



2016
Year in Review

Labor Relations Today

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Introduction

In the final year of his two term tenure, President Barack Obama's National Labor Relations Board and Department of Labor continued their double barreled efforts to remake labor law to benefit labor unions. Throughout the year, the agencies issued case decisions casually casting aside decades of precedent and engaged in aggressive — and unconstitutional — administrative rulemaking in pursuit of this agenda.

Board decisions continued to break completely new ground, and to expand the scope of the NLRB's protections in seemingly infinite fashion. The General Counsel brandished the new joint employment standard to challenge a wide variety of traditional business models. The DOL's new "Persuader Rule" and the FAR Council's "Blacklisting" Regulations devised colossal new regulatory schemes, threatening the ability of employers to operate across broad stretches of industry. And then, all of a sudden, with the most shocking electoral development in decades, by year's end, the election of Donald J. Trump to the presidency is poised to undo much of this administrative overreach.

We submit this Year in Review to summarize the most noteworthy developments in 2016 — as we emerge from a wildly unusual political year, and head into a new year potentially bringing even more mystery with it. Additional information on these topics and more is available at our Labor Relations Today blog (laborrelationstoday.com), where we will continue to chronicle and alert readers to significant changes in the law as they unfold in 2017 and beyond.

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In Its Final Act, President Obama’s National Labor Relations Board Continued Its Aggressive Expansion of Law in Labor’s Favor

Board Found Violations in Fairly Standard “Non-Compete” and “Employment At-Will” Policy Language

In *Minteq International, Inc.*, 364 NLRB No. 63 (July 29, 2016), the Board found that two common provisions in a non-compete agreement interfered with employees’ rights in violation of Section 8(a)(1) of the National Labor Relations Act. In this case, the unionized employer had new hires sign a relatively standard type of “Non-Compete and Confidentiality Agreement” containing the following provisions:

4. Interference with Relationships. During the Restricted Period Employee shall not, directly or indirectly, as employee, agent, consultant, stockholder, director, partner or in any other individual or representative capacity intentionally solicit or encourage any present or future customer or supplier of

the Company to terminate or otherwise alter his, her or its relationship with the Company in an adverse manner.

12. At-Will-Employee. Employee acknowledges that this Agreement does not affect Employee’s status as an employee-at-will and that no additional right is provided herein which changes such status.

The ALJ did not find these provisions to violate 8(a)(1) on their face, noting that “it would be quite an extrapolation from Section 4 to conclude that employees were prohibited, for example, from striking, because it would interfere with Minteq’s relationship with suppliers or customers.” The Board, however, refused to adhere to the requirement that it “refrain from reading particular phrases in isolation” and disagreed:



The “Interference with Relationships” rule clearly places restrictions on employees’ ability to communicate with the Respondent’s customers and restricts employee efforts to “improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.” ... These efforts could include asking customers to boycott the Respondent’s products or services, as the General Counsel argues, but they could also encompass other forms of appeals to the Respondent’s customers. A prohibition of this type of conduct is an unlawful restriction of employees’ Section 7 rights.

Likewise, the Board also reversed the ALJ finding that the unremarkable “employment at will” language here violated the Act because it would somehow discourage employees from engaging in Section 7 activities for fear that they could be terminated for such conduct:

We find that employees thus would reasonably doubt whether the CBA’s “just cause” provision remains in effect. Thus, the “At-Will” rule has a reasonable tendency to discourage employees from engaging in conduct

that would be protected by the CBA’s “just cause” provision and by Section 7 of the Act, including the exercise of rights under the collective-bargaining agreement and other protected, concerted activity (such as, for example, communicating among themselves or with the Respondent’s customers concerning their terms and conditions of employment), for fear that they could be discharged without the contractual “just cause” protection. Similarly, the conflict between the “At-Will” provision and the “just cause” provision would reasonably discourage employees from engaging in the Section 7 activity of utilizing the contractual grievance and arbitration procedures to challenge disciplinary actions they believe were not for “just cause.”

