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

DATE: March 4, 2019

TO: Leonard J. Perez
Regional Director, Region 14

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Stange Law Firm
Case 14-CA-227644

220-2550-8100
506-2001-5000
506-2017-4000
512-5012-0125
512-5012-0133

This case was submitted for advice as to whether: (1) the Employer maintained an unlawful anti-disparagement provision in its employment agreements; (2) anonymous postings on websites including Glassdoor.com constituted protected concerted activity; and (3) the Employer retaliated against the posters by filing breach of contract lawsuits regarding the postings. We conclude that the Employer's non-disparagement provision violates Section 8(a)(1) of the Act. We find that the anonymous postings did not constitute protected concerted activity and therefore the lawsuits were not filed in retaliation against protected activity. However, portions of the ongoing lawsuit are preempted because they seek to enforce the contractual non-disparagement provision that is at least arguably prohibited by the Act. Thus, we further conclude that the Employer will independently violate Section 8(a)(1) if it continues to prosecute those portions of the lawsuit alleging breaches of the non-disparagement clause after receiving a *Loehmann's* letter from the Region.[1]

FACTS

The Employer, Stange Law Firm, operates a law firm specializing in family law issues, with numerous offices in the greater St. Louis, Missouri area. The Employer requires all newly-hired support staff and attorneys to sign an employment agreement containing the following non-disparagement provision:

> [D]uring and after Employee's employment or association with Law Firm ends, for any reason, Employee will not in any way criticize, ridicule,

[1] *See Loehmann's Plaza*, 305 NLRB 663, 671 (1991), *supplemented by* 316 NLRB 109 (1995), *affd. sub nom. UFCW Local 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996).

> disparage, libel, or slander Law Firm, its owners, its partners, or any Law Firm employees, either orally or in writing. However, nothing in this Section 3.2 shall be deemed to limit or prohibit Employee from engaging in concerted group activity and communications with co-employees to try to improve his or her working conditions, as provided under Section 7 of the National Labor Relations Act.[2]

On March 29, 2017, the Employer filed a lawsuit in Missouri state court, which was later amended, against Former Employee and "Does 1-10," alleging that former employees, both the known individual and unidentified former employees, had breached the non-disparagement provisions in their employment contracts by criticizing the Employer in negative reviews posted on various websites, including Glassdoor.com, Indeed.com, Avvo, Yelp, and Yahoo.business.[3] The lawsuit also included an allegation that certain posts contained unlawful defamation of the Employer. The Employer filed a second lawsuit against a different named, former employee on October 20, 2017, alleging that the former employee had also breached the non-disparagement provision in the employment agreement by posting negative reviews online, and defamed the Employer.

The lawsuits allege that reviews posted anonymously[4] on Glassdoor, Indeed, and other sites were posted by former employees in violation of the non-disparagement provision in the employee agreements. These reviews include the following posted on Glassdoor and Indeed:

> "I highly recommend staying far away from this firm. There is a very high attorney and paralegal turnover rate due to micromanagement and

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[2] This is the text of the Attorney agreement. The support staff agreement is nearly identical in relevant portions.

[3] Glassdoor.com is a job recruiting site with job listings, company reviews, and other information about salaries and interviews that employees can anonymously post to the site. https://www.glassdoor.com/about-us/ (last visited February 14, 2019). Indeed.com is a job listing site where job seekers can search for jobs, post resumes, and research companies. https://www.indeed.com/about (last visited February 14, 2019). Avvo.com is a site that includes listings and reviews of lawyers with the stated goal of helping people find a lawyer. https://www.avvo.com/about_avvo (last visited February 14, 2019).

[4] The Employer has identified two former employees whom it alleges wrote certain reviews, but all reviews were posted anonymously on the sites. There are other posts referenced by the Employer's lawsuits that the Employer attributes to currently unidentified former employees.

