Ogletree Deakins

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The Practical NLRB Advisor

Another wild swing of the pendulum?

In this Issue

Since the National Labor Relations Board (NLRB) was not created until after his passing, Ben Franklin can be forgiven for mistakenly observing that the only certain things in life are death and taxes. As recent history has taught us, one can add to the list of life's inevitabilities the fact that when the political balance on the NLRB shifts, no precedent is safe. This reality, like its two companions in inevitability, is a seriously negative development for those affected.

In the last issue of the *Practical NLRB Advisor*, we noted with alarm the laundry list of major NLRB doctrines that its new general counsel (GC) signaled she wanted to see reversed or substantially altered. The GC's view is, of course, problematic because a prosecution can be predicated on it. That is unquestionably an issue for the given respondent that becomes the target of some new theory of liability favored by the GC. However, it does not become a problem for all stakeholders until the Board itself accepts the GC's view and changes the law. The Board is the adjudicatory body, so the law does not change until it says so.

Thus, until recently there remained some hope that the Board, at least, would restrain itself from engaging in the kind of wholesale reversal of extant Board law foreshadowed by the GC's various memoranda. It appears any hope along those lines was ill-founded. The new Board majority now seems poised to join the revisionist frenzy. It is an unfortunate and destabilizing turn of events that has become all too common.

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BRIAN IN BRIEF

In the last issue of the *Practical NLRB Advisor* we detailed the extremely aggressive agenda of the newly minted general counsel (GC) of the National Labor Relations Board (NLRB) and her apparent quest to persuade the Board to reverse or substantially modify broad swaths of extant decisional law under the National Labor Relations Act (NLRA). We also noted her likely effort to resuscitate theories and remedies that have been defunct for decades and never revived by earlier Boards regardless of their political or policy persuasion.

In this issue we report, with no small concern, that the other revisionist shoe has now officially dropped. As detailed in this issue's lead story, the newly formed Democratic-led Board majority appears just as eager as the GC to undo much settled law. In the lead story, we chronicle the Board's recent spate of briefing invitations. Not surprisingly the decision to seek public briefing split along partisan lines.

The solicitations seek input on how the Board should rule on several consequential matters: the lawfulness of confidentiality requirements in mandatory arbitration agreements; the standard for determining the legality of employer work rules and handbook provisions; the proper analytical framework for determining independent contractor status; and the standard for defining an appropriate bargaining unit. In addition, the Board unanimously invited briefing on whether it should expand make-whole remedies to include consequential damages.

Each of these briefing invitations plainly signals an intent to revisit—and very likely jettison—many extant decisions in significant areas of Board law. Beyond merely chronicling this activity, our lead story also sounds cautionary notes regarding the questionable wisdom of making consequential change for political purposes, in particular the prospect that more wildly fluctuating decision-making runs the substantial risk of squandering the agency's credibility not only with reviewing courts, but with stakeholders and lawmakers as well. There seems little chance that these observations will resonate with those who make the decisions; however, the likely consequences merit consideration.

Sincerely,

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About Ogletree Deakins' *Practical NLRB Advisor*

At Ogletree Deakins, we believe that client service means keeping our clients constantly apprised of the latest developments in labor and employment law. With the whirlwind of activity taking place at the National Labor Relations Board (NLRB) in recent years—affecting both unionized and nonunion employers—a quarterly newsletter focused on the NLRB is an essential tool to that end.

Ogletree Deakins' *Practical NLRB Advisor* seeks to inform clients of the critical issues that arise under the National Labor Relations Act and to suggest practical strategies for working successfully with the Board. The firm's veteran traditional labor attorneys will update you on the critical issues in NLRB practice with practical, "how to" advice and an insider's perspective. Assisting us in this venture are the editors of Wolters Kluwer Legal and Regulatory Solutions' *Employment Law Daily.*

The *Practical NLRB Advisor* does not provide legal advice. However, it does seek to alert employers of the myriad issues and challenges that arise in this area of practice so that they can timely consult with their attorneys about specific legal concerns.

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The briefing solicitations

While the GC signals the intent to seek changes in the law through the issuance of regional memoranda, the Board, most typically, simply changes the law through the vehicle of one of its decisions. Recently, however, the Board has provided an earlier signal of its intent through the issuance of briefing solicitations. The solicitations relate to cases before the Board that present issues of important Board doctrine, and they invariably foreshadow the Board's intent to reverse or substantially alter extant law.

Since its formation, the new Board majority has promulgated an unprecedented number of briefing solicitations in such a short period of time. Thus, the new Board has sought *amicus* briefing in six cases all of which involve significant Board issues. The solicitations signal the new Board's intent to revisit, and very likely to reverse or modify, current Board law. In some instances, it seems clear that the majority is looking to restore controversial views espoused by the Obama-era Board. The Obama Board has a well-documented history of having repeatedly broken with long-standing precedent to a degree not seen before in the agency's ninety-year existence. It appears as if the Biden Board is poised to repeat that unfortunate history.

Not surprisingly, the decision to seek public briefing split along partisan lines. In five of the six cases at issue, Democratic Chair Lauren McFerran and members Gwynne A. Wilcox and David M. Prouty joined in the notice and invitation, while Republican members Marvin E. Kaplan and John F. Ring dissented.

The solicitations seek input on how the Board should rule on several consequential matters: the lawfulness of confidentiality requirements in mandatory arbitration agreements; the standard for determining the legality of employer work rules and handbook provisions; the proper analytical framework for determining independent contractor status; and the standard for defining an appropriate bargaining unit. In addition, the Board unanimously invited briefing on whether it should expand make-whole remedies to include consequential damages. Here is a closer look at the issues implicated by the Board's solicitations.

Mandatory arbitration agreements

On January 18, 2022, the NLRB invited parties and *amici* to file briefs on whether the Board should adopt a new legal standard to determine whether confidentiality requirements in a mandatory arbitration agreement violate Section 8(a)(1) of the National Labor Relations Act (NLRA) and other legal issues related to mandatory arbitration agreements. The invitation was extended in a long-running case involving a grocery chain's mandatory dispute resolution program that barred employees from disclosing any details regarding its arbitration proceedings. In its present posture the case turns on whether such confidentiality provisions interfere with employee rights, most especially, the right to file NLRB complaints.

