WMACCA
Washington Metropolitan Area Corporate Counsel Association

NLRB Developments Affecting Union and Non-Union Employers

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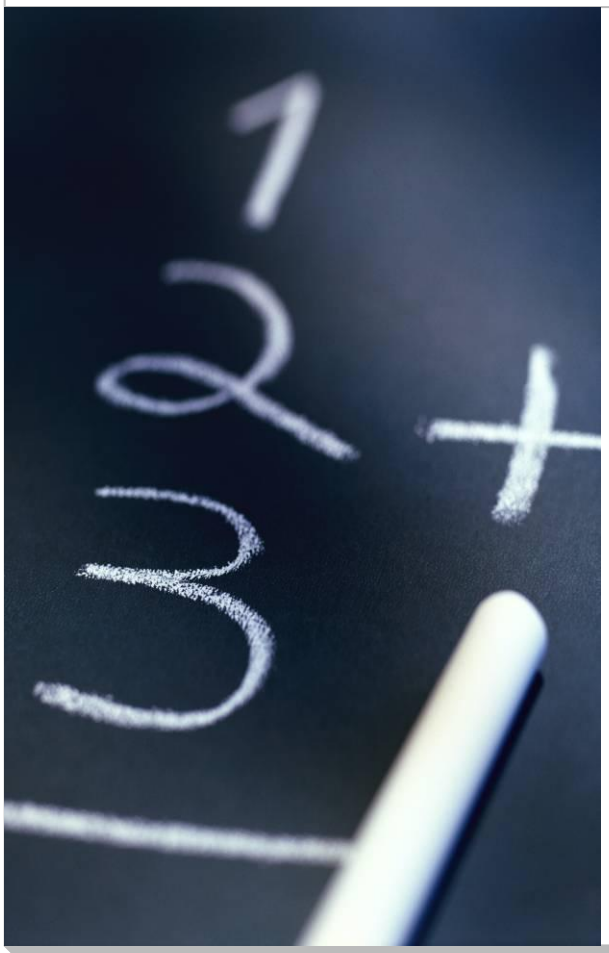
Proskauer

NLRB Basics



- Independent Federal Agency consisting of Presidentially-appointed, Senate-confirmed
  - Five Member Board
  - General Counsel
- Enforces NLRA rights to
  - Join, form or support a union
  - Engage in concerted protected activities (regardless of whether related to a union)
  - Refrain from the foregoing

NLRB Institutional Issues

- Two Member Board
  - *New Process Steel* Supreme Court Decision
  - Expiration of recess term of Member Becker
  - Other events
- Budget
- Appropriations Riders
- Amendments to NLRA

Current NLRB Political Leadership

- Board Members
  - Chairman Mark Pearce (D) (August 2013)
  - Member Brian Hayes (R) (December 2012)
  - Member Craig Becker (D) (adjournment sine die of the Senate – at the latest, January 3, 2012)
- Acting General Counsel
  - Lafe Solomon (D) (indeterminate)

NLRB Institutional Issues (cont'd)

- **Acting General Counsel Lafe Solomon**
  - Acting General Counsel exercises all the normal authority of the General Counsel's office.
  - Generally GCs serve 4-year terms beginning on date President signs Commission, following confirmation by Senate.
  - Mr. Solomon is a recess appointee under Federal Vacancies Reform Act, which allows for a series of 210-day "mini-terms."
  - Mr. Solomon's nomination pending in Senate.