The Board’s rationale for finding that the provision would discourage employees from engaging in Section 7 activities was a stretch, as no employee – whether “at will” or with “just cause” – can be discharged because of his or her protected, concerted activity. Given the Board’s effort to rationalize a violation here, many questioned whether the Board would ultimately revisit the overall legality of “at-will” employment disclaimers.

NLRB Division of Advice Asserted Misclassification of Employees, in Itself, Interferes with Section 7 Rights

In a General Counsel Advice Memorandum released in late August 2016, the NLRB Division of Advice asserted that employers who misclassify employees as independent contractors violate Section 8(a)(1) of the NLRA by restraining the employees' Section 7 rights to engage in concerted, protected activity. The Memorandum, issued in connection with *Pacific 9 Transportation*, Case No. 21-CA-150875, concerned a charge against a drayage company operating a fleet of approximately 160 trucks and 180 drivers to transport shipping containers in and around the ports of Los Angeles and Long Beach.

Like many employers who wish to utilize an independent contractor model, the company required each driver to sign an agreement that the driver was an independent contractor and that the driver, among other things, could accept or decline any shipment offered; was not required to lease or purchase a truck from the company; and, would acquire his or her own insurance.

During a prolonged corporate campaign to organize the drivers, the company, union and Board Regional Office settled an unfair labor practice charge, in connection with which the Regional Office had found the drivers to be statutory employees. Following the settlement, the company then distributed a memo to drivers doubling down on its classification position. The memo stated, among other things, that there were no employee drivers, only owner-operators and independent contractors, and that only employees have the right to form a union. This resulted in revocation of the settlement and subsequent enforcement proceedings; and a new charge alleging that the misclassification of drivers as independent contractors in itself violated Section 8(a)(1). Upon submission by the region, the Division of Advice agreed with the region's finding that the drivers were statutory employees, applying the familiar multi-factor test from the Restatement (Second) of Agency.

Next, after noting that the Board had never before held that an employer's misclassification of employees as independent contractors *in itself* violates Section 8(a)(1), the Division for the first time suggested exactly that

The Division argued that the company continued to insist that drivers were independent contractors, even after the Region determined they were employees (and after the settlement). The Memorandum asserted that this conduct was "without any legitimate purpose other than to deny the drivers the protections that inure to them as statutory employees" and that it chilled their future Section 7 activity. Next, the Division argued the memo to employees conveyed that unionization would be futile. Finally, it contended that the continued insistence that drivers were independent contractors (despite the Region's determination otherwise) was "akin to a misstatement of law that reasonably insinuates adverse consequences for employees' continued Section 7 activity." In sum, the Division recommended the Region issue a Complaint on the basis that the company's misclassification of drivers interfered with and restrained their protected, concerted activity, in violation of Section 8(a)(1).

This development underscored the Board's trend of focusing on broader issues of employment law — specifically including worker misclassification issues. General Counsel Memorandum 16-01, issued March 22, 2016, identified misclassification of employment status as an issue "of particular interest" to the Board. Employers must, for now, add "NLRB scrutiny" to the list of risks of employee misclassification (which already include tax liabilities, IRS audits, wage and hour claims and potential class actions).

The Battle Over the Status of Uber and Lyft Drivers Continues

Another area where this conflict between traditional labor law and broader employment law principles played out this year was in the local efforts against ride-share companies Uber and Lyft, challenging the status of their independently contracted drivers. Seattle, Washington, for example, enacted an ordinance purporting to allow Uber and Lyft drivers the right to “unionize”. Specifically, the ordinance, enacted in December 2015, would allow drivers working for the same company to form a nonprofit organization that could collectively bargain for them.