In 2016 the Board found that the employer violated Section 8(a)(1) by maintaining and enforcing a mandatory arbitration policy that (1) required employees to waive their right to pursue class or collective actions; (2) interfered with employees' ability to file unfair labor practice charges with the Board; and (3) required employees to maintain confidentiality with respect to the existence, content, and outcome of any arbitration proceedings. While the employer's appeal of this decision was pending in the U.S. Court of Appeals for the Ninth Circuit, the Supreme Court of the United States issued its landmark *Epic Systems Corp. v. Lewis* opinion, in which the high court announced that requiring mandatory arbitration agreements as a condition of employment did not violate the NLRA. As a result, the circuit court vacated that part of the Board's order governed by the *Epic Systems* decision. At the Board's request, however, the court remanded those portions of its earlier decision not foreclosed by *Epic Systems.* Thus, the findings with respect to confidentiality and interference with the Board's processes were returned to the NLRB.

In the interim, however, the then Republican-controlled Board had specifically addressed and overruled one of the remanded issues. In May of 2020, in *Anderson Enterprises, Inc. d/b/a Royal Motor Sales*, the Trump Board held that an arbitration agreement requiring employees to arbitrate all employment-related claims, but containing a "savings clause" relating to Board charges, did not interfere with employee access to the agency. In another related Trump-era decision, *California Commerce Club*, the Board held that the Federal Arbitration Act (FAA) permits employers to maintain confidentiality requirements in arbitration agreements,

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notwithstanding the resulting impediment to employees' exercise of their protected right to discuss terms and conditions of employment.

Among other things, the Biden Board has invited interested parties to specifically weigh in on whether it should overrule the *Anderson Enterprises* and *California Commerce* decisions. The dissenting Republican Board members, however, argued that: "existing Board precedent requires that arbitration agreements be interpreted reasonably and consistent with the principles set forth in the FAA as interpreted by the Supreme Court. Under that precedent, particular agreements have been found both lawful and unlawful, based on a careful analysis of their provisions. The majority today invites briefing on whether it should be overruled all the same." The majority declined to address those arguments simply noting "if it were clear that the Supreme Court's decisions compelled the results previously reached by the Board, we would not reconsider precedent."

Democratic Board members, along with pro-labor advocates and trial lawyers, have viewed mandatory arbitration agreements with palpable hostility. The attempt to prohibit them universally as being broadly inconsistent with the NLRA, however, was thwarted by the Supreme Court's decision in *Epic Systems.* The new briefing solicitation likely signals a different approach involving a more targeted attack on the legitimacy of specific clauses typically included in such agreements.

Work rule and handbook standards

On January 6, 2022, the Board invited briefing on whether it should adopt a new legal standard to determine if an employer's work rules violate Section 8(a)(1) of the NLRA. Specifically, the Board has sought input on whether the Trump-era standard adopted in its December 2017, decision in *The Boeing Company* should be abandoned in favor of more heightened scrutiny of workplace rules and policies. This development appears in lockstep with the view of NLRB General Counsel (GC) Jennifer A. Abruzzo, who previously required the Board's regional offices to send all cases involving the *Boeing* decision to the Division of Advice in her "Mandatory Submissions to Advice" memo (GC 21-04) issued on August 12, 2021.

In *Boeing*, the Board revamped its standard for deciding whether an employer's handbook policies or other work rules interfere with employees' protected rights. The decision marked an end to the overreaching analytical framework adopted by the Obama Board. Under that framework, the Obama Board found a host of common, and common-sense, employer handbook provisions violated the NLRA even though they were never adopted or even enforced for such a purpose. The test enunciated in *Boeing*, and revised in *LA Specialty Produce*, balances the potential impact of a rule on employees' NLRA-protected rights against the employer's "legitimate justifications" for implementing the measures.

Wrong focus? In a lengthy dissent, members Kaplan and Ring pointed out that the Supreme Court's *Epic Systems Corp.* decision "reminded us that 'Section 7 focuses on the right to organize unions and bargain collectively.'" "In keeping with this observation, the Board ought to devote the better part of its time and energy to ensuring free and fair elections and to dealing with employers who quell organizational efforts through intimidation or who refuse to bargain in good faith," the dissent wrote. "Scrutinizing facially neutral workplace rules that target unprotected conduct to determine whether they might be construed by labor-law professionals to reach some protected conduct as well consumes resources better devoted to going after the real bad apples."

Demonstrating just how broadly the Board may act to change policy on this issue, the briefing solicitation seeks input on not only whether it should continue to adhere to the *Boeing* standard, but also whether it should "modify existing law addressing the maintenance of employer work rules to better ensure that:

> (a) the Board interprets work rules in a way that accounts for the economic dependence of employees on their employers and the related potential for a work rule to chill the exercise of Section 7 rights by employees;
>
> (b) the Board properly allocates the burden of proof in cases challenging an employer's maintenance of a work rule under Section 8(a)(1); and
>
> (c) the Board appropriately balances employees' rights under Section 7 and employers' legitimate business interests?"

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In addition, the Board asked for comment on whether it should continue to hold that certain types of work rules, for example, investigative confidentiality rules and rules prohibiting outside employment, are always lawful to maintain.

The prospect of returning to a regime of after-the-fact parsing and grammatical nitpicking of policies and rules is a decidedly unwelcome one. Whether borne of a desire to broaden its footprint or to make the agency more relevant, the Obama-era obsession with handbook rules commanded much of the Board's attention but did little or nothing to advance its primary goal of shaping national labor policy. Accordingly, it seems unwise to go down this same path again. In this respect, the dissent's position on this solicitation appears particularly well taken.

Independent contractor standard

On December 27, 2021, the Board invited public briefing on whether it should reconsider its standard for determining the independent contractor status of individuals under the NLRA. The issue is one of considerable importance, especially in the gig economy. Independent contractors are specifically excluded from coverage under the NLRA. Thus, the question involves whether significant segments of the workforce are even subject to NLRB jurisdiction at all.

Decades ago, the Supreme Court held that independent contractor status under the Act should be determined through the application of the common law of agency. That common law typically rests on the assessment of a nonexhaustive list of multiple factors characterizing the relationship. First among those factors is the right of the principal to control the activities of the putative independent contractor. Some appellate courts, most notably the U.S. Court of Appeals for the D.C. Circuit, have held that in assessing all the common law factors, including control, the Board should view the factors "through the lens of entrepreneurial opportunity." When viewed through this "lens," individuals who have the right to accept or reject assignments and to determine what times they will and will not work tend to look like independent contractors.

