Labor Law Today

2020 | YEAR IN REVIEW

PERKINS COIE

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INTRODUCTION

No one needs an introduction to the dominant theme of 2020 in the field of traditional labor law. The main story, as in nearly all fields of law, was the COVID-19 pandemic and its impact on every aspect of American lives.

Like all other federal agencies, the National Labor Relations Board (the NLRB or the Board) found itself confronting workplace issues in an economy where most workplaces were turned upside down and drastically modified, if not shut down entirely. Still, while negotiating these substantial and unique challenges, the Board managed to pursue policy changes by aggressive administrative rulemaking measures. The Board reversed the course of several of its predecessors' initiatives, dialing back some of the significant 2014 election rule amendments, joint employer standards, and other expansions of the National Labor Relations Act's (NLRA) scope of protection. All this took place amid a heated federal election cycle, and later—as this publication was being drafted—during an apparent lame-duck period leading up to the inauguration of the next president.

We submit this Year in Review to summarize the most noteworthy developments in 2020, as we head into another likely period of major transformation in traditional labor law.

Like every other organization in the United States, the Board was forced to navigate significant operational challenges in 2020.

Beginning in March 2020, Board headquarters and various regional offices announced closures and work-from-home measures.

On March 12, 2020, the Board announced the closure of its headquarters in Washington, D.C., after learning an employee who was exhibiting cold-like symptoms potentially had been exposed to COVID-19. Just days later, on March 15, the Board announced that its Regional Offices in Manhattan, Detroit, and Chicago would be closed while an employee in each of those offices was tested for the virus. The Board then implemented telework policies at all four locations out of concern about potential spread of the virus. The telework policy in Washington, D.C., was slated to last through at least Monday, March 16, while the policies in Manhattan, Detroit, and Chicago were indefinite.

In response to increasing concerns about COVID-19, however, on March 16 the Board expanded upon its telework policies and announced an agency-wide telework policy that would last until at least April 1. That same day the Board also closed a number of small resident offices including Little Rock, San Antonio, and San Diego. Throughout the end of March, the Board was forced to temporarily shutter more offices, including Phoenix, San Francisco, and Denver due to suspected COVID-19 cases.

The Board announced on April 17 that all Regional Offices were "open" for operations. However, in the interest of safety and social distancing, the Board had limited access to offices by allowing visits by appointment only. Additionally, the Board extended its agency-wide work-from-home policy indefinitely. The policy required that all employees, except for limited essential personnel, continue to work from home.

The Board initially suspended representation elections but reversed itself under pressure from unions and their political allies, and has since routinely directed elections by mail-ballot voting.

Citing the extraordinary circumstances related to the COVID-19 pandemic, on March 19 the Board announced the suspension of all representation elections, including mail-ballot elections, through April 3. The move was met with immediate criticism from unions and their allies, including Committee on Education and Labor Chairman Robert C. "Bobby" Scott of Virginia. Congressman Scott in a letter addressed to NLRB Chairman John Ring, called the suspension "damaging" and claimed the Board was "forfeiting its duty to safely conduct representation elections." On April 1, the Board changed course and issued a press release announcing that it would resume conducting representation elections on April 6 because it had determined "appropriate measures [were then] available to permit elections to resume in a safe and effective manner."

The Board's long-standing policy has been that, ideally, representation elections should be conducted

manually, in person. However, when deciding to resume representation elections the Board placed the responsibility of choosing what method would be used in the hands of Regional Directors. As the pandemic spread, Regional Directors ordered an unprecedented number of mail-ballot elections in lieu of manual elections. They consistently held that the pandemic met the standard of "extraordinary circumstances" justifying mail-ballot elections under *San Diego Gas & Electric*, 325 NLRB 1143 (1998).

Some employers pushed back, requesting that more elections be held manually. In response to this demand, on July 6 the Board's General Counsel issued Memorandum GC 20-10. The memorandum provided over two dozen protocols with which employers would have to comply for the region to consider a manual election. However, it soon became clear that even when employers met all of the protocols, their requests to hold a manual election were almost always denied, usually due to COVID-19.

On November 9, the Board issued its decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020) and clarified its position on how determinations regarding mail-ballot elections should be made. In *Aspirus Keweenaw*, the Board established six situations that would necessitate the use of mail ballots due to COVID-19. Under this decision, if any one of the following is present, a mail-ballot election is appropriate:

- The agency office tasked with conducting the election is operating under "mandatory telework" status.
- Either the 14-day trend in the 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.
- The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size.
- The employer fails or refuses to commit to abide by the GC Memo 20-10 protocols.
- There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status.
- Other similarly compelling considerations.

