Ogletree Deakins

ISSUE 25 | FALL 2023

EMPLOYERS AND LAWYERS, WORKING TOGETHER

The Practical NLRB Advisor

Management authority over workplace under fire

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In two far-reaching, and deeply divided decisions, the Biden-era National Labor Relations Board (NLRB) has once again adopted new standards that continue to stretch the concept of protected concerted activity and create significant new managerial challenges and headaches for employers. In these two consequential opinions, the Democratic-led Board has restricted an employer's power to manage the workplace by: (1) instituting facially neutral work rules and handbooks; and (2) disciplining or discharging employees who engage in inappropriate or abusive conduct during otherwise protected activity under Section 7 of the National Labor Relations Act (NLRA).

These latest decisions join the current Board's previously issued slew of sharply divided decisions that were issued in the very last days of former member John F. Ring's term, and are discussed in detail in Issue 23 of the *Practical NLRB Advisor*. The Democratic majority's determination to use its decisional authority to reject established law has been continuously on full display, as it tilts the labor-management playing field decidedly in favor of organized labor. As we have previously noted, the seismic policy swings by the Board and its general counsel not only create huge managerial problems for employers, they also destabilize settled law and raise question as to the NLRB's ability to act as a neutral arbiter of the NLRA.

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BRIAN IN BRIEF

It has been a long hot summer in Washington, D.C., and at the National Labor Relations Board (NLRB). With the August expiration of Member Gwynne A. Wilcox's term approaching, the Democratic-led Board majority used the event to release a slew of end-of-term decisions that continues its dangerous course of reversing or substantially modifying broad swaths of extant decisional law under the National Labor Relations Act (NLRA).

In this issue of the *Advisor*, we cover three of those sharply divided decisions, taking a deeper dive into the Board's alarming new standards for evaluating workplace rules and disciplinary decisions and its return to an Obama-era independent-contractor standard that could make it more likely that workers will be found to be employees entitled to protections under the NLRA. In addition, we examine two more decidedly pro-labor directives issued by the Board's general counsel. The Board's other consequential end-of-term reversals will be detailed in the next *Advisor* edition.

As it eventuated, though Member Wilcox's term expired on August 27, 2023, she was not gone from the NLRB for long. The U.S. Senate approved her renomination to a second five-year term about one week later. Since the White House has not yet submitted a nomination to the Senate for the other vacant seat on the five-member Board, the agency is now split 3-1 on ideological and political lines with Member Marvin E. Kaplan as the sole Republican.

The timely and successful renomination of Wilcox is significant since, by long-standing tradition, the Board typically declines to overrule any existing precedent absent three votes to do so. With Wilcox back in the mix, there is a presumptive three-vote majority on virtually all the existing hot issues. Employers should now plan that the recent tide of important Board reversals will continue unabated.

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" insights. 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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Board adopts standard critical of workplace rules

On August 2, 2023, the NLRB issued a divided opinion in which it adopted a new burden-shifting standard for evaluating whether work rules infringe on employees' rights under Section 7. The new approach may require employers to significantly modify their extant work rules to ensure that they are narrowly tailored and do not even arguably trench on employee rights. The ruling in *Stericycle, Inc.* resuscitates and modifies the Board's analytical standard established in *Lutheran Heritage Village-Livonia* and overturns the two-factor balancing test the Trump Board previously adopted in *Boeing Co.* and *LA Specialty Produce Co.* that more clearly balanced employers' legitimate business interests in maintaining workplace rules with employee rights.

Under the newly adopted standard, the NLRB will now evaluate work rules and policies by determining whether the general counsel establishes that the work rule in question *could* reasonably be interpreted to have a coercive meaning, even if a contrary, noncoercive interpretation of the rule is also reasonable. In making this determination, the NLRB "will interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer." If this burden is met, under *Stericycle*, the NLRB will find that the rule is presumptively unlawful. The employer may rebut this presumption by proving that the rule advances a legitimate and substantial business interest *and* that the employer is unable to advance that interest with a more narrowly tailored rule.

Work rules and the NLRA. The lawfulness of facially neutral work rules and handbooks under the NLRA has been a heavily litigated issue at the NLRB in recent years, impacting both unionized and nonunionized workplaces. Section 8(a)(1) of the NLRA makes it an unfair labor practice for employers to interfere with, restrain, or coerce employees in the exercise of their right to engage in "concerted activities" under Section 7 of the Act, including the right to organize and bargain collectively. While the Board has long recognized the importance of considering business justifications for rules, the Board in its 2004 *Lutheran Heritage Village-Livonia* decision said that rules cannot stand if "employees would reasonably construe the language to prohibit Section 7 activity."