Since this analysis operated to exclude a number of individuals from the Act's coverage, the labor-friendly Obama Board significantly modified the test in a 2014 decision in which the Board took the position that the entrepreneurial opportunity had to have been exercised, not merely be theoretical, and that any employer-imposed constraints on the exercise of that opportunity had to be assessed as well. In reality, the Obama Board was shifting the focus away from entrepreneurial opportunity and substituting a "lens" of economic dependence. Not surprisingly, the D.C. Circuit subsequently rejected the Board's new approach. Following that, in 2019, the Trump Board issued its decision in *SuperShuttle DFW, Inc.* in which it re-established the traditional framework of assessing the common law factors through the lens of entrepreneurial opportunity.

Once again in Democratic hands, the Board has invited briefing on whether it should again reconsider that standard. In the case at hand, the employer sought review of an acting regional director's decision and direction of election based on the finding that the workers whom the union sought to represent—an opera company's makeup artists, wig artists, and hairstylists—were employees and not independent contractors. The Board's briefing invitation asked for input on whether it should "adhere to" the *SuperShuttle* standard, and if not, whether it should "return to" the 2014 standard, "either in its entirety or with modifications." The two Republican dissenting Board members pointed out that "no party to this case has asked the Board to overrule, modify, or even revisit *SuperShuttle*."

The case and the standard have significant jurisdictional and practical importance. From rideshare drivers to the artists and stylists in the present case, gig workers comprise a significant and growing segment of the labor force. To unions and their allies, they represent a vast and largely untapped source of new members. However, if they are independent contractors, they are not covered by the NLRA and are therefore not eligible to unionize under the statute. Much like the Obama Board, look for the current Board majority to liberalize the standard in an effort to maximize the number of individuals that qualify as statutory employees rather than independent contractors. Such liberalization would substantially broaden labor's range of potential organizing targets.

Appropriate bargaining units

The Board has also sought briefing as to whether it should return to the standard established in *Specialty Healthcare* for determining if a petitioned-for bargaining unit is appropriate. On December 7, 2021, the Board invited interested parties

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to weigh in on this consequential "micro-unit" issue. In *Specialty Healthcare*, the Obama Board departed from decades of prior precedent to sanction union elections among small micro units within a company. Employers and business groups vehemently opposed the decision, arguing that organizers could cherry-pick small segments of an employer's workforce to target a union organizing campaign. Nevertheless, over the next several years the standard withstood challenges in the federal courts of appeals.

The Board will consider establishing a practice of awarding a broader range of consequential damages, in addition to loss of earnings and benefits, to employees who are victims of unfair labor practices.

In 2017, the Trump Board overruled *Specialty Healthcare's* micro-unit rubric in its decision in *PCC Structurals, Inc.*. In that case, the Board announced that it was returning to the traditional community-of-interest test. Under this standard, when a party asserts that "the smallest appropriate unit must include employees excluded from the petitioned-for unit," the Board applies its traditional community-of-interest factors to determine "whether the employees in a petitioned-for group share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit." The Board considers "both the shared *and* the distinct interests of petitioned-for and excluded employees." (Emphasis in original.) The analysis also considers whether excluded employees have meaningful distinct interests in the context of collective bargaining that *outweigh* similarities with the included employees. The Board applied and clarified the community-of-interest standard in its 2019 ruling in *Boeing Company*.

In the case currently under review, a union requested review of a regional director's dismissal of its representation petition. The union sought to represent a unit of the steel company's full-time and regular part-time journeyman and apprentice field ironworkers, but the employer asserted that the appropriate unit should also include its fabrication shop employees, painters, and drivers. It argued that a plant-wide unit was the only appropriate unit. The regional director applied the community-of-interest factors and found that the field employees shared an internal community of interest, but it was not "sufficiently distinct" from the interests of the fabrication shop employees, painters, and drivers whom the union proposed to exclude from the unit, and thus dismissed the petition.

It should be noted that *Specialty Healthcare* itself was a radical departure from the Board's traditional unit determination jurisprudence. At its most fundamental level *Specialty Healthcare* was the product of the Obama Board's clear desire to make unionizing easier. It abandoned the decades-long, traditional approach that predicated unit determinations on what grouping of employees would best facilitate collective bargaining, not on which grouping would make it more or less likely that a union would win a representation election. Like all radical and ill-conceived departures from tradition, it was short-lived. That the current Board now apparently seeks to resuscitate the approach is both disturbing and predictive.

Consequential damages

On November 10, 2021, the NLRB unanimously invited interested parties to submit briefs on whether it should expand its standard make-whole remedies for unlawfully discharged or laid off employees to account more fully for the employees' actual economic losses. The Board will consider establishing a practice of awarding a broader range of consequential damages, in addition to loss of earnings and benefits, to employees who are victims of unfair labor practices.

The NLRB has previously declined to consider the awarding of consequential damages in most discharge cases. However, GC Abruzzo's "Seeking Full Remedies" memo (GC 21-06), issued on September 8, 2021, directs regional offices to seek "full" remedies in all cases and to exercise the full extent of the Board's authority, including "consequential" damages. Just two weeks earlier, on August 25, 2021, the NLRB issued a decision in which Chair McFerran, joined by Member Ring, indicated interest in having public input on the issue of awarding consequential damages. In that case, a nursing home unilaterally changed its health insurance plan without providing notice and opportunity to bargain. The unilateral change was found to violate the employer's duty

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to bargain and resulted in significant medical bills for some employees whose coverage was adversely affected and who were unaware of the change. These losses were not covered by the Board's traditional make-whole award.

The Democrat-authored Protecting the Right to Organize (PRO) Act as well as the Build Back Better reconciliation package both contained provisions for substantial monetary fines that would be imposed in the instance of NLRA violations. The fines in both pieces of legislation were as much as $50,000 to $100,000 per violation. The inclusion of these provisions was heavily lobbied by organized labor and would have changed the character of the NLRA from a remedial to a punitive statute. It has exclusively been the former since first enacted.

The Board does not have the authority to make the Act punitive on its own; only Congress can do that. However, the Board's current interest in consequential damages is no doubt motivated, at least in part, by the same considerations as the legislative fines. Proponents of the penal approach argue it will deter the commission of unfair labor practices. Meanwhile, the opponents argue that that conclusion is false, or at best unproven, and that a penal regime will do little more than exponentially increase and complicate labor-related litigation.

