

Labor Law Today

2022 | YEAR IN REVIEW



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INTRODUCTION

In 2022, President Joe Biden's promise "to be the most union-friendly president in history" began to come into focus. While the COVID-19 pandemic continued to play a dramatic role in union campaigns, the nation also began to feel the effects of Biden's appointment of Jennifer Abruzzo as the National Labor Relations Board's (the NLRB or Board) general counsel. Early in the year, Abruzzo attacked long-standing board precedent in favor of progressive changes that we had previously seen as part of the stalled Protecting the Right to Organize Act (PRO Act). First, she issued a memorandum in April calling for a prohibition on employers' "captive audience" meetings with their employees, calling these meetings, allowed since 1959, "a license to coerce" and "a fundamental misunderstanding of employer's speech rights." A week later, in the *Cemex* case (described in detail in this *Year in Review*), she filed a brief arguing that these meetings were illegal under the National Labor Relations Act (the NLRA or Act). Her *Cemex* brief also called for card checks—union recognition without an election if a union can present 50% of employee cards—and a prohibition on employer speech that would ban telling employees that an employer is not in favor of a union because it does not want a third party coming between the employer and employees. Any one of these changes would suggest a major change in labor policy; taken together, they signal a tectonic shift aimed at making unionization easier than ever.

Americans also witnessed an increase in job action as walkouts and strikes, especially the high-profile national railroad strike quelled by Congress, presented an interesting labor variable while the inflationary economy drifted toward recession. It is too early to tell whether this will have a rallying or chilling effect on the union cause nationwide.

The NLRB's decisions described in this *Year in Review* signal a traditional pendulum swing back to a Democrat-majority board, undoing some of the Trump Board's rulings. Decisions regarding union access to employer premises, union insignia, direct dealing, and employee speech all swung in employees' favor, and employers are advised to understand these changes as we shift into 2023.

We hope this 2022 *Year in Review* will prove helpful. The report is divided into three sections: 1) Proposed Rules and Legislation, 2) NLRB General Counsel Abruzzo's Actions, and 3) 2022 NLRB Decisions.

2022 Proposed Rules and Legislation

Joint Employer Status: Proposed Rulemaking

On September 6, 2022, the Board released a Notice of Proposed Rulemaking to establish a new “joint employer” legal standard under the National Labor Relations Act (NLRA). This standard is consequential for both unionized and nonunionized entities because if an entity is deemed an employer under the NLRA, it must recognize collective bargaining efforts and can be liable for violations arising from unfair labor practice allegations.

Under the current Trump-era standard, an entity can be deemed a joint employer only if it exercises actual “substantial direct and immediate control” over eight clearly defined, essential terms and conditions of employment of another employer’s employee. The NLRB’s proposed rule, however, would rescind this standard and instead permit evidence of potential but unexercised and indirect control over a nonexhaustive list of employment terms and conditions to be considered in the joint employer determination.

The Board’s Current Joint Employer Rule

Under the current “2020 Rule,” which went into effect on April 27, 2020, an entity is a joint employer of another employer’s employee only if the two share or codetermine the employee’s essential terms and conditions of employment, exclusively defined as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. To establish that an entity shares or codetermines the essential terms and conditions of employment, the entity must possess and actually exercise substantial direct and immediate control over one or more of the essential terms and conditions listed above in such a way that it “meaningfully affects matters relating to the employment relationship with those employees.” 29 C.F.R. § 103.40(a). Additionally, evidence of an entity’s indirect control over an essential term and condition of employment, its contractually

reserved but never exercised authority over such term and condition, and its control over mandatory subjects of bargaining other than essential terms and conditions is deemed merely probative; it may only be considered to the extent that these factors supplement and reinforce evidence of the entity’s direct and immediate control over a particular essential term and condition.

History of Conflict Between the Board and Courts Regarding the Standard

In 2015, the Board abandoned its decades-old standard that an entity must possess and exercise direct control over an employee’s terms and conditions of employment to be considered a joint employer. *Browning-Ferris Industries of California, Inc.*, 362 NLRB 1599 (2015) (BFI I). Instead, the Board held that evidence of indirect control, as well as reserved but unexercised control, is “clearly relevant to the joint-employment inquiry.”

In 2017, in a 3-2 decision, the Trump-era Board overturned *BFI I*, reasoning that its standard that “even when two entities have never exercised joint control over essential terms and conditions of employment, and even when any joint control is not ‘direct and immediate,’ the two entities will be joint employers based on the mere existence of ‘reserved’ joint control, or based on indirect control or control that is ‘limited and routine’ . . .” was “contrary to the [NLRA], ill-advised as a matter of policy, and its application would prevent the Board from discharging one of its primary responsibilities under the Act, which is to foster stability in labor-management relations.” *Hy-Brand Indus. Contrs., Ltd.*, 2017 NLRB LEXIS 635, at *2 (Dec. 14, 2017). However, only two months later, the Board vacated its decision in *Hy-Brand* due to an ethics violation, noting that Member William Emanuel (a Trump appointee) should have been disqualified from participating in the original proceeding.

The following year, the U.S. Court of Appeals for the District of Columbia Circuit concluded that although the Board could consider both indirect and reserved control in making a joint employer determination, by failing in *BFI I* to adequately distinguish “evidence of indirect control that bears on workers’ essential terms and conditions from evidence that simply documents the routine parameters of company-to-company contracting, the Board overshot the common-law mark.” The case was remanded to the Board. *Browning-Ferris Indus. of Cal. v. NLRB*, 911 F.3d 1195, 1216 (2018).

In February 2020, the Trump-era Board issued the “2020 Rule,” which rejected the standard set forth in *BFI I*. Then, while considering *BFI I* on remand in July 2020, the Board did not, as the D.C. Circuit had instructed, clarify when evidence of indirect control bears on a worker’s essential terms and conditions of employment. Instead, the Board reasoned that it would be “manifestly unjust” to retroactively hold the putative employer in *BFI I* liable as a joint employer based on indirect control, because “for at least 30 years preceding” the Board’s 2015 decision “there was a clear rule of law requiring proof of direct and immediate control under the applicable joint-employer test.” *Browning-Ferris Indus.*, 369 NLRB 139 (2020) (BFI II).

In July 2022, the D.C. Circuit, this time considering *BFI II*, again remanded the decision to the Board, holding that the Board’s reasoning in *BFI II* was “erroneous” and “made multiple overlapping errors.” For example, the court held that prior to 2015, there was no “clear rule” requiring direct and immediate control to find joint-employer status and that “the Board’s precedent on the joint-employer standard was anything but static.”

The Proposed Rule

On September 6, 2022, the Board released a Notice of Proposed Rulemaking that would rescind and replace the 2020 Rule. The proposed rule would make it significantly easier for an entity to be considered a joint employer and would broaden the definition even wider than what the Board attempted to do in *BFI*. Under the proposed rule, evidence of potential, unexercised, and indirect control



over any working condition could be deemed sufficient to confer joint employer status.

Additionally, unlike the 2020 Rule, which provided a defined list of essential terms and conditions of employment, the proposed rule would adopt a non-exhaustive list of factors, including the following: “wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance.” Accordingly, an entity’s reserved, unexercised right to control any of these factors—or even factors not listed—could be enough to deem that entity a joint employer.

Ultimately, if it takes effect, the proposed rule will make it significantly easier for an entity to be deemed a joint employer, as even indirect and potential (but unexercised) control over a broader, nonexhaustive list of terms and conditions of employment will be sufficient to confer joint employer status.

Proposed Rulemaking on Fair Choice and Employee Voice

On November 4, 2022, the NLRB published a [Notice of Proposed Rulemaking](#) seeking to rescind, in favor of prior law, an “election protection” rule adopted on April 1, 2020 (the April Rule). The proposed rule, which the NLRB has termed the Fair Choice and Employee Voice rule, has three parts, each addressed in turn below.

Restoring the “Blocking Charge” Policy

First, the proposed rule would restore the NLRB’s “blocking charge” policy. This would reinstate a tool used by unions to indefinitely delay representation and decertification elections while an unfair labor practice charge is investigated and litigated. According to the Board, under the proposed rule, “a Regional Director may delay the election if the conduct alleged threatens to interfere with employee free choice.” The proposed rule would also require employers to refrain from changing any terms and conditions of employment during the “blocked” period. In the Board’s view, “the proposed rule promotes employee free choice and conserves the Board’s resources, and those of the parties, by ensuring that the Board does not conduct elections—that might well have to be re-run—in a tainted environment.” But employers should be wary of unions attempting to use this rule as leverage to delay elections where union support is lacking.

Elimination of Notice-and-Election Procedure

Second, “the proposed rule would eliminate the required notice-and-election procedure triggered by an employer’s voluntary recognition of a union based on a showing of majority support among employees.” Under the April Rule, employees may challenge the representative status of a union that has been voluntarily recognized by an employer. Indeed, a voluntary recognition agreement will not bar the processing of an election petition if (1) the parties notify the NLRB of the recognition agreement, (2) the employer notifies employees of the recognition and their rights, and (3) no petitions are filed in the ensuing 45-day period. Under the new proposed rule, a voluntary recognition agreement would serve as an immediate bar to filing an election petition for no less than six months after the date of the parties’ first bargaining session and no more than one year after that date.

Restoration of Voluntary Recognition Process in the Construction Industry

Third, the proposed rule would restore the voluntary recognition process in the construction industry. The Board explained that the changes, which would limit

challenges to a union’s representative status, would include restoring a six-month limitations period for election petitions challenging a construction employer’s voluntary recognition of a union under Section 9(a) of the Act It would also include the principle ... that sufficiently detailed language in a collective-bargaining agreement can serve as sufficient evidence that voluntary recognition was based on Section 9(a) of the Act.

In the Board’s view, the new proposed rule will remove “uncertainty and unpredictability” from construction-industry labor relations.

The proposed rule is still subject to comment and revision. As of this writing, the deadline for filing comments was Thursday, February 2, 2023. Comments replying to those submitted during the initial comment period must be received by the Board on or before Thursday, February 16, 2023.

Reforms to Form LM-10 Reports

On September 13, 2022, the U.S. Department of Labor (DOL) issued proposed revisions to the Form LM-10 Employer Report (Form LM-10). Form LM-10 currently requires employers to report consultant expenditures and agreements made by the employer to persuade employees regarding organizing and collective bargaining, or to monitor employees and unions involved in a labor dispute with such employers (among other requirements).

The changes proposed by the DOL would additionally require the following:

- Disclosure of whether the employer is a federal contractor or subcontractor, including the federal agencies with which it holds contracts, as well as the employer’s Unique Entity Identifier (UEI).
- Disclosure of any payments made by the employer to a labor organization, including whether those payments concerned employees performing work on a federal contract or subcontract.

The DOL stated that the changes are needed, in part, to ensure that contractors are not being reimbursed for prohibited costs under Executive Order 13494.

That 2011 executive order precludes government contractors from receiving federal reimbursement for expenses incurred while attempting to influence employees regarding their decisions to form unions or engage in collective bargaining. The proposed change seeks to go further than monitoring compliance, however. “[P]ublic exposure would allow for an open public discussion and debate about the prevalence of persuader activity and the extent to which specific Federal agencies might be indirectly supporting such activities by doing business with employers that engage in persuader activities,” the department wrote when introducing the proposed changes.