In *Boeing*, the Board overturned *Lutheran Heritage* and established a framework for determining whether a facially neutral policy, rule, or handbook provision, when reasonably interpreted, potentially interfered with employees' exercise of NLRA rights. Under that framework, the NLRB evaluated a rule by (i) the nature and extent of the potential impact on rights under the Act, and (ii) the employer's legitimate justifications associated with the rule. Under *Boeing*, the Board would find that the rule's maintenance violated the NLRA if the business justifications for the rule were outweighed by the adverse impact on employees' Section 7 rights.

In *Boeing*, the Board further emphasized that the fact that a rule was overly broad was, on its own, insufficient to constitute a violation of the NLRA. In addition, for clarity, the *Boeing* Board delineated employment rules and policies into categories as cases were decided, including some categories of rules that the Board found do not prohibit or interfere with the exercise of Section 7 rights.

Two years later in *LA Specialty Produce*, the Board further clarified that rules must be interpreted from "the standpoint of reasonable employees," not "traditional labor lawyers," meaning rules should not be scrutinized to find any and all potential applications that may restrict NLRA-protected activity. The Board also emphasized that the burden of proof is on the general counsel to show that the rule in question actually interferes with NLRA rights.

***Boeing*'s categorical approach abandoned.** In the *Stericycle* decision, the Board concluded that the standard established in *Boeing*, and later refined by *LA Specialty Produce*, permitted employers to implement overbroad work rules that chill employees' exercise of their rights under the NLRA. The Board stated that the *Boeing* standard for evaluating rules "fails to account for the economic dependency of employees on their employers," which makes employees inclined to "construe an ambiguous work rule to prohibit statutorily protected activities."

Further, the Board rejected the categorical approach under *Boeing* that determined certain types of rules were categorically lawful, including investigative-confidentiality rules, nondisparagement rules, and rules prohibiting outside employment. The NLRB also overruled Board decisions involving work rules relying upon *Boeing* and *LA Specialty*

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Produce. Instead, the Board adopted a modified version of its prior *Lutheran Heritage* standard, clarifying that the rule will be interpreted from the perspective of the employee contemplating Section 7 activity, and on a case-by-case basis.

The Board stated that "if an employee *could* [emphasis added] reasonably interpret the rule to have a coercive meaning, the General Counsel will carry her burden," establishing a presumption that the rule is unlawful "even if a contrary, noncoercive interpretation of the rule is also reasonable." However, employers "may rebut that presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule." Notably, the Board declined to address the issue of whether a "safe harbor" provision could effectively disclaim any potential infringement on employee rights.

[T]he Stericycle decision … adopts the stance pushed by the Biden-appointed general counsel to look more critically at workplace rules, which could make it more likely that workplace rules—even commonplace ones—will be challenged and found to be unlawful.

The Board found that the new standard applies retroactively to pending cases and remanded to the administrative law judge the allegations over the employers' specific work rules for "further appropriate action" in light of the newly adopted standard. The Board further stated that this decision does not change Board precedent on work rules covering union (or other protected) solicitation, distribution, or insignia.

Dissent. In a dissenting opinion, Member Marvin Kaplan criticized the majority's approach, arguing that the new standard gives effectively "dispositive weight" to the "employee rights" side of the balance between employee rights and employer interests.

Employers beware. The *Stericycle* decision is the latest employee-friendly ruling from the Board in its current political makeup, including the February 2023 decision in *McLaren Macomb* that found certain nondisparagement and confidentiality provisions in severance agreements unlawful, and which is discussed in detail in Issue 23 of the *Practical NLRB Advisor*. Indeed, the *Stericycle* decision could prove even more significant because it adopts the stance pushed by the Biden-appointed general counsel to look more critically at workplace rules, which could make it more likely that workplace rules—even commonplace ones—will be challenged and found to be unlawful. Employers may want to consider reviewing their rules and handbooks to ensure compliance with the NLRA in light of the decision.

Ruling hampers ability to discipline workers over outbursts

Just three months earlier, on May 1, 2023, the NLRB issued a decision that changed the standards relating to discipline or discharge of workers who cross the line with offensive or abusive conduct while engaging in activity protected by the NLRA. In *Lion Elastomers LLC II,* the Biden Board reversed the Trump Board's 2020 ruling in *General Motors LLC*, and returned to "various setting-specific" standards for determining when discipline or discharge is lawful for employee misconduct during otherwise protected concerted activity under Section 7 of the NLRA. The Biden Board held that to "fully protect employee rights, conduct during protected concerted activity must be evaluated in the context of that important activity—not as if it occurred in the ordinary workplace context."

2020 decision focused on motive. Employers are often confronted with situations in which an employee engages in an outburst or abusive conduct during otherwise protected concerted activity—for example, the use of profane, sexually harassing, or racially inappropriate statements during collective bargaining negotiations, on a social media post, or on a picket line. For many years, such outbursts were evaluated under multiple, slightly different tests tied to the setting of the outburst.