> demanding environment. …Cons No breaks, No lunch, Micromanagement, Not allowed to talk to others in satellite offices without permission from higher pay grades"
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> "Stay away from this firm they are horrible to work for" "And they treat clients like they are just another number! Billing and power is all management cares about no respect for employees"
>
> "Think long and hard before accepting or even applying" "Management cares about one thing, are you billing[.] That's it nothing else! They micromanage everything and drain their clients"
>
> "DO NOT RECOMMEND WORKING HERE" … "Cons: Micromanaged, very little training provided, they don't value their employees and VERY high turnover."
>
> "Management is out of touch with reality. They give employees perks to leave positive reviews. The turnover rate is beyond worrisome. They are beyond unapproachable and the minute you don't agree with something even after being there for years you're "not a fit" and let go. Upon leaving the company I was 1000 pounds lighter. Save yourself stress and seek employment elsewhere." Advice to management: "After going to HR numerous times with concerns maybe you should listen to your employees. You've lost over 30 employees from quitting or being fired in less than a year alone. This should be a red flag to the owners."

In the first lawsuit, the Employer has issued a subpoena to Glassdoor seeking the identity of the anonymous individuals who posted the negative reviews on the site. The parties settled the second lawsuit in February 2018, but the Employer did not have it dismissed until August 3, 2018.

ACTION

We conclude that the Employer's non-disparagement provision violates Section 8(a)(1) of the Act. The Region should therefore issue complaint, absent settlement. We conclude also that the former employees were not engaged in protected concerted activity through their anonymous posts on Glassdoor and other employer review sites and that the Employer's lawsuit was therefore not filed in retaliation against protected activity. However, because portions of the ongoing lawsuit are preempted, the Employer will violate Section 8(a)(1) of the Act if it continues to litigate those lawsuit allegations after the Region issues complaint and the attendant *Loehmann's* letter.

I. The non-disparagement provision violates Section 8(a)(1).

In cases where a facially neutral employer work rule, if reasonably interpreted, would potentially interfere with Section 7 rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on Section 7 rights, and (ii) legitimate business justifications associated with the requirement(s).[5] The Board will conduct this evaluation "consistent with the Board's 'duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,' focusing on the perspective of employees."[6] In so doing, "the Board may differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral)," and make "reasonable distinctions between or among different industries and work settings."[7] The Board will also account for particular events that might shed light on the purpose served by the rule or the impact of its maintenance on Section 7 rights.[8]

The Board also indicated that its balancing test will ultimately result in its ability to classify the various types of employer rules into three categories, thereby eliminating the need to conduct case-specific balancing as to certain types of rules so as to provide employers, employees, and unions with greater certainty in the future. The Board described the following categories:

> • *Category 1* will include rules that the Board designates as *lawful* to maintain, either because: (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of Section 7 rights and thus no balancing of rights and justifications is required; or (ii) even though the rule has a reasonable tendency to interfere with Section 7 rights, the potential adverse impact on those protected rights is outweighed by employer justifications associated with the rule. The Board included in this category rules requiring "harmonious relationships" in the workplace, rules requiring employees to uphold basic standards of "civility," and rules prohibiting cameras in the workplace.

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[5] *Boeing Co.*, 365 NLRB No. 154, slip op. at 2–3 (Dec. 14, 2017) (expressly overruling the "reasonably construe" standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004)).

[6] *Id.*, slip op. at 3, *quoting NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967).

[7] *Boeing Co.*, 365 NLRB No. 154, slip op. at 15.

[8] *Id.,* slip op. at 16.

> • *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of Section 7 rights, and if so, whether any adverse impact on protected conduct is outweighed by legitimate business justifications.
>
> • *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit Section 7 conduct, and the adverse impact on Section 7 rights is not outweighed by justifications associated with the rule. The Board included as an example of a Category 3 rule one that prohibits employees from discussing wages and benefits with each other.[9]

The Board specified that these categories represent the results of the new balancing test, but are not part of the test itself.[10]

Applying the Board's test here, we conclude that the Employer's non-disparagement provision is an unlawful, Category 2 rule. The requirement that employees not "criticize, ridicule, [or] disparage" the Employer restricts core Section 7 activity.[11] The rule is not limited to criticism of other employees,[12] or the Employer's

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[9] *Id.,* slip op. at 3–4, 15.

[10] *Id.*, slip op. at 4.

[11] *See, e.g., Schwan's Home Service*, 364 NLRB No. 20, slip op. at 16 (June 10, 2016) (Member Miscimarra, concurring in part) (recognizing that "public statements by employees about the workplace are central to the exercise of employee rights under the Act"); *Teletech Holdings, Inc.*, 342 NLRB 924, 931–32 (2004) (finding rule unlawful where employees were not to speak negatively about their jobs) (citing *Lexington Chair Co.*, 150 NLRB 1328 (1965) (holding unlawful rule prohibiting employees from criticizing company rules and policies), *enfd.* 361 F.2d 283, 287 (4th Cir. 1966)).

