Ogletree Deakins

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The Practical NLRB Advisor

NLRB: 2019 in review

In this Issue

Despite operating without a full complement of five members, the National Labor Relations Board (NLRB) had a very productive 2019. The Trump Board decided a series of significant cases as it continued to significantly alter the policy course set by its predecessor Board. In addition to reversing a number of Obama-era rulings, the Board also reached out, in a few instances, to overturn more long-standing precedent.

The NLRB rang in 2019 with a decision in which it found airport shuttle drivers were independent contractors and not employees covered under the National Labor Relations Act (NLRA). The Board followed that up with a series of decisions reaffirming and clarifying the right of businesses to restrict labor activities on their property by non-employees. It also continued to refine its test for evaluating the lawfulness of employer work rules and began to redefine the parameters of Section 7's protections. In another line of decisions, the Board reminded employers that it will continue to scrutinize mandatory arbitration agreements for NLRA compliance, notwithstanding the demise of D.R. Horton *and its progeny.*

The NLRB also pursued an ambitious rulemaking agenda, most notably issuing a final rule revising the controversial 2014 "quickie election" rule. As the year drew to a close, Board Member Lauren McFerran's term expired. The lone Democrat dissented from most of the Board's significant holdings and rulemakings, including several landmark decisions issued on the final day of her term.

This double issue of the Practical NLRB Advisor *provides a detailed overview of agency developments and evolving Board law over the course of a particularly impactful year.* ■

BRIAN IN BRIEF

The old saying that "the more things change, the more they remain the same" could be applied to much of the National Labor Relations Board's activity this year. In both its decisions and rulemaking, the Trump NLRB has reversed a number of Obama Board policies and interpretations that were, themselves, abrupt departures from long-settled precedent.

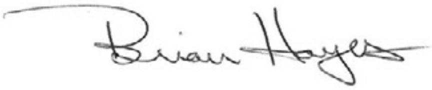
From returning to the 50-year old test for determining independent contractor status in *SuperShuttle DFW, Inc.*, to re-establishing the right of employers to suspend dues checkoff following the expiration of a collective bargaining agreement, the current majority has done much to restore Board policy to its traditional posture. To many observers this restoration, and re-centering, brings the agency's interpretation and administration of the National Labor Relations Act (NLRA) more in line with both the intent of Congress and the prevailing view of most federal courts.

In other respects, however, the current Board has gone beyond mere re-centering and undertaken new substantive and procedural initiatives. On the substantive front, it addressed such matters as the long-standing divide between the agency and circuit courts over the "contract coverage" theory, squarely confronted the need for the Board to interpret the NLRA in light of other federal employment laws, and reshaped Board precedent regarding union access rights.

From a procedural standpoint, the current Board has demonstrated an unprecedented reliance on the agency's statutory rulemaking authority. Just before this 2019 year in review went to press, the Board issued its final rule revising the legal test for joint-employer status. It presently has other issues pending at various stages of the formal rulemaking process, and more proposed rules may be on the way.

This is, by far, the most ambitious rulemaking agenda of any Board in the 85 years of the agency's existence. Because rules are more difficult to change than case decisions, they offer to agency stakeholders a greater degree of continuity and predictability in Board policy despite the ideological changes in its composition over time. To the extent these rulemaking initiatives are ultimately successful, the change from developing labor policy solely through case adjudication to also relying on rulemaking may ultimately be the most lasting legacy of the current Board.

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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Property rights versus “protected rights”: Balance restored

In addition to issuing a number of decisions that reassert employers’ managerial rights, the National Labor Relations Board (NLRB) decided several cases in 2019 that strengthen and clarify the right of businesses to control their own property in the face of labor-related activity. These decisions restore a property owner’s ability to decide whom it will permit on its property and what types of activities, if any, it will allow by outside union organizers and other non-employees.

Individuals who are not the employees of the property owner, however, do not have the same access rights as employees.

Employees have considerable protection under the National Labor Relations Act (NLRA) to engage in Section 7 activities on their employer’s property. Subject only to certain limited restrictions, employees are generally free to engage in such activities in non-work areas during non-working times. In addition, off-duty employees typically enjoy a right of access to their employer’s property for such purposes. Thus, an employer can generally restrict off-duty employee access only to the interior and other working areas of its property, but only if such a rule applies to employee access for *all* purposes.

Individuals who are not the employees of the property owner, however, do not have the same access rights as employees. These individuals fall into two categories: employees of a contractor or other third-party licensee who are lawfully on the property to perform work, and non-employees, typically union organizers. The former group, although they are “employees,” are not employees of the property owner, and, thus, have generally been accorded less protection under the Act than the property owner’s own employees. Non-employees have no statutory right to access an employer’s property; thus, a property owner may generally deny all access to such individuals.

These general “bright lines,” however, have grown dimmer over time, and employer property rights have been watered down in certain factual circumstances.

In the case of non-employees, the Board, over time, has created exceptions to an employer’s exclusionary right in cases where the employer had previously permitted property access by certain non-employees for purposes unrelated to any labor issue for example—where an employer permitted charitable organizations to solicit on its property but barred union organizers from conducting labor activities on its property, or an employer opened its property to the public and then denied access to non-employees engaged in solicitation. These exceptions were predicated on a discrimination theory. Thus, the theory held that where an employer opened its space to the public for limited purposes, or permitted access to its property by certain non-employees—again, for limited purposes—prohibiting other non-employees from accessing the property for labor-related purposes constituted unlawful discrimination.

In the case of contractor employees or other third-party employees, the development of exceptions to an employer’s exclusionary right was much swifter and less nuanced. Thus, in a series of cases, the Obama Board largely abandoned all distinctions between employees of the property owner and employees of a third party performing work on the owner’s property, finding the rights of both groups to be essentially the same.

In two recent decisions, the current Board sharply redefined the notion of “discrimination” and, as a consequence, significantly strengthened an employer’s property rights and its right to prohibit labor-related activity on its property. In addition, in a single case, the current Board held that third-party employees do not have the same rights as employees of the property owner’s employees, and that a property owner has greater rights to control the behavior of the former group while on its property.

Third-party and contractor employees: Property owner may exclude off-duty contractor employees

The NLRB reversed Obama-era precedent and restored the right of property owners to bar off-duty contractors and the employees of other third parties from engaging in Section 7

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activity on the property. *Bexar County Performing Arts Center Foundation dba Tobin Center for the Performing Arts* (August 23, 2019) involved the access rights of off-duty employees of a third-party licensee who worked on the premises.

The respondent in this case owned and operated the Tobin Center, a performing arts venue. The San Antonio Symphony was a licensee of the property and regularly rehearsed and performed there. During a labor dispute between the symphony's union-represented musicians and symphony management, the musicians attempted to leaflet on the property. The Tobin Center, however, was not the musicians' employer and was not involved in the underlying labor dispute. It barred the musicians from leafleting on its property, so the union filed unfair labor practice charges over their exclusion. A divided four-member Board found the Tobin Center had the right to prohibit the off-duty musicians from leafleting on its property. In doing so, the Board reversed the Obama Board's rulings in *New York New York, LLC* and *Simon DeBartolo Group,* which stood for the notion that off-duty employees of a contractor or licensee had largely the same rights under Section 7 as the property owner's own employees.

The Board majority noted that employees of an on-site contractor "are not generally entitled to the same Section 7 access rights as the property owner's own employees." Rather, the majority reasoned, "the contractor employees' right to access the property is derivative of their employer's right of access to conduct business there." The majority then held that off-duty employees of a contractor may be barred from accessing the property by its owner unless 1) the contractor employees work both "regularly and exclusively" on the property; and 2) the property owner fails to show that those employees have one or more . . . alternative means to communicate their message.

Under the first condition, only contractor employees who "regularly and exclusively" work on a property owner's premises have Section 7 access rights. The Board will consider contractor employees to work "regularly on the owner's property only if the contractor regularly conducts business or performs services there." In addition, a contractor's employees work "exclusively" on the owner's property if they perform all of their work for that contractor on the property, even if they also work a second job elsewhere for another employer.

In this case, the musicians did not work "exclusively" on Tobin Center property, because the symphony performed in other venues. Nor did they work "regularly" on the property because the symphony rehearsed and performed at the site only about 22 weeks a year. Moreover, the musicians clearly had a reasonable non-trespassory, alternative channel for reaching the public because they could have leafleted on public property directly across the street from the Tobin Center. They could also reach their intended audience through traditional and social media. Therefore, the Board held that the Tobin Center permissibly barred the musicians from engaging in Section 7 activity on its property.

Non-employees: Redefining "discrimination"

In *Kroger Limited Partnerships I Mid-Atlantic* (September 6, 2019), the NLRB held that an employer is not required to grant non-employee union agents access to its property for the purpose of protesting or soliciting customers to boycott its store, even though it had previously permitted civic and charitable organizations to solicit and distribute in its parking lot. The Board overturned a long line of cases that have found such conduct to be unlawful discrimination against Section 7 activities.

After building two new grocery stores in the area, the employer was closing its unionized store, and offering to reassign the store's employees to other unionized stores outside the area. The employer refused to reassign them to the new stores nearby, which were non-union. A representative from the union, who was not a store employee, began to solicit customers in the store parking lot, asking them to sign a petition opposing the employer's decision to transfer employees to stores outside the area. The employer forced the union representative to leave the premises.

An administrative law judge (ALJ) found that the employer had engaged in unlawful discrimination within the meaning of *NLRB v. Babcock & Wilcox, Inc.* (1956) by permitting other charitable and civic groups to fundraise on store property while ejecting the union representative. The ALJ relied on *Sandusky Mall Company* (1999), which required employers to allow non-employee union agents on their premises if they previously allowed "substantial

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civic, charitable, and promotional activities" by other non-employees/organizations on-site. The Board has long applied *Sandusky* despite the fact that the majority of federal circuit courts have rejected its holding.

On review, however, the Board reversed the ALJ and found the employer did not violate the NLRA by removing the union representative from its property. In its decision, the Board substantially revised the analysis it will use in such circumstances to determine if an employer has engaged in unlawful discrimination. Under this new analysis, an employer discriminates against non-employee union agents only when it refuses to permit them to engage in activities on its property that are "similar in nature" to the activities it has previously permitted other organizations to engage in on its property. In practice, the circuit courts have consistently applied the *Babcock* discrimination exception in this more limited manner, the majority observed.

What activities are "similar in nature"? On the whole, the circuit courts that have considered the matter have differed as to what activities are comparable. However, the Board noted, "they are unanimous in the conclusion that nonemployee protest or boycott activities are not comparable to nonemployee charitable, civic, or commercial solicitations, and that an employer does not engage in 'discrimination' within the meaning of *Babcock* when it forbids the former but permits the latter." Thus, an employer may refuse a non-employee agent access to its property to protest or boycott if it likewise bans non-labor groups seeking to protest or boycott.

Importantly, the activity in question must also be similar in *purpose* if it is to be deemed "similar in nature" under the Board's newly refined standard. For example, a local food bank volunteer and a non-employee union organizer may both seek to distribute handbills near a grocery store entrance. However, the food bank wishes to do so to advertise its food drive, while the organizer wants to urge shoppers to boycott the store. These activities appear to be similar on their face, but they are not similar in nature, the Board explained, because the purposes behind the two distributions are radically different.

Thus, in the case itself, while the grocery store had allowed the Salvation Army to pass out literature, under the "similar in purpose" criteria, the employer could lawfully prohibit a union representative from passing out literature, because its intent was not similar in purpose.

Non-employees: The "public space" exception is no more

Overturning nearly 40 years of precedent, the NLRB recently held that an employer may lawfully deny non-employee union agents access to areas of their property open to the public, such as cafeterias and restaurants, for organizing activities. In a divided four-member decision, the Board abandoned its long-standing "public space" exception, which required property owners to allow union agents to engage in labor activity in a facility's public areas.

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In *Babcock*, the Supreme Court of the United States held that "[a]n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." While the NLRB generally has applied the *Babcock* standard, with its two enumerated exceptions, the Board has created an additional exception when non-employee organizers want to engage in organizing activity in an area of an employer's private property that is open to the public, such as a cafeteria or restaurant. In these circumstances, the Board previously has held that non-employee union organizers cannot be denied access to these public spaces if they use the facility in a manner consistent with its intended use and if they are not disruptive.

However, in a 2019 decision, the Board majority reasoned that an employer should not have to allow any non-employees to access its cafeteria for all purposes, merely because it is open to the public. Rather, it held that "an employer does not

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have a duty to allow the use of its facility by nonemployees for promotional or organizational activity." A property owner must be permitted to decide what activities, if any, it will allow by non-employees on its property, absent discrimination between union agents and other non-employee visitors, as *Babcock* instructs.

Again, left somewhat open by the decision is the question of what constitutes discrimination, or "disparate treatment," between union organizers and other non-employees. If a property owner allows non-employees on its property to engage in certain activities—whether charitable, civic, or commercial—then union organizers must be allowed access to engage in activities that are *similar in nature*, in "similar relevant circumstances." The Board declined to specifically define "similar activity in similar relevant circumstances." However, the language of the decision suggests that a property owner will have fairly ample leeway in distinguishing the types of activities that it will allow by other non-employees to conduct on-site from the type of activities in which union agents typically engage.

Off-duty employees: A possible change afoot?

Under *Tri-County Medical Center* (1976), an employer generally is free to maintain a rule that restricts off-duty employees from returning to the "interior . . . and other working areas" of its property provided the rule is properly and widely promulgated and the rule restricts such access for *all* purposes. This last provision often serves to invalidate the rule in which employers occasionally permit off-duty employees to return to the premises for such reasons as picking up a paycheck or attending a work-related social event. In *Southern Bakeries, LLC,* decided August 28, 2019, however, two of the three current Board members dropped a footnote indicating their willingness to revisit this "for all purposes" requirement. Changing this requirement would be consistent with the current Board's discrimination analysis in other cases requiring that the conduct in question be "similar in nature." ■

NLRB to clarify property access rights through rulemaking

On May 22, 2019, the NLRB announced its intent to promulgate a rule outlining the "[s]tandards for access to an employer's private property." Although the agency's rulemaking agenda anticipated publication of a notice of proposed rulemaking by September 2019, the timelines for such "long-term actions" tend to be more aspirational than predictive. The announcement does, however, officially signal that the Board intends to issue clearer guidance on the question of what constitutes permissible union activity on employer property.

"What can employees, off-duty employees, and non-employees do, and where can they do it? Current law often lacks clarity on these issues," noted Brian E. Hayes, co-chair of Ogletree Deakins' Traditional Labor Relations Practice Group and former NLRB member. Cobbled together by caselaw, the rules are complex and difficult to apply to particular fact scenarios.

The proposed rule, once promulgated, is generally expected to expand the right of property owners to restrict non-employee union access and to define the scope of permissible activities on their property. Any rule will likely hew closely to the holdings in the three cases noted define "similar activity" and "similar circumstance" with greater specificity.

A formal regulation broadly addressing all forms of union-related activity, by both employees and non-employees, on employer property would serve to establish clear-cut and predictable rules for employers, employees, and unions, Hayes said.

The NLRB turns to rulemaking

Board issues final rule on representation case procedures

Revisiting one of the most significant actions of its predecessor during the Obama administration, the National Labor Relations Board (NLRB) issued a final rule in 2019 that again revises the procedures for conducting NLRB representation elections. The Board issued the rule without notice and comment, citing "the Board's clear regulatory authority to change its own representation case procedures" and its "longstanding practice of evaluating and improving its representation case procedures."

The agency made it clear it was "*not* rescinding the 2014 amendments in their entirety." Rather, it looked at the most controversial provisions of the so-called "quickie" or "ambush election" rule and modified them "in order to strike a better balance among the competing interests the Board's representation procedures are designed to serve." Thus, the 2019 final rule "very much follows in the footsteps of the 2014 amendments by making targeted revisions designed to address specific, identified concerns and problems."

The latest rule contains additional provisions unrelated to the 2014 amendments. For example, the final rule clarifies imprecise wording in the regulations that predate the 2014 amendments. The rule also resolves asymmetries between related provisions that earlier rulemakings overlooked and introduces several new "innovations" that "the Board believes will facilitate more fairness, accuracy, orderly litigation, and efficiency in case processing." As the Board explained in issuing the final rule, "now is the proper time not only to address problems and concerns related to the 2014 amendments, but also to address other issues unrelated to the 2014 amendments." Each of the changes adopted in the final rule, the agency said, "is part of the Board's ongoing process of continually evaluating and improving its procedures to better effectuate the purposes of the Act."