The day after the decision, the Board issued Memorandum GC 21-01 summarizing the major holdings of *Aspirus Keweenaw*, specifically the six situations requiring use of mail ballots. The Memorandum also provides that, other than GC Memo 20-10, it supersedes all other instructions on the subject of whether a mail-ballot or manual election is appropriate.

After initially postponing all ULP hearings, the Board directed resumption of trials effective June 1, and ignoring the clear language of its own rules and regulations, upheld judges' unilateral direction of entire trials via videoconference.

In light of the COVID-19 pandemic and related federal, state, and local guidance, the Board initially postponed all unfair labor practice (ULP) hearings. The Board then reversed course on May 15 and directed judges to resume trials starting on June 1, 2020. The accompanying press release announced that judges would no longer *sua sponte* postpone hearings and that requests for postponements would be considered on a case-by-case basis. As cases resumed, parties and judges were confronted with logistical questions concerning how hearings would be conducted consistent with public health guidelines. In response, judges unilaterally began to order trials to proceed entirely via remote videoconference technology. These decisions were upheld by the Board on appeal despite clear language in the federal regulations to the contrary. Specifically, 29 C.F.R. 102.35(c) provides that an administrative law judge should only direct witness testimony to proceed via videoconference in ULP hearings upon a showing of good cause and compelling circumstances; and, must provide for several specifically listed safeguards designed to ensure "minimum" standards of due process.

In *Morrison Healthcare*, 369 NLRB No. 76 (2020), the Board applied the framework of 29 C.F.R. 102.35(c) to

determine that, given the compelling circumstances of the pandemic, a representation case preelection conference could be held via videoconference. The Board concluded that Section 102.35(c) was instructive in the representation case despite its express application only to ULP hearings. In dicta, the Board declared, without any support in the express language of the rules or relevant case law, that Sec. 102.35(c) only applied to testimony by a single remote witness—not the conduct of an entire trial remotely.

Soon thereafter, in *William Beaumont Hospital*, 370 NLRB No. 9 (2020), and *XPO Cartage Inc.*, 370 NLRB No. 10 (2020), the Board applied this rationale to approve entire trials by videoconference without satisfaction of the express due process requirements of Section 102.35(c). The Board stressed in these decisions that the pandemic constituted "compelling circumstances," sufficient to order remote video hearings. In *XPO Cartage*, the Board further held that, notwithstanding the language of Sec. 102.35(c) explaining the requisite contents of a written application, the judge could order a trial via videoconference absent application by party. It is hard to square the Board's decisions in this area with anything but a submission to efficacy under unique public health circumstances. ■

The Board's 2019 representation election rule amendments were delayed, then partially enjoined and partially implemented.

In 2014, the Board announced an overhaul of its long-standing rules for the conduct of union representation elections. Taken as a whole, the 2014 rules shortened the time between the filing of a petition and the conduct of an election from an average of 39 days to just 23 days, resulting in significant increases in annual union success rates. The Board announced a number of amendments on December 13, 2019. Originally slated to go into effect on April 16, 2020, these amendments would have restored many of the standards and practices existing prior to the 2014 changes. However, on March 24, 2020, the Board postponed the effective date of the amendments to May 31.

The day before the new effective date, Judge Ketanji Brown Jackson of the U.S. District Court for the District of Columbia issued an order in *AFL-CIO v. NLRB*, Civ. No. 20-CV-0675, enjoining the implementation of five aspects of the 2019 amendments.

Those aspects, which cannot be implemented while the injunction is in place, included changes that:

> Restored parties' ability to litigate most voter eligibility and inclusion issues *prior* to the election.

> Would normally preclude the Regional Director from scheduling an election before the 20th business day after the date of the direction of election.

> Afforded employers five days following a direction of election to furnish the extensive voter list to the Regional Director and other parties, rather than the two business days under the 2014 rules.

> Limited parties' selection of election observers to individuals who are current members of the voting unit whenever possible.

> Indicated that the Regional Director would no longer issue certifications following elections if a request for review is pending or before the time has passed during which a request for relief could be filed.