The proposed changes emerged from the White House Task Force on Worker Organizing and Empowerment, which called for the federal government to “use longstanding authority to leverage the federal government’s purchasing and spending power to support workers who are organizing and pro-worker employers.”

If adopted, the addition to Form LM-10 may have a chilling effect on employers using third-party persuaders. Employees and prospective employees who object to employer persuasion may decline to work for employers who disclose persuader activities. Perhaps more significantly, employers may risk losing federal contracts. The proposed change will allow contracting agencies to easily identify employers that may be using federal funding to attempt to avoid union activity. Armed with that information, contracting agencies could reject such employers for future federal projects.



The public comment period closed on October 13, 2022, and the DOL is currently reviewing the comments received. The department has not yet announced whether it will shelve the proposed changes, adopt them, or adopt them with revisions.

California Fast Food Accountability and Standards Recovery Act

On September 5, 2022, California Governor Gavin Newsom signed the Fast Food Accountability and Standards Recovery Act (FAST Recovery Act or A.B. 257). The FAST Recovery Act creates the Fast Food Council, responsible for setting minimum standards for employees in the fast-food industry, including establishing minimum wages, working hours, and other working conditions related to health and safety. The FAST Recovery Act took effect on January 1, 2023, and will remain operative through 2028.

Many of the key provisions of the FAST Recovery Act are likely to be the subject of future litigation and have the potential to create significant financial consequences for covered employers, such as a higher minimum wage.

The Council

The FAST Recovery Act establishes a 10-member council to consist of one member from the Department of Industrial Relations (DIR), two representatives of fast-food restaurant franchisors, two representatives of fast-food restaurant franchisees, two representatives of fast-food restaurant employees, two representatives of advocates for fast-food restaurant employees, and one representative from the governor’s Office of Business and Economic Development. The speaker of the assembly and the California Senate Rules Committee will each appoint one representative as an advocate for fast-food restaurant employees. The governor will appoint the other representatives on the council. Representatives will serve four-year terms or until January 1, 2029. Additionally, counties or cities with a population of more than 200,000 may establish a local fast-food council to provide recommendations to the council operating at the state-level council.



The council has jurisdiction over fast-food restaurants, defined as any establishment that is part of a brand or fast-food chain with more than 100 locations that primarily provides food and beverages for immediate consumption to customers who order or select items and pay before eating, with items prepared in advance or prepared or heated quickly, and with limited or no table service.

Key Provisions

- Council decisions must be made by an affirmative vote from at least six of the council members, and council meetings must be held no less than every six months. All meetings must be open to the public and the council is required to review the minimum standards at least once every three years.
- If a conflict arises between standards issued by the council and standards of another state agency, the standards issued by the council apply to fast-food workers covered by the FAST Recovery Act.
- The council is not authorized to promulgate standards that fall within the jurisdiction of California's Occupational Safety and Health Standards Board (OSHSB). Instead, if a council standard conflicts with that set by the OSHSB, the council may petition the board to adopt, amend, or repeal the standard.
- The council has the authority to raise the 2023 minimum wage to up to \$22 per hour for fast-food workers, with subsequent years subject to inflationary increases.
- The FAST Recovery Act prohibits employers from discriminating or retaliating against employees for participating in proceedings relating to employee public health or safety, including any local fast-food council proceeding. There is a rebuttable presumption of unlawful discrimination or retaliation if the adverse action takes place within 90 days following the employee's protected activity. The FAST Recovery Act provides employees with a private right of action to enforce this provision and entitles the employee to reinstatement, treble lost wages and benefits, and lawyers' fees.
- The standards implemented by the council may not supersede those addressed in a valid collective bargaining agreement.

NLRB General Counsel Abruzzo's Actions

The NLRB Upholds *Johnnie's Poultry* Standard in *Sunbelt Rentals* Decision

Employers investigating unfair labor practice claims can breathe a little easier, as the NLRB upheld the long-standing *Johnnie's Poultry* standard for conducting interviews with employees about ongoing complaints. In *Sunbelt Rentals, Inc.*, the Board reaffirmed the continuing validity of the bright-line, per se standard promulgated in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), used to evaluate the legality of employer interrogations. In upholding and applying this standard, the Board ultimately concluded that *Sunbelt Rentals* violated Section 8(a)(1) when it interrogated two employees without providing required assurances.

The Board has applied the standard articulated in *Johnnie's Poultry* for more than 58 years. This standard permits an employer to question employees on matters involving Section 7 activity—concerted activity—in limited circumstances without incurring liability if the employer observes specific safeguards designed to minimize the coercive impact of such interrogation. An employer's failure to strictly observe these safeguards will result in a finding that the interrogation was per se unlawful. This standard is important because it largely dispels the dangers of coercion inherent in employer questioning in this context, accommodates an employer's need to question employees as it prepares a defense to unfair labor practice allegations, and ensures that employees may speak truthfully without fear of reprisal, thereby protecting the integrity of Board processes.

Under the *Johnnie's Poultry* standard, as reaffirmed in *Sunbelt Rentals*, employers must continue to abide by the following specific safeguards when interviewing employees in preparation for unfair labor practice proceedings before the Board: (1) communicate to the employee the purpose of the questioning; (2) assure the

employee that no reprisal will take place; (3) obtain the employee's participation on a voluntary basis; (4) conduct the questioning in a context free from employer hostility to union organization and not in a manner that is itself coercive in nature; and (5) not ask questions that exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

Had the Board instead decided to reject the *Johnnie's Poultry* standard, in whole or in part, it may have severely limited employers' abilities to protect their legal interests by speaking to their own employees during investigations. There was fear that the Board may have applied one of many less-flexible options, such as a multifactor totality of the circumstances standard, the rebuttable presumption standard, a bar on employer investigations involving their own employees, or requirements that some third party such as an NLRB union representative be present for any such investigations. But in reaffirming the *Johnnie's Poultry* standard, the Board held that the standard is rational, consistent with the NLRA, appropriately balances employer and employee interests, and best promotes the Board's interest in enforcing the law.

The NLRB Seeks To Overturn Precedent and Limit Employer's Private Property Rights

An ongoing challenge for employers faced with union activity is the regulation of their private property. In an *Advice Memorandum* released on May 25, 2022, NLRB General Counsel Abruzzo addressed this issue and laid out a blueprint for changes she would like made to Board precedent concerning nonemployee union access to employer property. Abruzzo argues that the Board has improperly been allowing employers to ban unions from accessing portions of their property held open to

the public. In summary, the general counsel is urging that private property rights take a back seat to the right to unionize.

Abruzzo issued the Advice Memorandum in response to *LT Transportation*, Case 05-CA-281-089. In *LT Transportation*, a union was trying to unionize bus drivers. As part of its efforts, the union stationed representatives along bus stops, which the bus company privately owned but held open to the public. At issue was the fact that the company ordered the union off the bus stop property, prohibiting the nonemployee union representatives from visiting stops along the bus routes to talk to drivers. While the case ultimately settled, the closing of the case allowed Abruzzo to issue the Advice Memorandum and opine on the legality of prohibiting the union's access to "public spaces," i.e., spaces that are contained within an employer's private property but remain accessible for public use.

The basis of the general counsel's Advice Memorandum is that current Board precedent is contrary to the U.S. Supreme Court's decision in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

The History of Nonemployee Union Access to Private Property

In *Babcock*, the Supreme Court held that employers may exclude nonemployee union organizers from an employer's property unless one of two conditions is present: (1) employees are otherwise inaccessible to the union; or (2) the employer has discriminated against the union by prohibiting it from using the employer's facilities, but grants access to nonunion groups.

The cornerstone of the discrimination exception is whether an employer excluded nonemployee union organizers from its private property but did not exclude other similarly situated individuals or organizations.

After *Babcock*, the Board held on numerous occasions that unions could access privately owned *public spaces*, so long as union organizers used them consistently with the public property's intended use and were not disruptive to the employer.

The NLRB General Counsel's Position Concerning the 2019 Decisions UPMC and Kroger

In the Advice Memorandum, General Counsel Abruzzo interpreted *UPMC*, 368 NLRB No. 2 (2019), and *Kroger Ltd. P'ship*, 368 NLRB No. 64 (2019), as improperly limiting the discrimination exception set forth in *Babcock* by permitting employers to prohibit union organizers from engaging in certain conduct on private property.

In *UPMC*, the Board held that the "public spaces" exception set by Board precedent was inconsistent with *Babcock*. The Board clarified that employers could eject union organizers from employer property, *including public spaces*, unless one of the two exceptions from *Babcock* was shown: employee inaccessibility or discrimination based on the use by nonunion groups.

The Board used *Kroger* to further clarify the discrimination standard set in *Babcock*. Here the Board affirmed that an employer engages in unlawful discrimination within the meaning of the discrimination exception when it treats union-related activities less favorably than similar activities that are not union related. The court ruled that the purpose behind the activities is instructive when determining whether the activities are "sufficiently similar" to invoke the discrimination exception.

In the Advice Memorandum, Abruzzo calls for the overruling of *Kroger* on the basis that *Kroger* considers not only the conduct of union organizers, but also the *purpose* behind said conduct. She concludes that, because *Kroger* looks to the purpose behind the conduct, an employer could potentially treat union-related activities less favorably than similar activities that are not union related. By this reasoning, an employer could lawfully ban union organizers from distributing union literature, while allowing nonunion groups to distribute literature for other activities, on the basis that the purpose behind each activity is sufficiently different.

While an Advice Memorandum does not constitute a change in the law, it does provide a clear indication of the general counsel's desire to convince the NLRB to overrule *UPMC* and *Kroger*. Should that occur, such an action could signal future pushes toward the limiting of



an employer’s property rights when it comes to these “public spaces.”

General Counsel Asks the Board To Overturn Boeing

On March 7, 2022, NLRB General Counsel Abruzzo called for the overturn of the *Boeing* legal standard used to evaluate workplace and employee handbook rules.

In *Stericycle, Inc. and Teamsters Local 628*, the Board is examining several workplace rules to determine whether they infringe upon employees’ rights under Section 8(a)(1) of the NLRA. *Stericycle* created workplace rules on “personal conduct,” “conflicts of interest,” and “confidentiality of harassment complaints.” After evaluating the rules under the *Boeing* standard, the administrative law judge found *Stericycle* to be in violation of Section 8(a)(1) for maintaining impermissibly overbroad rules.

Prior to reviewing these rules, the Board issued notice and invited the parties and amici to submit briefs on whether the Board should adopt a new legal standard to replace the standard established in *Boeing Co.*, 365 NLRB No. 154 (2017). Abruzzo’s brief asked the Board to return to the *Lutheran Heritage* legal standard that preceded *Boeing*.

Lutheran Heritage Village—Livonia, 343 NLRB 646 (2004), announced that a facially neutral work rule violates Section 8(a)(1) if “(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.”

The legal standard adopted in *Boeing* and later revised in *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019), overruled 13 years of *Lutheran Heritage* precedent. Under *Boeing*, workplace rules are divided into three categories: (1) rules that are lawful to maintain because they either do not interfere with the exercise of Section 7 rights or their potential impact on such rights is outweighed by legitimate justifications; (2) rules that warrant individualized scrutiny; and (3) rules that are unlawful to maintain because they interfere with the exercise of Section 7 rights, and the adverse impact on those rights is not outweighed by legitimate justifications.

