declined interviews. For those employees not interviewed, the Employer's attorney prepared individual declarations for them to sign. Each declaration stated, among other things, that the signatory employee did not want to participate in the class action lawsuit, did not want the former employee who had filed the suit to represent the employee, believed that the Employer had paid him or her properly and had treated him or her well, and would be willing to testify on the matters in the declaration. The declarations did not state that the Employer had assured the signatory employee either was participating on a voluntary basis or had been given assurances against reprisal by the Employer.

From June to August, the Executive Director approached all four Charging Parties (who were at the time current employees) with these declarations. In June or July, the Executive Director went to Cottage [REDACTED] to present Charging Parties 1 and 2, (b) (6), (b) (7)(C) and at the time lived in that cottage, with declarations for them to sign. Charging Party 2 states that the Executive Director told [REDACTED] "it is up to you whether you want to sign it or not." Charging Party 1 states that after [REDACTED] refused to sign, the Executive Director stated that it was "okay" that [REDACTED] did not sign. After both refused to sign, the Executive Director asked them why. Both replied that the statements in the declaration about how well the Employer treated them were untrue. They also indicated they did not want to testify on behalf of the Employer. The Executive Director asked them if they were happy with the Employer, and both responded no. The Executive Director left shortly thereafter. Subsequently, the Employer's Owner called Charging Party 2 and told [REDACTED] not to campaign against the Employer by discussing with [REDACTED] coworkers whether to sign the declarations. The

¹ All subsequent dates are in 2015 unless otherwise indicated.

Region has concluded that the Employer's Owner violated Section 8(a)(1) by making this statement.

In July, the Employer's General Manager asked Charging Party 4 (b) (6), (b) (7)(C), who also works for the Employer but is not a charging party in the current case, to sign a prepared declaration. They each refused. Charging Party 4 states this was the second time the General Manager had asked (b) (6), (b) (7) to sign a document regarding the class action lawsuit.²

According to Charging Party 3, sometime in August the Employer's General Manager and Executive Director approached (b) (6), (b) (7) with a document and asked (b) (6), (b) (7) to sign it. Charging Party 3 states the General Manager did not explain what the document was or what it said. Charging Party 3 asked for time to read the document. The document was in English only and (b) (6) has difficulty reading English. Charging Party 3 could understand the portion of the declaration that stated (b) (6) was happy at work, which was not true for (b) (6), (b) (7) because (b) (6), (b) (7) was unhappy at work. (b) (6), (b) (7) then told the General Manager that (b) (6), (b) (7) did not want to get involved with the lawsuit and did not want to sign the document. The General Manager asked why (b) (6), (b) (7) did not want to sign the document and asked if (b) (6), (b) (7) was happy with the Employer. Charging Party 3 replied no, and indicated that (b) (6), (b) (7) was unhappy with (b) (6), (b) (7) work assignment ((b) (6), (b) (7) wanted to be assigned to Cottage (b) (6), but the Employer had assigned (b) (6), (b) (7) to Cottage (b) (6)). The General Manager and Executive Director then left.

The Executive Director claims that (b) (6), (b) (7) told each Charging Party during these conversations that the discussion was voluntary and that nothing bad would happen if he or she decided not to talk to (b) (6), (b) (7). But none of the Charging Parties state that the Executive Director or General Manager provided assurances that no discipline would result from their declining to sign the declarations.

At least 22 of about 40 then-current employees signed the declarations that the Employer presented to them. In August, based on the signed declarations submitted by the Employer, the state trial court ruled that because a majority of the then-

² According to Charging Party 4, the General Manager previously had asked (b) (6), (b) (7) in 2014 to sign a postcard agreeing not to take part in the lawsuit. The General Manager said he "had" to sign the postcard to help the Employer. Charging Party 4 signed the postcard. Charging Party 4 is likely referring to mailings known as *Belaire* notices. See *Belaire-West Landscape, Inc. v. Superior Court*, 57 Cal. Rptr. 3d 197, 203 (Cal. Ct. App. 2007). These notices are used under California class action rules to apprise potential class members of a suit and provide them an opportunity to confidentially opt out of having their contact information shared with plaintiff's counsel. Such notices were prepared in the class action involving the Employer, and sent to potential class members by postcard in early 2015.

current employees did not want to participate in the wage and hour lawsuit, current employees would not be included in the certified class.