Prior to 2020, the Board used three different "setting-specific" tests—each with its own analysis—to resolve this question. This proved confusing to employers, yielded inconsistent decisions, and resulted in the Board's sanctioning some repugnant workplace behavior as protected by the Act. Accordingly, in a 2020 decision, the Trump Board harmonized its approach to such outbursts

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and held, in *General Motors*, that one consistent standard should be applied to all cases involving abusive context in the course of Section 7 activity. In *General Motors*, the Board adopted the *Wright Line* test for such disciplines or discharges—which focuses on the motive of the employer in taking adverse action. Under *Wright Line*, employers generally can meet their burden by demonstrating that they would have treated the employee the same whether or not they were engaging in NLRA-protected activity.

Revival of "setting-specific" tests. In its decision in *Lion Elastomers LLC II*, the Biden Board abandoned its reasonable change in 2020 and held that its confusing setting-specific tests must, again, be applied to determine whether a relevant disciplinary action is a violation of the NLRA. The new (old) standards are as follows:

1. **Employee conduct toward management in the workplace:** Such conduct should be evaluated under *Atlantic Steel*, which has a four-factor test that the Board will review to determine whether an employee's conduct during Section 7 activity loses the protection of the Act: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."
2. **Employee posts on social media and most conversations among employees in the workplace:** Such conduct will be evaluated under a totality of the circumstances test, considering all the relevant surrounding context.
3. **Picket-line conduct:** Such conduct will be evaluated under *Clear Pine Mouldings*, with an analysis of whether, under all of the circumstances, non-strikers reasonably would have been coerced or intimidated by the picket-line conduct.

In the next issue …

In the last days of August, the NLRB also issued two controversial decisions that will make it more difficult for employers to implement past practices during a break in bargaining or at an impasse, opening the door for unions to hold employers hostage by dragging out collective bargaining. In another consequential decision, the Biden Board adopted a new standard for union representation that requires an employer to recognize and bargain with a union that has demonstrated majority status unless the employer challenges the union's support through an employer-initiated NLRB election and does so without committing an unfair labor practice. One day earlier, the Board announced a new final rule for union elections that revives the prior "ambush" election rules. These and other significant labor developments will be discussed in detail in the next issue of the *Practical NLRB Advisor*.

Importantly, under all of the operative setting-specific standards, the first step of the analysis requires an evaluation of whether an employee or employees engaged in Section 7 activity (i.e., concerted activity for the purpose of collective bargaining or other mutual aid or protection).

Dissent's warning. Board Member Marvin Kaplan filed a dissenting opinion warning that setting-specific tests may lead to inconsistent results, writing:

> I am concerned that today's decision will, once again, require employers to continue to employ individuals who have engaged in such abusive conduct any reasonable employer would have terminated them for that conduct. If the past is any guide, the Board will now protect employees who engage in a full range of indefensible misconduct, such as profane ad hominem attacks and threats to supervisors in the workplace, posting social media attacks against a manager and his family, shouting racist epithets at other employees, or carrying signs sexually harassing a particular employee.

The Board majority challenged Member Kaplan's objection that setting-specific tests that do not take an employer's motive into consideration may impose legal obligations on employers that conflict with their "legal duties to protect employees from discrimination on the basis of protected characteristics—including race, color, religion, sex, national origin, age, and disability—as set forth in Federal, state, and local antidiscrimination laws." While the majority acknowledged that the NLRA must accommodate other federal statutes, it emphasized that other federal statutes

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must accommodate the Act and stated that there was no "obvious or inevitable conflict … between the Board's approach … and Federal antidiscrimination law" because, in many instances, employee outbursts will not rise to the level of discriminatory changes in the terms and conditions of employment. Ultimately, the Board indicated that such concerns can be addressed in appropriate future cases to the extent there is a possible conflict and did not issue any instructions or guides to employers that seek to navigate such tensions.

Stuck between a rock and a hard place. The Board's decision in *Lion Elastomers LLC II* may mark a step backward for employers in terms of dealing with offensive or abusive conduct that goes beyond the bounds of proper workplace conduct (i.e., maintaining a workplace free from violence, harassment, and discriminatory conduct) simply because the conduct arguably occurs in the context of exercising protected activity. Employers may now, once again, be in a difficult position in which they choose to either discipline or discharge a worker for such misconduct or do nothing and thereby implicitly condone the behavior. ■

Independent-contractor test modified, again

On June 13, 2023, the National Labor Relations Board (NLRB) overruled its 2019 independent-contractor standard focused on whether workers have "entrepreneurial opportunity" and returned to a common law multi-factor analysis that could lead to more workers being found to have been improperly classified as independent contractors.