Following the court's injunction, the Office of General Counsel published a Guidance Memorandum on Representation Case Procedure Changes, which noted the most significant changes in the 2019 amendments that were beyond the scope of Judge Jackson's injunction. The implemented changes referenced include:

- **Preelection Hearings:** Preelection hearings will generally be scheduled 14 business days (rather than the eight calendar days under the 2014 rules) from notice of the hearing, and Regional Directors will have greater discretion to postpone hearings.
- **Notice of Petition for Election:** Employers must post and distribute the Notice of Petition for Election within five business days after service of the notice of hearing (rather than two calendar days under the 2014 rules).
- **Non-Petitioning Party's Statement of Position:** Non-petitioning parties must file a Statement of Position within eight business days after service of the notice of hearing (rather than seven calendar days), and Regional Directors will have greater discretion to grant extensions.
- **Petitioning Party's Statement of Position:** Petitioners must file a Statement of Position responding to the issues raised in any non-petitioning party's Statement of Position. This Responsive Statement of Position is due at noon three business days before the hearing.
- **Post-Hearing Briefs:** Parties are permitted, once again, to file post-hearing briefs with the Regional Director following preelection hearings (rather than only upon special permission of the Regional Director). Post-hearing briefs will be permitted for post-election hearings as well. Such briefs are due within five business days, and hearing officers must grant an extension of up to 10 business days for good cause.
- **Notice of Election:** The Board emphasized a Regional Director's discretion to issue a direction of election that may or may not contain a Notice of Election.
- **Requests for Review Filed within 10 Business Days after Direction of Election:** If the Board either does not rule on a request for review or grants the request before the election, ballots will be impounded and remain unopened pending a decision by the Board.
- **Requests for Review Filed more than 10 Business Days after Direction of Election:** Parties may still file a request for review of a direction of election more than 10 business days after the direction, but the pendency of such a request for review will not require impoundment of the ballots or postponement of issuing a tally of ballots.
- **Post-Election Requests for Review:** Consistent with the practice, parties may wait to file a request for review of a direction of election until after the election has been conducted and the ballots counted.
- **Oppositions to Requests for Review:** Oppositions are explicitly permitted in response to all types of request for review, and the practice of permitting replies to oppositions and briefs on review only upon special leave of the Board has been codified..
- **Business Day Calculation:** All time periods applicable to the election rule are calculated based on business days as opposed to calendar days. Under the 2014 rules, there was a lack of consistency on the calculations of days. The amendments also clarify that only weekend days and federal holidays are not designated business days in time period calculations.

Both the Board and the AFL-CIO have appealed aspects of the judge's orders in this case, and these appeals remain pending. ■

The Board continued to pursue additional administrative changes to its election rules throughout the year.

Undeterred by the partial injunction outlined above, the Board continued throughout 2020 to attempt to reform aspects of the administration of representation elections via the rulemaking process.

The Board modified its rules and regulations regarding blocking charges, voluntary recognition bars, and construction industry recognition.

On April 1 the Board published its final "Election Protection Rule," announcing changes to its blocking charge policy, its recognition and contract bar doctrines, and its standard for recognizing majority support for a bargaining unit in the construction industry. Initially intended to be effective June 1, the Board temporarily postponed implementation in light of the COVID-19 pandemic until July 31. The Board's Office of the General Counsel published Memorandum GC 20-11 on July 30, explaining the amendments in further detail.

1. Changes to the Board's Blocking Charge Policy

First, the Board amended Section 103.20 of its Rules and Regulations to replace its current blocking charge policy with either a vote-and-count or a vote-and-impound procedure depending on the nature of the charge. Under this revision, elections will no longer be blocked by pending unfair labor practice charges. Rather, depending on the nature of the underlying charge, once a request to block an election has been filed and granted, ballots will either be impounded prior to the count or counted with further proceedings suspended after issuance of the tally. Additionally, regardless of the nature of the charge, the Board will not issue a certification of results (including, where appropriate, a certification of representative) until there is a final disposition of the charge and a determination of its effect, if any, on the election petition.

2. Changes to the Board's Recognition and Contract Bar Doctrines

Second, the Board amended Section 103.21 of its Rules and Regulations to introduce a limited exception to the recognition bar and contract bar doctrines. Under the final rule, the Board returned to the rule of *Dana Corp.*, 351 NLRB 434 (2007), to determine whether a voluntary recognition under Section 9(a) of the NLRA or a post-recognition collective-bargaining agreement will bar a subsequent representation petition. Under this standard, for enforcement of a bar, unit employees must receive notice that voluntary recognition has been granted *and* must be given a 45-day open period within which to file an election petition. Additionally, the amendment established a new requirement for parties to notify the Regional Office of the recognition agreement and to post a Notice to Employees regarding the agreement, which must be provided by the Regional Office. The amendment applied only to voluntary recognitions on or after the effective date of the rule on July 31.