Some thoughts on context

It is interesting to view the new Board and its actions in the larger context of administrative law and the contemporary debate over its reach. At some point in our education, all of us have been exposed to a writing or chart depicting the constitutional framework of our government. That framework notes that our government consists of three branches—legislative, executive and judicial. In reality, however, there now seems to be a fourth branch—the administrative state. On the federal level, it consists of a bewildering array of agencies that collectively exert enormous influence over almost every aspect of our daily lives. Although it remains technically part of the executive branch, the administrative state has grown exponentially both in terms of size and independence. Unelected and largely unaccountable, it has become nearly as independent as it is powerful. The causes for its growth are diverse and range from the sheer complexities of modern life to the calculated political expediency of vesting decisional authority in the hands of individuals who are not elected.

One fundamental factor in the growth of the administrative state has been the degree of acceptance by courts and legislatures of agency decision-making. In the case of reviewing courts, the doctrine of judicial deference has been an indispensable aid in the ascendancy of the modern administrative state. Judicial deference is a complex and multifaceted doctrine, but in its simplest form it means that federal courts are loathe to disturb an agency decision even if the court would reach an entirely different result based on the exact same facts. This high bar of deference and the already narrow scope of appellate review largely explains why agency decision-making is only rarely overturned by reviewing courts.

The supporting structure of judicial deference is, however, beginning to show some major cracks. Supreme Court justices Gorsuch and Kavanaugh appear to be squarely in the camp of the deference skeptics, and there is more than one reason to believe that justices Alito, Thomas, Barrett, and Chief Justice Roberts may harbor concerns as well. Notably, a handful of cases before the Court this term may well involve the issue of deference.

The current Board and GC would be wise to take note. The Board has traditionally enjoyed great success in defending its decision-making in the circuit courts. Much of this success has been attributable to a form of deference borne of the courts' collective view that the NLRB has significant expertise in the field of labor/management relations. The Board has also enjoyed an incredibly high compliance and settlement record and a largely hands-off approach from Congress for many of the same reasons. However, the prospect of more wildly fluctuating decision-making runs the substantial risk of squandering its credibility not only with reviewing courts, but with stakeholders and lawmakers as well. For example, finding the same bargaining unit inappropriate one day but appropriate the next or the same individual to be an independent contractor one day but an employee the next is not the kind of decision-making that inspires trust or confidence and is certainly not the product of any expertise. To the contrary, it smacks of results-driven politics, and reminds one of the Queen of Hearts proclamation: "Sentence first—verdict afterwards." ■

More pro-labor GC memos issued

The intention to align federal labor law with the administration's unabashedly pro-union agenda has been clear not only from the actions of the new five-member National Labor Relations Board (NLRB), but from its new chief prosecutor as well. General Counsel (GC) Jennifer Abruzzo has issued several memoranda directing regional offices to deploy the most aggressive tools in their enforcement arsenal and to tee up a host of important issues for eventual Board resolution. Most recently, Abruzzo has issued memoranda urging the robust usage of the agency's injunctive authority, particularly in the context of organizing campaigns. In addition, she issued memoranda aimed at protecting undocumented immigrant workers and making clear the view that student athletes are statutory "employees" entitled to the rights and protections afforded by the National Labor Relations Act (NLRA).

Injunctive relief

On February 1, 2022, Abruzzo issued memorandum GC 22-02, entitled "Seeking 10(j) Injunctions in Response to Unlawful Threats or Other Coercion During Union Organizing Campaigns." The memo details an initiative to seek injunctive relief under Section 10(j) of the NLRA in certain cases involving workers who have been subject to threats or other coercive conduct during an organizing campaign. According to Abruzzo, the initiative is intended "to protect worker rights and deter statutory violations by obtaining Section 10(j) injunctions in the earliest phases of unlawful employer anti-union actions during an organizing effort."

Section 10(j) injunctions. Section 10(j) authorizes the Board to seek injunctions against employers and unions in federal district courts to stop unfair labor practices where, due to the passage of time, the normal Board processes are likely to be inadequate to effectively remedy the alleged violations. Abruzzo opined in GC 22-02 they are "one of the most important tools available to effectively enforce the Act." Under the new initiative, Abruzzo will seek authorization to obtain prompt Section 10(j) relief "in all organizing campaigns where the facts demonstrate that employer threats or other coercion may lead to irreparable harm to employees' Section 7 rights." As such, she instructed regional offices to quickly investigate alleged threats or other coercion made during an organizing drive and to promptly submit those cases for consideration of injunctive relief.

"During the investigatory stage of an unfair labor practice charge involving an organizing drive, Board agents are already instructed to identify cases considered appropriate for pursuit of a Section 10(j) injunction," Abruzzo further explained. "This category will now include cases where employers swiftly react to organizing efforts with threats or other coercion, *even in the absence of other unlawful actions*." (Emphasis added).

Earlier injunction directive. Abruzzo's new memo builds on a previous memo that addressed injunctive relief. In August 2021, the GC issued her "Utilization of Section 10(j) Proceedings" memorandum (GC 21-05), in which she underscored the importance of 10(j) injunction proceedings and affirmed the Board's priority in continuing efforts to obtain immediate relief in cases that present a significant risk of remedial failure.

Practical effects. If fully implemented the injunction initiative could shift the arena for much campaign-related unfair labor practice litigation from the NLRB's administrative procedures into the federal district courts. It remains to be seen if the new policy will result in a significant spike in 10(j) utilization. Some observers believe any significant spike may encounter resistance from the federal district courts that not only already have crowded dockets, but were never intended to be the forum of first resort for unfair labor practice litigation. The GC's efforts may be tempered by the fact that in such proceedings the Board will bear the burden of showing that a given threat is "irreparable" and cannot be adequately addressed by the agency's own remedial authority.

Immigrant workers

The status of undocumented workers has been a focus for pro-labor advocates for decades. In the context of the NLRA, there has been frustration stemming from the 1984 decision by the Supreme Court of the United States in *Sure-Tan, Inc. v. National Labor Relations Board*. In *Sure-Tan,* the

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Court held that such individuals were statutory "employees" without regard to their immigration status. However, where such individuals were unlawfully discharged, the Board's traditional remedies of reinstatement and backpay would not be available for those who were illegally present in the United States. Since *Sure-Tan*, pro-labor Board majorities have struggled to craft remedies for individuals who are victims of employment discrimination yet not legally authorized to be working in the country.