In *The Atlanta Opera, Inc.*, the Biden Board overturned the Trump Board's 2019 ruling in *SuperShuttle DFW, Inc.* and returned the Board to a 2014 Obama-era standard that had focused on whether the workers in question work for separate, independent businesses. Applying this framework, the Biden Board ruled that makeup artists, wig artists, and hairstylists working for the Atlanta Opera—who filed a petition seeking representation by a union—are employees under Section 2(3) of the National Labor Relations Act (NLRA) and not independent contractors.

Background. The Atlanta Opera opposed a petition by a group of makeup artists, wig artists, and hairstylists who performed work for the opera to be represented by a union, arguing that the artists were independent contractors and thus excluded from coverage under the NLRA and not statutory employees entitled to its protection. After a hearing, an NLRB regional director ruled that the artists in the proposed bargaining unit were statutory employees.

In December 2021, the Board granted review of the case. Even though the opera argued only that the regional director misapplied the independent-contractor factors, the Board used the case to conduct a complete review and revision of its independent-contractor standard. The Board, on its own, raised the questions of whether it should stay with the independent-contractor standard articulated in *SuperShuttle DFW* and, if not, whether it should return to a standard focused on whether the putative employees are in business for themselves.

Independent-business analysis revived

In the *Atlanta Opera* decision, the Board majority decision reverted back to the independent-business analysis, concluding that focus on the entrepreneurial opportunity—which was previously observed by the U.S. Court of Appeals for the D.C. Circuit and adopted in *SuperShuttle DFW*—cannot be "reconciled" with the Board's prior precedent. Under this "independent-business analysis," the Board stated that the analysis should turn on the questions of whether the putative contractor: "(a) has a realistic ability to work for other companies; (b) has proprietary or ownership interest in their work; and (c) has control over important business decisions," such as scheduling, hiring, assignment of employers, purchasing equipment, and committing capital. Its analysis looked at the following factors:

1. "Extent of Control by Employer"
2. "Whether or not Individual is Engaged in a Distinct Occupation or Business"
3. "Whether the Work is Usually Done Under the Direction of the Employer or by a Specialist Without Supervision"
4. "Skill Required in the Occupation"
5. "Whether the Employer or Individual Supplies Instrumentalities, Tools, and Place of Work"

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6. "Length of Time for which Individual is Employed"
7. "Method of Payment"
8. "Whether or Not Work is Part of the Regular Business of the Employer"
9. Whether or not the Parties Believe they are Creating an Independent-Contractor Relationship"
10. "Whether the Principal is or is not in Business"
11. "Whether the Evidence Tends to Show that the Individual is, in Fact, Rendering Services as an Independent Business"

Applying the decision to the Atlanta Opera makeup artists, wig artists, and hairstylists, the Board found that most of the common-law employment factors pointed toward the workers being employees, rather than independent contractors. The Board stated that the opera exercises control over their day-to-day work, gives feedback and instructions on their work, provides necessary equipment and supplies, and pays an hourly wage with the potential for overtime pay. At the same time, the Board noted that the workers' distinct occupations, special skillsets, and lack of expectation of continuous employment weighed in favor of them being considered independent contractors.

Partial dissent. Member Marvin Kaplan issued a partial dissent that disagreed with the majority's premise that *SuperShuttle DFW* had changed Board precedent. He argued that entrepreneurial opportunity has always been at the core of the common law independent-contractor test and that "several courts have recognized entrepreneurial opportunity as an important consideration in evaluating the common-law agency principles."

Kaplan further argued that the Board's decision is unlikely to withstand judicial review, pointing out that the D.C. Circuit has already found the Board's previous entrepreneurial opportunity analysis to be consistent with precedent from the Supreme Court of the United States and the Board in addition to the common law. He stated, "there is no reason to expect the court to reach a different conclusion this time." However, he concurred in the majority's finding that the workers involved were indeed employees, even if the *SuperShuttle DFW* standard had been applied.

Significance. Whatever label one uses—independent contractors, gig workers, freelancers, or independent workers—there is no argument that such individuals comprise a huge and growing presence in the U.S. economy. Studies suggest that in 2020 some 59 million individuals, or 36 percent of the U.S. workforce, had participated in some capacity in the so-called gig economy. The same study predicted that by 2024 such individuals would comprise more than 50 percent of the U.S. workforce.

The notion that these alternative work arrangements now comprise an extremely significant segment of the U.S. economy is beyond debate. Also very likely beyond debate is the fact that, when the NLRA was amended in 1947 to specifically exclude independent contractors from coverage, no one in Congress ever envisioned that such work relationships would proliferate to the current extent. As the numbers have grown, so too has the debate over where to draw the line between excluded independent contractors and included employees. Unions have consistently sought the broadest possible interpretation of the term "employee" and the narrowest possible construction of the term

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Wilcox confirmed to second term

A little more than one week after her term expired, the U.S. Senate voted to confirm the renomination of Member Gwynne A. Wilcox for a full term on the National Labor Relations Board (NLRB). Following a vote to invoke cloture and proceed to the nomination, Wilcox was confirmed by a vote of 51-to-48 in the Senate. Surprisingly, one Democrat, Joe Manchin (D-WV), voted against the pro-labor Democrat nominee, and two Republicans, Lisa Murkowski (R-AK) and Dan Sullivan (R-AK), supported the renomination.