3. Changes to the Board's Standard for Proof of Majority Support in the Construction Industry

Finally, the Board amended Section 103.22 of its Rules and Regulations to require "positive evidence" of majority employee support, like in all other industries, to establish existence of a Section 9(a) relationship. The amendment overrules *Staunton Fuel & Material, Inc.*, 335 NLRB 717 (2001), specifying that collective-bargaining agreement recognition language following a Section 8(f) pre-hire agreement is insufficient to constitute positive evidence, and will not bar a subsequent petition. The amendment applies to an employer's voluntary recognition extended on or after July 31, 2020, and to any collective-bargaining agreement entered into on or after the effective date of voluntary recognition extended on or after July 31, 2020.

The Board proposed two additional amendments to limit exchange of employee contact information and to allow military absentee ballots in representation elections.

The Board also published a Notice of Proposed Rulemaking in the Federal Register on July 28, proposing two additional amendments to its current rules and regulations governing the conduct of elections held under the NLRA.

First, the Board proposed an amendment to Sections 102.62 and 102.67 of its Rules and Regulations to eliminate the requirement that employers must, as part of the Board's voter list requirements, provide "available personal email addresses" and "available home and personal cellular 'cell' telephone numbers" of all eligible voters (including individuals permitted to vote subject to challenge) to the Regional Director and other parties during a union's election campaign. The Board articulated that, subject to comments, elimination of this requirement will advance important employee privacy interests that the Board's current rules do not sufficiently protect.

Second, the Board proposed establishing a procedure to provide absentee ballots to eligible employees who would otherwise be unable to vote in a representation election because they are on military leave. The Board explained that, subject to comments, it should seek to accommodate voters serving the United States in the armed forces in light of congressional policies facilitating their participation in federal elections and protecting their employment rights, and that a practical procedure for providing military voters with absentee ballots can be instituted without impeding the expeditious resolution of representation elections.

Approximately 244 comments were submitted prior to the extended October 27 cutoff, and as this review was finalized, no further action had been taken on the proposals. ■

The Board issued its final rule restoring the "joint employer" standard cast aside by the 2015 *Browning-Ferris* decision.

The NLRB released its final rule governing the determination of joint-employer status under the NLRA on February 25, 2020. The final rule, which became effective on April 27, reversed the NLRB's 2015 decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB 1599 (2015). Under *Browning-Ferris*, joint-employer status could be found if an entity directly or indirectly controlled, or reserved the authority to control, the essential terms and conditions of employment. However, for several decades prior to *Browning-Ferris*, joint-employer status could only be found if an entity had actual direct and immediate control over the employment terms. The 2020 final rule is a return to this narrower interpretation of what constitutes a joint employer.

To be considered a joint employer under the final rule, "a business must possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees." The essential terms and conditions of employment are: wages; benefits; hours of work; hiring; discharge; discipline; supervision; and direction.

The final rule indicates that, while evidence of indirect and contractually reserved but never exercised control over essential employment terms may be a consideration for finding joint-employer status, it is only probative to the extent that it supplements and reinforces evidence of direct and immediate control. The final rule additionally provides that routine elements of an arm's-length contract cannot result in a contractor becoming considered a joint employer. To support this position, the final rule offers several examples of when actions constituted "substantial and direct immediate control."

The issuance of the final rule follows a prolonged effort by the current Board to reverse *Browning-Ferris*. The case was expressly rejected and overruled in late 2017 by *Hy-Brand Industrial Contractors*, 365 NLRB No. 156 (2017), which declared it "a distortion of common law" and "contrary to the Act." However, in early 2018, the Board vacated *Hy-Brand* and reinstated *Browning-Ferris* due to an Office of the Inspector General (OIG) report that criticized the participation of one of the Board members whose prior firm had represented Browning-Ferris. NLRB Chairman John F. Ring said the purpose of the final rule is to give the "joint-employer standard the clarity, stability, and predictability that is essential to any successful labor-management relationship and vital to our national economy." ■

Congress exercised oversight powers throughout the year, seeking explanations and testimony from agency leadership regarding the joint-employer issue.

The House Committee on Education and Labor exercised its oversight power in 2020 over the National Labor Relations Board by inquiring into alleged ethical issues at the Board, culminating in a subpoena to compel the Board to hand over documents. This move followed a long-running investigation and the repeated refusal by Board Chairman John Ring to produce the documents voluntarily.