With this as a backdrop, on November 8, 2021, Abruzzo issued Memorandum GC 22-01, entitled "Ensuring Rights and Remedies for Immigrant Workers Under the NLRA." The memo announced "critical policies" aimed at ensuring that immigrant workers have the protections they need to freely exercise their NLRA-protected rights without retaliation. The memo details case-handling procedures intended to let the agency serve the unique needs of immigrant communities and ensure that the NLRB is not only accessible to all workers who seek the NLRB's assistance, but also a safe place where they are treated with dignity regardless of immigration status or work authorization. Here are a few highlights.

Immigration status-related retaliation. The memo states that the agency "will continue to be vigilant and take very seriously any threat or retaliatory conduct by a charged party or respondent in an unfair labor practice case that is related to immigration status or work authorization." To that end, regions are instructed to "seek full and immediate remedies regarding such conduct at every stage of the case, including seeking Section 10(j) injunctive relief and amending existing complaints, if warranted." Moreover, "[i]f charged party counsel is involved in such unlawful conduct, Regional management should consider referring counsel for misconduct under Section 102.177 of the Board's Rules and Regulations, and should also consider referral to a state bar association for appropriate sanctions."

Affidavit testimony—immigration-related inquiry. In order to provide immigrant workers additional protections,

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Board approves former GC's firing, new GC's appointment

On December 30, 2021, the National Labor Relations Board (NLRB) issued a decision in which it affirmed the legality of President Joe Biden's termination of former general counsel (GC) Peter Robb's appointment before the end of his four-year term and the subsequent appointment of Jennifer Abruzzo as his successor. In a five-member decision, the NLRB rejected an employer's challenge to the validity of Biden's removal of Robb on January 20, 2021, some ten months before the end of his Senate-confirmed term. In an earlier case, the Board declined to reach the merits of a similar objection, concluding it was not within the Board's jurisdiction "to review the actions of the President." Subsequently, however, the Supreme Court of the United States issued its decision in *Collins v. Yellen*, which the Board now held had foreclosed any reasonable argument that the president lacked authority to remove Robb as GC. Members Kaplan and Ring filed a separate concurrence.

The Board further noted that even if the Supreme Court's intervening decision in *Collins* was not dispositive, Abruzzo's tenure was plainly lawful. Robb's statutory term as GC expired on November 17, 2021, and he could not have continued to serve thereafter even if he had not been lawfully removed before then. By the time Robb's statutory term expired, Abruzzo had already been confirmed as the new GC by the Senate and appointed by President Biden. Accordingly, the Board concluded that the employer's challenge to Abruzzo's authority as GC had no legal basis.

In a subsequent decision issued in a different case on February 1, 2022, the Board unanimously affirmed an administrative law judge's refusal to dismiss charges against an employer on the basis that Peter Ohr, who served as *Acting* GC between Robb's ouster and Abruzzo's confirmation, lacked authority to prosecute the underlying complaint.

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Abruzzo advised that "Board [a]gents should advise every person giving affidavit testimony that an individual's immigration or work authorization status is not relevant to the investigation of whether the Act has been violated, and that the Board agent will not inquire about the individual's immigration or work authorization status." Board agents have also been instructed to "refrain from asking for social security numbers or Individual Taxpayer Identification Numbers (ITINs) during the merits stage of a case."

"Sufficient factual basis." Board precedent states that "it will not allow its process to become an 'open-ended inquiry' into a witness's immigration or work authorization status, which may devolve into a 'fishing expedition [as] a method of discouraging employees from seeking back pay on meritorious claims.'" Thus, the Board requires a respondent to show "a 'sufficient factual basis' that a discriminatee lacks work authorization before it is permitted to litigate an immigration-based affirmative defense in a compliance proceeding." Accordingly, GC-2201 instructs "Counsel for the General Counsel (CGC)" to "generally oppose a respondent's intention to introduce evidence or question witnesses about their immigration status or work authorization during the liability phase of a ULP proceeding." The CGC "should seek all safeguards, including by filing a motion *in limine*, a motion to quash an overreaching subpoena, or a motion for a bill particulars designed to examine a respondent's factual basis." In addition, attempted inquiries into a witness's immigration status or work authorization may be "itself an independent unfair labor practice."

Conditional reinstatement. In terms of remedies, where a discriminatee may not have work authorization, a conditional reinstatement order issued under the parameters previously articulated by the Board "would afford the discriminatee a 'reasonable period of time' to complete forms and present appropriate documents allowing the respondent to meet its obligations under federal law to verify employee work authorization."

Interagency collaboration. Abruzzo stated that she and Board staff will continue to pursue interagency collaboration with the Department of Homeland Security and its subagencies "to strengthen deconfliction principles and practices, cross-train staff to identify abuses of labor law that involve a worker's immigration status or work authorization, and better protect immigrant workers." Moreover, "upon request by a charging party or witness, the NLRB will seek immigration relief including deferred action, parole, continued presence, U or T status, a stay of removal, or other relief as available and appropriate, to protect these workers in the exercise of their statutory rights and allow for vigorous enforcement of the Act."

Student athletes

In a memo issued on September 29, 2021, Abruzzo provided updated guidance on her prosecutorial position that certain student athletes are "employees" under the NLRA and as such are afforded all statutory protections. Although GC 21-08 is directed to regional directors, officers-in-charge, and resident officers, Abruzzo states that she expects the memo "will notify the public, especially Players at Academic Institutions, colleges and universities, athletic conferences, and the NCAA, that I will be taking that legal position in future investigations and litigation under the Act." The memo also advises that, "where appropriate, [Abruzzo] will allege that misclassifying such employees as mere 'student-athletes', and leading them to believe that they do not have statutory protections is a violation of Section 8(a)(1) of the Act."

If Abruzzo's position is ultimately adopted by the Biden Board, it will have serious consequences on private universities, which could be forced to provide NLRA protections, including the right to unionize and collectively bargain, to their athletes.

The memo serves as just another example of policy changing with the political winds. It overturns the opposite guidance contained in former GC Peter Robb's memorandum GC 18-02, stating that student athletes are not employees. Robb's memo, in turn, rescinded Obama-era guidance issued by Robb's predecessor, former GC Robert F. Griffin, that college football players at private universities are employees under the NLRA. If Abruzzo's position is ultimately adopted by the Biden Board, it will have serious consequences on private universities, which could be forced to provide NLRA protections, including the right to unionize and collectively bargain, to their athletes. ■

A slew of activity at the Board

A lot has happened at the National Labor Relations Board (NLRB) in the past few months beyond its briefing solicitations and regular case handling. Here's a brief synopsis of some of the more significant events.