[12] *See Boeing Co.*, 365 NLRB No. 154, slip op. at 4 n.15 (discussing that the civility rule from *William Beaumont Hospital* requiring employees to foster "harmonious interactions and relationships" had little impact on protected employee rights)*; Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 11–12 (Feb. 23, 2017) (Acting Chairman Miscimarra, dissenting in part) (although the Board had found rule prohibiting "[d]isparaging . . . the company's employees" unlawful under *Lutheran Heritage*, Acting Chairman Miscimarra in dissent concluded that the rule

products and services,[13] which would not have the same impact on Section 7 activity. The Employer's asserted interest in maintaining the rule, that it relies on its online reputation to advertise for clients and that negative reviews could hurt its business prospects, is not a unique interest nor strong enough to outweigh the significant interference the rule has with employee rights.

The purported "savings clause" does not make the rule lawful. For a clause to cure a workplace rule that otherwise has an unlawful impact on Section 7 rights, the Board has said that the clause must do more than generally refer to the Act or Section 7 rights.[14] An effective savings clause should address "the broad panoply of rights protected by Section 7" as well as be prominent and proximate to the rule that it purports to inform.[15] While the clause here does include a plain language explanation of Section 7 activities that a reasonable employee would understand ("concerted group activity and communications with co-employees to try to improve his or her working

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was lawful under his *William Beaumont* test). *See also* Memorandum GC 18-04, "Guidance on Handbook Rules Post-*Boeing,*" at 3–5 (June 6, 2018).

[13] *See Triple Play Sports Bar & Grille*, 361 NLRB 308, 311–13 (2014) (discussing an employer's interest in preventing disparagement of its products or services and protecting its reputation as balanced against Section 7 rights); *Valley Hospital Medical Center,* 351 NLRB 1250, 1252 (2007) (explaining that the Board distinguishes between "disparagement of an employer's product and the airing of what may be highly sensitive [employment] issues"), *enfd. mem. sub nom. Nevada Service Employees Local 1107 v. NLRB*, 358 F. App'x 783 (9th Cir. 2009). *See also* Guideline Memorandum GC 18-04 at 11–12.

[14] *See Allied Mechanical*, 349 NLRB 1077, 1077 n.1, 1084 (2007) (finding savings clause's general reference to protected rights did not cure rule's otherwise overbroad prohibition on protected activity; although "employees may understand that their NLRA rights are unaffected, . . . [they] may not know the fully [sic] panoply of those rights"); *Ingram Book Co.*, 315 NLRB 515, 516 & n.2 (1994) (finding savings clause stating that employer will "abide by the applicable state or federal law" if its policies conflict with such laws did not salvage overbroad no-distribution policy; "[r]ank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint").

[15] *First Transit, Inc.*, 360 NLRB 619, 621–22 (2014) (finding the freedom of association "safe harbor" provision to be inadequate because it focused solely on union organizational rights as opposed to addressing the "broad panoply of rights" in Section 7, and was not located near, nor referenced, the rules it purportedly informed in the lengthy handbook).

conditions"), it does not include the "full panoply" of rights protected by Section 7. For example, the clause only addresses communications with "co-employees" and does not include third parties, such as unions. Therefore, a reasonable employee would still understand the Employer's non-disparagement clause as prohibiting him or her from going to a union and saying anything negative about the Employer.

Because the Employer's non-disparagement clause significantly interferes with core Section 7 activity despite the "savings clause," and the Employer does not have a significant business justification for the rule, this rule should be treated as an unlawful Category 2 rule and the Region should issue complaint, absent settlement.

II. The anonymous posters were not engaged in protected concerted activity when they posted negative reviews on Glassdoor and other job websites.

For employee conduct to be considered protected concerted activity, it must be both "concerted" and for mutual aid or protection. Board precedent makes clear that these two elements are analytically distinct.[16] Conduct is concerted when it is "engaged in with or on the authority of other employees," or when an individual employee seeks "to initiate or to induce or to prepare for group action."[17] Regarding the latter, although other employees do not need to accept an individual's invitation to group action before the invitation itself is considered concerted,[18] there must at least be an invitation.[19] Mutual aid or protection focuses on the *goal* of the concerted activity and whether the employee or employees involved are seeking to "improve terms and conditions of

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[16] *Summit Regional Medical Center*, 357 NLRB 1614, 1615 (2011); *Meyers Industries, Inc. (Meyers II)*, 281 NLRB 882, 884, 885 (1986), *enfd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988).