On March 3 the U.S. Chamber of Commerce filed suit against the City of Seattle in Federal District Court in Washington challenging the ordinance. In addition to various challenges under state law, the complaint asserts that the ordinance violates, and is preempted by, the Sherman Antitrust Act as it would allow the independently contracted drivers to form an illegal cartel and engage in illegal horizontal fixing of prices. Federal labor law also preempted the city ordinance, according to the complaint, because:

Congress expressly left independent contractors unregulated and excluded from the NLRA’s collective-bargaining requirements; and

the NLRA preempts state resolution of issues committed to the exclusive jurisdiction of the National Labor Relations Board.

The complaint specifically noted that the:

NLRB has not definitely resolved the employee status of drivers who receive ride requests from software applications and, indeed, as to certain drivers, that issue is currently pending before the NLRB.

The Board, however, did not intervene in any way in this litigation prior to the court’s August 9, 2016 Order granting a motion to dismiss on Article III grounds.

Board Member Hirozawa Endorsed “Members Only” Union Recognition in Concurring Opinion as this Term Expired

In one of the final decisions of his expired term, Board Member Kent Hirozawa sanctioned a long-rejected interpretation of the National Labor Relations Act which would impose an obligation on employers to bargain with “members only” unions. Endorsing a theory outlined most thoroughly by Professor Charles Morris in his 2005 book, “The Blue Eagle at Work,” Member Hirozawa would not require a union to obtain “exclusive” recognition or majority status before Section 8(a)(5) bargaining obligations attach.

At issue in *Children’s Hospital of Oakland*, 364 NLRB No. 114 (Aug. 26, 2016), was whether an employer has an obligation to arbitrate earlier arising grievances with a superseded union that no longer represents a majority of the employees. The majority decision, signed by Members Lauren McFerran and Philip Miscimarra, found that such an employer must do so because it has “a continuing duty to arbitrate grievances that arose during its bargaining relationship with the



Union.” Member Hirozawa, however, would go farther than this and require resolution of the grievances regardless of the majority or non-majority status of the union.

Member Hirozawa’s concurrence highlighted two sections of statutory text in support of his position. First, he noted that Section 8(a) (5) simply requires bargaining “subject to the provisions of section 9(a)” – and not specifically only if the union is “the representative of the employees as provided in section 9(a).” Next, he suggested the breadth of Section 7’s text – “Employees shall have the right...to bargain collectively through representatives of their own choosing...” – is unfettered by express reference to Section 9(a) majority status.

The notions laid out in this concurring opinion, however, have found little or no support historically – underscored by the fact that no Board majority has read the largely unchanged statutory text this way over several decades. In 2006, the Steelworkers filed an unfair labor practice charge against Dick’s Sporting Goods, asserting the employer’s refusal to recognize and bargain with a minority union violated the Act. The Board’s Division of Advice directed the Regional Office to dismiss that charge, squarely rejecting the arguments advanced in the concurrence here:

We conclude that the Employer did not violate Section 8(a)(1) or (5) because the Employer in these circumstances had no obligation under the Act to recognize

the Charging Party in the absence of a Board election establishing that it represented a majority of the Employer’s employees. This principle is well-settled and is not an open issue. Our conclusion is based on the statutory language, the legislative history, and Board and Supreme Court decisions interpreting the Act, which underscore that the statutory obligation to bargain is fundamentally grounded on the principle of majority rule.

General Counsel Urged the Board to Disallow Permanent Replacements During Economic Strikes, Absent Employer Proof of Necessity

In *American Baptist Homes of the West d/b/a Piedmont Gardens*, 364 NLRB No. 13 (May 31, 2016), the Board broadened the standard for finding an employer’s permanent replacement of strikers unlawful. Under longstanding Board precedent, an employer that refuses to reinstate economic strikers violates § 8(a) (3) of the National Labor Relations Act unless it can demonstrate that it acted to advance a “legitimate and substantial business justification.” But the hiring of permanent replacement workers, in and of itself, to maintain operations has generally satisfied that requirement. As the ALJ explained in his decision in *United Site Services of California*, Cases 20-CA-139280, -149509, JD(SF)-14-16 (March 17, 2016):