Former Board member's ethics issue

On January 7, 2022, the Board issued notices to show cause in three previously decided cases alerting the parties of its intent to reconsider its earlier decisions and providing them an opportunity to comment. The Board determined that reconsideration was warranted in the three cases because former member William Emanuel participated in each of the decisions; however, the Board's Designated Agency Ethics Official (DAEO) subsequently determined he had a financial conflict of interest in the cases that should have disqualified him from participation. In each of these cases, the Board accepted the DAEO's determination that Emanuel should have been disqualified and found that vacating the affected decisions and orders and redeciding the cases was the presumptively appropriate remedy. However, the notices sent to the parties permits them to provide their input on what course the Board should take.

NLRB Chair Lauren McFerran was joined by members Marvin E. Kaplan, Gwynne A. Wilcox, and David M. Prouty in the notices to show cause, with Member Kaplan concurring only in the determination that the parties should be provided an opportunity to brief the issue of the appropriate remedy for Emanuel's disqualification. Member John F. Ring, dissenting in part, agreed that Emanuel should not have participated in these cases but disagreed with the majority's decision to make vacatur the presumptively appropriate remedy before the parties had a chance to brief the issue.

Current Board members cleared for SEIU case

In response to concerns raised by Republican members on the U.S. House of Representatives Committee on Education and Labor and U.S. Senate Health, Education, Labor and Pensions Committee, NLRB Chair McFerran confirmed that the agency's DAEO has advised Board members Wilcox and Prouty that they may participate in the Board's response to a lawsuit filed by the Service Employees International Union (SEIU). Both Board members have strong and long-standing ties to the SEIU. Immediately prior to his confirmation Prouty served as general counsel to SEIU Local 32 BJ, the country's largest union of building service workers boasting over 175,000 members. Wilcox, while in private practice immediately before her nomination, also served as the associate general counsel to SEIU 1199, United Health Care Workers-East.

Chair McFerran's November 5 letter confirms that Wilcox and Prouty sought and received appropriate guidance from the NLRB's DAEO, in accordance with ethics protocols. The DAEO found that no applicable ethics statute, regulation, or other provision required Wilcox or Prouty to recuse themselves from the Board's consideration of and response to the lawsuit. The DAEO recommended that, based on an assessment of the relevant facts, their participation would not raise appearance concerns about lack of impartiality. In agreement with the DAEO's conclusions and recommendations, which were shared with all Board members, Wilcox and Prouty made their respective decisions to participate in the Board's decision-making on the SEIU matter.

The ethics determination will certainly prove significant as both will now participate in the SEIU's challenge to the controversial Trump-era joint-employer rule. On December 10, 2021, the Board announced in its 2022 regulatory agenda that it will again revisit the joint-employer standard, likely signaling that it intends to adopt a more union-friendly approach through rulemaking.

Labor agencies join forces

NLRB and DOL's WHD team up. The U.S. Department of Labor (DOL) and the NLRB have entered into a five-year Memorandum of Understanding (MOU) strengthening the partnership between the DOL's Wage and Hour Division (WHD) and the NLRB, and outlining new procedures for information-sharing, joint investigations and enforcement activity, and education and outreach. "The agreement is an effort by the agencies to improve the enforcement process of the laws they administer and reaffirms their commitment to ensure the rights and protections of workers," the agencies said.

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Under the MOU, the WHD and the NLRB "may share, whether upon request or upon an agency's own initiative, any information or data that supports each agency's enforcement mandates, whether obtained in the course of an investigation or through any other sources to the extent permitted by law. This may include complaint referrals and other sharing of information in complaint or investigative files relating to alleged violations of the laws enforced by DOL/WHD and NLRB." Under the MOU, "[t]he agencies will also explore ways to efficiently systematize procedures to facilitate this information and data sharing."

The agreement also provides that "[w]hen, during an investigation" either agency "has reason to believe that there may be unlawful conduct falling within the jurisdiction of the" other agency, they will advise the complaining employee "that an opportunity may exist to file a charge with the [other agency]," and provide applicable "information about rights and remedies" along with the other agency's contact information.

"In appropriate cases the agencies will determine whether to conduct coordinated investigations of matters arising within both agencies' jurisdictions," and will consider whether it would be "appropriate for one agency to settle or litigate the matter while the other holds it in abeyance, considering under which statute it would be most feasible and practical to proceed."

This interagency cooperation may prove most significant in independent-contractor cases that often implicate both unfair labor practice claims and wage and hour violations.

Joint initiative on retaliation. On November 10, 2021, the NLRB, DOL, and Equal Employment Opportunity Commission (EEOC) announced a joint initiative to raise awareness about retaliation issues when workers exercise their protected labor rights. The NLRB's press release stated: "The initiative will include collaboration among these civil law enforcement agencies to protect workers on issues of unlawful retaliatory conduct, educate the public and engage with employers, business organizations, labor organizations and civil rights groups."

The agencies explained that the initiative "will build on the work of Memoranda of Understandings between the agencies, and strengthen interagency relationships. By doing so, the three agencies seek to ensure they cooperate effectively and efficiently to enforce related laws and protect workers' rights."

GC memo follows task force report. On February 10, 2022, NLRB General Counsel (GC) Jennifer Abruzzo issued an "Inter-agency Coordination" memorandum GC 22-03 outlining the Board's continuing efforts to cooperate with other federal agencies in order to further the mission of the National Labor Relations Act (NLRA). The report follows the recent release of a report by the White House Task Force on Worker Organizing and Empowerment. In addition to noting the Board's inter-agency agreements with the DOL and the EEOC, Abruzzo stated that she was "proceeding with efforts to establish partnerships with IRS [Internal Revenue Service], DOJ's [U.S. Department of Justice's] Antitrust Division, and FTC [Federal Trade Commission] to address unfair methods of competition that undermine workers' rights."