The subpoena demanded the Board produce documents linked to its efforts, under the Trump administration, to roll back the Obama-era expansion of the joint-employer rule in *Browning-Ferris Industries*. As discussed in detail immediately above, the Board made repeated separate attempts to undo the *Browning-Ferris* rule, ultimately succeeding earlier this year. The House Committee has asserted that the subpoenaed documents are the key to addressing allegations that the Board's efforts were tainted by ethical violations and conflicts of interest. The House inquiry began after the Board's first attempt to undo the expanded joint-employer rule in the 2017 *Hy-Brand Industrial Contractors* decision. As discussed above, the Board decided to vacate that decision after its inspector general and an ethics officer concluded that Member William Emanuel should have recused himself because of the involvement of his former law firm in the *Browning-Ferris* case.

The inquiry turned heated when Chairman Ring refused to produce the requested documents, arguing the "unprecedented" request would "discourage agency employees from providing candid advice and undermine the internal deliberations of the Board." Chairman Ring called the dispute a "made-up controversy solely for political theater."

In response, Committee Chair Rep. Bobby Scott, D. Va., issued a statement accusing the Board of obstructing the committee's constitutional authority and duty to conduct oversight efforts and suggested the Board's refusal to produce documents indicated it had "something to hide." The committee's subpoena followed in September, and sought documents related to the Board's earlier attempts to overturn the joint-employer rule and Member Emanuel's involvement in them. The first set involved the settlement of the McDonald's litigation. That case initiated by the Obama-era Board's general counsel alleged that McDonald's and a number of its independent franchises were joint employers of employees who brought claims arising out of the "Fight for $15 campaign." The protracted litigation continued until the Board's current general counsel reached a settlement with McDonald's—which an administrative law judge subsequently rejected as unreasonable. In December 2019, the Board overruled the judge and directed approval of the settlement, with Member Emanuel again casting the deciding vote, despite his prior law firm representing related parties. Member Emanuel sought and obtained an ethics memorandum concerning his involvement, but the Board has declined to turn it over to the committee.

The remaining subpoenaed documents concern the Board's rulemaking process regarding the joint-employer rule. The Board contracted out the categorizing of the 29,000 public comments it received on the proposed rule and has since refused to voluntarily turn over information about the categories or the accompanying instructions it gave to the contractors. The Committee has questioned whether the contractors substantively assessed the public comments, which could violate federal contracting rules. The subpoena also seeks another ethics opinion provided to Member Emanuel, clearing him to participate in the rulemaking. ■

The Board proposed rulemaking to exclude student teaching assistants from the jurisdiction of the NLRA.

In September 2019, the Board proposed a rule to exempt undergraduate and graduate students who perform work in connection with their studies from the definition of "employee" under Section 2(3) of the NLRA. Comments and replies to the proposed rule were originally due at the end of 2019, but because of the large number of initial comments received, the deadline was extended to February 28, 2020.

The Board's position on whether students should be excluded from the definition of "employee" has changed with each presidential administration in recent history. For over 25 years, the Board adhered to the principle set forth in *The Leland Stanford Junior University*, 214 NLRB 621, 623 (1974), wherein it held that graduate student research assistants were not employees within the meaning of Section 2(3) of the NLRA. In *Leland Stanford*, the Board found determinative that (1) the research assistants were graduate students enrolled as Ph.D. students; (2) the students were required to perform research to earn a degree; (3) the students received academic credit for their research work; and (4) the stipend the students received was aimed at providing them with financial support, not compensating them for work performed. But in 2000, the Board reversed itself in *New York University*, 332 NLRB 1205 (2000), and held that certain graduate students at New York University (NYU) were statutory employees. The Board applied the common law master-servant relationship doctrine and cited the breadth of the statutory language under Section 2(3) of the NLRA, the lack of any specific exclusion for graduate student assistants, and the facts presented. In the years since, the Board has swung back and forth at least twice more: upholding Leland Stanford's exclusion of student teaching assistants in *Brown University*, 342 NLRB 483 (2004); and then overruling both *Brown University* and *Leland Stanford* in *Columbia University*, 364 NLRB No. 90 (2016). In *Columbia University*, the Board expanded Section 2(3) of the NLRA, and for the first time, extended coverage to both graduate research assistants and undergraduate university student assistants.

The Board's current proposed rule aligns with the overruled *Leland Stanford* principle, excluding students who perform any services in connection with their undergraduate or graduate studies at a private college or university from the definition of "employee" under Section 2(3) of the NLRA. Since the comment and response period closed on February 28, 2020, the Board has not acted, but private universities and colleges should watch for movement from the current Board before new appointments are made in 2021. ■

Prior to reaching a first collective bargaining agreement, employers are not required to bargain before disciplining employees pursuant to preexisting disciplinary procedures.