Shortly after the Charging Parties refused to sign the declarations, Charging Parties 3 and 4 had their work assignments changed to Cottage (b)(6)—which was where Charging Parties 1 and 2 already lived and worked. Two other employees who had signed declarations were moved out of Cottage (b)(6), leaving the four Charging Parties as the only caregivers assigned to that cottage.

In mid-August, the Charging Parties signed documents stating their desire to join the pending class action lawsuit.³ The Region has concluded that the Employer, through either its Owner, Executive Director, or General Manager, unlawfully interrogated Charging Parties 1, 3, and 4 about whether they had attended a group employee meeting around this time and signed documents at that meeting. Charging Party 4 states that around this time the Executive Director also approached (b)(6), (b)(7) and asked if (b)(6) would retract the document (b)(6) had signed to join the class action lawsuit. (b)(6), (b)(7) refused.

In early September, the Employer received notice of the Charging Parties' inclusion in the class action lawsuit and of Charging Parties 1 and 3 being named as class representatives. Around the same time, the Executive Director began visiting Cottage (b)(6) each day. (b)(6), (b)(7) would observe the employees and frequently make critical comments about their work. (b)(6), (b)(7) also observed the employees via the 24-hour video surveillance system in the cottage. The Region has concluded that the Employer violated Section 8(a)(1) by subjecting the Charging Parties to stricter supervision.

Over the course of the next month, the Employer disciplined and ultimately terminated all four Charging Parties. All of the terminations were for various incidents regarding patient “restraint” issues—namely where employees either left seatbelts on patients while they were stationary in a wheelchair, or placed a soft chair in front of a patient so that the patient could not easily fall forward out of the wheelchair. Although the Employer asserted that it non-discriminatorily disciplined and discharged the Charging Parties for violating state healthcare regulations, the Region has concluded that the Employer’s explanations are a pretext and that the Employer violated Section 8(a)(1) by taking these adverse personnel actions.

³ Apparently, they were part of a group of about 14 then-current employees who signed declarations stating that they *did* want to join the class bringing the wage and hour lawsuit against the Employer. As a result of these declarations, the state trial court modified the date for inclusion in the certified class so that these employees would be included. However, the class for the wage and hour suit still does not include “current” employees.

On December 29, the Employer served on the class action plaintiffs' counsel a deposition notice and document request for Charging Party 1. The notice scheduled a deposition with the Employer's attorney on January 13, 2016, and it required Charging Party 1 to produce at the deposition, among other documents, "[a]ny affidavit or declaration prepared in connection with the charges submitted against [the Employer] to the National Labor Relations Board, Case Numbers 21-CA-161400, 21-CA-161401, 21-CA-161402, and/or 21-CA-161404." In a January 7, 2016 written response to the document request, the class action plaintiffs' counsel objected to the request for Board affidavits.

On January 13, 2016, the Employer's attorney deposed Charging Party 1, who did not produce a copy of (b) (6), (b) (7)(C) Board affidavit at the deposition. The Employer's attorney asked Charging Party 1 several questions about the affidavit and its content, specifically:

Q Did -- the complaint you filed with the NLRB, did you sign an affidavit?

A What?

Q Let me back up. Did you meet with [. . .] the lawyer for the NLRB?

A Yeah.

Q Okay. And how long did you meet with (b) (6), (b) (7)(C) for?

A We talked, but I think -- I think I --

* * *

Q And my question was, how long did you talk with (b) (6), (b) (7)(C) Was it an entire day? Two days?

A Two days.

Q And at the end of that process, did (b) (6), (b) (7)(C) present you with a written document that (b) (6), (b) (7)(C) wanted you to sign?