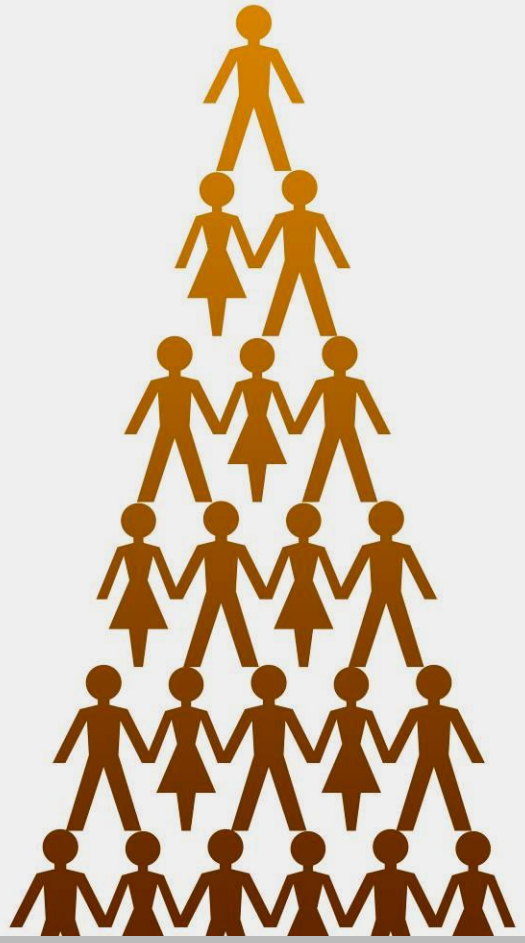
NLRB Institutional Issues (cont'd)

- **Budget Situation**
  - Part of overall budget debate in Washington
  - FY 10 budget – $ 283.4 million
  - On February 17, House voted 250 - 176 to defeat measure that would have completely defunded NLRB.
  - FY 11 budget request – $287.1 million
  - House proposal – $233.4 million ($50 million reduction)
  - Senate proposal – Continue FY 2010 level

What To Look for Going Forward

- What happens to the NLRB's FY 2012 budget
  - Appropriations riders
- Who fills vacancies on the Board created by the expiration of Member Becker's recess appointment
- What happens to nominations of Acting General Counsel Lafe Solomon and Board nominee Terry Flynn
- What happens in the 2012 elections

Making Union Organizing Easier



- Informing employees of their NLRA rights
  - NLRA rights notice posting
- Allowing smaller bargaining units
  - Specialty Healthcare decision
- Holding quicker elections
  - Expedited election regulations
- Access to property – real and virtual
  - Test for discrimination

NLRA Employee Rights Notice Posting

- Notice of Proposed Rulemaking, 75 Fed. Reg. 80410 (December 22, 2010)
- Final Rule Published, 76 Fed. Reg. 54006 (August 30, 2011)
- Codified at 29 CFR Part 104
- Effective date deferred to January 31, 2012.
- Notices may be obtained from the NLRB web site (www.nlrb.gov), from NLRB Regional Offices and from commercial providers.

Employee Rights

Under the National Labor Relations Act

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten or coerce you in order to gain your support for the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take adverse action against you because you have not joined or do not support the union.

If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: **http://www.nlrb.gov.**

You can also contact the NLRB by calling toll-free: **1-866-667-NLRB (6572)** or **(TTY) 1-866-315-NLRB (1-866-315-6572)** for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.

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SEPTEMBER 2011

Text of Notice (cont'd)

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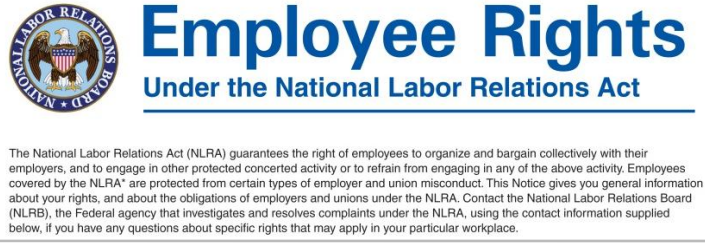

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NLRA Employee Rights Notice Posting

- Three actions have been filed to overturn the notice posting regulations:
  - *National Association of Manufacturers v. NLRB et al.,* Case No. 1:11-cv-01629-ABJ (D.D.C.)
  - *National Right to Work Legal Defense and Education Foundation et al. v. NLRB et el.,* Case No. 1:11-cv-01683-ABJ (D.D.C.)
  - *Chamber of Commerce of the United States of America et al. v. NLRB et al.,* Case No. 2:11-cv-02516-DCN (D.S.C.)

NLRA Employee Rights Notice Posting

- Arguments raised in the complaints
  - The NLRB lacks authority under the NLRA to
    - Order employers to post the notice
    - Make failure to post the notice an unfair labor practice
    - Toll the statute of limitations on unfair labor practices committed by employers do not post the notice
  - The regulations violate the Regulator Flexibility Act because the appropriate studies were not undertaken.
  - The notice is compelled speech and therefore violates the First Amendment.