Eight new regional directors appointed

In a span of less than six months, the NLRB has appointed a record number of eight new regional directors, all of whom are women. As a result, more than one-third of the agency's regional offices are now under new leadership. On September 14, 2021, Lisa Henderson was named regional director (RD) in Region 10. This was followed shortly thereafter on October 15, 2021, with the appointments of Laura A. Sacks (Region 1), Elizabeth K. Kerwin (Region 7), Iva Y. Choe (Region 8), Andrea J. Wilkes (Region 14), and Suzanne Sullivan (Region 22). On February 3, 2022, Linda Leslie was named RD in Region 3. All these appointees were employed by the agency at the time of their promotion and collectively have decades of NLRB experience.

In addition to the unprecedented number of RD slots that have been filled, a host of subordinate managerial positions including that of assistant RD and regional attorney have also recently been filled. It is important to bear in mind that most of the agency's work and its direct impact on employers take place at the regional level where RDs operate with significant discretion and latitude. It is equally important to note that the incumbents in these and other managerial positions have no fixed term in office and will continue in their posts regardless of subsequent changes in executive-level administration. Because these positions are filled with the concurrence of the Board and its general counsel, it is highly likely that the incumbents share similar views with those who have appointed them. ■

Union membership down, public opinion up?

On January 20, 2022, the U.S. Bureau of Labor Statistics (BLS) released the latest numbers on unionization in the United States, finding that in 2021, the number of combined public- and private-sector workers belonging to unions continued to decline (-241,000) to 14 million, and the union membership rate stood at 10.3 percent. The rate fell from 10.8 percent in 2020, when the rate increased due to a disproportionately significant drop in the total number of nonunion workers compared with the drop in the number of union members.

Notably, the 2021 overall unionization rate is the same as the 2019 rate (10.3 percent). However, when compared to 1983, the first year that comparable data was collected, the overall decline in union density is stark. In 1983, the combined unionization rate was 20.1 percent with some 17.7 million unionized workers. Thus, union density has been cut nearly in half, and the raw number of unionized employees has declined by close to 4 million.

It is important to bear in mind that these are *combined* numbers that include both public- and private-sector workers. Union density in the private sector is exceedingly low at only 6.1 percent of the workforce. The overall 10.3 percent density is the result of much higher levels of public-sector unionization. Indeed, the union membership levels for public-sector workers are more than five times that of private-sector employees (33.9 percent versus 6.1 percent).

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Other highlights from the 2021 BLS data survey reveal that:

- The highest unionization rates were among workers in education, training, and library occupations (34.6 percent) and protective service occupations (33.3 percent).
- Men continued to have a higher union membership rate (10.6 percent) than women (9.9 percent). The gap between union membership rates for men and women has narrowed considerably since 1983, when rates for men and women were 24.7 percent and 14.6 percent, respectively.
- Black workers remained more likely to be union members than White, Asian, or Hispanic workers.
- Nonunion workers had median weekly earnings that were 83 percent of earnings for workers who were union members ($975 versus $1,169). These comparisons of earnings, however, are on a broad level and do not control for many factors that can be important in explaining earnings differences.
- Among states, Hawaii and New York continued to have the highest union membership rates (22.4 percent and 22.2 percent, respectively), while South Carolina and North Carolina continued to have the lowest (1.7 percent and 2.6 percent, respectively).

What's causing the decline?

BLS included a cautionary note about interpreting these latest unionization statistics in the context of the COVID-19 pandemic's impact on the labor market. "Comparisons with union membership measures for 2020, including metrics such as the union membership rate and median usual weekly earnings, should be interpreted with caution," BLS said. The 2020 onset of the pandemic led to an increase in the unionization rate due to a disproportionately large decline in the number of nonunion workers compared with the decline in the number of union members. The 2021 decrease in the unionization rate reflects a large gain in the number of nonunion workers and a decrease in the number of union workers.

While the pandemic impacted *recent* data, union density in the private sector has been on a steady decline for decades. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) ascribes the decline to allegedly "broken" labor laws and claims the decline "highlight[s] the urgent need for the passage of the Protecting the Right to Organize (PRO) Act and the Public Service Freedom to Negotiate Act." Although as legislative matters the named bills are destined to go nowhere, organized labor continues

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to push the pro-labor agenda in the hope of implementing changes through the administrative process rather than legislation. In furtherance of the argument, labor advocates cite polling showing support for unions is at odds with the continuing decline in union density among private-sector workers. Thus, they conclude, it must be the law that is constraining unionization.

Indeed, AFL-CIO President Liz Schuler has claimed: "If everyone who wanted to join a union was able to do so, membership would skyrocket." On closer examination, however, the polling does not likely support the broad conclusion Schuler and others have voiced. The polling simply asked a randomized group of 1,000 respondents the very general question of whether they "approve[d] or disapprove[d] of labor unions." The responses to such a general inquiry do not actually address whether the respondents themselves would opt for unionization of their own workplaces. Hence, the ostensible data disconnect may be nothing more than a function of how the polling question is asked. ■

Labor's push to reverse the trend

The predictive value of such polling aside, unions continue to push on all governmental levels to make organizing easier and to reverse downward membership trends viewed by most unions as existential threats. In addition to the legislative and administrative fronts, organized labor's push has fueled initiatives by the executive branch. Indeed, one of President Joe Biden's first acts was to form a federal Task Force on Worker Organizing and Empowerment (E.O. 14025). The Task Force recently issued a 43-page report containing dozens of recommended actions to facilitate organizing and empowerment. Though almost all the specific recommendations focus on government employees, the overall tenor of the report will undoubtedly be used by the new Democratic Board majority as "cover" for its anticipated administrative changes in private sector labor/management law.

In a similar vein the U.S. Department of Labor (DOL) in January announced its "Good Jobs" initiative, which, "led by the Department of Labor, will provide critical information to workers, employers, and government entities as they seek to improve job quality and create access to good union jobs—free from discrimination and harassment—for all workers and job seekers." The U.S. Secretary of Labor Martin J. Walsh unveiled the Good Jobs initiative at a keynote address to the U.S. Conference of Mayors.

The DOL's announcement states that "[t]he Good Jobs initiative focuses on empowering working people by:

- Providing workers with easily accessible information about their rights, including the right to bargain collectively and form a union.
- Engaging employer stakeholders as partners to improve job quality and workforce pathways to good jobs.
- Supporting partnerships across federal agencies, and providing technical assistance on grants, contracts, and other investments intended to improve job quality."