The final rule was published in the *Federal Register* on December 18, 2019. The rules take effect April 16, 2020. Here are its key provisions:

Unit scope and voter eligibility. The rule resurrects some procedures in effect prior to the 2014 rule changes, modifying a provision on when unit scope and voter eligibility questions are to be litigated. Under the prior rules, "[d]isputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated

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Joint-employer rule released

On February 26, 2020, the NLRB released its final rule on Joint Employer Status Under the National Labor Relations Act. Under the final rule, "an entity is a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms or conditions of employment," defined as "the possession and exercise of 'such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees.'"

The Board will factor into the analysis an entity's "indirect control over essential terms or conditions of employment, contractually reserved control over essential terms or conditions of employment, and control over mandatory subjects of bargaining other than essential terms and conditions of employment into the joint-employer analysis, 'but only to the extent [they] supplement[] and reinforce[] evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment.'"

The final joint employer rule takes effect on April 27, 2020.

We will provide a detailed analysis and guidance on the Board's final joint employer rule in the forthcoming issue of the *Practical NRLB Advisor.*

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or resolved before an election is conducted." These disputes, including questions of voters' supervisory status, will now be litigated at the pre-election hearing and resolved by the regional director before an election is directed. However, the parties may agree to let disputed employees vote subject to challenge, deferring litigation concerning such disputes until after the election.

Post-election and post-hearing briefs. The right of parties to file a brief with the regional director following pre-election hearings has been restored, and that right has been extended to post-election hearings as well. Briefs will be due within five business days of the close of the hearing, although hearing officers may grant an extension of up to 10 additional business days for good cause. Under the prior rules, briefs were permitted only upon special permission of the regional director.

Time to election. The regional director will continue to schedule the election for the earliest date practicable but, absent waiver by the parties, normally will not schedule an election before the 20th business day after the date of the direction of election. This period will permit the Board to rule on certain types of requests for review prior to the election. This is largely consistent with the Board's procedures prior to the 2014 amendments, which provided that the regional director would normally schedule an election 25 to 30 days after the issuance of the direction of election.

The rule extends the period for other deadlines, allowing more time for employers to comply with various procedural requirements and for employees to consider their voting preferences.

- A pre-election hearing generally will be scheduled to open 14 business days from notice of the hearing; regional directors will have discretion to postpone the opening of the hearing for good cause. Under prior rules, the pre-election hearing was scheduled to open eight calendar days from the notice of hearing.
- The employer is required to post and distribute the Notice of Petition for Election within five business days after service of the notice of hearing. Prior rules required posting and distribution within two business days.
- Non-petitioning parties must file and serve a Statement of Position within eight business days after service of the notice of hearing; regional directors have discretion to permit additional time for filing and service for good cause. Previously, the Statement of Position had to be filed and served one day before the opening of the pre-election hearing—typically seven calendar days after service of the notice of hearing.
- The employer has five business days to furnish the required voter list following the issuance of the direction of election. The employer had only two business days to provide the list under the prior rule.

Ballot impoundment. When a request for review of a direction of election is filed within 10 business days of that direction, and where the Board has not ruled on the request, or has granted it, any ballots, the validity of which might be in issue, will be segregated, and all ballots will be impounded and remain unopened pending the ruling or decision. A party may still file a request for review of a direction of election more than 10 business days after the direction, but the pendency of that request for review will not require impoundment of the ballots. This is a partial return to the Board's procedures prior to the 2014 amendments, which removed the provision for automatic impoundment.

Certification of election results. The regional director no longer will certify the results of an election if a request for review is pending, or before the time has passed during which a request for review could be filed. Previously, regional directors were required to certify election results despite the pendency or possibility of a request for review; in cases where a certification issued, requests for review could be filed up until 14 days after the issuance of the certification.

Additional provisions. The final rule makes several other key changes:

- The petitioner will now need to file and serve a Statement of Position on all other parties responding to the issues raised by any non-petitioning party in its Statement of Position. The responsive Statement of Position will be due at noon, three business days before the hearing is scheduled to open. Timely amendments may be made on a showing of good cause. The petitioner was previously required only to respond orally to the Statement of Position at the start of the pre-election hearing.
- The rule emphasizes the regional director's discretion to issue a Notice of Election after issuing a direction of election.

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"The prior rules provided that regional directors 'ordinarily will' specify election details in the direction of election."

- The formatting and procedural requirements for all requests for review have been systematized, with all requests for review and oppositions subject to the same formatting requirements.
- A party may not request review of only part of a regional director's action in one request for review and subsequently request review of another part of that same action. The prior rule was not clear whether parties were permitted to proceed this way.
- In selecting election observers, a party will select a current member of the voting unit, whenever possible. If no such individual is available, a party should select a current nonsupervisory employee. The prior rules simply provide that parties may be represented by observers.

The upside: More voluntary agreements. "Often overlooked is the fact that the new rules contain provisions more likely to result in voluntary election agreements," according to Brian E. Hayes, co-chair of Ogletree Deakins' Traditional Labor Relations Practice Group and former NLRB member.

"For example, the requirement that both the employer and petitioner articulate their positions on the appropriateness of the unit in advance of the scheduled hearing facilitates discussion and, one hopes, will lead to an agreement that will obviate the need for a hearing. Moreover, the prospect of a hearing before the election will incentivize petitioners to make more reasonable requests with respect to unit scope and composition. The more reasonable the request, the more likely it is to result in a voluntary agreement."

Other election-related proposals

Also in 2019, the NLRB issued a formal notice of proposed rulemaking (NPRM) that would revise several agency policies, none of which are currently set forth as rules. The proposal was first announced on August 12, 2019.

The NPRM proposes three policy changes that are significant, although somewhat limited in scope:

Blocking charge policy. Under the current rubric, a scheduled NLRB election may be postponed if the union files an unfair labor practice charge that, if sustained, might affect the election results. Unions have often used the current blocking charge policy to indefinitely postpone a Board-supervised decertification vote. Under the new rule, the election would proceed as scheduled; however, the ballots would be impounded pending resolution of the charge and its likely impact. This change reflects the approach suggested by General Counsel Peter B. Robb in his comments regarding modifying the 2014 election rule.

Voluntary recognition. The proposed rule also would reinstate the Board's *Dana Corp*. policy that provides employees with notice, and a 45-day "disapproval window," when a union and employer agree to voluntary recognition under Section 9(a) of the National Labor Relations Act (NLRA). The *Dana Corp.* policy was adopted to minimize the reach of so-called "top-down" organizing efforts, in which employees were given no vote prior to recognition of the union. However, the policy was abandoned by the Obama Board in *Lamons Gasket Company*, which abandoned 40 years of Board precedent.

Construction industry. Lastly, the rule as proposed would require actual, contemporaneous proof of majority status before a Section 8(f) contract could be turned into a Section 9(a) agreement. Section 8(f) of the NLRA, unique to the construction industry, permits employers to enter into collective bargaining agreements with a union before the union attains majority status among employees. Either party may unilaterally terminate the relationship at the end of the contract. By contrast, an agreement under Section 9(a) of the NLRA is based on majority status, and the relationship may not be unilaterally terminated when the contract ends.

The proposed rule would require actual evidence of majority status, eliminating any confusion as to whether conversion to 9(a) status can be achieved by any alternative method. The proposal would adopt the position of the United States Court of Appeals for the District of Columbia Circuit to the effect that contract language alone cannot create a 9(a) bargaining relationship. Rather, extrinsic proof of contemporaneous majority support will be required.

According to the Board, the proposed amendments are designed to "better protect employees' statutory right of free choice on questions concerning representation."

The Board policies at issue in this NPRM were implemented through case adjudication. By codifying these policies in

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the NLRB's formal Rules & Regulations, the Board noted, "employers, unions, and employees will be able to plan their affairs free of the uncertainty that the legal regime may change on a moment's notice (and possibly retroactively) through the adjudication process."

Proposed rule provides that college students are not employees

One area of chronic uncertainty in NLRB decisional law is whether college students who perform research or teaching assistance pursuant to their academic program are "employees" under the NLRA. Different Boards have reached polar opposite conclusions on this issue over the last two decades. Addressing this recurring question, the Board on September 23, 2019, issued a proposed rule that would exempt from NLRB jurisdiction college and university students, both graduate and undergraduate, who perform services for financial compensation in connection with their studies. "This rulemaking is intended to bring stability to an area of federal labor law in which the Board, through adjudication, has reversed its approach three times since 2000," the agency said.

The proposed rule would establish that students who perform any services for compensation, including teaching or research, at a private college or university in connection with their studies are not "employees" within the meaning of Section 2(3) of the NLRA. In doing so, the rule would overrule contrary Board precedent. This standard "is consistent with the purposes and policies of the Act, which contemplates jurisdiction over economic relationships, not those that are primarily educational in nature," according to the Board.

"In the past 19 years, the Board has changed its stance on this issue three times," NLRB Chairman John F. Ring said in announcing the proposed rule. "This rulemaking is intended to obtain maximum input on this issue from the public, and then to bring stability to this important area of federal labor law."

More rulemaking in the works

In its semiannual agenda, the NLRB formalized its intention to tackle other critical matters of doctrinal labor law through rulemaking. The list of Long-Term Actions/Short-Term Actions, which outlines the NLRB's planned rulemaking activity, revealed that the Board aims to promulgate formal rules addressing a number of important and controversial areas of Board law, including recalibrating the balance between protected Section 7 rights and the rights of property owners (see "Property rights versus 'protected rights': Balance restored" on page 3).

In addition, the Board has requested briefs from interested parties on the question of how far an employee can go before protected activity crosses the line into misconduct, for which an employer can lawfully discipline the individual. (See "'Protected' and 'concerted' reconsidered" on page 21.) This is another matter of great importance to employers as they seek to maintain civility and productivity in the workplace, as well as comply with other statutory mandates aimed at curtailing harassment and discrimination in the workplace.

The NLRB typically invites public briefing in pending cases in which important, and often controversial, questions of Board law are being decided. Such invitations are often a telling indicator that the agency is contemplating a reversal of extant decisional law. Requests for briefs also reflect those areas of Board law of particular interest to the current Board majority, and afford stakeholders the opportunity to weigh in on these matters as they are pending adjudication. While an invitation for briefing does not signal that a formal rule is in the works, it does reflect an intention by the agency to shift direction on an important point of labor policy through the more conventional avenue of reversing Board precedent in individual case decisions.

Changing course through case adjudication offers less permanence than formal rulemaking because any decision can readily be reversed by a later Board—a frequent occurrence over the last decade. On the other hand, rulemaking presents its own challenges. It is a complicated, time-consuming, and rigorous process that is subject to difficult and exacting procedural requirements. Unlike case adjudication, the Board has very limited "in-house" experience and expertise in rulemaking. Any rule that the Board issues is subject to court challenge, and in recent decades, the Board's record of defending its formal rulemaking in the face of judicial scrutiny has been underwhelming. It remains to be seen whether the current Board, with its ambitious rulemaking agenda, will fare better in this regard. ■

Board posts sharp drop in case-processing times

The National Labor Relations Board (NLRB) issued 303 decisions in contested cases in fiscal year (FY) 2019 and is crediting a case-processing pilot program for improving its efficiency. The median age of all pending cases was reduced from 233 days in FY 2018 to 157 days at the end of FY 2019—a nearly 33 percent reduction. The Board attributes the improvements to a renewed focus on expediting cases as part of the agency's strategic plan. The number of cases pending before the Board at the end of FY 2019 was at its lowest level since 2012, dropping from 281 pending cases at the end of FY 2018 to 227 at the end of FY 2019—a reduction of nearly 20 percent.

Regional offices came close to meeting the general counsel's targeted goal of reducing case-processing time by 20 percent over four years. For unfair labor practice cases, the time from filing to disposition fell from 90 to 74 days, a 17.5 percent decrease. The regional offices also improved the timeliness of representation case handling by processing 90.9 percent of representation cases in 100 days or less.

The unfair labor practice settlement rate for FY 2019 stood at 99.1. More than 5,000 cases were resolved prior to the issuance of a complaint, and more than 800 cases were resolved post-complaint. The Board finalized compliance in more than 400 cases in which Board orders were issued. The agency also collected more than $21.2 million in back pay, fees, dues, fines, and reimbursements for employees.

"Resolving labor disputes more quickly is one of the best ways we can advance the purposes of the Act," NLRB Chairman John F. Ring said in an October 2019 press statement announcing the agency statistics, which, he noted, "are further evidence that our efforts to reduce case backlog and ensure timely consideration of cases are bearing fruit."

As for new case filings, the regional offices took in 18,549 unfair labor practice charges and 2,096 representation cases in FY 2019.

GC's office speeds up as well. The general counsel also reported a decrease in case-processing times in FY 2019 for the Office of Appeals, Division of Advice, and Freedom of Information Act (FOIA) Branch. The reduction in case-processing times, reflected in data released November 1, 2019, was a key goal of General Counsel Peter B. Robb.

The Office of Appeals "reviews appeals by employers, unions, and individuals who believe their unfair labor practice allegations have been wrongly dismissed by a Regional Office." Its backlog of cases fell "from 294 in FY 2018 to 98 in FY 2019." The office closed 400 more cases in 2019 and processed 245 more appeals than it received during the fiscal year.

The Division of Advice provides guidance to the regional offices on "difficult and novel issues arising in the processing of unfair labor practice charges." The division reduced the average age of closed cases 9.8 percent in FY 2019, to 38.6 days. "The average age of closed cases for Regional Advice Branch for FY19 was 51.1 days, a 12.4% reduction in case processing time from FY18," according to the press release. "[T]he average age of closed cases for the Injunction Litigation Branch was 9.1 days, a 34.5% reduction."

"The Agency's FOIA Branch processes all FOIA requests made to the Agency. In FY19, the Branch reported that it responded within 20 working days to 67.5% of FOIA requests and 90% of FOIA appeals. FOIA backlogs were reduced from 87 requests at the end of FY18 to 37 requests in FY19, a 57.5% decrease."

Faster turnaround, particularly with regard to Appeals and Advice dispositions, is a real benefit to all litigants at the regional office level. Too often in the past, matters transferred to Washington could remain in litigation limbo for excessive periods of time.

Reversing the Obama Board

The National Labor Relations Board (NLRB) made considerable progress during 2019 in undoing many of the decisional excesses of the previous eight years. In addition to reaffirming the right of an employer to control access to its property (see "Property rights versus 'protected rights': Balance restored" on page 3), the agency overturned a number of controversial decisions handed down by the Obama Board, sharply changing course in a number of critical areas of Board law. Although the course change was sharp, it was not necessarily groundbreaking. Thus, in many cases, the current Board merely returned the law to where it had been for decades before the Obama Board's changes.

Following its traditional pattern, the NLRB again issued a slew of significant, and often controversial, rulings in the final days of a departing Board member's term. In this case, the departing member was Lauren McFerran, the Board's lone Democrat, whose term expired on December 16, 2019. McFerran dissented in each of these cases.

Independent contractor test restored

On January 25, 2019, the NLRB abandoned an Obama-era "refinement" and restored the Board's traditional test of independent contractor status. In *SuperShuttle DFW, Inc.*, the Republican majority affirmed that entrepreneurial opportunity is the "lens" through which the determination of independent contractor status under the National Labor Relations Act (NLRA) is properly analyzed. As the United States Court of Appeals for the District of Columbia Circuit had previously noted in rejecting the Obama Board's independent contractor analysis in another case, entrepreneurial opportunity is an "animating principle" of the analysis and a "more accurate proxy" to capture "the distinction between an employee and an independent contractor."

The *SuperShuttle* decision, decidedly favorable to businesses, involves a critical legal issue in today's economy, particularly for those in the growing gig economy sector and those with business models that rely on the services of independent entrepreneurs. The van drivers in *SuperShuttle* were deemed to be independent contractors by the Board in a decision that viewed the common-law indicia of employment status in the context of a relationship in which entrepreneurial opportunity was central. The NLRB made clear, however, that it did not intend to "mechanically apply the entrepreneurial opportunity principle to each common-law factor in every case," pointing out that an analysis of independent contractor status is intended to be "qualitative, rather than strictly quantitative" and is one that is invariably fact-specific.