Abruzzo argued that the Board should return to the *Lutheran Heritage* standard because *Boeing* is “so forgiving of overbroad work rules as to effectively abdicate the Board’s role in protecting employees from their chilling effect” on employee rights. While touted as predictable and the only test to properly balance

employer interests with employee rights, *Boeing* has proved overly complicated, minimally predictable, and strongly skewed in favor of employers.

Notably, Abruzzo further recommended three clarifications to be made to the *Lutheran Heritage* standard. First, the Board should define the “reasonable employee” standard and assume that reasonable employees are indeed aware of their Section 7 rights. Second, the Board should modify the *Lutheran Heritage* standard to find facially neutral rules violative of Section 8 if employees could reasonably construe the language to unlawfully prohibit Section 7 activity. The Board should also modify the standard to explicitly allow overriding employer interests to outweigh infringement of employee rights in narrow circumstances. Third, the Board should create a model statement of rights for employers to include in their handbooks at their choosing.

With her brief in *Stericycle, Inc.*, Abruzzo appears to be making good on her intent to revisit *Boeing*, as announced in GC Memo 21-04 last year. Together, the Board’s opinion and Abruzzo’s *Stericycle* brief signal a pro-employee shift from the Trump-era *Boeing* standard and the case law that followed it.

While the Board’s decision is still pending, Abruzzo’s brief serves as a reminder to employers to evaluate their own workplace and employee handbook rules for any potential impact on employees’ Section 7 rights.

Duty To Recognize and Bargain

On April 11, 2022, NLRB General Counsel Abruzzo filed a brief seeking to expand unions’ right to obtain recognition from employers based on signed authorization cards alone, without the need for a Board election. In *Cemex Construction Materials Pacific LLC*, 28-CA-230115, Abruzzo asked the Board to overturn decades-old precedent and make several significant changes to employers’ rights during unionization campaigns. Specifically, Abruzzo sought to (1) ban so-called “captive audience” meetings, (2) eliminate the ability of employers to insist on secret-ballot elections, and (3) restrict an employer’s right to inform employees about how the employer-employee relationship may change with union representation.

The general counsel is independent from the Board, so her views do not necessarily indicate how the Board would decide these issues. However, her brief serves as an invitation to unions to file unfair labor practice charges around these common practices, which, in the near term, may have a chilling effect on employers’ ability to counter unions’ organizing activities.

Right to Speak To Employees About Unionization at Work

On April 7, 2022, NLRB General Counsel Abruzzo released GC Memo 22-04 seeking to make “captive audience” meetings unlawful. In so doing, the memorandum goes against decades of Board precedent permitting such meetings and creates uncertainty for employers.

So-called “captive audience” meetings are mandatory meetings held by employers to address Section 7 activity. For decades, employers could hold such events because the meetings were considered protected employer speech. Specifically, the NLRA states: “the expressing of any views, argument, or opinion ... shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act ... if such expression contains no threat of reprisal or force or promise of benefit.”

But GC Memo 22-04 describes captive audience meetings as inherently coercive, focusing on the threat of discipline for nonattendance and the employees’ economic dependence on keeping their jobs. The memo puts it bluntly by calling captive audience meetings a “license to coerce” and an “anomaly in labor law.” Not only are the meetings described as coercive, but the memo also argues that the meetings violate an employee’s “right to refrain from listening to employer speech.”

GC Memo 22-04 is not legally binding, but it indicates an enforcement position that may eventually put this issue before the Board. Whether the Board will adopt the arguments in the memo remains to be seen. However, employers continuing to use captive audience meetings run the risk of becoming a test case, and captive audience meetings will be closely scrutinized.

The general counsel's memo raises many questions, including the suggestion that employers may hold such meetings if they make the meetings "truly voluntary" and communicate "sensible assurances" to their employees. However, "sensible assurances" is not defined or described in the memo. Further, GC Memo 22-04 does not define or describe a clear line between ordinary work meetings and captive audience meetings. For example, what happens when a mandatory meeting on other topics drifts into Section 7 topics? These and other questions remain unanswered.

Because of the unanswered questions and associated risks, employers should consider all aspects of their meeting strategies, including whether to hold voluntary meetings, how to document the meetings, whether to implement management training on the topic, and how to revise their communications to avoid arguments that the communications violated an employee's "right to refrain."

Preemptive Injunctions for Alleged Unlawful Threats During Union Campaigns

On February 1, 2022, NLRB General Counsel Abruzzo released [GC Memo 22-02](#) directing NLRB regional offices (Regions) to seek preemptive Section 10(j) injunctions for alleged threats or other coercive conduct during union campaigns. Section 10(j) of the NLRA gives the Board the power to seek injunctive relief in federal court to prevent irreparable harm to aggrieved policies, rather than waiting for an adjudication by the Board.

In order to avoid difficulties in reversing chilling effects on organizing activity, General Counsel Abruzzo explains that the NLRB should seek Section 10(j) injunctions before an employer follows through on its threats or coercion. She states that without Section 10(j) injunctions, most employers will follow through on their threats and terminate union workers by the time the Board adjudicates a matter. Further, she believes employers will be less likely to initially interfere with organizing activities under the weight of a federal district court's order.

The memo instructs board agents to consider all contextual circumstances when determining whether pursuing a 10(j) injunction would be appropriate. Board agents are encouraged to examine "the inherent impact

on employees and union support; nature, frequency, severity and dissemination; hierarchal rank of the actor(s); local labor market; and recidivism, to name a few."

This guidance signals a continued trend of the NLRB encouraging the use of 10(j) injunctions against employers. In fact, as General Counsel Abruzzo pointed out in [another memo](#), she "believe[s] that Section 10(j) injunctions are one of the most important tools available" to enforce the NLRA. Along with GC Memo 22-02, General Counsel Abruzzo also produced [GC Memo 22-01](#), in which she directs Board agents to pursue Section 10(j) injunctions in cases where an employer utilizes illegal intimidation regarding immigration status. Employers should expect a continued increase in the number of 10(j) injunctions by the NLRB after years of decreased use during the Trump administration.

In light of this guidance, employers should communicate cautiously with employees during union organizing campaigns. The NLRB is extremely focused on addressing unfair labor practices during organizing campaigns and the legal rules regarding organizing campaigns are complex. To avoid being summoned to federal court, employers should tread carefully during such campaigns.

The NLRB General Counsel Issues Further Guidance on Securing Full Remedies in Settlements

On June 23, 2022, NLRB General Counsel Abruzzo issued [GC Memo 22-06](#), which praised the Regions for implementing the Board's "full remedies" settlement approach articulated in previous guidance. For instance, [GC Memo 21-07](#), issued on September 15, 2021, encouraged the Regions to seek expanded remedies when entering into settlement agreements to ensure employees subject to unfair practice charges were made whole for any losses they incurred from unlawful conduct. This expanded-remedies approach not only includes back pay and front pay, but also consequential damages. The general counsel highlighted the wide array of settlement terms for derivative economic harm that the Regions have secured, such as reimbursing fees for late car loan payments and late rent, payment of monthly interest on the loan to cover an employee's

living expenses, the cost of baby formula due to the loss of a workplace breast pumping station, and the cost of retrofitting an employee's car to make it usable in a new job.

In addition to listing monetary remedies, Abruzzo provided numerous examples of nonmonetary settlement terms the Regions have obtained, such as letters of apology to reinstated employees, permitting union use of employer bulletin boards, bargaining schedules and bargaining progress reports, training of supervisors and managers on employee rights under the NLRA, and requiring that job application forms and recruitment ads include a statement of employee rights. Likewise, she voiced her satisfaction in the Regions securing settlement agreements that exclude nonadmission clauses and include default language.

The general counsel also reminded the Regions to be proactive in ensuring compliance with settlement agreements, particularly enforcing default judgment provisions in the event of noncompliance, since the remedies secured are only effective when the employer complies with its settlement obligations. In past guidance, the general counsel has stated that Regions should seek a Board order providing a full remedy for the violations alleged in the complaint in the event of a default. However, in GC Memo 22-06, the general counsel acknowledged there may be situations in which it would better effectuate the purposes of the NLRA by enforcing the terms of the settlement agreement. The general counsel cited a situation in which an employee waived reinstatement in exchange for front pay. As a result, the general counsel instructed the Regions to include new default language in settlement agreements providing that the employer or charged party agrees that the Board may issue a default judgment against it on the allegations contained in the unfair labor practice charge "and/or an order requiring the Charged Party to perform terms of this settlement agreement."

Although Regions have included a wide array of consequential damages in settlement agreements with employers, the Board is still considering whether consequential damages should be awarded in unfair labor practice decisions as part of the Board's make-

whole remedy. Specifically, in *Thryv, Inc. and International Brotherhood of Electrical Workers, Local 1269*, the Board invited the parties and interested amici to address not only whether consequential damages could be awarded, but also whether these damages should be awarded strictly upon findings of egregious violations by the employer. An additional issue involves what evidence would be required to demonstrate that such damages are a direct and foreseeable result of an employer's unfair labor practice.

In sum, GC Memo 22-06 makes clear that the general counsel's office will continue to press for full remedies, including consequential damages and nonmonetary remedies, in unfair labor practice settlements. They also will include and enforce default judgment language when the remedies for the unfair practice charge violations better effectuate the purpose of the NLRA than would the settlement terms. Accordingly, employers should be aware that settling unfair practice charges may become more challenging as the Regions try to include various remedies and language in any potential settlement.

Rights of Immigrant Workers

On May 2, 2022, the NLRB general counsel's office issued an Operations-Management memorandum, [OM Memo 22-09](#), in which the NLRB reiterates the rights of immigrant workers under the NLRA and attaches a fact sheet "to provide information to witnesses related to immigration status and NLRB investigative procedures."

Specifically, the fact sheet attached to OM Memo 22-09 explains that immigration status is not relevant to whether a violation of the NLRA has occurred, that information obtained during NLRB investigations is protected, and that a charging party or witness may ask



the NLRB to seek immigration relief for employees at a worksite if it is necessary to protect employees who are participating in NLRB processes or exercising their rights under the NLRA.

OM Memo 22-09 directs Board agents to distribute the fact sheet to all witnesses before taking their testimony and directs information officers to provide a copy of the fact sheet to visitors or callers who seek assistance with preparing an NLRB charge. In short, the fact sheet reiterates the NLRB policy on workers' rights to access the NLRB collective bargaining and remedial procedures regardless of immigration status, without fear of reprisals from their employers or the federal government.

OM Memo 22-09 was issued in furtherance of the NLRB's aggressive approach to expanding legal protections for workers and labor unions, including immigrant workers. On November 21, 2022, the NLRB issued GC Memo 22-01, "Ensuring Rights and Remedies for Immigrant Workers Under the NLRA," in which the NLRB identified the policies and procedures related to effectively serving the particular needs of immigrant communities and to ensuring that the NLRB is accessible to all workers, as well as a safe place where immigrant workers are treated with dignity, without regard to immigration status or work authorization.