In *Care One at New Milford*, 369 NLRB No. 109 (2020), the Board overturned *Total Security*, 364 NLRB No. 106 (2016), and restored application of 80-year-old precedent establishing an employer's disciplinary bargaining obligations in advance of a first union contract. *Total Security* held that an employer must provide a union notice and an opportunity to bargain about "discretionary elements of an existing disciplinary policy before imposing serious discipline" on union employees not yet subject to a collective bargaining agreement. In support of its holding, the *Total Security* majority purported to clarify the unilateral change doctrine established by the U.S. Supreme Court in *NLRB v. Katz*, 369 U.S. 726 (1962), which states that employers cannot make a material change to any term or condition of employment without first providing the union with notice and an opportunity to bargain. *Total Security* held that virtually any exercise of discretion, even within an existing disciplinary system, could constitute such a "material change" creating a separate bargaining obligation.

In *Care One*, the Board rejected the *Total Security* majority's attempt to extend the bounds of the unilateral change doctrine, concluding that the correct analysis under *Katz* inquires only as to whether "an employer's individual disciplinary action is similar in kind and degree to what the employer did in the past within the structure of established policy or practice." If so, there is no "material change" that would create a pre-disciplinary bargaining obligation, even if the policy or practice in question permits the exercise of discretion. On application of the proper analytical framework, the Board held that the employer did not violate the NLRA by failing to provide notice and an opportunity to bargain because it "applied its preexisting disciplinary policy, which included the use of discretion," to discipline its employees, "which it is lawfully permitted to do."

The Board overruled Pacific Lutheran's jurisdictional analysis for religious institutions for infringement upon the First Amendment.

In *Bethany College*, 369 NLRB No. 98 (2020), the Board chose not to exercise jurisdiction over a self-identified religious institution of higher learning. In so doing, the Board reconsidered and overruled the standard set forth in *Pacific Lutheran University*, 361 NLRB 1404 (2014), and, in its place, adopted the test established by the U.S. Court of Appeals for the D.C. Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002).

The Board declared that *Pacific Lutheran*'s analysis was "fatally flawed" because in order to determine whether faculty members were performing a specific religious function required "an impermissible inquiry into what does and what does not constitute a religious function," and thereby improperly entangled the Board in religious matters protected under the First Amendment's religion clauses. For example, the Board concluded that the *Pacific Lutheran* Board interfered with First Amendment rights by scrutinizing that university's "governing documents, faculty handbook, website pages, [and] other material" to assess whether "the religious nature of the university affects faculty members' job duties or requirements."

In order to avoid "trolling through the beliefs of the University" at issue, the Board overruled its prior analysis and adopted the D.C. Circuit's three-pronged standard set forth in *Great Falls*. Under that test, the Board "must decline to exercise jurisdiction" over faculty at an institution that (1) "holds itself out to students, faculty, and community as providing a religious educational environment"; (2) is "organized as a nonprofit"; and (3) is "affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion."

Though specifically noting its important mission "to protect employees' rights set forth in the National Labor

Relations Act," the Board emphasized that "those rights are subordinate to those enshrined in the Constitution where there is a potential conflict between the two." By implementing the *Great Falls* "bright-line" jurisdictional test, the Board noted it would no longer have to make impermissible "subjective judgments about the nature of the institutions' activities or those of its faculty members" and, instead, would be properly limited to "making jurisdictional determinations based on objective evidence." On application of the *Great Falls* analysis to Bethany College, the Board determined that the university was not subject to the Board's jurisdiction and therefore dismissed the unfair labor practice complaint.

Board overrules prior precedent and holds that, regardless of setting, employers do not violate the NLRA by disciplining employees who engage in abusive conduct in the course of otherwise-protected Section 7 activity.

Following its September 2019 invitation to submit briefs, on July 21, 2020, the Board issued its long-awaited decision in *General Motors LLC*, 369 NLRB No. 127 (2020), concluding that employers may lawfully discipline employees who engage in profane, racist, sexist, or otherwise abusive conduct in the course of Section 7 activity. Rejecting the notion that abusive conduct is "analytically inseparable" from Section 7 activity, the Board discarded the preexisting "misconception" that "discipline based on abusive conduct violates" the NLRA "unless the Board determines, under one of its setting-specific standards, that the abusive conduct lost the employee the protection of the Act." In lieu of the circumstantial-dependent standards established by prior Board precedent, the Board determined that, in all pending and future cases, the Board shall apply the analysis established in *Wright Line*, 251 NLRB 1083 (1980), to decide whether employers violate the NLRA by disciplining employees who engaged in abusive conduct while exercising their Section 7 rights. A "more reliable, less arbitrary, and more equitable treatment of abusive conduct," *Wright Line* requires the General Counsel to "make an initial showing that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity." If the General Counsel establishes all three elements, the employer must then show that it would have taken the same adverse action against the employee regardless of the employee's protected activity.