“[w]here employees have engaged in an economic strike, the employer may hire permanent replacements whom it need not discharge even if the strikers offer to return to work unconditionally.” *Belknap*, 463 U.S. at 493, 103 S.Ct. 3172. At the same time (as the Board recognized), the Act is violated if “an independent unlawful purpose” motivated the hiring of permanent replacements. Bd. Decision at 5; see also *Hot Shoppes Inc.*, 146 NLRB 802, 805 (1964). As with other elements of an unfair labor practice, the General Counsel cannot prevail without a finding that the employer had an independent unlawful purpose. See *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 401, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983).

Thus, in *Piedmont Gardens*, the Board found that two such “independent unlawful purposes” existed: (1) to punish the strikers, and “teach [them] a lesson”; and (2) to try to avoid future strikes. According to the Board, these reasons, articulated expressly by the employer, manifested unlawful retaliation and “desire to interfere with employees’ future protected activity.”

In connection with exceptions to the above-quoted ALJ decision in *United Site Services of California*, the General Counsel argued that the Board should go even further. He would change existing law entirely to hold that an employer violates the Act when it permanently replaces striking employees without “a legitimate and substantial business justification.” In briefs, the General Counsel urged the Board to place the full burden on the employer to establish “necessity” to use permanent replacements during a strike. The standard urged by the General Counsel would hold that

[an] employers’ permanent replacement of economic strikers is inherently destructive of employees’ statutory rights, and therefore requires a showing by the employer that it is necessary to continuing operations during a strike.

Adoption of this new standard would significantly enhance the power of labor’s main economic weapon – the strike – in economic bargaining. By Order dated November 3, 2016, the Board remanded the case to the ALJ for further consideration in light of the *Piedmont Gardens* decision. Whether or not the Board is otherwise inclined to expand that decision’s new standard even further, as requested by the General Counsel, is yet unclear.



The Board Began Its Assault on a Variety of Business Relationships Under New *Browning-Ferris* “Joint Employment” Standard

Board’s First Joint Employer Decision Problematic for Temporary Staffing Firms and Their Clients

Almost a year after rewriting its decades-old joint employer test in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), the National Labor Relations Board finally issued a Board decision providing some guidance on what constitutes a joint employer relationship. To the surprise of no one given the facts of the case, the Board found that a joint employer relationship existed in *Retro Environmental, Inc.*, 364 NLRB No. 70 (Aug. 16, 2016). Nevertheless, the Board’s *Retro* decision was alarming because the Board signaled that the basic facts of a common and prevalent relationship between temporary staffing firms (supplier employers) and their clients (user employers) will now create a joint employer relationship.

In *Retro*, the union filed a petition to represent demolition and asbestos workers jointly employed by Retro, the user employer, and Green JobWorks, a temporary staffing agency. The two companies had worked together on multiple projects for at least five years and were operating under an expired contract. Although the Regional Director found a colorable claim of a joint employer relationship, the Regional Director dismissed the petition because he found that a union election would serve no purpose given that there was an imminent cessation of operations between the two employers – the two projects they were working on were coming to an end, and Retro had no future projects or bids that involved Green JobWorks.

Disagreeing with the Regional Director’s imminent cessation finding – it found no evidence that they would *not* do business together again – the Board majority addressed the joint employer issue. The Board’s finding that Retro and Green JobWorks are joint employers was not unexpected as the facts could have justified such a finding under the Board’s old joint employer standard. What was unexpected, however, was the Board majority’s assertion, in response to Member Miscimarra’s dissent, that only three basic facts – facts that are fairly standard to many relationships involving temporary staffing firms – are needed to create a joint employer relationship:

Even if the Employers’ relationships were altered on future projects, certain key aspects of their relationship will likely remain stable. For example, while Green JobWorks, as the supplier employer, will retain primary responsibility for hiring, assigning employees to project sites, and firing, Retro will assuredly continue to dictate the number of workers to be supplied by Green JobWorks, continue to impose conditions on Green JobWorks’ hiring to ensure that the workers supplied are adequately trained and qualified, and continue to retain the right to request a replacement if it is unsatisfied with a Green JobWorks-supplied employee. Therefore, given the distinct functions and areas of responsibility of each of the Employers, it is highly doubtful that the Employers’ relationship on future projects could change in such a manner that would render them no longer joint employers of the employees in the petitioned-for unit.