The action was also unusual in that there also exists a Republican vacancy on the Board. With two vacancies such as this, Wilcox typically would have been "paired" with a Republican nominee for the other seat. While there are rumored candidates for the empty Board seat, the White House has yet to send any nominees' names to the Senate. The Board now has four confirmed members—three Democrats and Marvin Kaplan, the sole Republican.

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"independent contractor." The equation is simple: the more employees, the more potential members, the greater the bargaining leverage and the higher the dues revenue. The NLRB itself has also generally tended in the same direction since those interpretations broaden its own jurisdiction and relevance—hence, the continuing debate and often foolish exercise of the Board trying to fit "round" new work arrangements into "square" traditional statutory definitions.

There are plenty of arguments on either side of the question of whether these new work arrangements are either suitable or appropriate for collective bargaining. That certainly is a judgement call best left to Congress. However, there is little chance Congress will ever return to and clarify the "employee" definition in the NLRA. Consequently, only two things are certain. First, the debate will continue by utilizing outdated terms and analyses to resolve unanticipated issues. Second, as long as the NLRB retains its current ideological disposition, the notion of "employee" will be stretched as far as humanly possible.

The *Atlanta Opera* ruling returns the Board to an independent-contractor standard that could make it more likely that workers will be found to be employees entitled to the protections under the NLRA, including the right to organize for union representation. The labor-friendly ruling is in line with recent decisions of the Board under its current composition as the Biden-appointed general counsel continues to push an aggressive, pro-labor agenda. Employers wishing to utilize independent contractors may want to review their workplace policies and procedures governing use of independent contractors. ■

General counsel compliance timetables, noncompete scrutiny

In another effort to speed up the processing of cases, the general counsel (GC) of the National Labor Relations Board (NLRB) issued a memorandum on May 22, 2023, instructing regional offices to speed up compliance with Board-ordered remedies in labor cases. In a second, and even more significant memorandum issued eight days later, the GC took aim at employers' use of noncompete agreements, announcing her view that the "proffer, maintenance, and enforcement" of these types of agreements in employment contracts and severance agreements violate the National Labor Relations Act (NLRA) "[e]xcept in limited circumstances." Since the GC has the discretion to determine whether unfair labor practices complaints are issued and, if so, on which theory they will be prosecuted, expect that such agreements will be under scrutiny and attack by the NLRB. Ogletree Deakins attorneys Jennifer G. Betts, C. *Thomas* Davis, Tobias E. Schlueter, Thomas M. Stanek, Christine Bestor Townsend, and Zachary V. Zagger offer their insights into the GC's latest directives on these consequential issues.

Chipping away at employment contracts

On May 30, 2023, the GC issued a memorandum entitled "Non-Compete Agreements that Violate the National Labor Relations Act," and declared a position foreshadowed by her March 2023 memorandum on the impact of the NLRB's hotly divided decision in *McLaren Macomb*, discussed in detail in Issue 24 of the *Practical NLRB Advisor*. In GC 23-08, the GC explained that noncompete agreements are overbroad in violation of Section 8(a)(1) to the extent they "reasonably tend to chill employees" from engaging in protected NLRA Section 7 activity.

The GC stated that a violation will be found unless employers can show that such a "provision is narrowly tailored to special circumstances justifying the infringement of employee rights." That standard is the same as the standard that the NLRB adopted in the recently issued *Stericycle, Inc.* decision, which principally relates to employer workplace rules and handbooks (and which we discuss in the lead story of this issue of the *Advisor*).

According to the memorandum, a "desire to avoid competition from a former employee is not a legitimate business interest that could support a special circumstances defense." Further, protecting "special investments in training employees" is "unlikely" to ever justify a noncompetition restrictive covenant because of the general protection for employee mobility under "U.S. law." The GC also noted that such interests may be protected through less restrictive means, such as a longevity bonus. Because the NLRA

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applies to only employees with Section 7 rights, the GC's memorandum seemingly does not apply to noncompete agreements offered to supervisory or managerial employees within the meaning of the NLRA.

'Overbroad.' The GC explained that, in her view, noncompetes are "overbroad" because they "tend to chill employees in the exercise of Section 7 rights" to improve working conditions. While noncompete agreements have long been used to protect employers' legitimate business interests, according to the GC, they may chill protected concerted activity because employees may understand the noncompetition restrictive covenants as denying their ability to quit or change jobs or blocking them from seeking other opportunities for which they may be qualified.