A Yes.

Q And did you sign -- did you sign a final version of that affidavit?

A After reading it, yeah.

* * *

Q Did (b) (6) give you a copy of that?

A Yes.

Q And so you still have it?

A Yes.

Q Okay. And you're aware that the record reflects that we have requested any affidavits that you signed? Apparently your lawyer has objected to production of that. What did you say in the affidavit?

* * *

Charging Party 1's attorney instructed (b) (6), (b) (7) not to disclose the content of (b) (6), (b) (7) Board affidavit.

ACTION

We conclude that the Employer's requests that the four Charging Parties sign declarations in support of the Employer for the pending class action wage and hour lawsuit were not accompanied by the required assurances against reprisal, and therefore constituted unlawful interrogations of their protected concerted activities in violation of Section 8(a)(1). We also conclude that the Employer's request for the Charging Party 1's confidential Board affidavit, and subsequent questioning about its content, violated Section 8(a)(1).

A. The Employer's Requests that the Charging Parties Sign Declarations in Support of the Employer for the Class Action Lawsuit Constituted Unlawful Interrogations that Violated Section 8(a)(1).

In *Johnnie's Poultry Co.*, the Board held that an employer "may exercise the privilege of interrogating employees on matters involving their Section 7 rights without incurring Section 8(a)(1) liability," if the purpose is the "investigation of facts concerning issues raised in [an unfair labor practice] complaint where such interrogation is necessary in preparing the employer's defense for trial of the case."⁴

⁴ 146 NLRB 770, 774-75 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965).

However, to ensure that an employer's legitimate interest in obtaining relevant evidence does not overly infringe on the Section 7 rights of its employees, the Board set forth "specific safeguards" that an employer must follow to lawfully complete such interrogations. Thus, such interrogations violate Section 8(a)(1) unless the employer: (1) communicates to the employee the purpose of the questioning; (2) assures the employee that no reprisal will take place for refusing to answer the employer's questions; (3) obtains the employee's participation on a voluntarily basis; (4) conducts the questioning in a context free from employer hostility toward union or protected concerted activity; (5) conducts the questioning in a non-coercive manner; and (6) limits the questions to necessary information required to defend against the alleged violations and does not pry into other protected matters, the employee's subjective state of mind, or otherwise interfere with the employee's statutory rights.⁵ The Board found that this framework struck the proper balance between an employer's need for factual information to defend itself in a ULP proceeding and its employees' need for protection from unlawful coercion.

In *Observer & Eccentric Newspapers*, the Board considered whether this same framework should apply where an employer questions employees to prepare a defense for a private civil lawsuit rather than a Board proceeding.⁶ The Board found it unnecessary to reach the issue because the employer's questioning separately violated the totality-of-the-circumstances test set out in *Rossmore House*.⁷ Under that test, the Board considers various factors to determine the lawfulness of an interrogation, including (1) any history of employer hostility or discrimination toward Section 7 activity, (2) the nature of the information sought, such as whether the interrogator sought information on which to base taking action against the employee, (3) the identity of the questioner, i.e., status in the managerial hierarchy, (4) the place and method of interrogation, e.g., whether there was an atmosphere of unnatural formality, and (5) the truthfulness of the employee's reply.⁸ Other factors can also

⁵ 146 NLRB at 775.

⁶ 340 NLRB 124, 124-25 (2003).

⁷ 269 NLRB 1176 (1984), *affd.* sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

⁸ *Medicare Associates, Inc.*, 330 NLRB 935, 939 (2000). While the totality-of-the-circumstances test is traditionally applied to interrogations regarding union activity, the Board has applied the same analysis to interrogations concerning nonunion, protected concerted activities. See *Samsung Electronics America, Inc.*, 363 NLRB No. 105, slip op. at 3 (Feb. 3, 2016).

include whether the employer (6) communicated a legitimate purpose for the questions and (7) provided assurances against reprisal, and (8) whether the employee openly and actively engaged in protected concerted activity.⁹ However, these factors are only a guide and should not be formalistically applied to the exclusion of other factors that may be relevant in a given situation.¹⁰