Independent contractor misclassification does not violate the NLRA. In a case in which the agency sought public briefing, the NLRB further held that misclassifying statutory employees as independent contractors does not, in and of itself, violate the NLRA. The Board found that the employer had mistakenly classified its courier-drivers as independent contractors. However, the drivers were in fact statutory employees under Section 2(3) and, as such, enjoyed the protections of the NLRA. The Board held that while the misclassification error itself did not violate the NLRA, the employer did violate it by discharging one of the drivers for complaining about the misclassification—a protected activity under Section 7 (*Velox Express, Inc.*, August 29, 2019).

New framework adopted for determining incumbent union support

The Board also adopted a new approach to resolving conflicting claims over a union's continuing majority status. When an employer is presented with objective evidence that an incumbent union no longer represents a majority of bargaining unit employees, often by way of an employee petition, the employer is privileged to advise the union that it will withdraw recognition when its current collective bargaining agreement (CBA) expires. However, the employer could lose the right to withdraw if, after receipt of the initial evidence, the union acquired and presented new evidence that it had regained its majority support.

Concluding that this "last in time" approach established in *Levitz Furniture Co. of the Pacific* and its progeny was unworkable, the current Board majority overruled precedent to the extent it permits an incumbent union to defeat withdrawal of recognition through an unfair labor practice proceeding by producing evidence that it subsequently

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reacquired majority status in the interim between "anticipatory withdrawal" and the expiration of the extant CBA. The Board will now require a union seeking to restore recognition to file a petition for a "Board-conducted, secret-ballot election" in order to establish that it once again enjoys majority support. In this dispute, which involved a disaffection petition showing a union had lost majority support, the Board found that at the time the employer withdrew recognition, the union had lost majority support, so the union's complaint was dismissed (*Johnson Controls, Inc.,* July 3, 2019).

"Clear and unmistakable waiver" standard abandoned

A divided NLRB ruled that, when determining whether an action taken by an employer fell within the scope of contractual language granting the employer the right to act unilaterally, it will forego the application of a "clear and unmistakable waiver" standard in favor of a "contract coverage" standard, concluding that the former "undermines contractual stability" and that the latter is more consistent with the purposes of the Act (*MV Transportation, Inc.,* September 10, 2019).

The "contract coverage" standard is much more predictable and employer-friendly than the "clear and unmistakable waiver" standard.

An employer violates the Act if it makes a material change regarding a mandatory subject of bargaining without first providing the union notice and a meaningful opportunity to bargain about the proposed change. One defense to such a claim, however, is that the union waived its right to bargain. Waiver is typically embodied in the "management rights" provisions of a CBA that allow an employer to act unilaterally during the term of the contract. Under the clear and unmistakable waiver standard, however, the language of the contract had to be unequivocal and had to refer to the very specific type of employer action at issue. If it lacked such specificity, the Board would hold that the employer was not privileged to act unilaterally and that if it did, it violated the Act.

However, several federal appeals courts expressly rejected this approach. Instead of requiring a specific and unequivocal waiver, the courts found that if the subject matter of the proposed change was "covered by the contract," the employer was privileged to act unilaterally as long as doing so did not violate another express provision of the CBA. The contract coverage standard is much more predictable and employer-friendly than the clear and unmistakable waiver standard.

Over the years, the D.C. Circuit, which has plenary jurisdiction to review Board decisions, has repeatedly criticized the clear and unmistakable waiver standard. In its view, an employer has the right to make a unilateral change to the terms and conditions of employment if the change at issue is "within the compass or scope" of a contract provision that grants the employer the right to act unilaterally. Thus, a non-specific but broadly worded management rights provision that encompasses the change at issue will privilege the employer to act unilaterally. "[T]he D.C. Circuit applies 'ordinary principles of contract law' and 'gives full effect to the plain meaning of such provision.'"

In changing course and adopting the contract coverage standard as a matter of Board law, the majority explained that it will examine the plain language of a CBA to determine whether the change made by the employer was within the scope of the management rights clause or any other contractual provision granting the employer the right to act unilaterally. If it was, then the Board will honor the terms of the parties' agreement and find the employer did not violate the NLRA by making the change without bargaining. However, if the agreement does not cover the disputed act, and that act has materially changed a term or condition of employment constituting a mandatory subject of bargaining, then the employer will have violated Section 8(a)(5) unless it demonstrates that the union clearly and unmistakably waived its right to bargain over the change or that its unilateral action was privileged for some other reason. The Board will apply the contract coverage test retroactively.

Post-expiration dues checkoff requirement nixed

In a 3–1 decision, the NLRB overruled *Lincoln Lutheran of Racine*, a 2015 NLRB case that held that, consistent with

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the unilateral change doctrine, a union can continue to insist on dues checkoff post contract and seek to enforce the contractual provision through Section 8(a)(5) of the NLRA. *Lincoln Lutheran* itself overruled the long-standing rule under *Bethlehem Steel*, which had been in effect for 50 years. Under *Bethlehem Steel* the checkoff obligation was deemed to expire along with the contract, and the employer was free to discontinue it. In restoring the law under *Bethlehem Steel,* the Board majority noted its disagreement with the policy rationale underlying the *Lincoln Lutheran* decision. "The paramount and clearly intended purpose of the holding in that case is to exclude the cessation of dues checkoff from the arsenal of economic weapons that an employer may legitimately use as leverage in support of its bargaining position. This represents impermissible interference with the statutory bargaining process," the Board wrote, noting that ceasing dues checkoff is a valid means of exerting economic pressure on a union in the course of bargaining—an economic weapon commensurate with a union's right to strike during this period.

Restrictive post-arbitral deferral standard overturned

Dismissing a UPS driver's claims that his discharge violated the NLRA, the Board found that a decision by a grievance

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Employers may impose blanket confidentiality rules for investigations

A blanket work rule requiring employees to maintain confidentiality during the course of a workplace investigation is presumptively lawful, a divided NLRB held, overturning *Banner Health System dba Banner Estrella Medical Center,* an Obama Board decision that required employers to determine on a case-by-case basis whether such confidentiality is necessary. Under the *Banner Health* framework, an employer's interests in ensuring the integrity of a workplace investigation did not even come into consideration until an employer demonstrated that, in a specific investigation, a witness was in need of protection, there was a possibility that evidence would be destroyed or testimony would be fabricated, or there was a need to prevent a cover-up. This approach improperly "placed the burden on the employer to determine . . . whether its interests in preserving the integrity of an investigation outweighed employee Section 7 rights," a burden that runs contrary to both precedent from the Supreme Court of the United States and the Board, according to the current Board majority (*Apogee Retail LLC dba Unique Thrift Store,* December 16, 2019).

At issue in this case was a rule that barred employees from engaging in "'unauthorized discussion' of investigations or interviews 'with other team members.'" Justifying its policy, the employer explained that several of its prior investigations had been hindered by a lack of confidentiality. For example, employees conferred in advance about what they were going to say in their investigatory interviews, and some workers feared repercussions when a manager was the subject of an investigation, or they were threatened with retaliation or with reputational damage.

Applying its *The Boeing Company* rubric, the majority held that investigative confidentiality rules are categorically lawful and fall within *Boeing*'s Category 1 when they apply only to currently open investigations. However, if a confidentiality rule is not limited on its face to the duration of an investigation, it falls within *Boeing*'s Category 2 and thus requires a determination of whether there is a legitimate employer justification for the restriction that outweighs any impact on employees' Section 7 rights. Because the rule in question was not limited to the duration of a workplace investigation, it was classified as a Category 2 rule. To determine its legality, the Board remanded the case to the region to consider whether the employer has legitimate justifications for requiring post-investigation confidentiality and, if so, whether those justifications outweigh the effect of requiring continued confidentiality on employees' exercise of their protected rights.

"*Banner Health* had limited employers' ability to require employees to maintain the confidentiality of ongoing investigations to the narrowest of situations, essentially requiring actual proof that violence was likely absent

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panel upholding his termination was entitled to deference. An administrative law judge had applied the post-arbitral deferral standard established in *Babcock & Wilcox Construction Co., Inc.,* an Obama Board decision that instituted a more restrictive standard for Board deference to an arbitrator's decision, and rejected the employer's argument that the Board should defer to the joint panel's grievance decision. However, the Board overruled *Babcock* and restored the pre-*Babcock* standard that had been controlling precedent for 30 years (*United Parcel Service, Inc.,* December 23, 2019).

In its 1984 ruling in *Olin Corp.*, the Board established the operative standard governing deferral to arbitral decisions in discharge and discipline cases. In *Olin*, the Board held that deferral is appropriate "if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice." *Olin* also incorporated the "repugnancy" standard established by the Board in *Spielberg Mfg. Co.*, a 1955 decision, finding that deferral is appropriate "unless the award is 'palpably wrong.'" Further, the *Olin* Board placed the burden of proof on the party seeking to have the Board reject deferral. In *Babcock*, the Board overturned *Olin* and held that deferral in such cases would be appropriate only when: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award. Further, the burden of proof was shifted to the party arguing for deferral.

Overruling *Babcock*, the Board noted two primary problems with its predecessors' reasoning in that case. First, the *Babcock* majority had feared that the *Olin* standard created an "excessive risk that the Board will defer when an arbitrator has not adequately considered the statutory

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confidentiality," according to Mark G. Kisicki, a shareholder in Ogletree Deakins' Phoenix office, who represented the employer in the 2015 decision. "*Apogee Retail* recognizes that the safety, human resources, compliance, or management representatives conducting workplace investigations are not equipped with the tools and training to determine, on a case-by-case basis, whether there is an actual risk of violence justifying a confidentiality directive under *Banner Health*," said Kisicki. "In the real-time, real-world workplace, generally applicable rules and standards are necessary, and *Apogee Retail* balances those real-life concerns against the minimal impact on NLRA rights that a rule requiring confidentiality during an investigation might have."

According to Kisicki, the Obama-era *Banner Health* decision "had put employers in shackles when they investigated issues in the workplace, regardless of how tangential NLRA issues or concerns might have been to the matter under investigation. *Apogee Retail* breaks the shackles and gives employers a bright-line rule to apply without being second-guessed by NLRB agents, who generally have never had to manage a workforce or investigate alleged wrongdoing by others in their own organization, and view employer rules through the prism of their expertise; i.e., the NLRA."

"*Banner Health* had treated NLRA rights as sacrosanct, above the rights provided employees by other laws, and above the privacy rights of third parties," Kisicki noted. Moreover, the decision "ignored the Equal Employment Opportunity Commission's guidelines that advised employers to maintain confidentiality of harassment investigations so as to protect the innocent parties and victims, and because confidentiality increased the likelihood that employees would report the harassment and willingly participate in harassment investigations."

"The Board used the *Apogee Retail* decision to further explain that NLRA rights are not inviolate but must be balanced against the legitimate, and often compelling, justifications employers have for workplace rules that are facially neutral."

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issue, or when it is impossible to tell whether he or she has done so." This concern was speculative; the majority could identify only three cases to support its argument, and then stated that additional cases may have never been brought to the Board because the general counsel or one of the parties would assume that the Board would defer. Moreover, it reflected "a general distrust of arbitration," which is counter to the FAA's preference for resolution of discharge and discipline cases through collectively bargained arbitration procedures.

The second problem was its premise that statutory rights are independent of contractual rights and that the Board "retains in full its primary adjudicatory role . . . to protect those rights." The Board noted that in enacting the NLRA, "Congress clearly did not seek to segregate private dispute resolution as a remedy separate from and independent of statutory remedies," citing Section 203(d)'s express preference for private remedies. Further, the union has authority to waive individual employee statutory rights in CBAs, such as the right to strike or refuse to cross a picket line. Accordingly, reasoned the Board majority, the inclusion of an arbitration provision in a CBA reflects such a waiver and forum choice, and makes it "obvious that the parties' grievance arbitration machinery, rather than the Board, becomes the primary mechanism for resolving everyday employment disputes, even when those disputes may arguably present issues of statutory protection."

The Board noted that in enacting the NLRA, "Congress clearly did not seek to segregate private dispute resolution as a remedy separate from and independent of statutory remedies[.]"

Thus, under the revived standard, the Board will defer to an arbitration award in discharge or discipline cases if (1) the arbitration proceedings were fair and regular; (2) the parties agreed to be bound; (3) the contractual issue was factually parallel to the unfair labor practice issue; (4) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice; and (5) the decision was not clearly repugnant to the purposes and policies of the NLRA.

A procedural catch-22 is fixed

The Board resolved a procedural dilemma for employers that engage in a so-called "technical" refusal to bargain aimed at testing the validity of an underlying Board certification in a representation case. Because there is no direct court appeal in a representation case, an employer can obtain court review of a union's certification only by intentionally refusing to bargain and appealing the subsequent unfair labor practice finding to the courts. A conundrum can arise when an employer, during the pendency of the appeal, receives an information request from the union to which it has legitimate objections. Typically, such an objection (for example, one claiming confidentiality with respect to the information sought) requires an employer to engage in so-called "accommodative bargaining" about limitations on the material to be produced. However, on one hand, if the employer engages in accommodative bargaining, it loses its right to seek appellate review of the underlying arbitration case. On the other hand, if it refuses to engage in accommodative bargaining, it loses its confidentiality defense. This legal catch-22 had never been adequately reconciled, the majority observed (*NP Palace LLC dba Palace Station Hotel & Casino*, December 16, 2019).

The employer in the underlying case was challenging the union's certification by refusing to bargain. The union made several information requests, which the employer summarily denied. The general counsel issued a complaint alleging that the employer violated Section 8(a)(5) of the NLRA by refusing both to recognize and bargain with the union and to furnish relevant information. The Board found that the employer unlawfully refused to recognize and bargain with the union, and severed the allegation that it unlawfully refused to furnish relevant information.

Among the information requested by the union were customer complaints, which the employer argued were not necessary for or relevant to bargaining. The employer also argued that the union's need for other information, including internal "wage or salary plans" and certain

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business information, did not outweigh the employer's interest in preserving the confidentiality of that information. First, the Board overruled a 2011 ruling in *Mercedes-Benz of San Diego*, which found that requests for customer complaints were presumptively relevant. Further, it held that the employer had articulated legitimate confidentiality interests with respect to some of the requested information.

It was undisputed, however, that when the union requested the information, the employer did not offer to engage in accommodative bargaining. Under current Board law, an employer must offer to engage in such bargaining in order to raise a viable confidentiality defense. This obviously placed the employer in an untenable legal position because, by bargaining with the union, it would waive its right to challenge the union's certification in a

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Employers may ban use of company email for non-business purposes

In a decision presaged by its invitation for briefs last year, the NLRB held that employees do not have a Section 7 right to use an employer's email system for union-related or other protected communications. Reversing the controversial 2014 decision in *Purple Communications* and restoring the standard established by the Board in 2007 in *Register Guard*, the majority stated that the *Purple Communications* decision "impermissibly discounted employers' property rights in their IT resources while overstating the importance of those resources to Section 7 activity." According to the majority, the decision is consistent with prior Board rulings, which have held that employees do not have a Section 7 right to use other employer-owned equipment, such as televisions, copy machines, telephones, or PA systems (*Caesars Entertainment dba Rio All-Suites Hotel and Casino,* December 16, 2019).

In *Purple Communications*, the Board held that if an employer allows employees to access its company email system, the employer cannot prohibit its employees from using the system for Section 7–protected communications. Here, however, the current majority said that the ruling was largely based on a "flawed" reading of the U.S. Supreme Court's holding in *Republic Aviation Corp. v. NLRB.* In that decision, the Supreme Court noted that blanket prohibitions on oral union solicitation in the workplace were unlawful. While employers were allowed to place certain restrictions on Section 7 activity, such as a ban on oral solicitation during working time, they could not ban such solicitation during non-working time. According to the new Board, the Obama Board in *Purple Communications* completely misread *Republic Aviation* and incorrectly concluded that it supported the notion that employees have a statutory right to use their employer's property for Section 7 purposes during non-working time. The majority in *Caesars* correctly noted that *Purple Communications* represented the first time the Board held that employees have an essentially unfettered right to use employer property under such circumstance.