Further, the GC identified five additional types of activity in her view protected by Section 7 of the NLRA that she believes noncompetes interfere with or restrain:

- "concertedly threatening to resign to demand better working conditions";
- "carrying out concerted threats to resign or otherwise concertedly resigning to secure improved working conditions";
- "concertedly seeking or accepting other employment with a local competitor to obtain better working conditions";
- "soliciting their co-workers to go work for a local competitor as part of a broader course of protected concerted activity"; and
- "seeking employment … specifically to engage in protected concerted activity with other workers at an employer's workplace."

At the same time, the GC did note that "not all non-compete agreements necessarily violate the NLRA," specifically:

- "provisions that clearly restrict only individuals' managerial ownership interests in a competing business";
- "true independent-contractor relationships"; or
- "circumstances in which a narrowly tailored non-compete agreement's infringement on employee rights is justified by special circumstances."

The GC also noted that employers have legitimate business interests in protecting proprietary or trade secret information but that such interests "can be addressed by narrowly tailored workplace agreements." Notably, the GC indicated that employer justifications will rarely be considered reasonable in situations involving noncompete provisions "imposed on low-wage or middle-wage workers who lack access to trade secrets or other protectable interests." Many states already prohibit the use of noncompete agreements with low-wage workers.

The GC instructed the regional offices to submit cases to the NLRB's Division of Advice involving noncompete provisions that are "arguably unlawful" and, where appropriate, "seek make-whole relief for employees" who can show that an "overbroad" noncompete provision caused them to lose out on other employment opportunities, "even absent additional conduct by the employer to enforce the provision."

Key takeaways. The GC's May 30, 2023, memorandum confirms that noncompetition agreements are an enforcement priority for her office. Importantly, GC 23-08 reaches restrictive covenants applicable both during and after employment, not simply post-employment restrictions. The memorandum, unfortunately, leaves ambiguity for employers as it does not contain specific examples of provisions that the GC views as problematic, focusing, instead, on broad concepts and defining noncompete agreements as "agreements between employers and employees prohibit[ing] employees from accepting certain types of jobs and operating certain types of businesses after the end of their employment."

In a footnote, the GC highlighted her office's "interagency approach" to protecting employee rights. In 2022, the GC entered into memoranda of understanding with both the Federal Trade Commission (FTC) and the U.S. Department of Justice's Antitrust Division that addressed noncompete agreements in employment. However, the GC's May 30, 2023, memorandum comes after the FTC issued a proposed rulemaking that would ban noncompete provisions in employment contracts, which has not yet been finalized.

Regardless of the final outcomes of the FTC rulemaking and the GC's position on the issue, the message to employers is consistent as it has been for years (including because of actions in state legislatures and in the courts): employers should ensure that all restrictive covenants are narrowly tailored to serve their legitimate business interests. This

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means properly differentiating between application of noncompetition, nonsolicitation (customer and employee), and nondisclosure agreements.

'Enforcement of Board Orders' memo

In Memorandum GC 23-07, entitled "Procedures for Seeking Compliance with and Enforcement of Board Orders," the GC instructed regional offices to seek prompt compliance with Board orders providing remedies to a statutory violation. The memorandum stated that "upon the issuance of a Board order that provides for a remedy of a statutory violation, the regional office will promptly send a written communication" with a "short deadline period" for a respondent to reply with its intent to comply with the Board order.

According to the memorandum, if the respondent indicates a willingness to forgo further challenge or an intent to comply, the matter will quickly move into the compliance stage. Alternatively, if the respondent indicates, "through a response or public statement, that it has no intention of complying, or if it fails to respond by the Region's deadline, the Regional Office will thereafter submit a recommendation" to the Board's appellate and supreme court litigation branch for enforcement under Section 10(e) of the NLRA. The GC pointed out in a footnote that Section 10(e) authorizes a court of appeals to enforce the Board's order or to issue "appropriate temporary relief or restraining order."

The memorandum comes as the GC has been pushing to expand potential remedies in labor cases. The Board issued a decision in December 2022 that held that as part of seeking make-whole remedies, victims of an unfair labor practice should be compensated "for all direct or foreseeable pecuniary harms suffered," arguably pushing beyond its statutory limits of what is recoverable in an unfair labor practice (ULP) case. Before that decision, the general counsel had issued Memorandum GC 22-06, discussed in detail in Issue 21 of the *Practical NLRB Advisor,* in which she ordered regions to seek "full remedies" in negotiated settlement agreements, including reimbursement for credit card late fees and for the loss of a home or car for failure to keep up with loan payments.