In other words, the Board majority asserted that how much and to what extent the user employer supervises and directs the temporary employees is irrelevant to finding a joint employer relationship if the user employer simply: (1) states that it needs “x” number of workers (2) with “y” qualifications and certifications and (3) has some ability to ask for a replacement if a particular temporary employee underperforms. Given that all three of those facts likely exist in many, if not most, relationships between supplier and user employers, the Board’s *Retro* decision certainly portends that the current Board takes the position that most temporary staffing firms and their clients are joint employers.

Board Reversed Rule To Allow Inclusion of Regular Employees and Third Party Employees in Single Bargaining Unit

Compounding the impact of its new joint employment standards in *Miller & Anderson, Inc.*, 364 NLRB No. 39 (July 11, 2016), the Board reversed yet another precedent, holding that permanent employees and temporary staffing employees could be combined in the same bargaining unit without either the employer or the staffing agency’s consent. Since the 1970s, the Board had consistently found that bargaining units containing both an employer’s regular employees and the employer’s temporary employees supplied by a staffing agency were inappropriate without the consent of both the employer and the staffing agency. *Greenhoot, Inc.*, 205 NLRB 250 (1973).

The Board abruptly changed its position in 2000 in *M.B. Sturgis*, 331 NLRB 1298 (2000), holding that temporary employees could be included in a single bargaining unit with regular employees, even without consent of all parties, if: (1) the staffing agency and the employer

were determined to be joint employers, and (2) the temporary employees shared a community of interest with the regular employees. This departure from longstanding precedent was short-lived, however, as a Bush-appointed Board returned to the joint-consent standard established in *Greenhoot* just four years later in *Oakwood Care Center*, 343 NLRB 659 (2004).

But *Miller & Anderson, Inc.*, swung the pendulum back again, holding that *Oakwood Care Center* was wrongly decided and reinstating the *M.B. Sturgis* rule. Citing its “statutory command” to ensure that “employees [have] the fullest freedom in exercising the rights guaranteed by th[e] Act,” the Board reasoned that the broad language of the term “employer unit” necessarily included both sets of employees who, according to the NLRB, are “working side by side, are part of a common enterprise.” Beyond the statutory language, the Board reasoned that the *M.B. Sturgis* rule effectuated the fundamental policies of the Act by affording employees the “fullest freedom” “to choose the unit they wish to organize.” While the new rule will facilitate union organizing, where



unions are successful at that organizing, it may complicate the collective bargaining process by requiring multiple “employers” to bargain with the union and by likely requiring all such “employers” to pursue a single collective bargaining agreement.

Will NLRB’s New ‘Joint Employer’ Standard Discourage Corporate Social Responsibility Initiatives?

Over the summer, an amicus filing by Microsoft and the HR Policy Association highlighted yet another possible unanticipated consequence of the Board’s new joint employment standards: the extent to which the new standard might disincentivize adoption of Corporate Social Responsibility (CSR) policies. CSR refers broadly to efforts by a corporation to promote social values and provide resulting benefits to a variety of stakeholders and the society at large. One prominent approach adopted by participant companies is a code of obligations and commitments they require of potential suppliers or vendors before contracting to do business with one another. Microsoft has been recognized repeatedly as the top “corporate citizen” by *Corporate Responsibility Magazine*. In March of 2015, Microsoft announced, as part of its CSR initiatives, that it would only contract with suppliers that “provide their employees who handle [Microsoft] work with at least 15 days of paid leave each year.”