The majority in *Caesars* further noted that a proper reading of *Republic Aviation* is that "employees must have 'adequate avenues of communication' in order to meaningfully exercise their Section 7 rights, and that employer property rights must yield to employees' Section 7 rights when necessary to avoid creating an '*unreasonable* impediment to the exercise of the right to self-organization.'" Employees, the Board noted, typically have more than adequate avenues for communication, without email, such as face-to-face oral communication and the distribution of written union literature. "There is no reason to believe that these methods of communication have ceased to be available in the typical workplace, and almost all employees continue to report to such workplaces on a regular basis," it observed. Further, unlike the employees in *Republic Aviation*, employees in today's workplaces have access to even more avenues of communication, such as "smartphones, personal email accounts, and social media." Thus, under the balancing test of *Republic Aviation,* an employer's property rights will almost always preponderate,

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court of appeals. Under such circumstance, the Board noted that it would be contrary to the intent of Congress to hold that an employer must waive either its right to appeal the certification or its confidentiality defense to the information request.

The conflict could be best resolved, the Board determined, by modifying the remedy for such violations. Adopting a new remedial approach, if a certification-testing employer articulates a specific confidentiality interest in particular information requested by the union, the Board will determine from the filings whether the confidentiality interest is legitimate on its face. If the Board finds that it is, it will remedy the violation by ordering the employer to engage in accommodative bargaining at the appropriate time. If the Board finds that the defense is not legitimate, it will remedy the violation by ordering the immediate production of the required evidence.

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and there is no absolute statutory right to use an employer's property for Section 7 communication.

The Board majority conceded that there may be unique circumstances in which "an employer's property rights may be required to yield," such as when company email is the only adequate avenue for employee communication. However, these circumstances are plainly very rare, so the Board declined to clearly define the scope of this exception, leaving it to be determined on a case-by-case basis.

Caesars centers almost exclusively on the tension between employer property rights and employee Section 7 rights. Resolving that tension does not always answer all the questions surrounding employer restrictions on solicitation. Such restrictions must also be viewed through the discrimination lens.

"The Board has said that any restrictions on employee use of IT resources must be 'facially neutral' and that such policies must not be applied discriminatorily," noted John T. Merrell, a shareholder in Ogletree Deakins' Greenville, South Carolina, office. "In determining whether an employer has discriminated against Section 7 activity with regard to an employer's IT resources, the Board would presumably apply the test in *Register Guard*, which provides that 'unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status.'"

The Board continues to define the notion of "similar character" in the context of discrimination analysis. For example, where an employee is permitted to use company email to solicit coworkers for Avon products or other similar business ventures, that would likely be considered of a similar character to union solicitation and thus might vitiate a facially lawful rule on discrimination grounds. On the other hand, allowing employees to use company computers to check their social media accounts, communicate with family while at work, or search the Internet may be too dissimilar in character to obviate the rule.

The key takeaway, according to Merrell, is that "most employers are going to be able to adopt policies that prohibit employees from engaging in non-work-related use of company email or other IT resources. The only caveat is that those policies have to be facially neutral, which basically means such policies cannot expressly restrict Section 7 activity, such as union organizing or group discussions of wages via company IT resources, while permitting other non-work-related use of company resources." Moreover, he cautioned, employers may want to exercise care not to discipline an employee who uses work email to solicit union support if the employer has permitted other employees to use email for similar solicitations involving other organizations.

The union in the *Caesars* case filed a motion for reconsideration on the same grounds that led the Board to vacate its joint-employer decision in *Hy-Brand Industrial Contractors.* The union argued that Member William Emanuel should be recused in this case as well because his former law firm is counsel in *Purple Communications,* the case overturned by *Caesars.* The Board denied the union's motion on February 28, 2020, in an unpublished ruling.

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Board won't let union withdraw charges to avoid potential loss

As a general rule, and despite the Board's recent embrace of formal rulemaking, the NLRB principally effectuates labor policy and interprets the NLRA through individual case decisions. However, it can decide only those cases that parties bring before it. Consequently, even if the Board wants to address a particular labor law question, it typically must wait for a case that presents an appropriate fact pattern and that implicates the legal issues it wants to address to come up on appeal. In an unusual move in one 2019 case, a divided NLRB refused a union's request to drop one of two charges pending before the agency. The majority cited the Board's sole discretion to permit withdrawal of unfair labor practice charges, and its obligation to serve the public interest and effectuate the purposes of the Act, rather than merely vindicate individual private rights as grounds for denying the withdrawal request. But the majority's real motive, Member McFerran charged in a pointed dissent, was to tee up the case as a vehicle to overturn a disfavored Obama-era precedent (*800 River Road Operating Company, LLC dba Care One at New Milford*, August 29, 2019).

In *Total Security Management Illinois 1, LLC,* the NLRB held that when a union has won an election but has not yet negotiated a bargaining agreement with the employer, the employer must give the union notice and an opportunity to bargain before imposing any discretionary discipline on an individual bargaining unit member—unless the company and union have otherwise reached an agreement on a

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Top 10 targets: a status check

In the Summer 2017 *Practical NLRB Advisor,* we identified the top 10 targets (of Obama-era NLRB rulings and actions) likely to be reversed by the Trump Board. Here's a look at where they currently stand:

OBAMA NLRB ACTIONS	STATUS
1. *Browning-Ferris* joint-employer case	**Reversed**
2. "Micro" bargaining units	**Reversed**
3. Constraints on managerial control	**Reversed, mostly**
4. Strict scrutiny of work rules	**New test adopted**
5. "Ambush" election rule	**Revised; potentially more to come**
6. Union access to employer email	**Reversed**
7. "Supervisor" definition narrowed	**Watch for incremental rollback through rulings.**
8. Graduate students allowed to organize	**Proposed rule would reverse**
9. Questioning motive for replacing strikers	**In an appropriate case, Obama Board overreach will be narrowed.**
10. Hamstringing employee discipline	**Watch for incremental rollback through rulings.**
* Requirement for bargaining over discipline with a newly certified union if the appropriate case comes up for review	**Headed for likely reversal in *800 River Road Operating Company***

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disciplinary process. The majority reasoned, in the 2016 ruling, that discretionary discipline is a mandatory subject of bargaining; as such, employers cannot unilaterally impose discipline. The employer excepted and the general counsel, following the shift to a Republican-majority Board, switched sides, now arguing that the NLRB should overrule *Total Security Management* and find that the unilateral imposition of discipline was lawful under the Board's previous standard.

The position switch by the general counsel prompted the union to file a motion seeking withdrawal of the underlying charge alleging that the employer unlawfully suspended workers unilaterally, without giving the newly elected union a chance to bargain over the discipline. The union claimed that it had subsequently investigated the facts on the ground more fully and had determined that the employer had good cause to impose discipline. It did not disclose any factual details it had allegedly uncovered in its belated investigation, leading to speculation that it was merely trying to deprive the Board of the opportunity to decide a case where the union believed the outcome would overrule precedent that it believed was favorable.

The NLRB denied the union's request, noting the absence of evidence that the alleged violations had been remedied or resolved through settlement. Moreover, it pointed to the resources expended thus far and to the fact that, because it would be only a partial withdrawal, the Board would still have to process the case. "In addition," the majority wrote, "this case presents the Board with an opportunity to address significant issues of law under the National Labor Relations Act involving the obligation of the Respondent, and other employers, to engage in bargaining before imposing discipline on employees."

McFerran argued to no avail that the charge should be dismissed because, based on the union's current stance and the general counsel's changed position, there was no longer any "case or controversy." The majority, however, found no basis for applying the justiciability doctrine, a feature of the courts, to NLRB proceedings. Under Section 102.9 of the Board's Rules and Regulations, once a case has been transferred to the Board, a charging party may withdraw its charge only with the Board's consent, and only the Board has discretion whether to allow withdrawal. As the majority reasoned, the very fact that the regulations empower the Board to "withhold its consent to withdraw a charge demonstrates that a case is not mooted simply because the charging party requests withdrawal of the charge—or, as here, withdrawal of part of the charge."

However, as McFerran saw it, it was inappropriate for the Board to force the union to proceed with its charge "simply to ensure that it loses." The refusal to let the union withdraw the charge was "inexplicable," she said, "unless, of course, the majority intends to use this case to overrule *Total Security Management*." Further, she charged, "[m]anufacturing an occasion to overrule precedent is the essence of arbitrary and capricious agency action."

For their part, however, McFerran's colleagues stated they had no view on how the matter should turn out and that McFerran's suggestion as to the likely outcome was mere speculation. ■

E-filing is now mandatory

Documents submitted in connection with unfair labor practice or representation cases must be submitted through the NLRB's electronic filing system, under a policy that took effect on October 22, 2019. The policy (GC 20-01) applies to all affidavits, correspondence, position statements, and documentary or other evidence in connection with unfair labor practice or representation cases processed in regional offices. The e-filing requirement does not apply to the filing of unfair labor practice charges or petitions in representation proceedings; however, parties in these cases may *choose* to use the e-filing system.

The NLRB anticipates that the e-filing requirement will increase the accuracy of case files, while allowing regional office employees to spend less time scanning and filing documents and more time on substantive case-handling matters. The new policy marked the completion of changes to Part 102 of the Board's Rules and Regulations, announced by the NLRB general counsel more than two years ago.

"Protected" and "concerted" reconsidered

The Republican majority at the National Labor Relations Board (NLRB) appears to have a far clearer understanding than its predecessors of the need for employers to maintain civility, non-discrimination, and good order in the workplace. Thus, the current NLRB is demonstrating a growing reluctance to condone employee conduct of a racist, sexist, threatening, or otherwise offensive nature. Such conduct, when it occurs in the context of otherwise protected employee activity, has often been tolerated under the National Labor Relations Act (NLRA). However, changing social and legal norms have made it less palatable to accord this type of behavior statutory protection under Section 7 of the NLRA.

> *"The current NLRB appears to be reining in the Obama Board's very expansive notion of what constitutes protected concerted activity[.]"*

In marked contrast, the predecessor Obama Board frequently invalidated work rules that mandated courtesy in the workplace, finding they were a potential infringement on protected rights. Indeed, the Obama Board even found that striking workers who hurled racial epithets at replacement workers enjoyed the NLRA's protection; and, that a subsequent attempt to discipline them for their misbehavior was unlawful. The current NLRB, however, is clearly taking a narrower view of what constitutes "protected concerted activity" under Section 7, and is adopting a more common-sense approach to determine if certain employee behavior should enjoy protection under the NLRA.

"The current NLRB appears to be reining in the Obama Board's very expansive notion of what constitutes protected concerted activity," noted Ogletree Deakins' Brian E. Hayes, a former Board member. This trend is largely reflected in the Board's decisional law in 2019.

When does an employee lose the protection of the Act?

The NLRB has traditionally applied the four-factor test established in *Atlantic Steel* (1979) to determine if behavior occurring in the course of otherwise protected activity nonetheless loses its protection because of the circumstances of the behavior. *Atlantic Steel* outlined four factors that should be considered in making the determination with respect to verbal altercations: 1) the *place* of the discussion; 2) the *subject* matter; 3) the *nature* of the employee outburst; and 4) whether or not the employee was *provoked* by the employer's unfair labor practices.

Verbal altercations regarding personnel or workplace issues continue to provide the most typical situations in which the issue arises. For example, the Board recently found that a union steward who called the company owner a "stupid jack off" in Greek did *not* engage in conduct so egregious as to lose the Act's protection. Applying the *Atlantic Steel* factors, the Board noted that the incident took place in the owner's office, that no other employees witnessed the encounter, and that the owner had provoked the employee by telling him to "get the f**k out before I throw you out." Moreover, the misconduct was part of the "res gestae" of his protected activity, as he was acting in his capacity as union steward at the time, discussing the return-to-work process for employees following a strike. Therefore, the employer violated the Act by firing the steward for the outburst (*Cadillac of Naperville, Inc.*, June 12, 2019).

On the other hand, the current Board, in *Entergy Nuclear Operations, Inc.* (May 21, 2019), held that an employee's profanity-laced and intimidating tirade over the removal of a water cooler exceeded the protections of the Act when analyzed under the *Atlantic Steel* test. In addition to verbal altercations, strike-related activity often tests the limits of "protected activity." While striking is obviously protected, not all conduct in furtherance of the strike does or should enjoy statutory protection. For example, during the course of a strike for a successor contract, a striking employee repeatedly cut off a company truck driven by a member of management while the two were on a four-lane highway and traveling at speeds of 45 to 55 mph. The United States Court of Appeals for the Seventh Circuit upheld an NLRB determination that the employee lost the protection of the

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Act and was lawfully disciplined for his misconduct (*Local 702, International Brotherhood of Electrical Workers, AFL–CIO v. National Labor Relations Board*, August 9, 2019).

While most observers would readily agree that this type of reckless behavior on the highway should certainly be grounds for discipline, this case was actually before the NLRB on remand from the United States Court of Appeals for the District of Columbia Circuit. In 2014, the Obama Board had decided that the employee's conduct was *not* severe enough to forfeit the protection of the Act, and thus, the employer acted unlawfully in disciplining her. However, the appeals court in *Consolidated Communications, Inc. v. National Labor Relations Board* rejected this conclusion, and said the Board had committed legal error—first, by giving controlling weight to the absence of violence in the incident in question and then by compounding the error by holding that any ambiguity as to whether the employee's conduct was serious enough to forfeit the protection of the Act should be resolved in favor of the employee.

Judge Patricia Millett issued a noteworthy concurring opinion in the case. She wrote separately to convey her concern with the too-often cavalier and enabling approach that the Board's decisions have taken toward the sexually and racially demeaning misconduct of some employees during strikes. Those decisions have repeatedly given refuge to conduct that is not only intolerable by any standard of decency, but also illegal in every other corner of the workplace. According to Judge Millett, time and again the Board's decisions have given short shrift to gender-targeted behavior, the message of which is calculated to be sexually derogatory and demeaning. The Board's rulings have been equally unmoved by racially derogatory and demeaning epithets and behavior, she pointed out.

With the case before the Board again on remand, the union argued that the employee did not intend to impede or intimidate, but only to follow the company vehicle so she could set up an ambulatory picket at the job site, as the union had encouraged. Moreover, it said, her conduct was not as severe as other incidents where strikers drove recklessly, hurled tomatoes or eggs, or tailgated or harassed replacement workers. However, Consolidated Communications dba Illinois Consolidated Telephone Company in a 2018 decision the Board found that the employee's strike-related highway misconduct was serious enough to lose the protection of the Act. And the Seventh Circuit agreed.

NLRB calls for briefing. Shortly after the Seventh Circuit issued its decision in *Consolidated Communications,* the NLRB published a public notice and invitation to file briefs in *General Motors LLC,* a case addressing the extent to which employers may permissibly discipline employees who engage in profane, racial or sexually offensive conduct or speech in the course of otherwise protected activity. General Motors has asked the Board to overrule *Plaza Auto Center,* a 2014 ruling, which it described as "wholly at odds with the modern workplace" and one that "put[s] employers at risk of losing control of their employees and their employees' safety." The employer also urged the Board to overturn *Pier Sixty, LLC,* a 2015 decision which held that an employee's profanity-laced social media posts attacking his supervisor did not lose the Act's protection, as well as the agency's 2016 *Cooper Tire & Rubber Company* decision, which found that a striking employee did not lose the protection of the Act when he shouted racially offensive statements at replacement workers.

The briefing invitation, issued September 5, 2019, sought comments on:

- the circumstances in which profane or offensive speech should lose the Act's protection;
- whether employees should be "granted some leeway" when they are engaged in Section 7 activity;
- whether the "norms of the workplace" should be part of the analysis—and, if so, whether employer rules prohibiting uncivil conduct should be a factor;
- whether the context of the outburst should be considered when "racially or sexually offensive" language is at issue; and
- the extent to which the Board should consider antidiscrimination laws such as Title VII of the Civil Rights Act of 1964 in analyzing whether employee conduct loses the protection of the NLRA.

Member Lauren McFerran dissented from the request for briefs. She noted, among other things, that "[n]ot a single Federal appellate court has rejected the Board's general approach or its specific tests for determining whether an employee has lost the protection of the Act in particular contexts." It is clear, however, that the Board majority intends to revisit this area of the law. In addition, as noted below, the D.C. Circuit is apparently of the same view. At the end of last year it remanded a case to the agency that will require

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the Board to consider the balance between the NLRA and various anti-discrimination laws.

Board must consider EEO law. In *Constellium Rolled Products Ravenswood, LLC*, a divided NLRB found that an employee who wrote "whore board" on an overtime sign-up sheet during a boycott protesting the employer's overtime procedures, was engaged in statutorily protected conduct and that his action was not so egregious as to lose the protection of the Act.