Specialty Healthcare Case

- A little background on union organizing.
  - Employees are organized in “bargaining units”
  - A bargaining unit is a group of employees who share a community of interest (e.g., common supervision, work location, schedule, wages and benefits package, etc).

Specialty Healthcare Case (cont'd)

- The NLRB has traditionally sought to avoid a proliferation of units or fragmented units, and has traditionally favored inclusion of all who share a community of interest at a particular location.
- The *Specialty Healthcare* decision has changed that last point.

Specialty Healthcare Case (cont'd)

- In *Specialty Healthcare and Rehabilitation Center*, 356 NLRB No. 56 (December 22, 2010), Board invited *amicus* briefs to address a number of questions, including
  - Where there is no history of collective bargaining, should the Board hold that a ***unit of all employees performing the same job*** at a single facility is presumptively appropriate in nonacute health care facilities? ***Should such a unit be presumptively appropriate as a general matter?***
- These questions set off alarm bells in much of the business community.

Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83 (August 26, 2011)

- Identified new two-step test:
  1) Are employees identifiable as a group (job titles, for example)?
  2) Do they share a community of interests?
- If so, petitioned for unit is appropriate unless demonstrated otherwise under an "overwhelming community of interests" test.
- Language in decision does not limit it application to the non-acute health care institutions.

Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83 (August 26, 2011) (cont'd)

- Key passage:

> "We therefore take this opportunity to make clear that, when employees or a labor organization petition for an election in a unit of employees who are **readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest** after considering the traditional criteria, the **Board will find the petitioned-for unit to be an appropriate unit despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate**, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit**."**
>
> 357 NLRB No. 83, Slip op. at 12-13 (footnotes omitted)

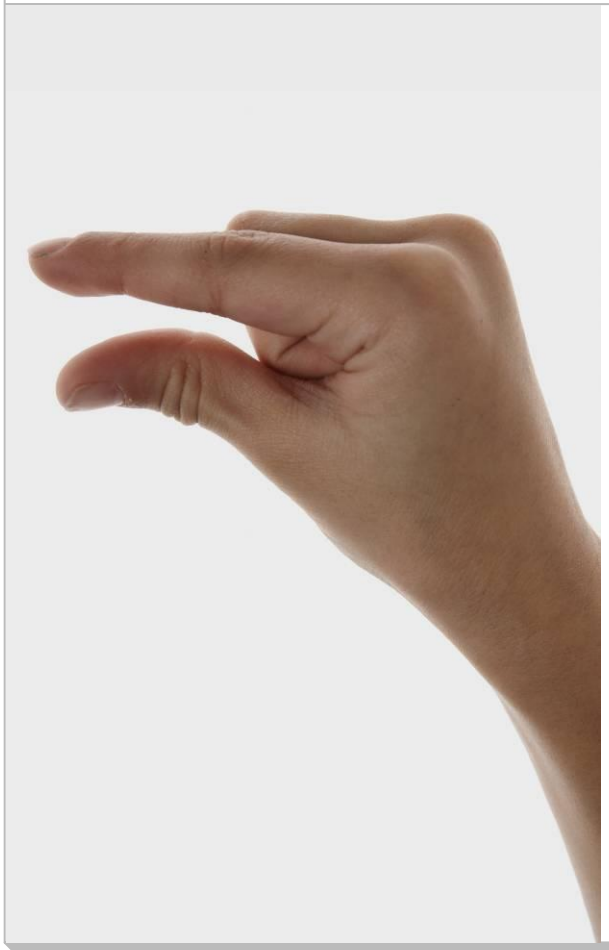
Overwhelming Community of Interest Required to Show Unit Inappropriate

- Employer can only challenge unit by showing that the employees included and excluded from a unit share an “overwhelming community of interests”
- Board said this requires interests of included and un-included employees to "overlay almost completely"
- This is test adopted from unit accretion cases
- Test may be appropriate for accretion cases, but not initial unit determinations
  - In accretion cases employees who are “accreted” do not have opportunity to vote, so community of interest should be overwhelming.