Specifically, GC Memo 22-01 identified the policies and procedures for (1) ensuring immigrant workers are provided safe, accessible, and significant engagement with the NLRB; (2) investigating and litigating matters involving immigrant workers to fully effectuate the NLRA; (3) implementing meaningful interagency engagement with the U.S. Department of Homeland Security and other labor agencies; and (4) providing training opportunities with the NLRB and its partners, including agencies at the federal, state, and local levels.

As part of its efforts to enhance its procedures for investigating and litigating matters involving immigrant workers, GC Memo 22-01 directed the NLRB's immigration team to "distribute a document in multiple languages that can be provided to any witness or party who expresses a concern related to immigration status and our case processing procedures." This directive was

satisfied by the NLRB through its issuance of OM Memo 22-09. Employers should remain mindful of the NLRA's protections extended to immigrant workers and work with experienced legal counsel to address questions pertaining to the NLRB's policies and procedures.

The NLRB Is Pushing for a Ban on Compulsory Workplace Arbitration Agreements

Arbitration has long been a cornerstone of dispute resolution for employment cases, and rightfully so, since arbitration is confidential and generally faster and cheaper than traditional litigation. But if the NLRB has its way, that will no longer be the case.

On March 3, 2022, Congress passed 9 U.S.C.A. § 402, which made predispute arbitration agreements for sexual assault and sexual harassment unenforceable. According to the NLRB, this is just the beginning.

On February 15, 2022, NLRB General Counsel Abruzzo asked Congress to ban workplace arbitration agreements, effectively circumventing the Supreme Court's decision in *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1616 (2018), holding that arbitration agreements requiring employees to participate in individualized proceedings are enforceable. Abruzzo's comments follow passage by Congress of 9 U.S.C.A. § 402 and made clear that the current laws still prevent the type of collective action contemplated in the NLRA.

A complete ban on arbitration agreements in the workplace will have seismic effects on dispute resolution, all but ensuring the following:

1. **No confidentiality.** All disputes that are not resolved in prelitigation negotiations will be publicly filed in court rather than filed confidentially in arbitration.
2. **Higher costs to litigate.** Some of the main advantages of arbitration are limited discovery, informal discovery dispute resolution, and streamlined case management, meaning quick hearing dates and an early arbitration date. By losing the right to arbitration, the parties will be forced to go through backed-up courts, engage in extensive discovery, and sometimes wait years for a trial date, which means more time and money spent on litigation.

3. **Risk of higher verdicts.** Arbitrators have extensive experience acting as the judge and jury in employment cases and are more prone to “get it right” when making a final decision. And often, an arbitrator is willing to throw out punitive damages, essentially cutting the plaintiff’s damages by more than half. Juries, however, do not have the same experience and are more likely to award high punitive damages, exposing employers to more costly verdicts.

Although mandatory arbitration agreements for legal actions other than those related to sexual assault and harassment claims are still enforceable, employers should be on the lookout for future actions from Congress.

The NLRB Introduces New Goals for Initial Unfair Labor Practice Investigations

NLRB General Counsel Abruzzo introduced [GC Memo 22-05](#), outlining changes to the process of initial unfair labor practice investigations to better effectuate timely and quality processing of unfair labor practice charges. After seeking the recommendation of the Labor-Management Forum (LMF), the general counsel implemented the following changes, which took effect June 1, 2022:

1. **Changing the measure of timeliness.** Previously, *each Region’s goal* was to annually reduce its average number of days from filing of a charge to the disposition of the charge. Now, the NLRB’s assessment of timeliness will be based on “the average number of days from filing of the charge until the Region either disposes of the charge or reaches a stopping point at which the Region can no longer advance the investigation pending the occurrence of some event beyond the Region’s control (Abeyance).” Rather than assess timeliness differently at each Region, *the goal of the NLRB and of each Region* will be to reach disposition in an average of 91 days or fewer.
2. **Reimplementing Impact Analysis tool with changes.** The general counsel reintroduced the Impact Analysis tool (use of which was previously discontinued in 2019 pursuant to GC Memo 19-02) but with changes. These changes include:

a. Adjusting the targets for investigating each category of case (assigned based on impact level). The new goals reflect the NLRB’s analysis that Category 3 cases take the longest time to investigate, describing them as “highest impact.”

	2018 Goals	2022 Goals under GC Memo 22-05
Category 1	98 days	49 days
Category 2	77 days	91 days
Category 3	49 days	105 days

b. Though all dates across categories were adjusted, the NLRB’s institutional timeliness goals for initial unfair labor practice investigations will be (1) the 91-day overall goal across all three categories of cases and (2) the 105-day goal for Category 3 cases specifically.

3. **Use of Appendixes A and B.** The NLRB also provided Appendixes A and B to keep all Regions consistent. Appendix A is a list of “Dispositions of Initial Investigation,” which will help determine the circumstances under which the case is within a Region’s control or in abeyance. Appendix B lists types of cases to categorize as a Category 1, 2, or 3.

The general counsel also adopted the LMF’s recommendation to reconvene by February 2023 to “examine initial experiences with the system, assess related data, and submit recommended modifications, if deemed appropriate.” She also requested the LMF’s recommendations for a system for measuring post-abeyance case handling. Further recommendations may be forthcoming in 2023.

White House Task Force on Worker Organizing and Empowerment and the NLRB

On February 7, 2022, the White House Task Force on Worker Organizing and Empowerment, led by Vice President Kamala Harris as chair and Labor Secretary Martin Walsh as vice-chair, released a [report](#) that includes approximately 70 recommendations aimed at

promoting worker organizing and collective bargaining for workers. The task force was originally established by President Joe Biden's April 26, 2021, executive order with the mission of "mobilizing the federal government's policies, programs, and practices to empower workers to organize and successfully bargain with their employers."

The recommendations set forth in the task force's report are designed to accomplish the following three specific goals:

1. Position the federal government as a model actor.
2. Use the federal government's authority to support worker empowerment by providing information, improving transparency, and making sure existing pro-worker services are delivered in a timely and helpful manner.
3. Use long-standing authority to leverage the federal government's purchasing and spending power to support workers who are organizing and pro-worker employers.

On February 10, 2022, NLRB General Counsel Abruzzo issued a [memorandum](#) responding to the Report's recommendation for increased coordination among agencies working on labor and employment matters; Abruzzo committed to work "closely with other federal agencies to fully effectuate the mission of the National Labor Relations Act (NLRA)." The memo outlines plans to strengthen partnerships with other agencies and reiterates the need for "better inter-agency collaboration and coordination to ensure that the government is co-functioning and co-enforcing all related laws in the most effective and efficient way, which will ensure workers are fully protected while minimizing employers' compliance burdens."

Abruzzo also referenced the NLRB's current [Memoranda of Understanding](#) with other agencies, including the U.S. Department of Justice (DOJ), the Federal Trade Commission (FTC), and the DOL, which establish "ground rules for information-sharing, investigation, enforcement, training, and outreach," but noted that those guidelines need to be strengthened and enhanced. The memo

explains that the NLRB is working with the DOL and the Equal Employment Opportunity Commission (EEOC) to create a series of webinars focused on combatting retaliation. Lastly, the memo "strongly" encourages all NLRB regional offices "to develop similar inter-agency partnerships and engage in similar joint activities with their local counterparts."

Both the task force's report and the NLRA's memo encourage agency collaboration to increase workers' protections and to foster equality in the workforce. It remains to be seen how the recommendations will play out in 2023.

NLRB General Counsel Issues Memo Warning Against Interfering With Section 7 Rights Through Electronic Monitoring of Employees

On October 31, 2022, NLRB General Counsel Abruzzo issued a warning in GC Memo 23-02 against the use of employee monitoring and management technologies that have the potential to interfere with employee rights granted by the NLRA. Specifically, Abruzzo expressed concern over what she calls "omnipresent surveillance and other algorithmic-management tools," which can interfere with the exercise of rights pursuant to Section 7 of the NLRA. Because of these concerns, the memo indicates that Abruzzo intends to "urge the Board to apply the Act to protect employees, to the greatest extent possible, from intrusive or abusive electronic monitoring and automated management practices that would have a tendency to interfere with Section 7 rights."

In GC Memo 23-02, Abruzzo identifies various examples of practices that she contends already violate "settled Board law." For example, according to Abruzzo, "it is well established that an employer violates Section 8(a)(1) if it institutes new monitoring technologies in response to activity protected by Section 7; utilizes technologies already in place for the purpose of discovering that activity, including by reviewing security-camera footage or employees' social media accounts; or creates the impression that it is doing such things." Abruzzo identifies other examples of conduct that violate Section 8(a)(1), including disciplining employees

“who concertedly protest workplace surveillance” and coercively questioning employees with “personality tests designed to evaluate their propensity to seek union representation.”

Abruzzo also makes clear that employers and third-party software providers may violate Section 8(a)(3) if they rely upon “artificial intelligence to screen job applicants or issue discipline” “if the underlying algorithm is making decisions based on employees’ protected activity.” Employers also violate Section 8(a)(3) if they “discriminatorily” apply “production quotas or efficiency standards to rid themselves of union supporters.”

Finally, for employees with union representation, Abruzzo notes that employers violate Section 8(a)(5) if “they fail to provide information about, and bargain over, the implementation of tracking technologies and their use of the data they accumulate.”

In addition to Abruzzo’s identification of conduct that she says violates existing law, in the memo she says she will “urge the Board to adopt a new framework” to prevent interference with employees’ Section 7 rights. Although Abruzzo acknowledges that employers may have legitimate needs for utilizing a form of electronic monitoring, she states that “the employer’s interests must be balanced against employees’ rights under the Act.” Accordingly, under Abruzzo’s proposed framework, in appropriate cases she will urge the Board to find that

an employer has *presumptively* violated Section 8(a)(1) where the employer’s surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act. If the employer establishes that the practices at issue are narrowly tailored to address a legitimate business need—i.e., that its need cannot be met through means less damaging to employee rights—I will urge the Board to balance the respective interests of the employer and the employees to determine whether the Act permits the employer’s practices. If the employer’s business need outweighs employees’ Section 7 rights, unless the employer demonstrates that special circumstances require covert use of the



technologies, I will urge the Board to require the employer to disclose to employees the technologies it uses to monitor and manage them, its reasons for doing so, and how it is using the information it obtains. Only with that information can employees intelligently exercise their Section 7 rights and take appropriate measures to protect the confidentiality of their protected activity if they so choose.

(Emphasis added.) Abruzzo notes that her framework is consistent with the approach she advocates in instances where “an employer maintains facially neutral work rules that could interfere with the exercise of Section 7 rights.”

In closing, Abruzzo clarifies that she is committed to an “interagency approach” with other federal agencies—including the FTC, the Consumer Financial Protection Bureau (CFPB), the DOJ, the EEOC, and the DOL—to “combat” these issues.

Going forward and based on the memo, employers who utilize technologies to monitor current and/or prospective employees must be mindful of Abruzzo’s guidance. Employers should heed Abruzzo’s warnings and ensure that they have legitimate explanations for any employee monitoring and management technologies

they deploy. Further, in addition to Abruzzo’s guidance, employers who utilize monitoring technologies must also be aware of other federal, state, and local laws regulating the use of these types of technologies within the workforce and ensure compliance with those requirements.