[17] *Meyers II*, 281 NLRB at 885, 887; *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 7 (Jan. 11, 2019) (to be concerted, the totality of the circumstances must support a reasonable inference that an employee was seeking to initiate, induce or prepare for group action).

[18] *Whittaker Corp.*, 289 NLRB 933, 934 (1988), *affirmed in Alstate Maintenance*, 367 NLRB No. 68, slip op. at 4-5. *See also Phillips Petroleum Co.*, 339 NLRB 916, 918 (2003) (""the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection"" is "concerted as long as it is 'engaged in with the object of initiating or inducing…group action'") (quoting *Cibao Meat Products*, 338 NLRB 934 (2003)).

[19] *See e.g., Alstate Maintenance,* 367 NLRB No. 68, slip op. at 7–8; *El Gran Combo*, 284 NLRB 1115, 1117 (1987), *enfd.* 853 F.2d 996 (1st Cir. 1988).

employment or otherwise improve their lot as employees."[20] Although individuals do not need to be current employees of a specific employer to engage in concerted activity,[21] they must be seeking to improve their lot as employees or they are not acting for "mutual aid and protection."[22]

Here, the former employees' online posts were not concerted. There is no evidence of any group discussions or plans amongst employees to post online negative reviews of the Employer or that employees planned to take group action once they were no longer employed by the Employer. There is no discussion of a specific labor dispute among the many issues mentioned in the reviews. Nor do the posts include calls for group action or requests for other employees to take any action to support the posters. The posts cannot be seen as logical extensions of prior group activity because there is no evidence of any prior group concerns.[23] In these circumstances, we conclude that the posts are more akin to individual gripes and therefore not concerted.[24]

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[20] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). *See also Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014).

[21] *See e.g.*, *Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 (1977) (the Board has long held that the term "employee" within the meaning of Section 2(3) of the Act means "members of the working class generally, including former employees of a particular employer"); *Phelps Dodge v. NLRB*, 313 U.S. 177 (1941) (applicants can be protected by the Act).

[22] *See e.g., Waters of Orchard Park,* 341 NLRB 642, 643 (2004) (employees' concerted complaint to state health agency's "Patient Care Hotline" about the temperature in the facility not protected because it "did not involve a term or condition of their employment and was not otherwise an effort to improve their lot as employees"); *New York Chinatown Senior Citizens Coalition Center*, 239 NLRB 614, 614 n.1 (1978) (employees' activity was not protected because it was an effort to change the top management and not related to their own working conditions).

[23] *Cf. Salisbury Hotel*, 283 NLRB 685 (1987) (an individual's call to the DOL to ask about a new break policy was part of a concerted effort to get the Employer to change the break policy because the employees, including the discriminatee, had previously complained about the policy amongst themselves); *Mike Yurosek & Son, Inc.,* 306 NLRB 1037, 1038–39 (1992) (finding four employees' individual decisions to refuse overtime work were logical outgrowth of concerns they expressed as a group over new scheduling policy), *supplemented by* 310 NLRB 831 (1993), *enfd.* 53 F.3d 261 (9th Cir. 1995).

[24] *See Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964) ("activity which consists of mere talk must, in order to be protected, be talk looking toward group action.… [I]f it looks forward to no action at all, it is more than likely to be

The type of websites that the individuals used for their reviews also undercuts finding the activity to be concerted. Those websites, most notably Glassdoor and Indeed, are not social media sites. Rather, they target job seekers and potential customers by hosting job postings and company reviews. In this regard, employer reviews posted on these sites, including those at issue here, are one-way communications; the sites do not allow for other employees to comment on the reviews or engage in any discussion.[25] Thus, the posters could not reasonably be intending to initiate group dialogue about the issues in their respective reviews, since there was no way for employees to communicate with each other or any basis for believing that employees of the Employer would even see the reviews.[26]

In addition to not being concerted, we conclude that the anonymous posts were also not for mutual aid and protection. The evidence indicates that the posters are all former employees who have no intent to return to work for the Employer. As discussed above, the reviews were targeted at jobseekers who were not employees of the Employer, and they were not seeking to change the terms and conditions of employment of the Employer's employees. Rather, the anonymous posters were trying to warn potential applicants to stay away from the Employer for the applicants' own

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mere griping"). *See also Tampa Tribune*, 346 NLRB 369, 371–72 (2006) (employee who raised a personal gripe about favoritism was not engaged in protected concerted activity because he was speaking only for himself and there was no evidence that his coworkers even shared his belief that favoritism existed).