At the time, a small independent union, the Temporary Workers of America, was engaged in a labor dispute with a Microsoft supplier, Lionbridge Technologies over the terms of an initial collective-bargaining agreement for Lionbridge employees it represented. Frustrated by the employer’s offer on the table, the union invited a Microsoft executive to join the bargaining. When Microsoft declined, citing the BFI decision and the PTO requirement in Microsoft’s CSR policy, the union filed an unfair labor practice charge against Microsoft for failure to bargain in good faith. That case, NLRB Case No. 19-CA-162985, was ultimately withdrawn during investigation.

The *Browning-Ferris* case, on the other hand, is up on appeal before the United States Court of Appeals for the District of Columbia Circuit. On June 14, 2016, Microsoft and HRP filed an amicus brief arguing not only that the Board’s BFI decision was deeply flawed, but that it would also:

cause companies to question whether CSR initiatives will contribute to findings of joint employment relationships, and ultimately deter adoption of such initiatives.

If so, the law of unintended consequences could well result in companies declining to institute CSR policies like the Microsoft example at issue here, denying improved terms and conditions of employment to employees throughout the economy.

Board's Historic Joint Employer Cases Against McDonald's and Numerous Franchises Nowhere Near Resolution

Two years after the General Counsel announced consolidation of 86 cases and issuance of complaint against McDonald's USA LLC and numerous franchises as joint employers, the parties continue to battle over subpoena enforcement. Initially, the Board regionalized the hearings, scheduling consolidated hearings cycling through Manhattan, Chicago and Los Angeles. The cases have since continued somewhat separately again, and after numerous hearing dates, appear no closer to substantive decisions. In fact, by Order dated December 1, 2016, an Administrative Law Judge scheduled an additional 54 hearing dates between now and the end of July 2017.

The Board Continued to Enforce and Explore New Ways to Facilitate Successful Union Organizing

Board's New Expedited Election Rules Deemed Lawful

The National Labor Relations Board scored a victory in June when the Fifth Circuit upheld the Board's 2015 amendments to its representation case rules in *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2016), finding the rules neither unlawful nor arbitrary and capricious. The Board's purported reasoning behind the amendments was to remove "unnecessary barriers to the fair and expeditious resolution of representation cases, simplify representation-case procedures, codify best practices, and make them more transparent and uniform across regions."

The Fifth Circuit rejected the employer and business groups' argument that the new election rules impermissibly limited parties from litigating representation case issues before employees cast ballots on union representation. The Court noted that the law does not "demand" a hearing on all election issues, and the employer groups failed to explain how the new rule "inhibits meaningful debate or qualifies as arbitrary and capricious." The Court also rejected the challenge to the rule based on privacy grounds, as the new rule requires the disclosure of additional employee information such as personal home and cell phone numbers and personal email addresses. While acknowledging the privacy concerns, the Court noted that the Act does not preclude such disclosures and that the Board provided a "rational explanation" for the rule based on "encouraging an informed employee electorate by allowing unions the right of access to employees."

The New Election Rules Are Having The Board’s Intended Effect

Not only are the new election rules here to stay (at least until President-elect Trump takes office), they are having the desired effect – both in terms of expediting the processing of petitions and increasing unions’ chances of victory. Per an annual review of R-Case Rules conducted by the NLRB in April 2016, the average time between the petition filing and an election in representation (RC) cases was 23 days under the new rules, down from the average of 38 days for the previous year under the old rules. Not only have the rules resulted in quicker elections, but they appear to be impacting election results. In FY2016, the Board’s first full fiscal year under the election rules, unions won a RC petition election 72.6% of the time, *more than four to 12 percentage points higher* than the average win rate in recent years under the old election rules:

YEAR	ELECTIONS HELD	WON BY UNION	UNION’S WINNING %
FY16	1396	1014	72.6%
FY15*	1574	1120	71.2%
FY14	1407	952	67.7%
FY13	1330	852	64.1%
FY12	1348	868	64.4%
FY11	1398	935	66.9%
FY10	1571	1036	65.9%
FY09	1335	915	68.5%
FY08	1614	1028	63.7%
FY07	1530	916	59.9%

*The new election rules went into effect six months into the fiscal year.