However, the D.C. Circuit disagreed. It explained that the NLRB should have addressed the merits of the employer's contention that the Board must consider the employer's obligations under state and federal equal employment opportunity laws "to provide a workplace free of sexual harassment"—particularly given that the company had recently been assessed a $1 million jury award against it in a case alleging a hostile work environment at its plant (*Constellium Rolled Products Ravenswood, LLC v. National Labor Relations Board*, December 31, 2019).

The employer argued that protecting the "whore board" comment "would eliminate the Company's ability to police the workplace and remove similar foul messages in the future." Moreover, the comment was in conflict with the employer's "clear anti-harassment rule," which it "reaffirmed" following the adverse trial judgment in the hostile work environment case. The Board, while conceding that the "whore board" comment was "harsh and arguably vulgar," nonetheless accorded it protection without fully addressing the employer's argument.

Critically, the appeals court observed: "the Board did not so much as advert to the potential conflict it was arguably creating between the NLRA and state and federal equal employment opportunity laws." The court remanded the case for the Board to address the legitimate concerns raised by the employer and to assess the proper balance between the NLRA and other workplace anti-discrimination statutes.

When are strikes not "protected"?

In 2019, the NLRB also addressed the question of when, and under what circumstances, a concerted refusal to work may lose protection under the NLRA.

In a high-profile labor action, OUR Walmart, a group formed and supported by the United Food and Commercial Workers International Union, organized a series of job actions against the retail giant. Walmart employees would stop working to participate in a scheduled event, then return to work for a period of time, only to cease work again for the next event. The third of these four planned events was a so-called "Ride for Respect," in which more than 100 Walmart employees stopped working for five to six days in order to travel to, and demonstrate at, Walmart's annual shareholders' meeting. Walmart discharged the participants.

A divided NLRB panel found that their discharge was lawful. While the NLRA protects the right to strike, it does not protect serial or sequential work stoppages as occurred here. The OUR Walmart job actions were essentially unprotected intermittent strikes, in support of the broad goal of improving wages, hours, benefits, and other working conditions, and so Walmart did not violate the Act by firing the Ride for Respect participants (*Walmart Stores, Inc.*, July 25, 2019).

Similarly, a "wildcat" strike by unionized employees was not protected under the Act, a unanimous three-member NLRB panel held (*CC1 Limited Partnership dba Coca Cola Puerto Rico Bottlers*, September 30, 2019). In this case, during negotiations for a successor bargaining agreement, leaders of the union representing warehouse employees, along with several shop stewards, led employees on a two-hour work stoppage. The employer suspended the stewards. The employer rejected the union's demand to reinstate the stewards and resume negotiations. Thereafter, the union conducted a strike vote, which was unanimously approved, and the union requested strike assistance from its national headquarters. However, it did not commence a strike.

A month later, the stewards called a meeting at which employees again authorized a strike, and shortly thereafter, the stewards led more than 100 employees in a work stoppage. The union itself, however, had taken no part in the meeting and did not authorize the strike. Indeed, on the first day of the walkout, the union notified the employer in a faxed letter that it did not authorize the strike and that it would take action against the "false union leaders." The employer distributed copies of the union's letter to the striking workers, most of whom continued striking for several days. In the end, the

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employer suspended or discharged 86 strikers and the stewards.

In a 2015 opinion, a divided Board found the wildcat strike was protected and that the employer violated the Act by suspending and discharging the striking workers. However, in a supplemental order on remand from the D.C. Circuit, the Board found the strike was no longer protected once the strikers became aware that the union disavowed their walkout. The letter from the union was more than sufficient to put the strikers on notice that the walkout was not authorized and was opposed by their own exclusive bargaining agent. Their subsequent continuation of the walkout undermined the union's exclusive bargaining authority and lost the protection of the Act.

An individual gripe is not "concerted" merely because it is made in the presence of coworkers, the Board explained.

When is activity "concerted"?

In 2019, the NLRB issued several decisions in cases involving the "concerted" prong of the "protected concerted activity" language in Section 7 of the NLRA. In its January 11, 2019 ruling in *Alstate Maintenance, LLC*, a divided four-member Board panel started off the year reversing an Obama-era ruling and restoring a standard established decades ago, narrowing the scope of "concerted activity" subject to NLRA protection.

In *Alstate*, the Board majority held that an airport skycap who complained about the tipping habits of a soccer team was not engaged in concerted activity merely because he voiced his complaint in front of other skycaps and used the word "we." The majority rejected the notion that his use of the plural pronoun necessarily conferred statutory protection on his actions.

An individual gripe is not "concerted" merely because it is made in the presence of coworkers, the Board explained. "[T]o be concerted activity, an individual employee's statement to a supervisor or manager must either bring a truly group complaint regarding a workplace issue to management's attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action," the majority wrote.

The Board revived the approach adopted long ago in its *Meyers Industries* cases: For an employee's activity to be "concerted" within the meaning of the NLRA, the activity must be "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." As the Board explained, "an individual employee who raises a workplace concern with a supervisor or manager is engaged in concerted activity if there is evidence of 'group activities'—e.g. prior or contemporaneous discussion of the concern between or among members of the workforce—warranting a finding that the employee was indeed bringing to management's attention a 'truly group complaint,' as opposed to a purely personal grievance." An employee's efforts to "induce group action" could also be concerted in some cases.

The *Alstate Maintenance* majority outlined five factors that would support an inference that a statement made by an employee in a group setting is protected concerted activity:

> (1) the statement was made in an employee meeting called by the employer to announce a decision affecting wages, hours, or some other term or condition of employment; (2) the decision affects multiple employees attending the meeting; (3) the employee who speaks up [at the meeting] did so to protest or complain about the decision, not merely . . . to ask questions about how the decision has been or will be implemented; (4) the speaker protested or complained about the decision's effect on the work force generally or some portion of the work force, not solely about its effect on the speaker him- or herself; and (5) the meeting presented the first opportunity employees had to address the decision, so that the speaker had no opportunity to discuss it with other employees beforehand.

Noting that a number of cases decided after *Meyers* had blurred the distinction between protected group activity

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and unprotected individual activity, the Board overruled any conflicting precedent, including its 2011 decision in *Wyndham Resort Development Corp. dba WorldMark By Wyndham,* which held that an employee engaged in concerted activity simply by protesting publicly in a group setting.

Applying the restored standard to the facts at hand, the Board found that the skycap did not engage in concerted activity. There was no contention he was bringing a truly group complaint to the attention of management, and the record was devoid of evidence of past or present "group activities." Moreover, the substance of his statement did not evidence an attempt to induce group action. "Where a statement looks forward to no action at all, it is more than likely mere griping," said the court. And, because his complaint was neither concerted activity nor undertaken for the purpose of mutual aid or protection, the employer did not violate the Act when it discharged the skycap for refusing his supervisor's directive to assist the soccer team with its equipment.

In contrast, the NLRB found that an oil refinery unlawfully suspended an employee for individually refusing to operate a machine due to bona fide safety concerns, and the United States Court of Appeals for the Eighth Circuit enforced the Board's decision and order (*St. Paul Park Refining Co., LLC dba Western Refining v. National Labor Relations Board*, July 8, 2019). The appeals court agreed with the Board that the employee's refusal was a "logical outgrowth" of his discussions with a coworker earlier that day about the same work assignment, in which they both shared their safety concerns; and, after their conversation, the employee repeatedly called for a "safety stop." Consequently, the employee was engaged in concerted activity.

The takeaway

The current Board is clearly narrowing the ambit of employee behavior that it will consider to be both "protected" and "concerted." As to the first prong, most observers believe the eventual decision in *General Motors* will recognize the statutory and societal necessity for employers to ensure a non-discriminatory, non-threatening workplace; and, will consequently place much stricter limits on the type of employee behavior that will be accorded NLRA protection. A decision in *General Motors* would seem likely before next fall. As to the second prong, the majority's return to *Meyers* signals a corresponding contraction in the range of activities that will be deemed "concerted." ■

Closing out the "ethics" quandary?

Since 2018, the NLRB has been mired in a series of ethical disputes centering on when Board members are required to recuse themselves because of their previous law firm employment. The issue resulted in a formal review of the Board's ethics recusal program. On November 19, 2019, the NLRB released the product of its comprehensive, 18-month review. The National Labor Relations Board's Ethics Recusal Report, issued by NLRB Chairman John F. Ring, concluded that the NLRB's ethics program for Board member recusals "is strong, [and] fully compliant with all applicable government ethics requirements."

The report did, however, identify certain gaps in the Board's recusal protocols requiring modification. To that end, the Board said it will implement several new procedures to ensure full compliance.

The catalyst. The comprehensive review was prompted by the controversy surrounding the Board's December 2017 decision in *Hy-Brand Industrial Contractors, Ltd.* A Board majority in *Hy-Brand* overruled the controversial Obama-era decision in *Browning-Ferris Industries of California, Inc. (BFI).* The *BFI* decision had, itself, overruled decades of Board precedent, and made it much more likely that two separate businesses could be deemed the "joint employer" of a given group of employees. In overruling *BFI*, the Trump Board in *Hy-Brand* returned to the Board's long-standing, traditional test for joint-employer status.

However, after its issuance, the NLRB inspector general injected himself into the matter, and opined that Board

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Member William Emanuel should have recused himself from participating in the *Hy-Brand* case because his former law firm had represented a party in the *BFI* litigation. In the inspector general's view, *Hy-Brand* was essentially a "do-over" for the *BFI* parties. Accordingly, under the ethics pledge found in President Trump's Executive Order 13770, Emanuel should not have participated in the *Hy-Brand* decision. Since neither Emanuel nor his former law firm ever represented Hy-Brand, many observers believe the inspector general not only overstepped his jurisdictional bounds, but also reached an incorrect legal conclusion. Nevertheless, the remaining Board members then voted to vacate the *Hy-Brand* decision. As a result, *BFI* was restored as controlling Board precedent, and remains so today. (A detailed discussion of the controversy can be found in the Spring 2018 *Practical NLRB Advisor.*)

In the wake of this controversy, the Board undertook a detailed review of its recusal practices, including consultation with the Office of Government Ethics (OGE) and benchmarking with other federal agencies.

Strong protections; potential gaps. According to a fact sheet accompanying the Board's announcement of the report's release, the review "established that the Agency's ethics program for Board member recusals is strong, fully compliant with all applicable government ethics requirements and merits the full confidence of the Agency's stakeholders."

"The NLRB's current practices for identifying conflicts, establishing screening procedures, and obtaining advice from the Designated Agency Ethics Official, provide strong protections against conflicts of interest in the Board's adjudicative and rulemaking responsibilities," according to the announcement on the report's findings. However, the announcement stated that "the Board identified potential gaps and other areas for improvement and has approved changes to address them." Specifically, the Board will:

- Require parties appearing before the agency to file an organizational disclosure statement at the outset. The statement will require identification of any parent/subsidiary relationships parallel to the disclosure requirements regularly applied in federal and state courts.
- Acknowledge the designated agency ethics officer (DAEO) "red flags" checklist, which identifies atypical situations in which conflicts could arise, and incorporate this guidance into Board member and staff ethics training.
- Adopt a written protocol for handling recusal motions to ensure that the process is easily understood, fully transparent, and consistent with past practices of allowing individual Board members to determine their own recusal motions, with DAEO guidance.
- Adopt a protocol for Board member recusal determinations in full compliance with ethics standards, including external notifications. The protocol will ensure that future recusal matters will be addressed consistently and also ensure the transparency of the overall recusal process.
- Adopt procedures for maintaining and supplementing recusal lists to ensure better coordination between the DAEO, Office of the Executive Secretary, and individual Board members, including Board member sign-off of all revisions made to his or her own recusal list.
- Make Board member recusal lists available on the agency's public website.

"This was a significant undertaking that the Board took very seriously because ensuring the highest ethical standards is one of the most important things we do," Ring said. "Unless those who rely on the Board can have complete confidence in its fairness, impartiality and integrity, we are not doing our job."

The Ethics Recusal Report includes a letter from Chairman Ring, a separate statement from Member Lauren McFerran, and related appendices.

After issuance of the report, the OGE pushed back on some aspects of the document. Most notably, the OGE sought to dispel any implication in the report that it would serve to adjudicate any future disagreements between the DAEO and a given Board member regarding a particular recusal decision. The Board is currently in the process of amending its report in response to the OGE.

Applying the *Boeing* test, expanding its use

In *Lutheran Heritage Village-Livonia*, the National Labor Relations Board (NLRB) first established a standard for determining whether an employer's facially neutral work rule could nonetheless be deemed unlawful under the National Labor Relations Act (NLRA). Over time, however, the standard proved so vague and elastic that it led to conflicting, and often untenable results. The chief problem with the *Lutheran Heritage* test was the completely subjective question of whether or not employees would "reasonably construe" the language of a rule as prohibiting NLRA-protected activity.

The NLRB issued several decisions in 2019 ... applying the Boeing *standard to confidentiality and media contact rules[.]*

Given the mounting problems with its application, the NLRB, in 2017, overruled *Lutheran Heritage*, and established a new approach for analyzing whether an employer's facially neutral work rule, policy, or handbook provision might nevertheless interfere with employees' exercise of their protected rights. Under the framework delineated in *The Boeing Company*, the Board now considers a rule in light of: "(i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule." The aim, according to the Board majority in *Boeing* (quoting a 1967 case), is "to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy."

The *Boeing* decision outlined three categories of employer policies:

- "*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 NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule."
- "*Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications."
- "*Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another."

The NLRB issued several decisions in 2019 (including those summarized below) applying the *Boeing* standard to confidentiality and media contact rules and adopting the rubric in a union insignia case, as it continues to build a body of common law under its new framework.

Confidentiality rule upheld

The Board held that an insurance company's code of conduct, which required employees to preserve the confidentiality of certain information, was lawful under a *Boeing* analysis. The code of conduct defined "confidential information" to encompass "all non-public information that might be of use to competitors or harmful to the Company or its customers if disclosed. It also includes information that suppliers and customers have entrusted to the Company." Thus, the code did not specifically designate as confidential terms and conditions of employment or, more generally, employee information (*National Indemnity Company,* December 18, 2019).

The Board designates rules that require employees to maintain the confidentiality of non-public information that could, if disclosed outside the company, cause harm to the company or its customers or benefit its competitors as *Boeing* Category 1(a) rules. These are lawful to maintain "because, when reasonably interpreted, they would have no tendency to interfere with Section 7 rights and therefore no balancing of rights and justifications is warranted." To fall under Category 1(a), a rule must either (1) omit from coverage, expressly or implicitly, wages, salaries, and other terms and conditions of employment or, more generally,

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employee or personnel information; or (2), if it includes wage or salary information, make clear that the information referred to is limited to data maintained and only accessible in the employer's confidential records.

[A] Walmart policy that limited, but did not prohibit, the wearing of insignia, including union insignia, on its selling floors did not violate the NLRA.

Notably, the rule in question was an updated version of the company's previous confidentiality agreement, which did include "personnel information" among the information to be kept confidential. However, the employer deleted this clause and added language expressly providing that nothing in the agreement prohibited employees from discussing wages, benefits, hours, or other terms and conditions of employment.

Boeing replaces "special circumstances" test

A divided four-member Board found that a Walmart policy that limited, but did not prohibit, the wearing of insignia, including union insignia, on its selling floors did not violate the NLRA. When an employer maintains a facially neutral rule that limits the size and/or appearance of buttons and insignia that employees can wear, but does not ban them altogether, the Board will not analyze the rule under its *Republic Aviation* "special circumstances" test. That test was traditionally used in cases where *all* union buttons and insignia were prohibited and involved a balancing of employees' Section 7 rights and the "special circumstances" of the employer's business operation that would justify the ban. Going forward, the Board announced that in cases involving insignia limitations it will undertake a *Boeing* analysis, noting that in such cases the infringement on Section 7 rights is minimal; and, thus, the employer's justification for maintaining the restriction need not be as compelling (*Wal-Mart Stores, Inc.,* December 16, 2019).