Rejecting the precedential "misconception that abusive conduct must necessarily be tolerated for Section 7 rights to be meaningful," the Board determined that, regardless of the setting involved, "[a]busive speech and conduct (e.g., profane ad hominem attack or racial slur) is not protected by the NLRA and is differentiable from speech or conduct that is protected by Section 7 (e.g., articulating a concerted grievance or patrolling a picket line)." The Board went on to state that union employees who engage in abusive conduct in the course of Section 7 activity are entitled to no "greater protection from discipline than other employees who engage in abusive conduct." Moreover, by permitting employers to discipline union employees for racist, sexual, or other profane or abusive speech or conduct—just as they would with any other employee—employers will be able to "proactively respond and prevent hostile work environments on the basis of protected traits" in accordance with applicable law prohibiting workplace discrimination. ■

The Board seeks input of interested parties on issues in a number of pending cases.

The Board indicated its intent to visit whether the iconic giant inflatable rat used at union protests violates the NLRA.

On October 27, 2020, the Board invited parties and amici to submit briefs to address the question of whether the posting of "Scabby the Rat," a 12-foot inflatable rat, outside a business constitutes unlawful coercion or illegal picketing under the NLRA. In *International Union of Operating Engineers, Local Union No. 150 (Lippert Components, Inc.)*, Administrative Law Judge Kimberly Sorg-Graves found that the union's stationary display of the iconic inflatable rat and two large banners on public property (a neutral site) did not constitute picketing or otherwise coercive conduct in violation of Sections 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act. In arriving at this decision, Judge Sorg-Graves applied *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010), and *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 356 NLRB 1290 (2011), which held displays of stationary banners did not violate the NLRA.

The General Counsel has requested the Board reverse the judge and overrule these prior decisions, contending that the definitions of "picketing" and "coercion" used in these matters were vague and imprecise and that the decisions strayed from "the dictates of Section 8(b)(4)" and decades of established law. In order to inform its deliberation, the Board invited briefs from interested parties on the following questions:

1. Should the Board adhere to, modify, or overrule *Eliason & Knuth* and *Brandon Regional Medical Center*?

2. If you believe the Board should alter its standard for determining what conduct constitutes proscribed picketing under Section 8(b)(4), what should the standard be?

3. If you believe the Board should alter its standard for determining what non-picketing conduct is otherwise unlawfully coercive under Section 8(b)(4), what should the standard be?

4. Why would finding that the conduct at issue in this case violated the National Labor Relations Act under any proposed standard not result in a violation of the Respondent's rights under the First Amendment?

Briefs were due December 28, 2020.

The Board signals potential modification of long-standing contract-bar doctrine.

On July 7, 2020, the Board invited parties and amici to submit briefs addressing the question of whether the Board should overrule or narrow the scope of the "contract-bar doctrine," which generally precludes the processing of an election petition filed during the term of a collective-bargaining agreement, for a period of up to three years. In *Mountaire Farms, Inc.*, 05-RD-256888, the incumbent union argued that the existing collective bargaining agreement barred the processing of a decertification petition. The petitioner and employer argued that the agreement should not serve as a bar because, among other things, it contained an unlawful union security clause. The Board identified this case as an opportunity to explore that specific issue and invited parties and amici to brief more broadly whether the Board should "(1) rescind the contract-bar doctrine, (2) retain it as it currently exists, or (3) retain the doctrine with modifications."

Some 16 entities filed amicus briefs prior to the September 8, 2020 due date, but the Board has taken no further action as of publication of this review. ■

The Board has just three members for much of the year; decreases its processing times.

The five seats on the Board are traditionally filled by two Democrats, two Republicans, and a chairman of the current president's party. For most of 2020, just three of the five seats on the NLRB were occupied, all by Republicans: Chairman John Ring and members William Emanuel and Marvin Kaplan. Following expiration of Member Lauren McFerran's term, it had two vacant Democratic seats. In anticipation of the expiration of Member Kaplan's term in August 2020 and a resulting loss of quorum, the White House packaged the renomination of Member Kaplan with the nomination to return Democrat Lauren McFerran to the Board. The U.S. Senate confirmed their appointments in July 2020.