Cemex NLRB Briefing (Overarching Review)

On April 11, 2022, NLRB General Counsel Abruzzo filed a brief in a case currently pending before the NLRB, *Cemex Construction Materials Pacific, LLC*, 28-CA-230115 et al., asking the Board to overturn decades-old precedent and make significant changes to employer rights during unionization campaigns. In her brief, Abruzzo argues that the following changes to well-established Board law must be made: (1) instituting voluntary “card check” recognition over confidential, anonymous secret ballot elections conducted by the NLRB; (2) abandoning more than 70 years of Board and Supreme Court precedent permitting employers to require employees to attend meetings on company time; and (3) eliminating an employer’s right to inform employees during organizing campaigns that direct access to management will be limited if they vote for union representation.

“Captive Audience” Meetings

On July 18, 2022, a group of staffing firms sued in the U.S. District Court for the Eastern District of Texas, Case No. 4:2022cv00605, to prevent Abruzzo from arguing that federal labor law prohibits forcing workers to attend captive audience meetings on the grounds that it violates the employers’ First Amendment rights to present their views on unions.

Currently, employers can require employees to attend meetings on working time so that the employer can express its position on unionization as long as there are no threats or promises of benefits. See *Babcock & Wilcox*, 77 NLRB 577 (1948). Such mandatory meetings are pejoratively called “captive audience” meetings. Abruzzo has argued for reversal of this more than 75-year precedent, arguing that such meetings “inherently involve a threat of reprisal to employees for exercising the protected right to refrain from listening to such speech.” Abruzzo also urges the Board to require employers to provide certain “safeguards” during meetings where unionization is being discussed. In Abruzzo’s view, these “safeguards” will serve to “neutralize the implicit threat of reprisal” in the meeting. Specifically, she believes employers should advise employees that (1) attendance at and/or listening during the meeting is voluntary; (2) if employees attend, they are free to leave at any time; and (3) there will be no benefits for attendance or reprisals for nonattendance.

Significantly, Abruzzo’s view is at odds with the Supreme Court precedent announced in *Chamber of Commerce of United States v. Brown*, 554 U.S. 60 (2008), which prohibits the regulation of noncoercive speech about labor issues because the NLRA “favor[s] uninhibited, robust, and wide-open debate in labor disputes.” For nearly 75 years, employers have been able to use work time—even during required meetings—to express how unions can alter the work environment. Undaunted in the face of this precedent, the general counsel has asked the Board to overrule *Babcock* and return to *Clark Brothers*, making all mandatory meetings unlawful if they concern an employee’s Section 7 rights.





The changes proposed by Abruzzo would take away a tool often used by employers to educate employees about the effects of unions and unionization.

“Captive Audience” Meetings

Abruzzo argued that “captive audience” meetings should be outlawed, a legal change that would require the Board to ignore nearly 75 years of case law and return to the Truman-era rule in *Clark Brothers*, 70 NLRB 802 (1946). In *Clark Brothers*, the Board held that an employer commits an unfair labor practice when it requires employees to attend meetings where the employer expresses its view on unionization.

Abruzzo stated that such captive audience meetings “inherently involve a threat of reprisal to employees for exercising the protected right to refrain from listening to such speech.” This view is directly at odds with both the NLRA and Supreme Court precedent. In 1947, Congress enacted several amendments to the NLRA, including Section 8(c), which explicitly allowed employers to express their views about labor organizing absent a threat of reprisal or promise of benefit. The following year, the Board overruled *Clark Brothers* in *Babcock & Wilcox Co.*, 77 NLRB 577 (1948), stating that “the language of Section 8(c) of the amended Act, and its legislative history, make it clear that the doctrine of the *Clark Bros.* case no longer exists as a basis for finding unfair labor practices.”

Significantly, Abruzzo’s view is at odds with the Supreme Court precedent announced in *Chamber of Commerce of United States v. Brown*, 554 U.S. 60 (2008), which prohibits the regulation of noncoercive speech about labor issues because the NLRA “favor[s] uninhibited, robust, and wide-open debate in labor disputes.” For nearly 75 years, employers have been able to use work time—even during required meetings—to express how unions can alter the work environment. Undaunted in the face of this precedent, the general counsel has asked the Board to overrule *Babcock* and return to *Clark Brothers*, making all mandatory meetings unlawful if they concern an employee’s Section 7 rights.

Secret-Ballot Elections

In her brief, Abruzzo also sought to eliminate or significantly diminish the use of elections to determine union representation. Currently, a union can organize employees either through a secret-ballot election overseen by the NLRB or by employer recognition through a card check. In a card check, an employer presented with evidence that a majority of its employees wish to be represented by a union can simply recognize the union. The multitude of reasons to refuse a card check are well known, including the potential for forged cards, disingenuous organizing techniques, employees being browbeaten into signing, relentless home visits, and other coercion tactics. By contrast, in order to request a secret-ballot election, the union must now submit

authorization cards to the Board, signed by at least 30% of employees, that indicate employee support for a union. The current process ensures that a democratic election takes place and allows employees to express their preference anonymously.

Notwithstanding these benefits, Abruzzo asked the Board, in her brief, to reinstate the standard set forth in *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), a standard rejected decades ago. Reinstatement of the Joy Silk doctrine would require an employer to recognize and bargain with a union if it is presented with signed authorization cards from a majority of workers. The burden of proof would then shift to the employer to demonstrate that it has a “good faith doubt” as to the union’s majority status. If the employer is unable to satisfy this “good faith doubt” test, the Board would order the employer to recognize and bargain with the union without a secret-ballot election. Abruzzo’s proposed change would make it much easier for unions to assert representation status, would deny the vote to employees who oppose unionization, and is likely to lead to a steep uptick in union organization efforts.

Employer-Employee Relationship With Union Representation

Currently, under *Tri-Cast*, 274 NLRB 377 (1985), employers may tell employees that their access to management will be limited if they vote for union representation without violating Section 9(a) of the NLRA. Section 9(a) provides employees the right to adjustment of their grievances, without the intervention of the bargaining representative, *as long as the adjustment is not inconsistent with the terms of a collective bargaining contract and so long as the representative has been*

given opportunity to be present at such adjustment. So, while Section 9(a) may preserve employees’ rights to take action on their own behalf in theory, in practice many of collective bargaining agreements explicitly bar it, instead granting exclusive representation rights to the union. The Tri-Cast Board recognized that Section 9(a) does contemplate a change in the way the employer and employee deal with each other, and that it is a fact that when a union represents employees, they deal with the employer indirectly through a shop steward.

In her brief, Abruzzo asked the Board to overrule *Tri-Cast* and find that employer statements suggesting that access to management will be curtailed by union representation are “unlawful threats of the loss of existing benefits.” Abruzzo argued that such statements do not simply convey an anticipated change in the employer-employee relationship, but that they instead misrepresent employee Section 9(a) rights. She further argued that Section 9(a) provides employees the opportunity to “deal directly” with management to adjust grievances—despite unambiguous language in 9(a) requiring that the adjustment be consistent with the collective bargaining agreement and that the union be given the opportunity to be present. If the Board were to adopt this departure from precedent, employers could expect (1) immediate union scrutiny of any statement during organizing campaigns regarding the impending change in the employer-employee relationship and (2) additional grounds to challenge election results where employees have exercised their right to remain union-free.

2022 NLRB Decisions

Workplace Limitations on Wearing Union Apparel or Insignia

In *Tesla, Inc.*, NLRB Case 32-CA-197020 (2022), a Board majority struck down a Trump-era ruling that gave companies more leeway to block button-wearing and confirmed that the “special circumstances” test applies when an employer interferes in any way with employees’ right under Section 7 of the NLRA to display union insignia.

Workers have long had the right to wear and display union insignia and apparel under the Supreme Court’s 1945 decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), absent special circumstances that justify an employer’s imposition of a restriction on the display of such union insignia and apparel. In 2019, however, the NLRB in *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (2019), created an exception to that general rule by holding that lesser size-and-appearance restrictions on union insignia could be deemed lawful under the less-demanding test for workplace rules from the NLRB’s decision in *Boeing Co.*, 365 NLRB No. 154 (2017).

But, in the *Tesla* decision, the Board majority overruled the *Wal-Mart* decision and found that it was unlawful for Tesla to maintain a policy requiring employees to wear a plain black T-shirt or one imprinted with the employer’s logo, thus prohibiting employees from substituting a shirt bearing union insignia. The Board found that the *Wal-Mart* decision was fundamentally flawed and could not be squared with *Republic Aviation* because “it effectively treat[ed] the display of union insignia more as a privilege to be granted by the employer on the terms it chooses, rather than as an essential Section 7 right that—pursuant to federal labor law—the employer is required to accommodate absent a showing of special circumstances.”

Accordingly, the *Tesla* decision reaffirms that any attempt to restrict the wearing of union clothing or insignia is presumptively unlawful, unless an employer is able to meet the heightened burden and demonstrate special circumstances (e.g., the insignia could threaten employee safety, quality control, public image, or workplace decorum) to justify its attempts to limit employees’ rights pursuant to federal labor law. Although the ruling stated that it does not implicate facially neutral dress code policies, employers may want to take a closer look at such policies—particularly those that require specific uniforms, do not permit any deviations, and are not based on meaningful safety concerns or other special circumstance (akin to the uniform policy in *Tesla*).

Board Upholds Successor Bar Doctrine: *Hospital Menonita de Guayama, Inc.*

In June 2022, the NLRB voted to uphold the so-called “successor bar doctrine” in *Hospital Menonita de Guayama, Inc.*, 371 NLRB No. 108 (June 28, 2022). By a 2-1 vote, the Board found Hospital Menonita de Guayama (Hospital Menonita) violated the law when it withdrew recognition from the incumbent union’s five bargaining units before attempting to bargain with them. See *Hospital Menonita de Guayama, Inc.*, 371 NLRB No. 108 at 1-2.

Hospital Menonita purchased Hospital San Lucas Guayama (San Lucas) in September 2017. San Lucas employees belonged to five bargaining units: one each representing registered nurses, practical nurses, medical technologists, technicians, and clerical workers. At the time Hospital Menonita purchased San Lucas, the union was in the process of negotiating collective bargaining agreements for all five units. Hospital Menonita told San Lucas employees it would not honor any of San Lucas’s collective bargaining agreements,

but that it would bargain terms with each of the five units anew. 371 NLRB at 2-3.

Despite recognizing the union by letter in November 2017, by April 2018, Hospital Menonita had withdrawn recognition from each of the five bargaining units, claiming there was “objective evidence” the employees “no longer wished to be represented by the Union.” After each withdrawal of recognition, Hospital Menonita “made unilateral changes to the terms and conditions of employment of the newly-unrepresented employees.” *Id.* Ultimately, after withdrawing recognition from all five units, Hospital Menonita distributed an employee manual and general rules of conduct to all employees. These new rules changed disciplinary policies and benefits for employees in all five units. Hospital Menonita did not attempt to bargain with the union when preparing the new rules.

The question before the Board was “whether [Hospital Menonita], an admitted successor employer, unlawfully withdrew recognition seriatim from the incumbent Union ... before any negotiations had taken place.” By a vote of 2-1, the Board determined that Hospital Menonita had violated the law when it withdrew recognition from the incumbent union after taking over for San Lucas. *Id.* at 2. Importantly, in so deciding, the Board reaffirmed the applicability of the successor bar doctrine as articulated in *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011). That is, the Board determined incumbent unions enjoy an irrebuttable presumption of majority support for at least six months after a change in employer ownership even where, as Hospital Menonita did here, the successor employer claims to have objective evidence that the union has lost majority support.