Although *Observer & Eccentric Newspapers* suggests that the totality-of-the-circumstances test is applicable to the instant set of facts, we conclude that the Region should argue that *Johnnie's Poultry* is the appropriate test for analyzing the Employer's interrogation in this case.¹¹ In *Observer & Eccentric Newspapers*, although occurring in the context of preparing a defense to a civil lawsuit, the employer interrogated its employees about their ongoing union activities. By contrast, the Employer's repeated act here of requesting employees to sign the declarations constituted interrogations about the merits of the pending lawsuit and whether employees would participate in the suit against the Employer. Thus, the Employer not only interrogated employees about their protected concerted activities, but attempted to enlist the employees to testify on its behalf. Just as with interrogations for the purpose of preparing a legal defense prior to a Board proceeding, interrogations of employees regarding their Section 7 activities to prepare a defense prior to a private civil lawsuit present an "inherent danger of coercion."¹² Thus, the safeguards set out in *Johnnie's Poultry* strike the proper balance between conflicting interests because they minimize employee exposure to that coercion while permitting employers to prepare their legal defense to lawsuits.¹³

Applying *Johnnie's Poultry* to the instant case, we conclude that the Employer violated Section 8(a)(1) by asking its employees to sign the declarations without providing them any assurances against reprisal. None of the Charging Parties, while

⁹ See *Samsung Electronics America, Inc.*, 363 NLRB No. 105, slip op. at 3; *Observer & Eccentric Newspapers*, 340 NLRB at 125, n.8 (finding that employer's questioning of employee while preparing defense for age discrimination and wrongful discharge suit filed by her coworkers was coercive because, among other things, the employee was not an open union supporter).

¹⁰ See *Medicare Associates, Inc.*, 330 NLRB at 939.

¹¹ We emphasize that while the Board has not found it necessary to address this issue, it has never ruled that the *Johnnie's Poultry* safeguards should not apply in the context of a private civil lawsuit.

¹² *Johnnie's Poultry Co.*, 146 NLRB at 774.

¹³ *Id.* at 774-75.

providing comprehensive testimony about the details of these meetings, state that they were told at the beginning of their conversations with management that they would not be disciplined for refusing to talk to the Executive Director or General Manager, or for not signing the declarations. Indeed, only Charging Party 2 states that [REDACTED] was specifically told when presented with the declaration that signing was voluntary.¹⁴ Moreover, the Board repeatedly has held that “litigation pursued concertedly by employees” in an effort to improve their working conditions is protected by Section 7.¹⁵ Thus, the Employer’s questioning of the Charging Parties from June to mid-August about their willingness to sign the declarations and opt out of the wage and hour class action lawsuit necessarily disclosed their protected concerted activities before that information was made public in early September. Accordingly, the Employer violated Section 8(a)(1) by interrogating the charging parties without proper assurances.

In the alternative, the Region should assert that the Employer’s asking the Charging Parties to sign the declarations constituted unlawful interrogations under the general totality-of-the-circumstance test. Here, the Charging Parties would reasonably have felt coerced by the Employer’s questioning. The Charging Parties were approached by the Employer’s Executive Director and/or General Manager, i.e., upper-level managers, and told to sign documents. As noted above, by even asking the Charging Parties to sign the declarations, the upper-level managers were asking them to disclose whether they supported the protected concerted activity of suing the Employer for state wage and hour violations before knowledge of their involvement in that suit became public. The upper-level managers told the Charging Parties that signing the declaration would help the Employer, and when they refused to sign, the managers further questioned them about why they did not want to sign. Those comments would reasonably lead an employee to conclude that a lack of reprisal from the Employer depended on assisting it against the lawsuit, and refraining from pursuing Section 7 activity that could harm the Employer. Indeed, that inference is reinforced here because, as noted above, the two managers failed to provide the Charging Parties with any assurances against reprisal for not signing the

¹⁴ Specifically, Charging Party 2 states the Executive Director told [REDACTED] “it is up to you whether you want to sign it or not.” Charging Party 1 states that *after* [REDACTED] declined to sign, the Executive Director then told [REDACTED] that it was “okay,” but [REDACTED] did not provide assurances at the time of the request.