Expect quick turnaround. While this directive will only impact a narrow population of respondents in ULP matters, employers with cases before the Board should expect those matters to move forward quickly following the Board's issuance of an order with remedies. The recent *McLaren Macomb* decision discussed above was an example of this quick turnaround. The Board issued its decision in that case on February 21, 2023, and then petitioned the U.S. Court of Appeals for the Sixth Circuit to enforce that order on April 12, 2023. The latest general counsel memorandum could increase the burden on employers in complying with Board orders in ULP cases and provide employers with less time to assess whether to challenge a Board order. ■

Other NLRB developments

Federal court decisions

D.C. Cir.: Hospital's challenges to election in favor of nurses' union fail. The U.S. Court of Appeals for the D.C. Circuit denied a hospital's petition for review of a National Labor Relations Board (NLRB) decision finding that the hospital violated the National Labor Relations Act (NLRA) by refusing to bargain with a nurses' union and that its challenges to the mail-in representation election lacked merit. In the proceedings below, the hospital challenged one ballot as void because the nurse had printed, rather than signed, her name on the ballot. The hearing officer recommended rejecting the challenge after having found the nurse's testimony that she had, in fact, signed the envelope was credible. The union then won the election by one vote. On appeal, the D.C. Circuit held that the regional director "did not depart from precedent when she considered [the nurse's] post-election testimony." The Board also did not abuse its discretion in overruling the employer's ballot solicitation objection without an evidentiary hearing. The Board explained that while it has held in the past that parties engage in ballot solicitation if they make a statement to a voter that "'could be reasonably interpreted as an offer to collect and mail [the employee's] ballot,'" that was not the case here. Rather, the hospital only pointed to a union text message that assisted employees with understanding election instructions by stating how to properly sign ballot envelopes and reminding them to drop their ballots in the mail.

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To bring the representation matter before the court of appeals, the hospital needed to engage in a "technical" refusal to bargain since an unfair labor practice finding is a jurisdictional prerequisite for appellate review. Given the refusal to bargain, albeit a "technical" one, the general counsel in this case, as in other similar cases, sought the highly controversial so-called "make-whole bargaining remedy" under which an employer would be liable for damages attributable to the delay in entering into negotiations. In other words, the Board would order a remedy based on its speculation of what the employer *might have* agreed to in negotiations had they begun at the time the Board issued its order. This remedy is expressly foreclosed by the Board's own decision in *Ex-Cell-O Corp., 185 N.L.R.B. at 110.* However, the current general counsel has urged the Board to overrule *Ex-Cell-O*. In the proceedings below, the Board severed the remedy issue from the case and held it for future decision. The appeals court found that the Board was entitled to sever the remedy issue and that the *Ex-Cell-O* issue was therefore not before the court in the current proceeding.

Beyond the substantive legal issue of whether the Board has statutory authority to order the kind of remedy at issue, particularly in a "technical" refusal to bargain case, its decision to sever the issue in this and other cases creates a significant practical problem. An employer that seeks to obtain appellate review of a representation case issue can only do so by engaging in a technical refusal to bargain. However, if the make whole bargaining remedy was the law, then employers would face the prospect of potentially enormous liability for pursuing the appeal. By severing the resolution of this issue the Board is allowing the general counsel to hang this enormous liability sword over employers' heads without ever actually ruling on whether it believes the sword is legitimate under the statute. At the very least, this complicates the decision to seek court resolution in a representation case (*Longmont United Hospital v. National Labor Relations Board*, June 13, 2023).

11th Cir.: NLRB must consider directing employer to cease pursuing arbitration of employee's Title VII claim. The U.S. Court of Appeals for the Eleventh Circuit held that the NLRB possessed the authority to direct an employer to cease pursuing a motion to compel arbitration of a union member's Title VII claim, notwithstanding what would otherwise be its right under the First Amendment's Petition Clause to utilize that defense in a federal action brought against it by an employee for race discrimination and retaliation. This case turned on whether the employer's filing of its motion to compel arbitration constituted "an objective that is illegal under federal law." The Eleventh Circuit explained that, "in the context of litigation implicating labor law, federal courts have followed the directive of the Supreme Court in concluding that the filing of litigation—be it a lawsuit before a judicial forum or a grievance or request for arbitration before the NLRB—can be enjoined by the NLRB when the object of that litigation is unlawful." Accordingly, the appeals court granted the union's petition for review and vacated the Board's decision. The court also directed the Board to determine, on remand, whether the employer's motion to compel arbitration pursuant to a dispute resolution agreement—which the union employee signed as an applicant and which the union claimed should not have applied to him until the union had the opportunity to bargain over the question of whether the policy should apply to its members—should be enjoined as having "'an objective that is illegal under federal law'" (*International Brotherhood of Teamsters Local 947 v. National Labor Relations Board*, May 3, 2023).