Courts Continue to Uphold NLRB’s Specialty Healthcare Decision Allowing Micro-Unit Organizing

In a decision four years in the making, the Fifth Circuit delivered another victory to the NLRB as it upheld the Board’s certification of a unit of only cosmetics and fragrances employees at a Macy’s department store under the Board’s *Specialty Healthcare* standard for determining appropriate units in representation elections (*Macy’s v. NLRB*, 824 F.3d 557 (5th Cir. 2016)). Since the Board issued *Specialty Healthcare* in 2011, employers and business groups have challenged the ruling on the basis that the new standard was improper and would lead to a proliferation of small voting units thereby possibly creating a complicated array of bargaining units for employers. Prior to the Fifth Circuit’s decision, three other courts—the Fourth, Sixth, and Eighth circuits – had already considered and upheld the Board’s new bargaining unit determination standard, but many were waiting to see how the Fifth Circuit, which is frequently critical of the Board, would treat *Specialty Healthcare*.

The Fifth Circuit, like its sister courts before it, found that *Specialty Healthcare* was a permissible clarification of NLRB precedent. Applying *Specialty Healthcare* to the facts of the case, the Court also rejected Macy's argument that all its sales employees constituted a "homogenous work force" and that it was improper for the Board to separate out the cosmetics and fragrances employees from the others. The Court noted that the NLRB had found that the employees in question did indeed have "distinct interests" separate from the other sales employees justifying a separate unit. Moreover, in rejecting the employer's argument that allowing such a unit could be disruptive to its business, the Fifth Circuit opined that the impact a bargaining unit determination has on an employer's business is immaterial.

2016 also saw the Second, Third and Seventh Circuits chime in on *Specialty Healthcare*, and each of them similarly upheld the Board's new unit determination standard.

The Board Again Overrules Years of Precedent to Further Limit Employers' Ability to Communicate with Its Employees About Unionization

For more than 50 years, the Board had maintained a rule for mail ballot elections, set forth in *Oregon Washington Telephone*, 123 NLRB 339 (1959), prohibiting the parties from holding mass campaign meetings on company time (commonly referred to as "captive audience" meetings) with employees "from the time and date on which the 'mail in' ballots are scheduled to be dispatched by the Regional Office until the terminal time and date prescribed for their return." In January 2016, however, the Board overruled that long-standing rule in *Guardsmark, LLC*, 363 NLRB No. 103 (Jan. 29, 2016).

In *Guardsmark*, the Board majority of Chairman Pearce and Members Hirozawa and McFerran declared that a new rule was needed because of confusion surrounding the rule and a need for a "bright line" standard for all cases. In manual elections, the Board's *Peerless Plywood* decision provides that employers cannot hold captive audience meetings beginning 24 hours before the election begins. Thus, to make the mail ballot rule consistent with *Peerless Plywood*, the Board declared a new standard for mail ballot elections where the prohibition on captive audience meetings would apply to the entire period beginning 24 hours before the ballots are mailed by the Regional Director and ending with the return of the ballots.

Member Miscimarra vehemently disagreed with the Board's "clarification." In his dissent Miscimarra asserts that the new rule does not create consistency, but rather "a double standard that, in [his] view, lacks any rational justification:"

By setting the starting time of the captive-audience-speech prohibition in mail-ballot elections 24 hours before a regional office puts ballots in the mail, my colleagues establish a new rule, contrary to over 50 years of precedent, that upsets the consistency between *Oregon Washington Telephone* and *Peerless Plywood*. My colleagues say the point in time 24 hours before ballots are mailed "seems to correspond most naturally to the *Peerless Plywood* rule." To the contrary, by overruling *Oregon Washington Telephone*, my colleagues all but guarantee that, in mail-ballot elections, there will be a 48-hour prohibition against captive-audience speeches, double the 24-hour restriction adopted in *Peerless Plywood* for manual elections.