[25] Glassdoor allows other users to decide whether a review is "useful" or flag it as inappropriate, but cannot otherwise engage with a post. An individual is only allowed to post one review per employer per year per review type. Only the employer is then allowed to respond to the review. *See* https://help.glassdoor.com/article/Community-Guidelines/en_US (last visited February 14, 2019).

[26] *Cf. Northwest Rural Electric Cooperative*, 366 NLRB No. 132, slip op. at 1, 14 (July 19, 2018) (an individual's post about workplace health and safety in the industry was concerted because the Facebook group in which he posted included many other employees in the industry as well as several of his coworkers and he was seeking their support for his safety concerns previously raised with management).

benefit.[27] To the extent the former employees were seeking to hurt the Employer economically, or put it out of business, those goals are also not protected.[28]

III. The allegations in the Employer's lawsuit seeking to enforce the Employer's non-disparagement provision are preempted and the Employer will violate Section 8(a)(1) by continuing to process them after receiving a *Loehmann's* letter.

The Board may find that maintenance of a civil lawsuit violates Section 8(a)(1) under any of three theories: (1) the lawsuit has an "illegal objective" under the Act;[29] (2) the lawsuit is preempted by the Act;[30] or (3) the lawsuit lacks a reasonable basis in

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[27] *See Abell Engineering & Mfg.*, 338 NLRB 434, 434–35 (2002) (an employee urging a coworker to quit and take a job with a union shop was unprotected because the attempt was "unrelated to organizing the Respondent's employees or improving their conditions of employment with the Respondent"). *Cf. Campbell Electric Co.*, 340 NLRB 825, 825, 840–41 (2003) (affirming the judge's conclusion that it is protected activity to recruit employees away from the employer to work for union contractors because the efforts were not to drive the employer out of business but to restrict the supply of labor until such time as the employer became a union contractor and paid union rates).

[28] *See American Golf Corp.*, 338 NLRB 581 (2002) (an employee was lawfully fired for distributing an unprotected flyer disparaging the employer's operations and soliciting competitors to take over the contract, despite engaging in other protected activity). *See also Elko General Hospital*, 347 NLRB 1425, 1427 (2006) (an employee's conduct during a meeting including advocating for her employer to lose its contract was unprotected because "[c]learly, an employer need not tolerate the disloyal actions of an employee who wishes to oust her own employer from its position as employer"); *Turner Beverage Co.*, 279 NLRB 160, 167 (1986) (employees' concerted anonymous calls to the franchisor which put the employer in jeopardy of losing its franchise were unprotected because not for mutual aid or protection; the calls were "simply an act of retaliation" and not connected to working conditions).

[29] *See e.g., Manufacturers Woodworking Assn. of Greater New York, Inc.*, 345 NLRB 538, 540 (2005); *see also Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 737 n.5 (1983).

[30] *See Loehmann's Plaza*, 305 NLRB at 670; *Webco Industries, Inc.*, 337 NLRB 361, 363 (2001).

law or fact and was commenced with the motive of retaliating against the exercise of Section 7 rights.[31]

The Employer's lawsuits were not filed with an illegal objective or in retaliation against protected concerted activity. While the General Counsel will argue that the non-disparagement clause is unlawful, it has not yet been determined to be unlawful by the Board, and therefore a remaining lawsuit seeking to enforce the clause does not yet have an "illegal objective." Furthermore, since the anonymous posters were not engaged in protected concerted activity when posting negative reviews on Glassdoor and similar websites, the lawsuits cannot be found to have been filed in retaliation against the exercise of Section 7 rights.