NLRB Proposed Election Regulations

- Notice of Proposed Rulemaking, 76 Fed. Reg. 36812 (June 22, 2011).
- Public hearing held July 18-19 with 66 witnesses testifying.
- Over 65,000 written comments filed.
- Unprecedented public dispute involving NLRB Chairman Mark Pearce, the NLRB's lone Republican appointee, Brian Hayes, and Chairman John Kline of the U.S. House Committee on Education and the Workforce.
- The National Labor Relations Board has decided to move forward with a scaled back package of proposed election regulations, based on a resolution adopted at a public meeting of the Board on November 30, 2011.

NLRB Scaled Back Election Regulations



- Allow Hearing Officers (Regional Office employees) to limit a pre-election hearing only to those matters relevant to the question of whether an election should be held, eliminating the right to raise issues such as the supervisory status of some putative unit members.

NLRB Scaled Back Election Regulations (cont'd)

- Authorize Hearing Officers to decide whether or not to permit post-hearing briefs, eliminating briefing as a matter of right.
- Eliminate discretionary pre-election review by the Board of questions addressed by the Hearing Officer and, instead, consolidate such issues with a single, post-election discretionary review proceeding, and eliminate post-election review as a matter of right.

NLRB Scaled Back Election Regulations (cont'd)

- End the practice of not scheduling an election until approximately 25 days after a decision and direction of election (which is the current practice to allow time for a pre-election request for review, now being eliminated).
- Limit the grounds upon which special permission to appeal to the Board may be granted to "extraordinary circumstances" which the Board considers to mean that an important issue will escape review altogether if special permission is not granted.

NLRB Scaled Back Election Regulations (cont'd)

- Board must promulgate these before Member Becker's term ends – will likely promulgate in mid to late December.
- Legal/policy question exists whether Board may promulgate in the absence of three affirmative votes (Member Hayes has voted against promulgation).
- Lack of Regulatory Flexibility Act analysis may also undermine regulations.
- Likely that legal challenge(s) will be filed on these and possibly other grounds.

Access to Property

- *New York New York Hotel and Casino*, 356 NLRB No 119 (March 25, 2011)
  - Permits employees of contractor regularly performing on owner's property (in this case a lessee restaurant inside a casino) to enter the owner's property to handbill at restaurant entrance.
  - Employer can defeat if it can establish legitimate business reason such as need to maintain production and discipline.
- Dissent would require showing of "no reasonable alternative means of communication".

Discrimination in Property Use or Access

- In *Roundy's Inc*., Case No. 30-CA-17185, Board has invited *amicus* briefs on question of what constitutes discrimination in access to employer property.
- Case will likely resolve inconsistency in Board case law on what constitutes unlawful access discrimination.
  - *Sandusky Mall Co.*, 329 NLRB 618 (1999) – virtually any access given third parties to the employer's real property will cause denial of use by union representatives to be found discriminatory.
  - *Register Guard*, 351 NLRB 1110 (2007) – charitable, or noncommercial use by third parties of the employers e-mail system would not be treated the same as commercial use, such as by unions.

Expanding Protected Concerted Activity

- Social media
- Bannering
- Class action waivers
- Anticipated activity
- Individual conduct
- Viewing facts differently
  - Violence
  - Speech

Social Media Cases

- Section 7 of the Act protects "concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."
  - ***Note: No union or union-related activity required.***
- Section 8(a)(1) of the Act forbids an employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7."

Social Media Cases (cont'd)

- Section 8(b)(1) of the Act forbids a labor union "to restrain or coerce . . . employees in the exercise of rights guaranteed in Section 7."
- The Board uses the same test for legality of social media rules as developed over the years for legality of other work rules:
  - Does the rule directly interfere with or restrain protected activity?
- If not:
  - Was the rule enforced to interfere with or restrain protected activity?
  - Was the rule issued in response to protected activity?
  - Can the rule be reasonably read to interfere with or restrain protected activity?

Social Media Cases (cont'd)

- Disparaging comments about the employer, including supervisors and managers, are generally protected unless:
  - are not related to a dispute over working conditions;
  - focus only on company products or business policies, particularly if the criticism comes at a "critical time" for the Company;
  - appeal to racial, ethnic, or similar prejudices;
  - cross some ill-defined line of propriety – "I know it when I see it" approach.