The Board explained “[t]he explicit policy of the National Labor Relations Act is to promote collective bargaining.” *Id.* at 4 (citations omitted). To that end, the Board believes a “bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.” *Id.* at 4 (citing *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944)). The successor bar doctrine is designed to “promote a primary goal of the [NLRA] by stabilizing labor-management relationships” and “promoting

collective bargaining[] without interfering with the freedom of employees to periodically select a new representative or reject representation.” *Id.* (quoting *UGL-UNICCO*, 357 NLRB at 801). Specifically, the doctrine creates an “insulated period” during which an incumbent union enjoys a presumption of majority support. That period must last at least six months, but it can last up to a year; it does not start until the first bargaining session between the incumbent union and the successor employer. *Id.* at 4, 6.

In sum, the Board reaffirmed the applicability of the successor bar doctrine as articulated in *UGL-UNICCO*. For at least six months after a change in employer ownership, no employer, employee, or rival union may challenge the incumbent union’s majority status. Critically, the successor employer may not withdraw recognition from the union based on a claim the union has lost majority support, even if the successor employer has evidence of such a decline in support.

No Right for Employers to Restart Decertification Process: *Geodis Logistics, LLC*

In *Geodis Logistics, LLC*, 371 NLRB No. 102 (2022), the Board held that employers do not have the right to request the reinstatement of a decertification petition as this right belongs exclusively to employees.

In 2018 and 2019, Geodis Logistics employees filed decertification petitions to challenge the status of United Steelworkers as the bargaining representative



for a group of production workers. In 2020, the regional director dismissed the decertification petitions in light of unresolved unfair labor practice charges alleging that the employer provided improper assistance to the petitioners in the decertification cases.

After settling the unfair labor practice charges, the employer requested that the regional director reinstate the decertification petitions. The regional director denied the employer's request, and the employer subsequently filed a request for review by the Board.

The Board in *Geodis Logistics* affirmed the regional director's decision not to reinstate the petitions, holding that the request to reinstate a decertification petition must come from the employee, not the employer. The employer argued that an employer in a decertification proceeding should be permitted to request reinstatement of the decertification petition after the completion of the remedial period associated with the settlement of the unfair labor practice charge. The Board rejected the employer's argument, finding that this would open the door for employers to manipulate the NLRB's processes by unlawfully assisting employees with decertification petitions, settling any unfair labor practice charges that arose from the unlawful assistance, and compelling the Board to reinstate the decertification petition.

The Board also pointed to the structure of the NLRA, noting that Section 9(c) establishes separate procedures for employees to file decertification petitions and for employers to force elections to test a union's majority status. The decertification procedure provides a remedy exclusively for employees, so only employees may request reinstatement of a decertification petition.

Notably, the Board emphasized that its holding is a narrow one and that "[n]othing in this decision precludes employer participation in other aspects of the decertification process, so long as that participation does not otherwise exceed the bounds of permissible conduct." However, throughout the opinion, the Board reiterated the long-standing rule that employers are prohibited from providing direct assistance to their employees in connection with the employees' decertification petitions.

Accordingly, employers should be careful not to provide employees improper assistance with their decertification petitions. Providing more than ministerial assistance to employees could lead to dismissal of the employee's decertification petition, and under *Geodis Logistics*, employers will not be allowed to later request reinstatement of the dismissed petition.

NLRB General Counsel's Appeal to Overturn *American Federation for Children*

The NLRB general counsel's office has asked the Board to overrule Trump-era case law, which could broaden the types of employee actions that would be protected under the NLRA. The general counsel also asked the Board to find employee discussions of discrimination to be inherently concerted and reinstate the solidarity principle. In an appeal filed January 13, 2022, the general counsel argued that the decision of the administrative law judge (ALJ) in *American Federation for Children*, No. JD(SF)-14-21 (NLRB Div. of Judges Aug. 11, 2021), was incorrect because it ignored years of precedent and did not align with the purpose of the NLRA.

In *American Federation for Children (AFC)*, a former employee argued that she was unlawfully discharged for engaging in protected concerted activity when she reported concerns to coworkers and a former supervisor about her current supervisor's possible anti-immigration bias. The ALJ ruled that the former employee did not engage in protected activity, but instead was engaged in misconduct by acting on an ill-supported suspicion and publicly accusing her supervisor of being a racist, which the ALJ considered an incendiary accusation.

Regarding Concerted Activity, the General Counsel Urges the Board to Replace *Alstate*

In *Alstate*, a Trump-era ruling, the Board found that an employee's statement was not protected because there was no evidence of prior group discussion and the statement itself did not demonstrate that the employee was trying to initiate or induce group action. *Alstate Maint., LLC*, 367 NLRB No. 68 (2019).

Without an express call to action, the Board in *Alstate* determined that an intent to engage in concerted activity could be found using the following factors:

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 affected multiple employees attending the meeting.
3. The employee who spoke up in response to the announcement did so to protest or complain about the decision, not merely to ask questions about how the decision had been or will be implemented.
4. The speaker(s) 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(s) themselves.
5. The meeting presented the first opportunity employees had to address the decision, so that the speaker had no opportunity to discuss it in advance with other employees.

Id. Citing *Alstate*, the ALJ argued in *AFC* that the employee was raising a personal grievance, not a group concern.

However, the general counsel believes a list of factors is unnecessary, and advocates for a return to case law that more broadly defines concerted activity, allowing the NLRA to better protect an employee's individual advocacy. The general counsel references prior cases that protect employee activity if it relates to matters of common concern.

Regarding Concerted Activity, the General Counsel Urges the Board to Find Employee Discussions of Discrimination to Be Inherently Concerted

On appeal, the general counsel takes the position that workplace discussions concerning racial discrimination (including race and national origin) are inherently concerted. The Board has previously ruled that employee discussions regarding certain subjects are inherently concerted. Under this doctrine, when a subject matter is inherently concerted, inducing group action is implied

and need not be expressed. The general counsel argues that discussions regarding discrimination should also be considered inherently concerted because discrimination implicates all terms and conditions of employment, is of interest to all employees in the workplace, and anti-discrimination provisions are included in virtually every collective bargaining agreement.

Regarding Mutual Aid and Protection, the General Counsel Urges the Board to Overrule *Amnesty* and Reinstate the Solidarity Principle

In *Amnesty*, another Trump-era ruling, the Board held that advocating for unpaid interns was not protected activity because “[a]ctivity advocating only for nonemployees is not for ‘other mutual aid or protection’ within the meaning of Section 7.” *Amnesty*, 368 NLRB No. 112 (2019). The ALJ made a similar argument in *AFC*, that the employee's advocacy for the rehire of a former employee was not for mutual aid and protection, because the former employee was a nonemployee.

But the general counsel argues that *Amnesty* should be overruled because solidarity between employees and nonemployees is for mutual aid and protection. The general counsel references the NLRB's decision in *General Electric*, in which the Board found that employees' support for striking nonemployee agricultural workers was for mutual aid and protection. *General Electric*, 169 NLRB 1101, 1104 (1968).

Regarding Mutual Aid and Protection, the General Counsel Urges the Board to Overrule *Alstate* and *Quicken*

The general counsel argues that a broader interpretation of mutual aid and protection is consistent with the purpose of the NLRA, which includes improving employee working conditions. The general counsel believes the decisions in *Alstate* and *Quicken* undermine this purpose by narrowing what activities are considered for mutual aid and protection. *Alstate Maint., LLC*, 367 NLRB No. 68 (2019); *Quicken Loans, Inc.*, 367 NLRB No. 112 (2019).

The general counsel's appeal is still pending.



Affirming Merit-Determination Dismissals Without a *Saint Gobain* Hearing

In *Rieth-Riley Construction Co.*, 371 NLRB No. 109 (2022), a slim Board majority affirmed that merit-determination dismissals, which authorize regional directors to dismiss a representation petition when a regional director has found that an unfair labor practice irrevocably tainted the petition, remain available under the Election Protection Rule despite the rule's limitation on abeyances for such petitions. The Board upheld these merit-determination dismissals even in circumstances where a *Saint Gobain* hearing, a hearing structured to assess the merits of the unfair labor practice allegations, had not been held.

Merit-determination dismissals have long been a tool of the NLRB, allowing regional directors to intervene to dismiss a representation petition when an ongoing unfair labor practice complaint alleges interference with employee free choice in the election. Issuance of the Trump-era Election Protection Rule, however, had called into question the continued viability of this means of dismissal. The Election Protection Rule limits the ability of regional directors to place holds—otherwise known as abeyances—on representation petitions when an ongoing unfair labor practice has been alleged. The *Rieth-Riley Construction Company* argued that the Election Protection Rule's limitations on holds also created limitations on the use of merit-determination dismissals.

A unanimous Board disagreed with extending application of the Election Protection Rule to merit-determination dismissals. However, while the entire Board accepted the availability of merit-determination dismissals, the use of such dismissals without an accompanying *Saint Gobain* evidentiary hearing was

hotly contested, resulting in a 3-2 split. In 1984, the NLRB in *Master Slack Corp.*, 271 NLRB 78 (1984), established a factor-based “causal nexus” analysis, which looks to how an alleged unfair labor practice affects an entire unit of employees, to help identify when a merit-determination dismissal is appropriate. In 2002, however, applications of the *Master Slack* test were limited by the NLRB's decision in *Saint Gobain Abrasives*, 342 NLRB 434 (2004), which established that in some circumstances an evidentiary hearing would be needed to establish the *Master Slack* causal nexus. While the dissent argued that a *Saint Gobain* evidentiary hearing is always needed to establish a causal nexus between an unfair labor practice and employee disaffection, the Board held that no such hearing is required when an alleged unfair labor practice inherently affects all unit employees, such as when a lockout occurs or when unilateral changes in wages are made.

The *Rieth-Riley Construction Co.* decision thus reaffirms regional directors' discretion to dismiss election petitions. Under *Rieth-Riley Construction Co.*, regional directors can determine, as a matter of law, that alleged unfair labor practices necessarily taint a petition, even without first conducting an evidentiary hearing. Given that the NLRB's spring rulemaking agenda indicated it is considering revising the Trump-era Election Protection Rule, the decision in *Rieth-Riley Construction Co.* may foreshadow future expansions in the authority of regional directors to intervene in representation petitions.

Post-Expiration Union Dues: *Valley Hospital Medical Center*

On October 3, 2022, in *Valley Hospital Medical Center*, Case 28-CA-213783, the NLRB ruled that employers may not unilaterally cease union dues checkoff after the expiration of a collective bargaining agreement that provides for the arrangement. Ruling on remand from the U.S. Court of Appeals for the Ninth Circuit, the Board reversed its ruling in *Valley Hospital I* (2019) and returned to the rule of *Lincoln Lutheran* (2015), requiring employers to maintain dues-checkoff arrangements after expiration of an agreement. The Board majority reasoned that its decision was consistent with the general rule of *NLRB v. Katz*, 369 U.S. 736, 743 (1962), requiring

employers to maintain most terms and conditions of employment after contract expiration to facilitate bargaining for a new agreement.