¹⁵ *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 5, 18 (Oct. 28, 2014) (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978)), enf. denied 808 F.3d 1013 (5th Cir. 2015).

declarations. Accordingly, we find the Employer violated Section 8(a)(1), regardless of the test applied.

B. The Employer Violated Section 8(a)(1) Both by Requesting that Charging Party 1 Provide a Copy of [REDACTED] Board Affidavit and by Questioning [REDACTED] About its Content.

An employer’s request for an employee’s confidential Board affidavit is “inherently coercive” and therefore is a per se violation of Section 8(a)(1).¹⁶ Board affidavits often contain confidential information, including employees’ thoughts about the employer and information about protected concerted activities. An employer’s request for this information brings with it a strong likelihood that employees will be fearful of the employer’s reaction, and thus chilled in exercising their Section 7 rights.¹⁷ Moreover, an affidavit request is likely to interfere with the Board’s ability to obtain information from charging parties and potential witnesses by exerting “an inhibitory effect on the employee’s willingness to give a statement at all or to disclose all of the matters of which he has knowledge for fear of saying something that might incur the [e]mployer’s displeasure and possible reprisal.”¹⁸

Because of the strong likelihood of coercion, the Board has made clear that any affidavit request—regardless of the surrounding circumstances—constitutes a violation.¹⁹ Requesting that an employee turn over a Board affidavit voluntarily, or

¹⁶ *Acme Bus Corp.*, 357 NLRB 902, 903 (2011); *Inter-Disciplinary Advantage*, 349 NLRB 480, 505 (2007), enfd. 312 Fed. Appx. 737 (6th Cir. 2008).

¹⁷ *Waggoner Corp.*, 162 NLRB 1161, 1163 (1967).

¹⁸ *Winn-Dixie Stores*, 143 NLRB 848, 850 (1963), enfd. 341 F.2d 750 (6th Cir.), cert. denied 382 U.S. 830 (1965); see also *Texas Indus., Inc. v. NLRB*, 336 F.2d 128, 134 (5th Cir. 1964) (“It would seem axiomatic that if an employee knows his statements to Board agents will be freely discoverable by his employer, he will be less candid in his disclosures. The employee will be understandably reluctant to reveal information prejudicial to his employer when the employer can easily find out that he has done so. No employee will want to risk forfeiting the goodwill of his superiors, thereby lessening his job security and promotion opportunities.”), enforcing in relevant part 139 NLRB 365, 367-68 (1962).

¹⁹ See *W. T. Grant Co.*, 144 NLRB 1179, 1181 (1963) (holding “[i]t is not material that Respondent ‘requested’ rather than ‘demanded’ the statements, or that the employees

giving assurances against reprisal, will not absolve an employer of liability, as the request is itself unlawful.²⁰ The Board has specifically stated that providing the *Johnnie's Poultry* assurances described above provides no protection to an employer requesting Board affidavits, because even if those safeguards are provided the request remains inherently coercive and thus violates the Act.²¹ As the *Johnnie's Poultry* Board itself stated, “[i]n defining the area of permissible inquiry, the Board has generally found coercive, and outside the ambit of privilege, interrogation concerning statements or affidavits given to a Board agent.”²²

were told that they were under no obligation to accede to the ‘request’” because “[a]n employer's request for a copy of a statement which an employee has given to a Board agent is, in substance, an attempt to engage in” unlawful interrogation), enf. denied in relevant part 337 F.2d 447, 449 (7th Cir. 1964).