Other NLRB developments

Circuit court decisions

3rd Cir.: Unions' labor tactics not "extortionate." A divided three-member panel of the U.S. Court of Appeals for the Third Circuit declined to revive an employer's claim that in pursuing their labor goals, unions engaged in "extortionate acts" in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). In a 2-1 decision affirming the district court, the Third Circuit concluded that the unions had sought to advance "a legitimate labor goal," namely, "forcing [the employer] to provide better wages and working conditions to [u]nion members," and that while they "employed hard-nosed pressure tactics," their actions were not extortionate. Applying precedent established by the Supreme Court of the United States, the majority found that the unions could not be held liable "for nonviolent pressure tactics directed against management in support of legitimate objectives," which in this case included the unions' use of "pressure campaigns, regulatory processes, and the criminal justice system." In addition, the majority found that "no reasonable juror could conclude that the vandalism underlying [some of the employer's] claims could be attributed to union members, much less the [u]nions themselves." Judge Kent A. Jordan filed a separate dissenting opinion in which he opined that there was enough evidence to "give [the employer] its day in court" (*Care One Management, LLC v. United Healthcare Workers East*, December 17, 2021).

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9th Cir.: Secondary boycott case sent back to district court. The U.S. Court of Appeals for the Ninth Circuit has dismissed an interlocutory appeal and returned a high-profile secondary boycott case involving the Longshore Union (ILWU) and a Portland Terminal Operator (ICTSI Oregon) to the district court. A jury had earlier awarded the operator $96.3 million in damages resulting from the ILWU's unlawful secondary boycott activity that led to the closure of Terminal 6 in Portland for more than one year. Following the jury award, both parties filed post-verdict motions. The district court denied the union's motion for a new trial and conditionally denied the union's motion regarding damages contingent on the parties' acceptance of a reduction in damages to $19 million. The operator, however, rejected the reduced award. Both parties filed interlocutory appeals, however, the Ninth Circuit found that in its present procedural posture the circuit did not have appellate jurisdiction over the dispute. It dismissed the appeals and returned the case to the district court. The district court will likely now issue an all-encompassing final order at which point the dispute should become "ripe" for appellate review. Given the stakes in the litigation, it seems likely the case will wind up in the Ninth Circuit again once the district court issues its final order (*ICTSI Oregon v. International Longshore and Warehouse Union*, January 18, 2022).

5th Cir.: Tour bus companies constituted "single employer." The U.S. Court of Appeals for the Fifth Circuit affirmed a decision by the National Labor Relations Board (NLRB) finding that a tour bus guide was unlawfully fired for attempting to unionize his coworkers and that five tour bus companies constituted a "single employer" for liability purposes. The Board's single-employer determination was supported by substantial evidence since the record demonstrated that the individual tour bus companies shared "common ownership and financial control," that their "operations" were interrelated, that they were managed by "a common cast of characters, who operate[d] on a 'readily fungible' team," and that there was "centralized control over critical policy matters." The Board also did not abuse its discretion in selecting the comparator method to determine the employee's backpay in order "to account for the seasonal considerations and fluctuating hours

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that characterize the tour business." However, because the Board engaged in "impermissible speculation" when calculating the dischargee's backpay during a discrete period for which it had no data, based solely on the hours of the comparator, the Fifth Circuit reversed the backpay award for that period of time and sent the case back for backpay recalculation (*New York Party Shuttle, LLC dba On Board Tours v. National Labor Relations Board*, November 22, 2021).

NLRB rulings

Failure to bargain over annual raises violated NRLA. An employer violated Sections 8(a)(5) and (1) of the NLRA by not granting wage increases to its newly represented food and beverage employees, consistent with its past practice, and without notifying the union and giving it an opportunity to bargain over this change, a divided three-member panel of the NLRB ruled. Since the employer had regularly provided an annual wage increase to the unit employees in each of the five years immediately preceding the union's 2019 certification, as well as one or more increases in each year (except 2009) between 2002 and 2014, the Board majority concluded that the employees had "reasonably come to expect a wage increase around September." Member John F. Ring dissented, arguing that the ongoing wage increases were not a term and condition of employment since "they were not fixed as to criteria," and thus the employer "did exactly what the law required it to do when it held the wages of its [food and beverage] unit employees steady after those employees selected the Union as their bargaining representative" (*Omni Hotels Management Corporation*, January 20, 2022).

Rule barring discussions of working conditions unlawful. The NLRB affirmed a decision by an administrative law judge (ALJ) finding that the operator of a mental health facility engaged in a number of violations of Section 8(a)(1) of the NLRA, including "orally promulgating a work rule that unlawfully prohibited employees from engaging in discussions protected by the Act; threatening employees with unspecified reprisals if they violated that unlawful work rule; [and] creating the impression the employees' protected concerted activities were under surveillance." At the center of the dispute were several comments that the employer's chief executive officer (CEO) made during a staff meeting, which included his saying: "'[w]e won't tolerate you guys talking to each other about your problems … You don't need to talk to each other about it and we have zero tolerance for that'" and "'[i]f I hear … talking negatively or talking bad about the agency, I'm going to have to do what I have to do.'" The Board also agreed with the ALJ's conclusion that the record evidence "overwhelmingly" supported his conclusion that the respondent had unlawfully discharged employees in violation of Section 8(a)(3) and that it failed in its defense to demonstrate that it would have discharged the employees even absent their protected activity (*Community Counseling & Mentoring Services, Inc.*, December 8, 2021).

Employer was "perfectly clear" successor. The NLRB agreed with an ALJ's finding that an employer was a "perfectly clear" successor. A "perfectly clear" successor must not only recognize and bargain with an incumbent union but also loses its right to unilaterally establish the initial terms and conditions of employment and is bound by the predecessor's collective bargaining agreement until altered through bargaining. The Board found that the ALJ's conclusion was properly predicated on the finding that the successor employer "led employees of the predecessor … to reasonably believe that they would be retained without any changes in their existing terms and conditions." The Board noted that the employer's offer letters to the predecessor's employees "referenced no terms and conditions of employment other than their base pay rate, which remained the same as the base pay under the predecessor's collective-bargaining agreement with the Union." The employer also "deliberately made no mention of new terms and conditions of employment in the drivers' interviews prior to the issuance of the offer letters." The unanimous three-member panel concluded: "In these circumstances, the Respondent's employees were led to reasonably believe that their initial terms and conditions of employment with the Respondent would not differ from those of the predecessor" (*Logmet, LLC*, December 1, 2021). ■

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