The policy at issue in the case explicitly granted employees the right to wear "small, non-distracting logos or graphics no larger than the size of your [employee] name badge." Under the policy, Walmart had permitted employees to wear buttons, pins, and wristbands containing logos or graphics no larger than 2.25 inches by 3.5 inches, including logos featuring "OUR Walmart," a "union-supported "alt-labor" group. Thus, applying the *Boeing* framework, the Board found that Walmart lawfully maintained the policy on the selling floor. When reasonably interpreted, the policy would potentially interfere with employees' Section 7 right to display some union insignia. However, the adverse effect was relatively minor, as the policy did not deny the right completely; it merely restricted the size of the permissible insignia. Moreover, Walmart's business justification for maintaining the policy on the selling floor outweighed the relatively minor impact on Section 7 rights.

On the other hand, even under *Boeing*'s lower threshold, Walmart did not offer a sufficient business justification for maintaining the rule on its loading docks and other "employee only" areas, the Board concluded. Accordingly, to the extent the policy was enforced beyond the selling floor, it was overly broad and violated Section 8(a)(1).

The takeaway

It remains to be seen if, in the long run, the *Boeing* test will result in more predictability and stability in the analysis of employer work rules than the old *Lutheran Heritage* formulation. What is, however, immediately clear is that unlike the Obama Board, the current Board majority is unlikely to regard all *possible* interpretations of a rule, no matter how speculative and attenuated, to be *reasonable.* Remote or speculative potential "infringements" are no longer likely to invalidate rules. Also clear is the fact that an employer's business justification for a given rule will be accorded significantly greater analytical weight than in the recent past. ■

The NLRB applied the *Boeing* test in numerous other contexts in 2019, including the consideration of employer arbitration agreements, provisions requiring confidentiality in workplace investigations, and other significant issues of Board law. A discussion of these decisions appear elsewhere in this issue.

Arbitration agreements still draw scrutiny post *Epic Systems*

In its 2018 decision in *Epic Systems Corp. v. Lewis,* the Supreme Court of the United States rejected the National Labor Relations Board's (NLRB) *D.R. Horton* line of cases. These NLRB decisions, invalidated by the Court, held that mandatory arbitration agreements containing class and collective action waivers run afoul of Section 8(a)(1) of the National Labor Relations Act (NLRA).

After these cases were overturned, casual observers may have assumed that the NLRB, particularly under a Republican majority, would have no further quarrel with employers entering into mandatory arbitration agreements with their employees. However, the NLRB has long held that an employer violates Section 8(a)(1) of the NLRA if it restricts employees' right to file charges with the Board, or otherwise interferes with employees' right to avail themselves of Board procedures. That includes, of course, any restrictions contained in arbitration agreements. Nothing in the *Epic Systems* decision disturbed this long-standing precedent.

[T]he NLRB will continue to carefully scrutinize all arbitration agreements, whether or not they contain a class waiver[.]

The key takeaways from the NLRB's 2019 post–*Epic Systems* arbitration cases are the following: (1) an employer's arbitration agreement, like all employer policies, will be evaluated under the framework set forth in *The Boeing Company;* (2) the NLRB will continue to carefully scrutinize all arbitration agreements, whether or not they contain a class waiver, to determine if they interfere with the right of employees to avail themselves of the Board's processes; and (3) the current Board will not hesitate to strike down policies if they interfere with, or even appear to restrict, access to the Board.

The *Boeing* rubric applies. *Prime Healthcare Paradise Valley, LLC* (June 18, 2019), the Board's first decision addressing employers' use of mandatory arbitration agreements since the Supreme Court issued *Epic Systems*, was a supplemental decision on remand from the United States Court of Appeals for the District of Columbia Circuit. The NLRB found that an employer violated Section 8(a)(1) of the NLRA by maintaining and enforcing an arbitration agreement that limited employee access to the NLRB and its processes.

The administrative law judge (ALJ) had analyzed the arbitration agreement under *Lutheran Heritage Village-Livonia*. However, the Board held that its *Boeing* standard applies to arbitration provisions as well. The analysis proceeds as follows: an arbitration agreement that expressly prohibits filing claims with the NLRB, or with administrative agencies in general, is unlawful because it amounts to "an explicit prohibition on the exercise of rights under the Act." However, when an agreement does not explicitly prohibit the filing of claims with the NLRB—that is, when the agreement is facially neutral—the Board will first "determine whether that agreement, 'when reasonably interpreted, would potentially interfere with the exercise of NLRA rights.'" A unanimous four-member Board found that the language of the agreement at issue met that standard for potential interference.

The agreement stated that "'all claims or controversies for which a federal or state court would be authorized to grant relief' [must] be resolved by binding arbitration." It covered an extensive list of employment statutes, including "claims for violation of any federal, state, or other governmental constitution, statute, ordinance, regulation, or public policy," and intended for arbitration to serve as the forum for resolving all these claims. Although it specifically excluded certain claims, it did not exclude charges filed with the NLRB. Thus, while the agreement did not expressly restrict the filing of charges with the NLRB, when reasonably interpreted, it had the effect of doing so, and thus interfered with employees' Section 7 rights. As such, the employer violated the Act by implementing and enforcing the agreement.

The agreement also "required employees, as a condition of employment, to waive their rights to pursue class or

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collective actions involving employment-related claims in all forums, whether arbitral or judicial." This provision on its own, however, did not violate the Act, under the holding of *Epic Systems*.

In *Four Seasons Healthcare & Wellness Center, LP* (November 21, 2019), the Board readily disposed of a complaint challenging an arbitration agreement that contained a class waiver in light of *Epic Systems.* But a separate question remained as whether the "agreement independently violated . . . the Act because it would reasonably be construed by employees to restrict their ability to file" NLRB charges. At the time of the ALJ's ruling, the *Lutheran Heritage Village* "reasonably construe" standard was controlling, but in issuing *Boeing,* the Board said its new test would apply retroactively to all pending cases. Accordingly, the Board severed and retained this complaint allegation and issued a notice to show cause why it should not be remanded to the ALJ for further proceedings in light of *Boeing*.

Is discharge for refusing to sign lawful? It depends on whether the agreement is lawful.

Employers can roll out agreements in response to collective actions. In *Cordúa Restaurants, Inc.* (August 14, 2019), another supplemental decision, the Board addressed an issue of first impression post *Epic Systems*. Consistent with long-standing precedent, it held that filing a class or collective action constitutes protected concerted activity, and it is therefore unlawful for an employer to take adverse action against employees for doing so. However, it also held that the employer was not prohibited from promulgating a mandatory arbitration agreement containing a class action waiver in response to employees opting in to the collective action.

Restating this principle, in *Tarlton and Son, Inc.* (October 30, 2019), a case on remand from the United States Court of Appeals for the Ninth Circuit, a Board panel reversed its pre-*Epic Systems* decision that found that an employer unlawfully promulgated an arbitration policy with a class waiver in response to its employees filing a wage and hour claim in state court. For the reasons stated in *Cordúa Restaurants*, the Board explained, to find that the employer violated the NLRA in implementing the agreement in response to protected activity would be inconsistent with the Supreme Court's holding in *Epic Systems* that individual arbitration agreements do not violate the Act and must be enforced according to their terms.

Is discharge for refusing to sign lawful? It depends on whether the agreement is lawful. The Board in *Cordúa Restaurants* tackled another issue of first impression following the Supreme Court's *Epic Systems* decision: whether an employer is barred from threatening to discharge an employee for refusing to sign a mandatory arbitration agreement.

In *Cordúa Restaurants*, the Board found the employer did not violate the Act by issuing a threat of discharge, because its arbitration agreement was lawful. By way of contrast, in *Everglades College, Inc. dba Keiser University* (November 27, 2019), the Board found unlawful an arbitration agreement containing language that arbitration is the exclusive forum for the resolution of claims arising under the NLRA. And because the agreement was unlawful, the employer's discharge of the employee for refusing to sign it also violated the NLRA.

Similarly, in *E.A. Renfroe & Co. Inc.* (December 16, 2019), the Board found an employer's mandatory arbitration agreement violated the NLRA, and that the employer separately violated it by discharging an employee for refusing to sign. The employer argued that it lawfully discharged the employee because she had refused to agree to provisions in the arbitration agreement that were not specifically alleged to violate the NLRA. The Board rejected this argument, noting there was no evidence the employee could have avoided discharge by consenting to the lawful provisions only.

NLRB invalidates numerous arbitration provisions. When presented with arbitration agreements that were alleged to violate Section 8(a)(1) of the Act by unlawfully restricting employee access to the Board and its processes,

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the NLRB struck down more provisions than it upheld. These include the following:

- An agreement providing that "all claims or controversies in any way related to or associated with . . . employment or the termination of . . . employment will be resolved exclusively by binding arbitration," including all statutory claims.

  The agreement purported to exclude from coverage all claims that are "preempted by federal labor laws," but this carve-out was not sufficient. An objectively reasonable employee would not construe this vague language as an intent to exclude claims under the NLRA. It was unlikely that an employee would be familiar with the legal doctrine of preemption, or what actions and claims are preempted by federal labor laws. Consequently, when reasonably interpreted under *Boeing*, the agreement makes arbitration the exclusive forum for resolving claims arising under the Act (*Cedars-Sinai Medical Center,* September 30, 2019).

[T]he NLRB struck down more [arbitration] provisions than it upheld.

- An agreement stating that the employer and employees agree to submit any claims either has against the other to final and binding arbitration.

  The broad "any claims" language can create a reasonable impression that an employee is waiving not just trial rights, but administrative rights as well. Moreover, the agreement contained no exception for filing charges with the Board or administrative agencies generally, yet it *did* contain an express exception for workers' compensation and unemployment claims (*Beena Beauty Holding, Inc. dba Planet Beauty,* October 8, 2019).

- An agreement that could reasonably be interpreted as making arbitration the exclusive forum for the resolution of all claims, including statutory claims under the NLRA.

  The agreement did not contain a specific exception for filing Board charges; it merely purported to exclude claims or actions "where specifically prohibited by law." This "[v]ague, generalized language . . . would undoubtedly require employees to meticulously determine the state of the law themselves," which is prohibited under *Boeing* because a reasonable employee would be left in the "in the dark as to *what* is 'specifically prohibited by law,'" the Board held (*Everglades College, Inc.*).

- An agreement that prohibited employees from receiving back pay or other monetary compensation through NLRB proceedings.

  Although the agreement expressly allowed employees to file unfair labor practice charges, it required employees to give up the opportunity to recover monetary relief through Board proceedings and to pursue any such relief in arbitration. Notwithstanding the language allowing employees to file administratively, this provision tended to limit employee access to the Board's processes and undermined the incentive to file a charge in the first place. Moreover, it impermissibly sought to limit the Board's own remedial powers under Section 10(c). The Board noted that those powers were intended to vindicate not only private or individual rights, but public rights as well. The Board rejected several arguments raised by the employer: that back pay is a "remedy, not a Board process"; that Section 9(a) of the NLRA "preserves the individual right of an employee to present a grievance directly to the employer"; and that its exclusions paragraph was justified based on the Board's discretionary practices of deferring to arbitration and of permitting parties to settle unfair labor practice charges (*Kelly Services, Inc.,* December 12, 2019).

- An agreement containing a clause that excluded from mandatory arbitration those claims that the parties cannot agree to arbitrate "as a matter of law."

  The language of this savings clause was "legally insufficient" because it was "vague" and "would require employees to 'meticulously determine the state of the law' themselves." It is unlikely that a reasonable employee would be familiar with preemption, "let alone what actions and claims are preempted by federal labor laws," the Board explained (*E.A. Renfroe & Co., Inc.*).

- A notice to job applicants that contained an arbitration provision requiring applicants to consent to "obligatory arbitration for all disputes and complaints" arising from

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the submission of their application and, if the applicant is hired, to further agree that "all disputes or complaints that cannot be resolved within the Company and informally shall be submitted to obligatory arbitration."

The provision "neither excludes from its scope claims arising under the Act nor contains a savings clause preserving the right to file charges with the Board or with administrative agencies generally" (*Haynes Building Services, LLC*, December 23, 2019).

Savings clause. In several instances, however, the Board found that an arbitration agreement was lawful under the *Boeing* standard because it included a savings clause explicitly stating that nothing in the agreement was to "be construed to prohibit any current or former employee from filing any charge or complaint or participating in any investigation or proceeding conducted by an administrative agency, including . . . the National Labor Relations Board." The language of the provision was unconditional and fell in close "proximity to the provision requiring that all claims be resolved through binding arbitration." As such, it was "sufficiently prominent" to ensure that employees who read it would "know that the agreement preserved employees' rights to access the Board and its processes." Rejecting an ALJ's finding that the employer violated the NLRA, a unanimous four-member Board held that "employees would not reasonably interpret the agreements to bar or restrict their access to the [NLRB and its processes] . . . including the filing of Board charges and participating in Board proceedings." Rather, the agreements were a lawful rule under *Boeing* category 1(a) (*Briad Wenco, LLC dba Wendy's Restaurant,* September 11, 2019).

[A] unanimous four-member Board held that "employees would not reasonably interpret the agreements to bar or restrict their access to the [NLRB and its processes]..."

Likewise, in another ruling, the Board determined that an employee would not reasonably believe that an employer's arbitration agreement precluded employees from filing charges with the Board, rejecting an ALJ's contrary finding. The arbitration agreements covered all employment-related disputes but explicitly exempted claims that could be made to the NLRB. The agreement also included a class action waiver. The parties submitted the case to an ALJ on a stipulated record. The general counsel belatedly sought to add the claim that the agreement was unlawful because a reasonable employee would construe the agreement as precluding access to the NLRB. The Board found that the ALJ should not have reached that allegation because it was beyond the stipulation. Furthermore, it held that even if the ALJ properly raised the issue, the agreement did not violate the NLRA in this respect because it explicitly stated that any claims that could be brought to the NLRB were exempt (*Private National Mortgage Acceptance Company LLC,* December 9, 2019). ■

The NLRB year ahead

Since the August 2018 departure of Democratic member Mark Gaston Pearce, the National Labor Relations Board (NLRB) has carried out its work through 2019 without a fifth member. With the end of Member Lauren McFerran's term on December 16, 2019, the Board now has just three members, none of whom are Democrats. For now, the three Republicans—Chairman John F. Ring and members William Emanuel and Marvin Kaplan—will issue all Board decisions until one or both of the existing vacancies are filled.

On March 2, 2020, President Trump announced his intent to nominate Member Kaplan for another five-year term and to renominate former Member McFerran in a deal struck by the White House to ensure that the agency will continue to have a quorum after Kaplan's current term expires this summer. It remains unlikely, however, that the White House will fill the fifth seat with another Democrat anytime soon; that slot could remain vacant until after the 2020 election is well over.

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Currently, the NLRB has an ambitious rulemaking agenda, and there are significant issues of Board law in the decisional pipeline. As noted, the Board has a legal quorum and thus full authority to decide cases and issue rules despite the two Democrat vacancies. The absence of these likely dissenting voices, however, will undoubtedly result in some political pushback from Capitol Hill Democrats.

Among those pending rules is the long-anticipated joint-employer rule, as well as other proposed regulations likely to be favorable to the business community. In a similar vein, there are cases in the Board's decisional inventory that could provide the vehicle for additional reversals of Obama-era decisions and the promulgation of other policy changes that are more employer-friendly. The current majority shows no signs that it will be deterred from pushing forward on either the rulemaking or decisional front because of any political pushback.

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An election year. The Board is an increasingly political and ideological institution, and, thus, no summary of the road ahead can fail to note that 2020 is a presidential election year. If the White House were to change political hands after the November election, the ideological balance on the Board and in the general counsel's office would shift quickly and dramatically. This ever-present possibility may prompt the current Board to issue cases more quickly and to rely even more on rulemaking, since policy that is embodied in a formal rule, rather than a case decision, is more difficult for a subsequent Board to undo.

The prospect of a Democratic NLRB in 2021 should also factor into a number of employer decisions. It is worth remembering that a case appealed to the Board today will likely not be addressed by the current Board before the election. Certainly, an employer's actions may be reviewed by a Board that could have a radically different ideological perspective. This lack of predictability is the unfortunate legacy of the Board's increasingly volatile doctrinal changes. Vexing as that may be, it is nonetheless the reality.

PRO Act prospects. Of even greater concern for employers is the fact that a Democratic administration coupled with a Democratic majority in the U.S. Senate could significantly raise the prospects for passage of comprehensive legislation aimed at fundamentally and radically overhauling the National Labor Relations Act (NLRA).