Dues-checkoff arrangements require an employer to deduct union dues from employees' wages and remit the dues to the unions. For decades, the Board held that such arrangements were among the terms and conditions of employment that employers could change unilaterally after expiration of a collective bargaining agreement. In *Bethlehem Steel* (1962), the Board held that an employer's obligation to check off union dues ends when its collective bargaining agreement containing a checkoff provision expires. In that decision, the Board likened dues-checkoff provisions to union-security provisions which, as mandated by Section 8(a)(3) of the NLRA, terminate upon expiration of a collective bargaining agreement containing them. The Board affirmed its *Bethlehem Steel* holding in a series of subsequent decisions, including *Tampa Sheet Metal* (1988) and *Hacienda Hotel* (2000).

The Board first overturned *Bethlehem Steel* in *Lincoln Lutheran* (2015). In that decision, a Board majority held that dues-checkoff provisions were subject to the general rule prohibiting unilateral changes in most terms and conditions of employment after expiration of a collective bargaining agreement. *Lincoln Lutheran* distinguished dues-checkoff provisions from other contractual provisions that do not survive contract expiration because they involve the waiver of statutory rights, such as mandatory arbitration, no-strike, and management-rights provisions. The Board reasoned that



the latter provisions, unlike dues-checkoff arrangements, materially differ from other terms and conditions of employment and merit an exception from the *Katz* bargaining obligation because, “in agreeing to each of these terms, parties have waived rights that they otherwise would enjoy in the interest of concluding a collective-bargaining agreement, and such waivers are presumed not to survive the contract.” *Lincoln Lutheran*, 362 NLRB at 1657. The Board also noted that dues-checkoff arrangements “directly assist employees in their voluntary efforts to support their designated bargaining representatives financially” and, accordingly, are “an exercise of Sec. 7 rights” under the NLRA. *Id.* at fn. 12.

In *Valley Hospital I* (2019), just four years after *Lincoln Lutheran*, the Board returned to the *Bethlehem Steel* rule, once again holding that employers could unilaterally cease dues-checkoff arrangements post-expiration. The Board ruled that since such provisions were “uniquely of a contractual nature,” they could not survive the contract’s expiration. 368 NLRB No. 139. The Board also contended that dues checkoffs are materially unlike other voluntary payroll deduction arrangements that survive expiration because they involve “direct payments by an employer to a union,” which are subject to the limits of 302 of the Labor Management Relations Act regulating payments from employers to union representatives.

In 2020, the Ninth Circuit remanded *Valley Hospital Medical Center* and other cases to the Board, asking the panel to reconsider whether dues-checkoff provisions should be subject to the *Katz* rule requiring an employer to maintain the terms and conditions of employment after expiration of a collective bargaining agreement. *LJEB v. NLRB*, 840 F. App’x 134 (9th Cir. 2020). The Ninth Circuit’s opinion criticized the Board’s reasoning in *Valley Hospital I* that dues-checkoff arrangements are “uniquely of a contractual nature,” citing multiple prior cases where the Board determined that the *Katz* rule applied to other provisions of a collective bargaining agreement that “indisputably could not have existed until they were ‘created’ by such an agreement.” *LJEB v. NLRB*, 840 F. App’x at 136-37. For example, the Board has previously held that provisions requiring an employer to process grievances short of arbitration,

granting union representatives leave for official union business, and granting security rights to union officials all remain insulated from unilateral changes after contract termination.

The Board's decision in *Valley Hospital Medical Center* largely followed its 2015 *Lincoln Lutheran* ruling. First, the Board majority explained that Section 8(a)(3) does not mandate termination of dues-checkoff provisions upon expiration of a collective bargaining agreement, unlike union-security clauses. 371 NLRB No. 160, at 9. Second, the Board found that dues-checkoff arrangements were akin to other terms and conditions that survive expiration, such as common payroll deductions for savings bonds and insurance policy premiums. *Id.* at 10. Finally, the Board reasoned that dues-checkoff arrangements are an exercise of an employee's Section 7 rights. *Id.* at 11. The Board rejected the arguments advanced in *Valley Hospital I* and by the dissent, determining that dues-checkoff provisions are not "uniquely created by contract" and should not be included among the exceptions to *Katz's* rule against unilateral change post-expiration. The Board concluded that "dues-checkoff provisions are properly understood to survive the expiration of the contract that contains them, and to be enforceable under Section 8(a)(5)." *Id.* at 15.

The *Valley Hospital Medical Center* decision applies retroactively to all pending cases, including those where an employer acted while *Valley Hospital I* was in effect. The Board argued that retroactive application of its ruling did not constitute a "manifest injustice" to employers since the "contrary rule" espoused in *Valley Hospital I* had been "subjected to sustained judicial criticism." 371 NLRB No. 160, at 16. By applying its holding retroactively, the Board found that it would "avoid the potential for inconsistency in pending cases, more efficiently restore clarity to this area of law, and more effectively ensure that today's holding serves its intended goal of promoting stability in labor relations (consistent with the design of the statute)." *Id.*

Direct Dealing and *Southern Ocean Medical Center*

In *Southern Ocean Med. Ctr.*, 371 NLRB No. 147 (Sept. 26, 2022), the NLRB expanded the circumstances under which employers might be held liable under Section 8(a)(5) and (1) of the NLRA for directly dealing with represented employees. In this case, the employer was a new healthcare entity, Hackensack Meridian Health (HMH), that formed after the merger of two different healthcare providers. Some of the members of the new entity's workforce were represented by a union. HMH introduced a new benefits plan that sought to standardize, or "harmonize," benefits across a workforce that included both represented and unrepresented employees.

Prior to the merger, HMH and the union were parties to various three-year collective bargaining agreements; following the merger, HMH renewed these contracts for one year because HMH wanted to "harmonize" its operation and employee benefits across its facilities. As HMH worked on its harmonization plan, it engaged in bargaining with the union. At a March 2018 bargaining session, the parties discussed such topics as health insurance, staffing, contract expiration dates, and a fair election process, but did not exchange specific proposals and did not specifically discuss HMH's harmonization plan. The union generally opposed benefits standardization to the extent it would result in terms less favorable than those in prior contracts.

Almost two months later, in May, HMH's lead negotiator informed a union representative via email that in three days, HMH would share updated harmonization information with all employees, including those represented by the union, even though some of the information concerned mandatory subjects of bargaining. The email also said that the correlative website would have "appropriate disclaimers and acknowledgement that for all union represented team members 'HMH is legally required to bargain with the union regarding mandatory subjects and it will continue to do so.'" Further, the email stated that HMH was in the process of arranging a preview of this information, to occur the day before the information was to be shared with all employees. This same email also stated that when "this

process and negotiations are complete, HMH hopes that all team members will enjoy the same benefits, but obviously the negotiations [sic] process may result in variations in certain areas compared to the benefits enjoyed by other team members.”

Two days later, the parties held a bargaining session for one of the bargaining units. At the session, the HMH representative informed a union representative that he wanted to make a presentation to the union on the information that was to be shared on the harmonization website the next day. The union rep refused to negotiate over the website and demanded that HMH present proposals, but HMH instead made the presentation, which consisted of a slideshow that contained screen shots from some of the pages of the not-yet-live harmonization website.

The presentation contained information on a range of terms and conditions of employment, from paid leave and health insurance to pay periods and pay dates. This harmonization plan, if applied to unit employees, would modify certain contractual provisions on mandatory subjects of bargaining. The presentation also included a disclaimer in large, bold font: “We are required by law to deal with the unions on behalf of unionized team members, and we will continue to do so. We will only negotiate with the unions, not with individual unionized team members.” When the harmonization website went live the next day, union representatives received access just before employees. The website included a footer with the same disclaimer used in the presentation, but in smaller font. That same day, HMH emailed employees a flyer about the harmonization program, which included a link to the website and a video of a conversation between HMH leaders in which they discussed anticipated changes to employee benefits. A hard copy of this flyer, which contained disclaiming language in small type at the end, was also distributed.

To determine whether HMH’s conduct constituted direct dealing, the Board applied the three-part test from *Permanente Medical Group*, 332 NLRB 1143 (2000). It asserts that “unlawful direct dealing occurs when: (1) an employer communicates directly with union-represented employees; (2) the discussion was for the purpose of

establishing or changing wages, hours, and terms and conditions of employment or undercutting the union’s role in bargaining; and (3) such communication was made to the exclusion of the union.”

The Board determined that all elements of the *Permanente* test were satisfied. The Board held that the communications sent to all employees regarding the harmonization plan constituted unlawful direct dealing with union-represented employees, even though they contained disclaimers. The Board held that even though HMH gave the union a presentation about and preview of the messages in the email and website before it sent them to employees and published them to the website, these communications were made to the exclusion of the union. This was so, the Board concluded, because HMH kept the specifics of the harmonization plan confidential and did not share specific information regarding the plan with the union until the day before it was presented to employees—despite the fact that the parties were actively engaged in bargaining at this time. In so holding, the Board noted the importance of providing the union sufficient time to consider or respond to a proposal.

The NLRB Grants Regional Directors Authority To Control Rerun Election Procedures Where Parties Agree to Rerun but Reach Impasse on Procedures

In *Dynamic Concepts*, 371 NLRB No. 117 (July 22, 2022), the union filed objections after losing an election seeking to represent employees of the employer. In short, the union alleged that the employer had engaged in various forms of misconduct that warranted setting aside the election results. Rather than litigate the merits of the union’s election misconduct allegations and objections, the employer agreed to a rerun election. However, the parties could not reach an agreement on certain terms and procedures regarding the rerun election. Specifically, the union refused to agree to the employer’s proposal to limit information on the Board’s rerun election notice about the reasons for the rerun election, and therefore the union refused to sign a stipulation regarding same.

As the parties had reached an impasse, the regional director approved a stipulation (signed only by the

employer) providing for a rerun election and issued a notice of election to the employees. The notice of election stated, in relevant part:

[The election] was set aside by agreement based upon alleged objectionable conduct of the Employer that interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election.

The union filed a request for review with the Board, challenging (1) whether the regional director had the authority to approve a stipulation setting aside the election and directing a rerun election where, as here, the union refused to sign the stipulation; and (2) whether the regional director's notice of election adequately informed the employees of the reason for the rerun election.

On the first issue, the Board held that, in this specific, unique scenario, regional directors have the authority to set aside the results of an election and to direct a rerun election, even if one party refuses to sign the stipulation, so long as the regional director schedules the election at an appropriate time during which the circumstances permit the free choice of a bargaining representative. The Board reasoned that where, as here, the parties agree that a rerun is warranted, a disagreement about the details of the rerun election should not prevent the election because it would result in an unnecessary expenditure of resources and unreasonably delay the question concerning representation.