²⁰ See *Gex of Colorado*, 250 NLRB 593, 596 (1980) (providing assurances did not exculpate employer who requested affidavit); *Robertshaw Controls*, 196 NLRB 449, 455 (1972) (finding violation even though employer gave assurances because “it is the very manifestation by an employer to an employee of an interest in what the latter had to say about him in the statement which constitutes the vice of the situation”), enf. denied 483 F.2d 762 (4th Cir. 1973); see also *Texas Indus., Inc. v. NLRB*, 336 F.2d at 134 (“It is no answer to say that the employee is free to refuse to furnish his employer with a copy of his statement. A refusal under such circumstances would be tantamount to an admission that the statement contained matter which the employee wished to conceal from the employer.”).

²¹ *Acme Bus Corp.*, 357 NLRB at 903 (“[W]e find that the *Johnnie's Poultry* privilege was not available to the Respondent in these circumstances [and the employer's] questions to [the employee] regarding his affidavit were inherently coercive, and violated the Act.”).

²² *Johnnie's Poultry*, 146 NLRB at 775. Indeed, because of the important interests in protecting employee confidentiality and encouraging employee testimony, the Board has found violations of Section 8(a)(1) even in circumstances where an employer's inquiry falls short of requesting the affidavit. See, e.g., *Wire Products*, 326 NLRB 625, 628 (1998) (violation where employer merely asked employee if they gave an affidavit, but did not request a copy or ask about its content), enfd. sub nom. *NLRB v. R.T. Blankenship & Assocs.*, 210 F.3d 375 (7th Cir. 2000) (unpublished table decision); *Astro Printing Servs.*, 300 NLRB 1028, 1028-29 (1990) (violation where employer's attorney asked employees whether they had given affidavits and, separately, by stating that “it would be helpful to the company if someone wanted to give the owners a copy”); *Waggoner Corp.*, 162 NLRB at 1163 (violation where employer encouraged employees to request copies of their Board affidavit, and assisted them in doing so, but where employer did not itself request a copy or inquire into its contents).

Based on the per se rule described above, the Employer's request that Charging Party 1 produce (b) (6), (b) (7)(C) affidavit at the deposition violated Section 8(a)(1). The Employer's contention that it should be absolved of liability because it made the request in the context of civil discovery for a separate lawsuit is a flawed argument. Affidavit requests made by counsel during adjudicative proceedings equally violate the Act.²³ While employers are free to defend themselves from suit by interviewing employees or utilizing ordinary civil discovery methods, they remain prohibited from seeking Board affidavits.²⁴ Accordingly, the Employer's request violated the Act.

We further conclude that the Employer separately violated Section 8(a)(1) when its attorney asked Charging Party 1 at the deposition what (b) (6), (b) (7)(C) had said in (b) (6), (b) (7)(C) affidavit. As the Board has made clear, requesting information contained in an affidavit is no less a violation than asking for the affidavit itself.²⁵

In reaching these conclusions, we do not rely on the test set forth in *Guess?, Inc.*,²⁶ for when an employer's questioning of an employee during a deposition violates

²³ See *Ampersand Publishing, LLC*, 361 NLRB No. 88, slip op. at 1 n.1 (Nov. 3, 2014) (finding subpoena for Board affidavit, in advance of Board hearing, unlawful), incorporating by reference 358 NLRB 1539, 1541-42 (2012); cf. *Wright Electric*, 327 NLRB 1194, 1195 (1999) (holding that employer's discovery request for signed union authorization cards in a civil lawsuit violated Section 8(a)(1)), enfd. 200 F.3d 1162 (8th Cir. 2000).

²⁴ See, e.g., *Halloran v. Fisher Foods, Inc.*, No. C77-408, 1977 WL 1804, at *2 (N.D. Ohio Nov. 1, 1977) (recognizing employers may seek evidence from witnesses relevant to civil lawsuit, "but an attempt to obtain NLRB affidavits from individual employees may, itself, represent an unfair labor practice").