Despite its lopsided political makeup, the Board reported increased productivity and efficiency in 2020, perhaps due, in part, to reduced deliberation over dissenting views. In accordance with its case-expediting program initiated in September 2018, the Board reported the number of cases pending before the Board is at its lowest level in over 40 years. The Board focused on issuing decisions in the oldest pending cases and issued 374 decisions in contested cases during FY 2020. As a result of the Board's emphasis on more timely processing of cases, the average age of the cases pending before the Board was reduced from 157 days in FY 2019 to 85 days in FY 2020, a 46% reduction. Moreover, the Regional Offices reduced the average time between filing and disposition from 90 days to 73.8 days, a decrease of 18% since the end of FY 2018. The Regional Office settlement rate was 96% in FY 2020.

The NLRB also announced enhancements to its public website, designed to increase transparency with the public, make research easier, and increase the public's access to NLRB data. The enhancements include tools to allow users to personalize their website experience, conduct advanced searches for case and election data, access Spanish translations of the website, and view case data through an interactive map interface. ■

What impact will President-elect Biden's administration have?

President-elect Biden has long been allied with the labor movement, and during his tenure as vice president, the administration pursued policies favorable to organized labor. The same should be expected following his January 2021 inauguration. While he will have an immediate opportunity to fill one current NLRB vacancy, the Board will maintain a Republican majority at least until August of 2021, when Member Emanuel's term will expire. Likewise, whether current Board general counsel Peter Robb stays on until expiration of his term late in the year will determine how soon the new president will be able to appoint a general counsel more aligned with his politics. Various issues in the Senate – composition, the fate of the filibuster, etc. – may complicate making predictions about legislative business. Regardless, however, expect the Executive Branch to proceed by administrative and other regulatory means as well to pursue its agenda.

Will Congress establish any momentum behind the ambitious Protecting the Right to Organize (PRO) Act, or any of its component parts?

In 2018 congressional Democrats introduced a sweeping bill designed to overhaul federal labor law to be more favorable to employees and labor unions than current law. The comprehensive package would: (1) authorize civil monetary penalties against employers; (2) impose liability on corporate directors and officers; (3) require pursuit of preliminary injunctions in a wide range of ULP cases; (4) make Board orders self-enforcing; (5) authorize a private right of action; (6) prohibit employers from requiring workers to attend workplace meetings where union representation is to be discussed; (7) remove the legal prohibition on secondary boycotts and intermittent strikes; (8) require mandatory interest arbitration to settle first contracts after just 150 days of negotiations; (9) prohibit permanent replacement workers during economic strikes; (10) forbid mandatory arbitration agreements; (11) outlaw state "Right to Work" statutes; (12) make misclassification of workers a labor law violation; (13) extend remedies to undocumented workers; (14) restore and codify the *Browning-Ferris* joint-employer standard; and (15) restore the invalidated Obama-era Persuader Rule, among other items. President-elect Biden has expressed support for the bill. While we believe that passing such an expansive piece of legislation is unlikely in a roughly evenly divided Congress, the bill nevertheless sets the parameters within which a significant debate over labor law reform will occur.

How aggressive will the current Board be while it retains its majority?

As mentioned above, despite the change in the White House, barring resignations, the Board will remain majority Republican until late in the coming year. There remain a number of pending matters on which the current Board majority almost certainly has a different perspective than will an incoming majority appointed by President-elect Biden. At press time for this publication, the Board had not yet issued decisions on several of the issues outlined above, including the legality of Scabby the Rat, the scope of the contract-bar doctrine, the status of student teaching assistants under the NLRA, and a number of additional election-related protocols. It will be interesting to watch whether the Board announces final determinations on these issues as the clock winds down on its current composition.

Will the United States-Mexico-Canada Agreement (USMCA) result in increasing adoption of U.S. labor standards south of the Mexican border?

The trade agreement replacing NAFTA went into effect on July 1, 2020. As a precondition of its entry into the agreement, Mexico instituted a number of constitutional

and statutory reforms designed to provide more transparency and competition among labor organizations seeking to represent Mexican workers. In mid-December, a U.S. panel of experts issued a report critical of the pace of Mexican implementation of those required reforms. Moreover, in order to promote a trend toward increased uniformity of labor standards, Annex 31-A to the USMCA provides for a "Rapid Response Labor Mechanism," by which U.S. stakeholders may advance challenges to pressure greater enforcement of labor standards by Mexico. The extent to which U.S. labor organizations utilize this mechanism to leverage their interests in connection with multi-national corporations and cross-border operations is potentially transformative. ■

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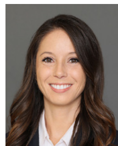

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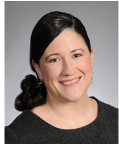

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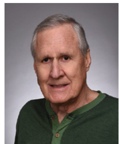

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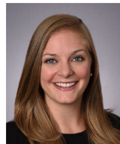

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