The Protecting the Right to Organize Act of 2019 (PRO Act) (H.R. 2474; S. 1306), introduced in both chambers of Congress in May 2019, is a veritable wish list of organized labor's desired legislative goals. The legislation would expand union organizing opportunities, strip employer rights and protections, and impose onerous new penalties on employers for violations of the statute. (A detailed overview of the PRO Act appears in the Spring 2019 *Practical NLRB Advisor.*)

On February 6, the House passed the PRO Act in a 224-194 (mostly party-line) vote. It will be dead on arrival in the Senate. A change in the White House, and the turnover of four Republican seats in the Senate, however, could put the legislation back on track for eventual enactment. Bear in mind that when the controversial Employee Free Choice Act (EFCA) was first introduced, most in the management community viewed the legislation as so radical that it would never be passed, let alone enacted. However, the bill eventually came within a single vote of congressional consideration. Had it cleared that hurdle, it likely would have passed and certainly would have been signed into law by President Obama. ■

Other NLRB developments

Circuit court decisions

School bus company was a "perfectly clear" successor. A school bus company that won a transportation subcontract was a "perfectly clear" successor employer of the school district's unionized bus drivers and attendants, ruled the United States Court of Appeals for the District of Columbia Circuit. A "perfectly clear successor" is required to continue recognizing and bargaining with the incumbent union, and it is also bound by the terms of the existing collective bargaining agreement (CBA). It is an exception to the general rule that a legal successor, although required to recognize and bargain with the incumbent union, is free to unilaterally set the initial terms and conditions of employment. The appeals court agreed with the National Labor Relations Board (NLRB) that the bus company became a perfectly clear successor, under the U.S. Supreme Court's decision in *NLRB v. Burns International Security Services, Inc.,* on the date that a company official first met with the employees to discuss the transition in management and indicated an intent to retain a majority of the school district's employees without clearly announcing an intent to establish different initial terms and conditions of employment. Under these facts, the company was a perfectly clear successor and had an obligation to bargain with the incumbent union, but it violated that duty by changing the initial terms and conditions without bargaining beforehand (*First Student, Inc., a Division of First Group America v. National Labor Relations Board*, September 3, 2019).

Judge Silberman, dissenting in part, found it "crucial to note that the only factor the Supreme Court relied on to distinguish a so-called 'perfectly clear successor' from an ordinary successor was the employer's plan to hire *all* of the bargaining unit employees, presumably as a group." However, in this case, the company indicated that it anticipated hiring only a *majority* of the employees, not *all* of the bargaining unit employees. Further, it was clear the employer intended to make individual hiring decisions rather than hire all bargaining unit employees as a group, as the Supreme Court contemplated in *Burns*. In Silberman's view, this case disclosed a "rather disturbing effort on the part of the Board to substantially nullify a right given to employers, under a Supreme Court opinion, by vastly expanding a narrow exception to that right."

Board must explain why ALJ's findings were rejected. In a recent case, the D.C. Circuit held that an NLRB finding that a nursing home discharged a nursing assistant because she engaged in protected activity was not supported by substantial evidence. The Board failed to give "attentive consideration" to the administrative law judge's (ALJ) finding that although protected activity was a factor in her discharge, the employer would have fired her anyway based on its zero-tolerance policy regarding resident abuse. The Board disagreed with the ALJ that the nursing home had carried its rebuttal burden, and cited record evidence of disparate treatment. However, the record evidence showed the other employee in question was not accused of similar misconduct. While the Board may substitute its judgment for the ALJ's, "when it disagrees with the ALJ, [it] must make clear the basis of its disagreement." Moreover, "the Board is obligated to confront evidence detracting from its conclusions, particularly where the dissenting Member has offered a non-frivolous analysis," the appeals court said, granting the nursing home's petition for review (*Windsor Redding Care Center, LLC v. National Labor Relations Board,* December 10, 2019).

Firing pro-union nurse one month after union election violated NLRA. The D.C. Circuit denied a hospital's petition for review of an NLRB decision that found that the employer committed four unfair labor practices after its nurses voted to unionize. Shortly after the election, the employer fired a pro-union nurse and reported her to the state board of nursing. Applying *Wright Line* to determine whether employee discipline constitutes an unfair labor practice, the appeals court held that the temporal proximity between the nurse's union advocacy and her termination, in addition to the fact that she was disciplined more harshly than nurses who committed similar infractions, indicated that her union activity was the reason for her termination. The court also agreed with the Board that the hospital committed additional unfair labor practices after the election when it banned a union representative from the premises, refused to bargain, and threatened to retaliate against nurses who filled out a union-issued complaint form (*DHSC, LLC dba Affinity Medical Center v. National Labor Relations Board,* December 20, 2019).

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NLRB properly found that LPNs were not statutory supervisors. A nursing home violated the National Labor Relations Act (NLRA) by refusing to bargain with a union representing a unit of licensed practical nurses (LPN), and changing their wages and benefits without giving notice to a union or providing the union with an opportunity to bargain, ruled the United States Court of Appeals for the Third Circuit. After hiring the majority of its predecessor's LPNs, the nursing home attempted to circumvent its obligation to bargain with the incumbent union by converting the LPNs into supervisors under Section 2(11) of the NLRA. As the party claiming supervisory status, the employer had the burden of establishing it, and the record supported the Board's conclusion that the nursing home was unable to do so.

The appeals court rejected every challenge presented by the trucker's former employer, finding some to be contrary to settled law and others to fail in light of the deference granted to the NLRB on review[.]

Specifically, the employer could not show that the LPNs had "supervisory authority to discipline or effectively recommended discipline," or that they had "supervisory authority to adjust grievances" (*Coral Harbor Rehabilitation and Nursing Center v. National Labor Relations Board,* December 26, 2019).

No due process breach in ruling on violation not in the charge. The NLRB held that an employer violated the NLRA when it unilaterally changed its attendance policy on two separate occasions without giving the union notice and an opportunity to bargain, and then discharged an employee pursuant to the new policy. Although the second violation was not specifically alleged in the unfair labor practice charge or complaint, the Board's finding did not deprive the employer of due process, the United States Court of Appeals for the Sixth Circuit ruled. The employer argued that the Board misapplied its previous decision in *Pergament United Sales*, which held that "[i]n the context of the [NLRA], due process is satisfied when a complaint gives a respondent fair notice of the acts alleged to constitute the unfair labor practice and when the conduct implicated in the alleged violation has been fully and fairly litigated." The employer argued that the Board's finding was based on an allegation of fact that had not been pled; however, *Pergament* applies to unpled alleged violations, not unpled allegations of fact, the appeals court explained. The record was replete with evidence that the Board provided ample notice to the employer, and the parties thoroughly litigated the issue at the hearing, the appeals court stated in denying the petition for review and enforcing the Board's order (*Ozburn-Hessey Logistics, LLC dba Geodis Logistics, LLC v. National Labor Relations Board,* September 24, 2019).

ALJ's back pay calculations for fired trucker upheld. The NLRB did not abuse its discretion in affirming an ALJ's calculations of a discharged trucker's back pay when it resolved multiple factual disputes and upheld the ALJ's formula, the Sixth Circuit held. The employee was fired for engaging in protected activity, and the appeals court had upheld a finding that his termination violated the NLRA. Based on calculations performed by an NLRB field examiner, an ALJ determined that the employer owed the employee $49,817 in back pay. The NLRB affirmed the ALJ's determination, and the employer appealed to the Sixth Circuit. The appeals court rejected every challenge presented by the trucker's former employer, finding some to be contrary to settled law and others to fail in light of the deference granted to the NLRB on review (*Lou's Transport, Inc. v. National Labor Relations Board,* December 26, 2019).

No error in disallowing evidence that student workers were "temporary." The NLRB did not abuse its discretion or violate due process rights in refusing to admit pre-election evidence that the University of Chicago wished to introduce showing that student library workers were temporary employees. The university contended that as temporary workers and "primarily students," they could not collectively bargain as a matter of law because they did not manifest a sufficient interest in the terms and conditions of their employment. However, this theory was explicitly rejected by the Board in its 2016 decision in *Columbia University,* which made clear that the "short-term nature of student employment" was not a sufficient reason to deny collective bargaining rights. Therefore, even if the factual allegations in the university's offer of proof were taken as true, they would not have altered the Board's analysis under governing law allowing part-time students to collectively bargain. And while the university said it wanted to present the evidence anyway because it was making the argument that *Columbia University*

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should be overturned, it did not ask the United States Court of Appeals for the Seventh Circuit to evaluate or invalidate that decision. Thus, the appeals court denied the university's petition for review and granted the Board's cross-application for enforcement (*University of Chicago v. National Labor Relations Board,* December 17, 2019). The Board is currently considering formal rulemaking to address the issue of whether the NLRA should be deemed to cover "student employees."

Employer properly relied on LCA later deemed unlawful. In partial reliance on a "Last Chance Agreement" (LCA) that was later found to violate the NLRA, an employer discharged an active union supporter and placed a "do not rehire" notation in her records. The NLRB found the employer's actions violated the NLRA. However, the United States Court of Appeals for the Eighth Circuit reversed, concluding that the infirmity in the original LCA did render the subsequent discipline unlawful (*Southern Bakeries, LLC v. National Labor Relations Board,* September 11, 2019).

The earlier LCA, issued in 2013, was not unlawful at the time of the subsequent events, the court noted. An ALJ found the LCA was unlawful in 2014 and issued a recommended order requiring it to be removed from the employee's file. However, the employer's appeal of the ALJ's recommended order was pending before the Board when a second LCA was issued in 2015 for a work rule violation. In 2016, the Board adopted the ALJ's finding that the 2013 LCA was unlawful, but the employer's petition for Eighth Circuit review was pending until September 2017, when the appeals court ultimately enforced the Board's order.

In the latest round, an ALJ concluded that the employer violated the NLRA by issuing the 2015 LCA, discharging her, and marking her as ineligible for rehire. The Board adopted the finding, reasoning that the adverse employment decisions relied on the unlawful 2013 warning and that the company failed to establish it would have taken the actions absent that reliance. However, the Board erred by relying entirely on the fact that the employer factored in the 2013 LCA discipline. There was no showing of a nexus between the employee's protected union activity in 2013 and 2014 and the adverse actions in 2015 and 2016. Though "a legitimate basis for discharge or suspension cannot be established by unlawful disciplinary warnings," that principle has not been applied to "unlawful" discipline that was still in litigation when the subsequent discipline was imposed. "[T]he Board faulted new . . . managers for taking into account prior discipline that should have been 'expunged' from its records. However, "there was no order to expunge" in 2015 or early 2016, when that NLRB order was pending on appeal. Therefore, "[i]t was legal error for the ALJ and the Board to [rely] *entirely* on this factor."

NLRB finding of unlawful secondary activity affirmed. Substantial evidence supported the NLRB's finding that the Iron Workers union violated Section 8(b)(4)(i)(B) of the NLRA by encouraging neutral employees at a construction site to strike or stop work in support of the union's labor dispute with another subcontractor on-site. The Iron Workers' business agent texted the neutral employees a link to a webpage encouraging them not to cross the union's picket line in its labor dispute with another subcontractor. He also spoke directly to the neutral employees at the jobsite and placed copies of a flyer titled "Picket Line Etiquette" in their lunchboxes (*National Labor Relations Board v. International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local 229,* October 28, 2019).

The union conceded that it violated Section 8(b)(4)(i)(B), but it raised a number of constitutional and statutory defenses, all of which the United States Court of Appeals for the Ninth Circuit rejected on appeal. First, the union contended that application of the statutory provision to the conduct in question punished First Amendment–protected expressive activity. However, two circuits have addressed "the First Amendment implications of Section 8(b)(4)(i)(B) in the context of pure speech," and both have held "that the 'First Amendment is not at all implicated' when activities prohibited by Section 8(b)(4)(i) are proscribed." The union also argued that the U.S. Supreme Court's 1951 secondary boycott decision in *International Brotherhood of Electrical Workers v. NLRB* applied only to picketing and not speech. But the Court concluded that "[t]he words 'induce and encourage' are broad enough to include in them every form of influence and persuasion" in order to prevent secondary boycotts. Also rejected was the union's contention that Section 8(c) of the NLRA protected its communications. The court noted that the Supreme Court "definitely and undeniably rejected the notion that activities proscribed by Section 8(b)(4) could escape prohibition through application of Section 8(c)." Finally, the appeals court found the Board "properly rejected [the union's challenges] under the Religious Freedom Restoration Act and under the Thirteenth Amendment to the United States

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Constitution." Accordingly, the Ninth Circuit enforced the NLRB's cease and desist order enjoining the Iron Workers from engaging in unlawful secondary boycott activity.

NLRB rulings

Employer unlawfully ceased longevity pay hike after CBA expired. An employer unlawfully discontinued longevity pay increases provided for in an expired CBA, the NLRB held. After a CBA expires, an employer must maintain the status quo of all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations. By refusing to grant the longevity pay increases, the employer effectively created a two-tier wage system, and this wage "freeze" was a change in status quo. The employer also violated Section 8(a)(5) of the NLRA by refusing the union's request to meet for negotiations (*Richfield Hospitality, Inc.,* August 15, 2019).

Unilateral changes to company-wide retirement benefits lawful. DuPont did not violate Section 8(a)(5) of the NLRA by making unilateral changes to company-wide dental and medical retirement benefit plans without negotiating with three unions whose members were impacted by the change. The parties' agreements, bargaining history, and past practice, when taken together, made clear that DuPont offered, and the unions accepted, company-wide benefit plans in which unit employees would participate on the same terms as all other DuPont employees, subject to the employer's reservation of the right to make changes or terminate the plans on a company-

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Divided four-member panel nixes proposed micro-unit at Boeing

A union's petitioned-for bargaining unit limited to two classifications within Boeing's 787 aircraft production line was an inappropriate micro-unit, the NLRB ruled in a 3–1 decision. "[T]he two classifications in the petitioned-for unit do not share a community of interest with each other, and even if they did, they do not share a community of interest that is sufficiently distinct from the interests of other production-and-maintenance employees excluded from the unit." Applying and clarifying its traditional community-of-interest standard, the Board reversed a regional director's direction of an election, vacated the union's certification, and dismissed the petition. Member Lauren McFerran dissented (*The Boeing Company,* September 9, 2019).

In *PCC Structurals, Inc.,* a 2017 decision, the NLRB majority rejected the Obama Board's micro-unit decision in *Specialty Healthcare*, a 2011 ruling, and announced that it was returning to the traditional community-of-interest test. Under the traditional 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 petitioned-for employees share a community of interest distinct from employees excluded from the proposed unit to warrant a separate appropriate unit." The Board will consider "both the shared *and* the distinct interests of petitioned-for and excluded employees." The analysis also considers "whether excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with [the included employees]."

The Board in *PCC Structurals* did not clearly articulate how that standard should be applied. Here, the Board outlined the three-step analysis for determining whether a petitioned-for unit is appropriate:

1. Whether the members of the petitioned-for unit "share a community of interest with each other"
2. Whether "the employees excluded from the unit have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members"
3. Whether the unit is consistent with guidelines "the Board has established for specific industries with regard to appropriate unit configurations."

Applying this analytical test, the Board found that, on balance, "the interests shared by the petitioned-for

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wide basis. Finding that the unions had waived their right to bargain over the changes, a divided three-member Board panel ruled that the benefit plan changes were lawful (*E.I. Du Pont De Nemours and Company,* September 4, 2019).

Employer lawfully refused to furnish information. A steel processing plant did not unlawfully refuse to provide a union with financial information during contract negotiations, the NLRB held. "The parties had been bargaining for a first contract since the [u]nion's initial certification in 2007." While the union demanded increased pay from the start, the employer repeatedly opposed it, citing "annual declines in business." The Board found "that the [employer's] statements during bargaining," including a comment that the "iceberg" it was on was "melting," "amounted to an assertion of competitive disadvantage rather than a present inability to pay." The company focused primarily on external conditions and competitive pressures—such as an unfavorable economic climate, increased costs, new competitors, and downward pressure on prices. It never said that it did not have sufficient assets to meet the union's demands or would have insufficient assets to do so during the life of the contract, that it was in imminent danger of closing, or that acceptance of the union's demands would cause it to go out of business. And even if the statements could be interpreted as claiming an inability to pay, the employer clarified—explicitly and repeatedly—that it was not claiming an inability to pay (*Arlington Metals Corp.,* September 13, 2019).