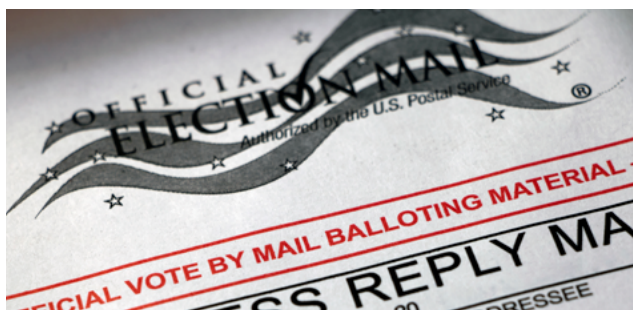
However, the Board agreed with the union that the regional director's notice of election was improper, as it inadequately informed the employees about the reason for the rerun election. The Board held that, under these circumstances, a notice of election must (1) clearly

identify the party or parties that have agreed to proceed to a rerun election, thereby avoiding language that may incorrectly suggest all parties have agreed to this course of action, and (2) describe the objections that were filed pertaining to the original election. For additional clarity and uniformity, the Board's decision provided a template notice of election that regional directors must now use where, as here, the parties have agreed to a rerun election but cannot reach agreement on the language for a pertinent stipulation.

The NLRB Updates Considerations for Directing Mail-Ballot Elections

The NLRB issued a decision on September 29, 2022, in *Starbucks Corporation*, 371 NLRB No. 154 (2022), updating the considerations that guide regional directors when deciding whether union elections should be conducted by mail ballot due to COVID-19 concerns. This decision updates the Board's standard laid out in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), which identified the six factors listed below to guide regional directors in exercising their discretion to order mail-ballot elections and held that the presence of any one factor would justify—though not require—the direction of a mail-ballot election:

1. The NLRB office tasked with conducting the election is operating under "mandatory telework status."
2. Either the 14-day trend in number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5% or higher.
3. The proposed manual election site cannot reasonably be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size.
4. The employer fails or refuses to abide by GC Memo 20-10, "Suggested Manual Election Protocols."
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status.





6. Other similarly compelling circumstances exist.

The *Starbucks* decision updates the second factor by “reorient[ing] factor 2 from its current data points to the Centers for Disease Control and Prevention’s (CDC) recently established Community Level tracker.” According to the CDC, this tracker “provides an integrated, county view of key data for monitoring the COVID-19 pandemic in the United States [and] allows for the exploration of standardized data across the country.” The Community Level tracker is grounded in a collective assessment of three data points: new COVID-19 cases, new COVID-19 hospital admissions, and the percent of staffed inpatient beds in use by COVID-19 patients.

Under the new standard, a regional director will not abuse their discretion by directing a mail-ballot election when the county encompassing the employer’s facility is in the “High” Community Level category. Additionally, the Board held that “Medium” and “Low” Community Levels will not be independently sufficient to support a mail-ballot determination under factor 2. The *Starbucks* decision does not alter the remaining five *Aspirus* factors and does not apply retroactively.

In a press release following the decision, NLRB Chairman Lauren McFerran commented, “State and local governments no longer provide the COVID-19 data in the manner that they did when the 2020 *Aspirus* decision was issued. Using the CDC’s tracker instead will allow regional directors to easily and consistently evaluate the safety of conducting in-person elections, while minimizing delay caused by disputes over the appropriate interpretation and application of COVID-19 data.”

For employers, this will likely clarify what had become a murky process. Under *Aspirus*, unions and employers

often presented different and conflicting COVID-19 data due to the variety of data sources and inconsistent metrics. By focusing only on the CDC’s tracker, the NLRB has streamlined a process that had grown cumbersome.

Constellium Update

Where does a worker’s right to complain about work conditions end and an employer’s interest in upholding workforce civility begin? On August 9, 2022, the D.C. Circuit upheld a Board decision finding that an employee who wrote “Whore Board” above an overtime sign-up sheet posted by his employer was engaged in protected activity under the NLRA.

The employer, Constellium Rolled Products, had a system for scheduling overtime assignments at one of its facilities. Under the system, employees who wanted to work overtime were required to write their name on sign-up sheets in a high-traffic area, and failure to complete the scheduled shift would result in discipline. Under the previous system, employees were not disciplined if they did not work the volunteer overtime shifts. In protest, many employees at the facility, including supervisors, began to refer to the sign-up sheets as the “Whore Board.” This term was used frequently by employees, including over the company-wide radio system. The company never disciplined employees for using this term until an employee went a step further and wrote “Whore Board” above the sign-up sheet. The employee who wrote the term admitted to it and was suspended and ultimately discharged. The Board found the discharge unlawful, and the appeals court ultimately upheld the decision.

First, the court held that the writing was a protected activity because it was “part of a continuing course of

protected activity” in protest of the overtime procedures. Additionally, the employer could not single out the employee for discipline when it had permitted other employees, including supervisors, to express their dissatisfaction with the overtime policy by using the same vulgarities without discipline. Second, the court determined that disciplining the employee did not conflict with the company’s obligations under anti-discrimination and anti-harassment laws since the company had no history of enforcing any such policy in a consistent manner until disciplining the employee.

This decision highlights that an employee’s use of vulgar language may still be protected activity if it relates to a complaint or protest of company policy. Accordingly, employers should be cautious of tolerating vulgar or otherwise abusive language in the workplace and should promptly and consistently enforce their anti-harassment and anti-discrimination policies. Failure to do so may cause a court to determine that an employer’s attempt to justify discipline based on an employee’s otherwise vulgar language is pretextual.

Next Steps for Employers

When considering discipline for misconduct, employers should follow these additional steps to ensure compliance with the NLRA:

- Employers should take extra precautions when an employee’s conduct involves a complaint or protest against a company policy or working conditions.
- Employers should similarly discipline all employees who engage in abusive conduct, make it clear that such behavior will not be tolerated, and promptly respond when this behavior occurs.
- Employers should enforce their anti-discrimination and anti-harassment policies. In addition to having written policies that are widely available and known to employees, employers must take immediate action when violations of these policies occur.
- Employers should also seek experienced legal counsel to ensure that their anti-harassment and anti-discrimination policies comply with applicable laws.

NLRB Returns to Obama-Era Microunit Standard

On December 14, 2022, the NLRB issued a decision in *American Steel Construction, Inc.*, in which a 3-2 Board majority threw out the Trump-era standard used to determine whether a microunit (i.e., a small, discrete subset of employees at a larger worksite) is appropriate. The decision also reinstated the Obama-era standard, which held that petitioned-for units would be found appropriate, unless there was an “overwhelming” community of interest between the petitioned-for unit and excluded employees.

The Board was tasked with evaluating a regional director’s determination that a petitioned-for microunit was not appropriate because the evidence was insufficient to establish that field ironworkers of employer American Steel Construction, Inc., who predominantly work as installers at third-party job sites, possess a community of interest that was “sufficiently distinct” from the employer’s remaining employees. Before addressing the regional director’s ruling, the Board majority reevaluated its current standard for determining whether a petitioned-for unit is appropriate. As a result, the majority explicitly overruled its decisions in *PCC Structurals, Inc.*, and *The Boeing Co.* and reinstated *Specialty Healthcare & Rehabilitation Center of Mobile*.

Under *PCC Structurals* and *Boeing*, the Board determined whether a microunit was appropriate by looking to “whether employees in the proposed unit share a community of interest *sufficiently distinct* from the interest of employees excluded from the unit to warrant a separate bargaining unit.” (Emphasis in original). In throwing out these two decisions, the Board majority in *American Steel* wrote that “the standard articulated by *PCC-Boeing* has weak foundation in Board law and lacks any clear guiding principle that can be explained by statutory policy or the Act’s test for Regional Directors who are charged with applying it.” It also held that “*PCC-Boeing* incorrectly examines the ‘overwhelming community of interest’ standard in a vacuum and, in overruling it, makes the ‘sufficiently distinct’ element the Board’s highest concern, thereby obscuring and ignoring the Board’s primary duty in unit determination cases: to

determine whether the petitioned-for unit is appropriate for the purposes of collective bargaining.”

After overruling *PCC* and *Boeing*, the Board majority reinstated the Obama-era *Specialty Healthcare* test:

[T]he Board will . . . approve a petitioned-for “subdivision” of employee classifications if the petitioned-for unit: (1) shares an internal community of interest; (2) is readily identifiable as a group based on job classifications, departments, functions, work locations, skills, or similar factors; and (3) is sufficiently distinct.

It went on to clarify that “the Board need not address every element in every case: if a particular element is not disputed, it need not be adjudicated.” However:

[I]f a party contends that the petitioned-for unit is not sufficiently distinct—i.e., that the smallest appropriate unit contains additional employees—then the Board will apply its traditional community-of-interest factors to determine **whether there is an “overwhelming community of interest” between the petitioned-for and excluded employees, such that there is no rational basis for the exclusion.** If there are only minimal differences, from the perspective of collective bargaining, between the petitioned-for employees and a particular classification, then an overwhelming community of interest exists, and that classification must be included in the unit. (Emphasis added)

The Board’s decision also included dicta concerning the appropriateness of craft units, employer-wide units, and plant-wide units:

Over the years, the Board has developed various tests to analyze the unit configurations articulated in 9(b). Employer-wide and plant-wide units are presumptively appropriate under the Act, and will be approved unless the contesting party can rebut the presumption. Similarly, if the petitioned-for unit meets the criteria to be defined as a “craft unit,” it will also be approved.

Notably, the Board did not elaborate on the test used to determine whether a group of petitioned-for employees is a craft unit.

The Board’s reinstated *Specialty Healthcare* standard applies retroactively to all pending cases. Here, the Board, “[i]n the interest of fairness,” remanded the case to the regional director and stated that the regional director could reopen the record if necessary. In doing so, the Board acknowledged that its “reinstatement of the *Specialty Healthcare* standard alters the burden placed on [Specialty Healthcare] in terms of litigating whether the petitioned-for unit is appropriate without the inclusion of additional employees—i.e., whether the unit is ‘sufficiently distinct.’”

Members Marvin Kaplan and John Ring vigorously dissented, writing:

PCC Structurals and *The Boeing Company* facilitate the Board’s accomplishment of its statutory duty to consider in each case the interests of petitioned-for and excluded employees and embody the traditional community-of-interest standard the Board has applied for decades. By overruling *PCC Structurals* and *Boeing* and returning to *Specialty Healthcare*, the majority guts that standard, undermines labor-relations stability, and shackles the Board in fulfilling its duties under Section 9(b).

The Board’s return to the *Specialty Healthcare* standard will make it much easier for unions to organize smaller groups of employees, especially in larger, compartmentalized workplaces. Employers operating large production facilities should take steps now to raise the likelihood that the Board will find that their employees share an overwhelming community of interest with other employees at the facility. These steps may include giving employees in one department temporary work assignments in other departments, transferring employees from one department to another, functionally integrating the various steps along a production line, and implementing common personnel systems for hiring, background checks, and trainings.

A FINAL NOTE

What to Expect in 2023

If 2023 is anything like 2022, look for aggressive employee-friendly actions from the NLRB and the general counsel. As noted throughout this publication, General Counsel Abruzzo is hard at work looking to advance and expand certain objectives and issues in favor of unions and employees, including union access to employer private property, the analysis pertaining to employee handbooks and employee Section 7 rights, prohibiting captive audience settings, encouraging the NLRB to seek injunctions against employers to prevent coercive actions preemptively, and increase remedies for unfair labor practices.

In addition, look for the NLRB to continue overturning Trump-era decisions and take employee-friendly avenues as it adjudicates decisions in 2023. Employers should consider the NLRB's and General Counsel Abruzzo's agenda and trends in evaluating risk and developing employment policies and procedures.



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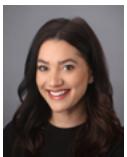
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