Bannering Case

- Section 8(b)(4)(ii)(B) of the Act prohibits unions from threatening, coercing or restraining one company in an effort to get it to cease doing business with another company.
- In ***United Brotherhood of Carpenters and Joiners of America, Local 1506***, 355 NLRB No. 159 (2010), the question was whether bannering equals threatening, coercing or restraining.

Bannering Case (cont'd)

- **Key Facts in Lead Case**
  - Banners held stationary by individuals
  - No patrolling back and forth (as in picketing)
  - No shouting, drum beating or other noisy, disruptive or threatening conduct
  - Banner not positioned near and did not interfere with, access to the business premises
  - Banner was facing the street, as were the persons holding it, so that the message was aimed at the public passing by, and not directed at the business or the workers at the site

Bannering Case (cont'd)

- Based on these facts, the Board held that the bannering did not threaten, coerce or restrain.
- Rather, this type of activity is simply free speech designed to persuade the public that the targeted business should not be patronized.
- Question remains open regarding other types of bannering accompanied by noise, rats, etc.
- Board has also decided other pending cases to allow bannering, relying on this lead case.

Arbitration Agreements Banning Class Actions

- In Memorandum GC 10-06 (June 16, 2010), the General Counsel stated that individual employee waivers of the right to go to court and instead agreeing to arbitrate employment related claims were not unlawful so long as the arbitration waivers did not bar
  - Individuals or groups from filing unfair labor practice charges with the NLRB; and
  - Collective actions to challenge the validity of the employer's arbitration system.
- Issue is currently before the Board in *D.R. Horton, Inc.*, Case No. 12-CA-25764.
  - Amicus briefs invited.

Arbitration Agreements Banning Class Actions (cont'd)

- ***AT&T Mobility LLC v. Concepcion***, No. 09-893, __ U.S. __ (April 27, 2011)
  - The FAA's overarching purpose is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings.
  - Parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit with whom they will arbitrate.
  - Class arbitration, to the extent it is imposed rather than consensual, interferes with fundamental attributes of arbitration.
  - The switch from bilateral to class arbitration sacrifices arbitration's informality and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.

Arbitration Agreements Banning Class Actions (cont'd)

- ***AT&T Mobility LLC v. Concepcion***, No. 09-893, __ U.S. __ (April 27, 2011) (cont'd)
  - Class arbitration greatly increases risks to defendants.
  - The absence of multilayered review makes it more likely that errors will go uncorrected.
  - The risk of error may become unacceptable when damages allegedly owed to thousands of claimants are aggregated and decided at once.
  - Arbitration is poorly suited to these higher stakes.

Concerted Protected Activity

- In *Parexcel International, LLC*, 356 NLRB No. 82 (January 28, 2011), Board reversed ALJ and held "preemptive strike" discharge of employee to prevent her from engaging in protected concerted activity violated Section 8(a)(1) of the Act.
- In *Worldmark by Wyndham*, 356 NLRB No. 104 (March 2, 20110), Board reversed ALJ and held that individual employee's complaint about rule applicable to and in presence of other employees, and use of words like "us" and "we," converted individual's action to concerted protected activity.
- Member Hayes dissented that both decisions "reduce to meaninglessness the distinction between unprotected individual activity and protected concerted activity."

Viewing Facts Differently

- In *AT&T Connecticut*, 356 NLRB 118 (March 24, 2011), Board held employer violated 8(a)(1) when it refused to allow employee technicians to wear shirt with word “Inmate” on front and “Prisoner of AT$T” on back.
- Member Hayes’ dissent maintained that “special circumstances” of recent home invasion and murder in Connecticut was sufficient to warrant banning the shirt.

Viewing Facts Differently (cont'd)

- In *Mastic Direct TV*, 356 NLRB No. 110 (March 11, 2011), the Board held verbal threats by pro-union employees – third parties in Board parlance – to physically harm and sabotage the work of fellow employees if they did not vote for the union, made just days before the election, were insufficient to overturn a 1 vote victory by union.
- Member Hayes' dissent maintained that such conduct need not create a "general" atmosphere of fear, but should be evaluated under the particular facts and circumstances of the case. Here he would have set aside the election because of the threats.

The Boeing Case

- Are we pushing the legal envelope?
- What is the wrong we are trying to right?
- What is the remedy we need to seek?
- How will this affect the agency's mission overall?
- Status of settlement.

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