Negotiation-expense remedy not warranted. On remand from the Seventh Circuit, the NLRB ruled that a negotiation-expense remedy was not warranted after the appeals court denied enforcement of the Board's finding that an employer engaged in bad-faith bargaining for a successor agreement with the union representing its part-time faculty, and by failing to provide the union with certain requested information. In remanding this case, the appeals court required the Board to reconsider whether the negotiation-expense remedy was still appropriate after the court had denied enforcement with respect to the Board's finding that the employer refused to bargain over the effects of a lawful managerial decision to

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employees . . . are too disparate to form a community of interest within the petitioned-for unit."

Boeing manufactures the 787 aircraft at its South Carolina facility. The production line employs about 2,700 production-and-maintenance employees, and each aircraft requires about 9,000 tasks. The union petitioned to represent a unit consisting of certain technicians and quality inspectors permanently assigned to the flight line, "a unit consisting of only these two classifications, about 178 employees."

While the two classifications "share nearly identical terms and conditions of employment, have frequent daily contact with each other . . . and share many of the same skills and training," they "have significantly different interests in the context of collective bargaining." Thus, "[t]hey belong to separate departments and do not share any supervision." Moreover, "there had never been interchange between [the classifications]." Thus, the requested unit itself was hardly homogeneous in terms of community of interest.

Of perhaps greater significance, however, was step two of the analysis: the fact that the interests of all the excluded employees were not meaningfully distinct from the interests of the petitioned-for employees. All the production-and-maintenance employees enjoyed the same working conditions, were subject to the same policies, and all worked in an integrated manufacturing process producing a single product. Thus, the large grouping of excluded employees clearly shared a significant community of interest with members of the artificially narrow petitioned-for unit.

As to the third step, the Board found that "[n]o industry-specific guidelines are applicable to this case." It rejected "the [e]mployer's contention that the Board has established a presumption in favor of a plantwide unit for integrated manufacturing facilities that must be rebutted by a union seeking a smaller unit." Functional integration is only one factor in the community-of-interest analysis.

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reduce the number of credit hours for certain courses. On remand, the Board concluded that the totality of the employer's remaining misconduct did not warrant an award of negotiation expenses (*Columbia College Chicago,* September 30, 2019).

Cooperative exercised control over initial workforce, was joint employer. The NLRB found that a cooperative of corporate supermarket owners was a joint employer with the individual supermarkets that it had acquired. The cooperative included entities that owned the supermarkets that purchased the nine individual stores in question. The purchase agreement required the supermarkets to make offers of employment agreed to on their behalf by the cooperative, and the cooperative exercised near-absolute control over negotiations for a common CBA that would cover all employees at the newly purchased stores. In fact, the cooperative was the sole "employer" signatory to the CBAs. The cooperative effectively controlled all initial hiring and exercised direct and immediate control over the essential terms and conditions of employment for the individual stores' employees. One individual store owner testified that he could not do anything without the approval of the cooperative when the union asked to deal directly with him to end union handbilling. On these facts, the Board found that the cooperative was a joint employer of those employees (*Seven Seas Union Square, LLC,* October 16, 2019).

Settlement agreement didn't block decertification petition. A regional director erroneously dismissed a decertification petition based on a settlement agreement between the employer and union in which the employer agreed to extend the union's certification year for seven months. After the union filed charges that the employer engaged in bad-faith bargaining in negotiations for an initial contract, the regional director granted the union's request to block further proceedings on the decertification petition and ordered that the petition be held in abeyance pending resolution of the charge. The union and employer later resolved the dispute and entered into a settlement agreement in which the employer did not admit a violation, but they did agree to extend the union's certification year. However, the employee who filed the decertification petition was not a party to the settlement agreement and thus did not lose the right to have his petition processed without delay (*Pinnacle Foods Group, LLC,* October 21, 2019).

The Board has repeatedly held that a decertification "petitioner cannot 'be bound to a settlement agreement by others that has the effect of waiving the petitioner's rights under the Act to have the decertification petition processed,'" the Board majority observed, reversing the regional director in a 3–1 decision. In *Cablevision Systems Corp.*, the Board reaffirmed that "when a decertification petition has been blocked by subsequently settled unfair labor practice charges, 'a timely filed decertification petition that has met all of the Board's requirements should be reinstated and processed at the petitioner's request following the parties' settlement and resolution of the unfair labor practice charge.'" The Board also pointed to its 2007 decision in *Truserv Corp.*, in which the Board held that, absent a finding of a violation or an admission by the employer of such a violation, there is no basis for dismissing a petition based on the settlement of alleged but unproven unfair labor practices. In light of this precedent, the Board concluded that the regional director erred.

Employer unlawfully surveilled employee Facebook group. The NLRB found that an employer engaged in unlawful surveillance of a private, invitation-only employee Facebook group dedicated to supporting unionization. The company president repeatedly solicited and received reports regarding pro-union messages on the Facebook page, as well as the names of the group's members and page administrators. The Board rejected the employer's argument that there was no unlawful surveillance, because the employees were not aware that their activity was being monitored and because the employer took no adverse employment action based on the information it obtained (*National Captioning Institute, Inc.,* October 29, 2019).

The complaint also alleged that the employer violated the NLRA by implementing and maintaining unlawful social media and unacceptable behavior policies. The employer searched an in-house chat platform shortly after learning that employees were in contact with a union, and it looked for conversations by a known union supporter. The employer located entries by a "squeaky wheel" employee who held herself out as a leader of the organizing campaign and who posted a number of workplace complaints. One of the complaints involved having to cover for a coworker who had undergone surgery, and the employee discussed her coworker's surgery in detail. When the coworker complained that the employee was discussing her medical condition on the chat platform, the employee was issued a warning for violating the unacceptable behavior policy. Since it was

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unclear whether the propriety of the discipline should be analyzed as a "work rule" or as an "ad hoc directive," the Board remanded this allegation to the ALJ.

Comments about employee petition were not coercive or protected. Statements by a non-profit's executive director about a petition that employees joined in support of compensation for unpaid interns did not imply a threat of reprisal against the employees, concluded the NLRB. At a meeting with one of the employees involved in collecting signatures, the executive director said she saw the petition as "litigious," "adversarial," and "sort of levy[ing] a threat." She also said she was "very embarrassed" that her employees felt they could not approach her about the issue, and that she was disappointed that she did not "have the kind of relationship with staff" that she thought she had. Finally, she said that it would have been "really helpful" to have had advance notice that the interns were interested in paid internships, adding that the employee could have given her a heads-up. The Board noted that "to violate Section 8(a)(1), a statement must contain a threat of reprisal, or force or promise of benefit." While the executive director's statements may have conveyed her disappointment about how the petition was handled, they did not contain any threat of reprisal. Moreover, there was no evidence the employees signed the petition for any other reason than to support the interns. However, interns are not "employees" under Section 2(3) of the NLRA, and activity advocating for non-employees is not protected activity. Accordingly, on both grounds, the executive director's statements did not violate the NLRA (*Amnesty International of the USA, Inc.,* November 12, 2019).

Board finds nexus between discharge, union activity; "clarifies" *Wright Line*. In a supplemental decision on remand from the Eighth Circuit, the Board found that the general counsel "quite convincingly" established that an employee's union activity was a motivating factor in the decision to discharge him. There was undisputed evidence that the discharged employee initiated a union campaign, served as the union's election observer, and frequently discussed the union with other employees. The employer knew of his union activity and issued him a written warning "for discussing union organizational viewpoints." Just one day after issuing the warning, the employer advised the union's business agent that the employee could be terminated if he did not stop "bothering" coworkers about the union. The Board emphasized that these circumstances were evidence of *specific* animus against the employee's union activity, not merely generalized union animus. Six weeks later, and without the benefit of an investigation, the employee was precipitously discharged for accessing non-work-related websites while at work (*Tschiggfrie Properties, Ltd.*, November 22, 2019).

The NLRB took the opportunity to "clarify" the general counsel's *Wright Line* burden, noting the confusion that followed the Board's 2014 decision in *Libertyville Toyota*. In that case, the Board stated that the general counsel did not have to make a showing of "particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." But the Eighth Circuit reviewed this formulation in *Nichols Aluminum, LLC v. NLRB*, and noted the Board "misapplied the *Wright Line* standard and failed to analyze causation properly." Recent precedent suggested the burden could be met with proof of circumstantial evidence of *any* animus or hostility toward union or other protected activity. But the "causation test" requires more.

Direct or circumstantial evidence of animus "must support finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." To the extent *Libertyville Toyota* and its progeny suggested that the general counsel satisfied *Wright Line* by "simply producing *any evidence* of the employer's animus or hostility toward union or other protected activity," they were overruled. Direct evidence of animus is not required, though; discriminatory motivation can be inferred from circumstantial evidence in certain instances.

Member McFerran, in a separate concurrence, expressed fear that this "clarification" might result in a "significant raising of the bar" in future *Wright Line* cases.

Employer wasn't obligated to bargain following unit consolidation. The consolidation of a unionized group of employees with a larger group of non-union employees, following an employer's acquisition of another company, resulted in the former bargaining unit losing its separate identity. Following the acquisition, the smaller unionized group was absorbed by the larger non-union workforce, the union and non-union employees became fully combined and integrated and the historic unit lost its distinct identity. Under

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such circumstances the employer is no longer obligated to recognize or bargain with the union as the representative of employees in the historic unit or to place new hires in the union-represented group. To hold otherwise would mean that a minority of employees in a workplace have essentially compelled the majority of employees, who are unrepresented, to be included in a bargaining unit without allowing them the opportunity to express their preference through an election, explained the Board (*ADT, LLC,* November 22, 2019).

A snack food distributor did not unlawfully refuse to bargain with the union over the sale of four distribution routes, a divided Board found.

No union animus in transferring employee to different shift than wife. The general counsel failed to meet his initial *Wright Line* burden of proving that a hospital employee's shift assignment was discriminatorily motivated, ruled the NLRB. The employee was a union supporter who wore a union lanyard and had appeared in a photograph on the union's Facebook page. However, there was no direct evidence the employer knew of his union activity when it reassigned him to a different shift than the one he shared with his wife. Rather, the reassignment was based on a policy against "related persons" working the same shift and a recommendation from human resources to reassign him. An ALJ had inferred animus from the timing of the reassignment and the "suddenness" of the employer's decision to enforce an existing policy against family members working on the same shift. However, the ALJ failed to give sufficient weight to the facts surrounding the decision. The supervisor who made the decision had recently taken over as director of the department and learned that he had a married couple on the same shift. After consulting with the human resources department, he reassigned the employee to the day shift. The ALJ's inference of animus was based on circumstantial evidence and thus was not warranted, the Board ruled (*Queen of the Valley Medical Center,* November 25, 2019).

Case remanded for retroactive application of community-of-interest standard. A divided Board panel recently denied summary judgment in a technical refusal-to-bargain case in which an employer was challenging a union's certification. The Board remanded the case to the regional director for retroactive application of the community-of-interest standard established in *PCC Structurals.* The majority noted that because there was an intervening change in the legal standard applicable to the unit determination (*PCC Structurals* restored the traditional test that was abandoned in *Specialty Healthcare*, which since has been reversed), it was appropriate to permit relitigation of the issue. The "usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage,'" the Board said. It applies a new rule "to the parties in the case in which the new rule is announced and to parties in other cases pending at the time so long as [retroactivity] does not work a manifest injustice." Applying these principles, the Board found that retroactive application of *PCC Structurals* would not work a manifest injustice. Assuming the union relied on *Specialty Healthcare* in selecting the scope of the petitioned-for unit, the Board rejected the view that such reliance would preclude retroactivity in *PCC Structurals* itself, which the Board remanded to the regional director to apply the standard announced by the Board therein (*Cristal USA, Inc.,* December 11, 2019).

Employer had past practice of selling union delivery routes. A snack food distributor did not unlawfully refuse to bargain with the union over the sale of four distribution routes, a divided Board found. The company deployed both (unionized) employees and independent distributors to deliver its products from plants to distribution centers, and then from distribution centers to customers. For nearly two decades, the company had been selling off its less profitable routes, and the union did not object or request to bargain over those sales. The latest route sales were in keeping with a long-standing past practice, a continuation of the status quo, and consistent with *Raytheon Network Centric Systems*, which held that an employer may take unilateral actions "similar in kind and degree with what the employer did in the past, even though the challenged actions involved substantial discretion" (*Mike-Sell's Potato Chip Company,* December 16, 2019).

An ALJ had found that the prior route sales were "neither regular nor consistent," because the company did not sell any routes in 10 of the preceding 17 years and because the reasons for the most recent route sales were "materially varied in kind and degree," in that they were not due to unprofitability. However, the Board disagreed, noting that the employer had sold 51 routes over a span of 17 years, and this was "sufficient to establish a past practice

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of such regularity and frequency that employees would expect and recognize the contested 2016 route sales as a continuation of that established operational process." *Raytheon* reaffirmed two prior decisions, which held that a past practice existed without examining whether the actions took place at a regular time pattern or if the same number of actions were taken at each interval. Moreover, there is no Board precedent that requires an employer to have similar reasons for a recurrent action; the employer needs to show only that similar actions have been taken, for any reason, "such that employees would recognize an additional action as part of 'a familiar pattern comporting with the [employer's] usual method of conducting its manufacturing operations.'"

A supervisor at a Domino's Pizza restaurant engaged in objectionable pro-union activity when he said that employees would lose their jobs if the union lost an impending election.

Supervisor's pro-union conduct tainted election. A supervisor at a Domino's Pizza restaurant engaged in objectionable pro-union activity when he said that employees would lose their jobs if the union lost an impending election. The supervisor's conduct was coercive, a divided NLRB found, even if the supervisor had no firing authority, explaining that "express statements that employees will lose their jobs based on the election result cannot be construed as anything but highly coercive attempts to induce employees to vote for the union." The Board reversed the regional director's certification of representative and concluded that the supervisor's conduct warranted a new election (*Domino's Pizza LLC*, December 16, 2019).

Limited bargaining order will remedy implementation of final offer. An employer violated the NLRA by unilaterally implementing its final offer absent a valid impasse, the NLRB held in adopting an ALJ's finding. However, it did not adopt the ALJ's additional finding that the employer unlawfully refused to bargain with the union after implementing its final offer, because the complaint did not allege this violation and the ALJ did not analyze the issue. Consequently, the Board issued a limited bargaining order directing the employer to rescind the unilateral changes, "cease and desist from implementing a final offer absent a valid impasse," and "not depart from the status quo ante without giving the [u]nion notice and opportunity to bargain."

Dissenting in part, Member McFerran would have imposed an affirmative bargaining order, noting "the Board's well-established position that in a remedial context uncertainty resulting from unlawful conduct must be resolved against the wrongdoer." However, after a 2002 Board decision, it "began issuing so-called limited bargaining orders" to remedy unilateral-change violations. And while it has not been "perfectly consistent" since then, "limited bargaining orders have long been regarded as the standard remedy for unilateral-change violations." Further, an affirmative bargaining order, with its corresponding decertification bar, "would add nothing to the [employer's] legal obligations" and "is not necessary to effectuate the purposes of the [NLRA]," according to the majority. "The only material difference an affirmative bargaining order would make would be to preclude the [union members], for as long as a year, from exercising their Section 7 rights to choose to be represented by a different union or by no union at all" (*American Security Programs, Inc.,* December 16, 2019).

Insistence on negotiating non-economic terms first was lawful. A divided NLRB reversed an ALJ's finding that an employer violated Section 8(a)(5) of the Act "by insisting on resolving noneconomic subjects of bargaining before discussing economic subjects." The parties had explicitly agreed to discuss noneconomic proposals first; moreover, "at the time bargaining ceased, the [employer] had not fragmented bargaining or frustrated the parties' ability to reach agreement," as "the parties were still making progress toward agreement on non-economic subjects of bargaining." Thus, "we do not believe that it is the Board's place to pass judgment on what subjects the parties should have prioritized during bargaining," the majority said. And the employer did not violate the Act "by failing to comprehensively respond to the [u]nion's . . . complete contract proposal." However, the Board affirmed the ALJ's finding that the employer unlawfully withdrew recognition from the union, because the company failed to establish that the union had actually "lost majority support at the time." It also adopted, in part, the ALJ's conclusion that the employer refused to furnish relevant information sought by the union pursuant to its role as the employees' bargaining representative (*Wyman Gordon Pennsylvania, LLC*, December 16, 2019). ■

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