NLRB rulings

Employees who accepted pre-strike job offers were part of pre-strike complement. The NLRB adopted the findings of an administrative law judge (ALJ) that an automobile manufacturer violated Section 8(a)(3) and (1) by failing to recall strikers to fill vacancies that arose after the strikers' unconditional offer to return to work. The Board panel majority additionally agreed with the ALJ's conclusion that the employer also violated Section 8(a)(3) and (1) by failing to recall strikers to fill two vacancies that existed at the time of the strikers' unconditional offer to return to work. The ALJ found that those two employees accepted offers of employment before the strike began, thereby increasing the employer's "pre-strike complement" of employees to 19 even though the start date of one of the employees was after the strike began. Dissenting in part, Member Marvin E. Kaplan disagreed with the majority's "suggestion that an employer's extension of a job offer alone to certain individuals would be sufficient to include those individuals in the calculation of the pre-strike complement of employees" and found that the general counsel failed to prove that the two employees were pre-strike hires as opposed to strike replacements who occupied vacancies that were created by the strike (*Tracy Auto, L.P. dba Tracy Toyota*, July 6, 2023).

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Employer's threat to implement pension plan absent valid impasse violated NLRA. A divided three-member panel of the NLRB accepted the findings of an ALJ that an employer violated Section 8(a)(5) and (1) when it threatened to implement its pension plan offer without having reached a valid impasse. The Board affirmed the ALJ's conclusion that the employer failed to demonstrate that the parties had exhausted the prospect of concluding an agreement before its declaration of impasse, but reversed the ALJ's finding that the employer unlawfully laid off two employees after they participated in protected activity. Although the employer issued the employees layoff notices, "the layoffs were rescinded *before* they took effect and *before* the men stopped working for the day" (emphasis in original), and therefore the record lacked "the existence of a necessary element of an 8(a)(3) violation—an adverse employment action."

Member Kaplan filed a separate opinion dissenting in part, in which he parted ways with the majority on their "finding that the [employer] violated Section 8(a)(5) and (1) by 'declaring' impasse and 'threatening' to implement its pension proposal during bargaining and in the absence of a valid impasse." "[G]iven the posture of this case," Kaplan continued, the majority's ruling "creates new law pursuant to which the inaccurate assertion of impasse while bargaining is ongoing, absent any unilateral action whatsoever and without consideration of the party's overall bargaining conduct, would constitute a *per se* violation of 8(a)(5) and (1)." Such an interpretation is not consistent with existing Board law, urged Kaplan (*Troy Grove*, June 22, 2023).

Employer unlawfully interrogated drivers about steward's grievance. The NLRB reversed an ALJ's finding that an employer did not violate Section 8(a)(1) of the NLRA when it interrogated several truck drivers about whether they approved of and supported a grievance filed by the union steward. Applying the totality-of-the-circumstances analysis, the Board found that the "strained" relationship between the employer and union supported finding that the questioning was coercive since, in the weeks surrounding the questioning, the employer locked drivers out when the parties failed to reach a new collective bargaining agreement, disciplined the steward who had filed grievances over conduct that impacted all drivers, and disciplined drivers in retaliation for the grievances. The "identity and rank of the questioner" also supported finding the questioning coercive since he was a first-line supervisor who had unlawfully removed the steward from his usual and preferred truck and disciplined him after he filed two grievances. Finally, the "place and method of the interrogation" supported a finding of coerciveness as the supervisor "initiated the interrogations by forwarding the grievance and then approaching or calling some of the drivers to inquire about their support of the grievance" (*River City Asphalt, Inc.*, May 11, 2023).

Firearm instructor's loud rebuke over safety issue protected activity. The NLRB adopted an ALJ's finding that firearm instructors at an employer's training facility for security guards were neither managerial employees nor statutory supervisors who were not protected by the NLRA, and that the employer unlawfully suspended and discharged one of the instructors as a result of an outburst in which he expressed his dissatisfaction with the corrective measures taken by the employer to fix a ricochet problem at its firing ranges. The Board agreed with the ALJ's conclusion that "[r]aising one's voice and an insolent manner, are insufficient to forfeit the protections of the Act, while engaged in protected activity." In addition, the ALJ noted that his outburst was a single incident, not a sustained course of action, and there was no threat to the supervisor (*Constellis, LLC dba Academi Training Center, LLC*, May 3, 2023).

Employer's unilateral implementation of post-COVID-19 return-to-work date unlawful. The NLRB adopted an ALJ's conclusion that an employer violated Section 8(a)(5) and (1) of the NLRA by implementing a return-to-campus policy for bargaining unit employees and a change from a mask mandate to a mask recommendation without first bargaining with a union to an overall good faith impasse. There was no evidence that the employer ever provided the union "any indication that the parties had arrived at any impasse on either the return-to-campus or mask mandate issues." Similarly, the employer violated Section 8(a)(5) and (1) by unilaterally changing the full-time remote work status of an associate director of development position without first notifying and bargaining with the union and by discharging the employee when he failed to report to work on campus (*Goddard College Corp.*, May 3, 2023). ■

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