²⁵ See *Johnnie's Poultry Co.*, 146 NLRB 775-76; *Surprenant Mfg. Co.*, 144 NLRB 507, 518 (1963) (violation where employer's counsel asked about contents of Board affidavit, but did not ask for a copy of the affidavit), enfd. 341 F. 2d 756 (6th Cir. 1965); *Inter-Disciplinary Advantage*, 349 NLRB at 505 ("The Board has consistently held that the questioning of an employee as to statements he or she may have given to a Board agent, *as well as* employer requests for copies of affidavits provided by employees to the Board, is inherently coercive and unlawful.") (emphasis added).

²⁶ 339 NLRB 432, 434 (2003) (involving employer's questioning of an employee during a deposition in a workers' compensation case for the names of coworkers who had attended union meetings with her).

Section 8(a)(1). That case is more properly applied to circumstances where employees are asked during a legal proceeding about their own union or protected concerted activities, or those of their coworkers.²⁷ Here, we find the Board's per se rule against interrogations regarding the content of employee Board affidavits is the more relevant precedent.

However, we would likewise find a violation under the *Guess?, Inc.* test. In *Guess?, Inc.*, the Board developed the following three-part test for determining whether an employer's deposition questions regarding union or protected concerted activity were lawful:

First, the questioning must be relevant. Second, if the questioning is relevant, it must not have an illegal objective. Third, if the questioning is relevant and does not have an illegal objective, the employer's interest in obtaining this information must outweigh the employees' confidentiality interests under Section 7 of the Act.²⁸

Here, the Employer attorney's deposition question about the content of Charging Party 1's Board affidavit was not relevant to the state civil lawsuit, which concerns whether the Employer properly paid its employees overtime and provided them with required break periods under state wage and hour laws. The questioning also had an illegal objective, namely, seeking to obtain confidential information provided to a Board agent and interfering with Charging Party 1's statutory right to file a charge with and give testimony to the Board.

And, even assuming that the Employer can satisfy the first two parts of the *Guess?* test, the balancing of interests under the final factor strongly favors protecting Charging Party 1's confidentiality interests under Section 7. The Board repeatedly has recognized the importance of keeping employees' Section 7 activities confidential because the willingness of employees to engage in those activities would be undermined if an employer could easily obtain such information.²⁹ Thus, there is a very strong interest in keeping the content of Charging Party 1's affidavit confidential. That is particularly true here because the Region has concluded that the Employer unlawfully disciplined and discharged all four Charging Parties because of

²⁷ See, e.g., *Allied Mechanical*, 349 NLRB 1077, 1077 n.1, 1083 (2007) (applying *Guess?* framework to employer counsel's questioning employees about union activities during depositions for wage claim lawsuit filed by the employees).

²⁸ *Guess?, Inc.*, 339 NLRB at 434.

²⁹ See *id.* at 434; *Wright Electric*, 327 NLRB at 1195.

their protected concerted activities. Questioning Charging Party 1 about the content of (b) (6), (b) (7)(C) affidavit would definitely have revealed employee protected concerted activities, including possible information related to current employees of the Employer, and any information it could have yielded that was marginally relevant to the Employer's defense to the state lawsuit could have been obtained through less intrusive methods than posing a broad question about the content of Charging Party 1's Board affidavit.³⁰ Thus, under the *Guess?* test, the Employer violated Section 8(a)(1) both by requesting that Charging Party 1 provide it a copy of (b) (6), (b) (7)(C) Board affidavit, and then by questioning (b) (6), (b) (7)(C) about its content when (b) (6) refused to provide it.

Accordingly, the Region should issue complaint, absent settlement, based on the analysis set forth above.

/s/
B.J.K.

H: ADV.21-CA-161400.Response.DupontResidentialCare (b) (6), (b) (7)(C)

³⁰ See *Guess?, Inc.*, 339 NLRB at 435 (finding employer's broad questions during deposition violated Section 8(a)(1) because they may not have yielded responses relevant to the employer's defense of workers' compensation claim); *Wright Electric*, 327 NLRB at 1195 (finding employer's discovery request for signed authorization cards unlawful because there were less intrusive ways for the employer to obtain the information, including requesting the state court judge to conduct an in camera inspection of the cards).