However, once the Region issues complaint alleging that the non-disparagement provision is unlawfully overbroad in violation of the Act, the portions of the ongoing lawsuit that seek enforcement of the provision will be preempted and the continued prosecution thereof will violate Section 8(a)(1). In *San Diego Bldg. Trades Council v. Garmon*, the Supreme Court held that "[w]hen an activity is arguably subject to [Section] 7 or [Section] 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the [Board]."[32] In such circumstances, the Board must exercise its "primary jurisdiction" and determine in the first instance whether the activity is protected or prohibited by the Act, thereby potentially divesting the states of all jurisdiction.[33] Thus, *Garmon* preemption is designed to prevent state and local interference with the Board's interpretation and enforcement of the integrated scheme of regulation established by the Act.

Preemption of lawsuits involving arguably protected or prohibited activity occurs when the General Counsel issues a complaint regarding that activity.[34] Afterwards, a respondent's continued maintenance of a preempted lawsuit can be condemned as an

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[31] *Atelier Condominium & Cooper Square Realty*, 361 NLRB 966, 968 (2014), *enfd.* 653 F. App'x 62 (2d Cir. 2016); *see also Bill Johnson's Restaurants*, 461 U.S. at 748–49.

[32] 359 U.S. 236, 245 (1959).

[33] *Id.*

[34] *Loehmann's Plaza*, 305 NLRB at 670.

unfair labor practice if the suit is unlawful under traditional Board principles,[35] i.e., if the lawsuit has a tendency to interfere with the exercise of Section 7 rights.[36]

Here, the continued prosecution of the breach of contract allegations in the ongoing lawsuit after the Region issues complaint will be preempted under *Garmon* insofar as the Employer would be seeking to enforce the non-disparagement provision alleged by the General Counsel to be unlawfully overbroad. Because the non-disparagement provision is at least arguably overbroad and therefore prohibited by the Act, the Board must address the lawfulness of that provision in the first instance "if the danger of state interference with national [labor] policy is to be averted."[37] Because the breach of contract claims in the Employer's ongoing lawsuit would require the Missouri state court to interpret and enforce the same rule that will be before the Board, they are preempted. [38]

Based on the foregoing, the Region should issue complaint, absent settlement, alleging that the non-disparagement provision in the Employer's employment agreement is unlawfully overbroad. The Region should also issue a *Loehmann's* letter to the Employer directing it to take affirmative action within seven days of issuance of the Region's complaint to stay or dismiss adjudication of the preempted portions of the

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[35] *See id.* at 671; *Webco Industries*, 337 NLRB at 363.

[36] *Loehmann's Plaza*, 305 NLRB at 671.

[37] *Garmon*, 359 U.S. at 245; *see also Webco Industries*, 337 NLRB at 362 (Board had exclusive jurisdiction to determine legal effect of severance agreements discriminatees had signed because there was clear potential "for State interference with national labor policy" if employer's state claims for breach of those agreements were allowed to proceed).

[38] There are two exceptions to *Garmon* preemption – where activity is "a merely peripheral concern" of the Act and where activity touches interests "deeply rooted in local feeling and responsibility"—and neither applies here. The non-disparagement provision prohibits core Section 7 activity, it does not involve interests deeply rooted in local feelings and responsibility. The Supreme Court has typically applied the latter exception in cases where the disputed conduct concerned activity historically recognized to be the subject of local regulation, such as trespass, intentional infliction of emotional distress, malicious libel, violence, and destruction of property. *See e.g.*, *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978) (trespass); *Farmer v. Carpenters*, 430 U.S. 290 (1977) (intentional infliction of emotional distress); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (malicious libel); *Automobile Workers v. Russell*, 356 U.S. 634 (1958) (mass picketing and threats of violence).

lawsuit.[39] The letter should provide the Employer with two alternative means to avoid an additional Section 8(a)(1) violation, either seek to dismiss or to stay adjudication of the breach of contract counts pending resolution of the unfair labor practice complaint.[40] If the Employer does not seek to dismiss or stay enforcement of its breach of contract claims, the Region should issue an amended complaint alleging that the Employer has further violated Section 8(a)(1) by maintaining a preempted lawsuit.[41]

/s/
J.L.S.

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[39] *See Loehmann's Plaza*, 305 NLRB at 671.

[40] In the event the Employer opts for a stay, the Employer can resume prosecuting its lawsuit in its entirety if the Board decides that the non-disparagement provision is lawful. *See Webco Industries*, 337 NLRB at 365 (employer was free to reinstate claims that lost preempted character based on issuance of Board decision).

[41] (b) (5) [redacted]