Professors Petitioned NLRB For Rule Granting Unions Right to Hold Captive Audience Meetings on Company Time

Despite the significant gains pro-labor groups have received under the new election rules and the Board's *Specialty Healthcare* decision, a group of more than 100 professors from about 70 universities filed a rulemaking petition with the National Labor Relations Board early in the year seeking an additional rule to boost organizing efforts. Specifically, the professors sought a rule providing that where employers prohibit employees from soliciting for the union during working time, the union would have the right to have a mandatory, on-the-clock meeting with employees whenever the employer conducts a "captive audience" meeting to express opposition to a union organizing campaign. Under the proposed rule, if the union loses the election, an employer's refusal to grant such access would be sufficient grounds to set aside the election.

The professors claimed that the petition, filed under the rarely-used NLRB Rule and

Regulation §102.124 allowing any interested person to petition the Board for the "issuance, amendment, or repeal of a rule or regulation," was designed to counteract the "anti-democratic phenomenon" of captive-audience meetings that they argued destroys the laboratory conditions required for an election. However, the professors expressly noted that captive-audience meetings are not objectionable because of the content. Rather, their objection to such meetings is that it denies the union comparable access to the employees. Curiously, the professors cited the Railway Labor Act (RLA) as justification for their proposed rule because the National Mediation Board (NMB), which has jurisdiction over the RLA, *prohibits* captive audience meetings because it believes that they are "*inherently coercive*" and thus violate "the 'laboratory conditions' required for a fair election," a conclusion that the professors deny.

Under the Board's rules and regulations, the Board has the option of granting or denying the petition with or without a hearing. To date, the Board has not addressed the petition in depth.



Federal Courts of Appeals Asserted Themselves This Year in an Effort to Rein in the Board

D.C. Circuit Sanctioned National Labor Relations Board for “Abusive Tactics and Extremism”

On September 30, 2016, the United States Court of Appeals for the District of Columbia issued a stunning and scathing rebuke to the National Labor Relations Board for “abusive tactics and extremism,” ordering the Board to pay an employer nearly \$18,000 in legal fees incurred due to the Board’s “bad faith litigation.” *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16 (D.C. Cir. 2016).

The Board sued the employer on the theory that the employer unlawfully refused to bargain on a matter allegedly within the scope of a collective bargaining agreement without a “clear and unmistakable” waiver—a theory consistently rejected by the D.C. Circuit. Rather than attempt to transfer the appeal to the Sixth Circuit, which embraces the Board’s “clear and unmistakable” waiver theory and which covers Michigan where the underlying conduct occurred, the Board proceeded to challenge D.C. Circuit precedent and cross-petitioned for enforcement of its order. As the D.C. Circuit described the Board’s strategy: “In lieu of legitimate options, the Board chose obstinacy.”

Moreover, in a responsive pleading filed late in the appeal, the Board for the first time asserted a policy of “nonacquiescence,” claiming a prerogative to “stake out its own position contrary” to any circuit or all circuits. In principle, nonacquiescence allows the Board to oppose adverse circuit court decisions and bring national labor law questions to the Supreme Court for resolution, thus achieving a uniform and orderly administration of the NLRA. As the D.C. Circuit observed, however, this was not the Board’s goal — or else it would have pursued appeal via the Sixth Circuit in

order to create a split. Rather, the D.C. Circuit observed that the Board’s conduct clearly was intended to chill opposition: “It is clear enough that the Board’s conduct was intended to send a chilling message to Heartland, as well as others caught in the Board’s crosshairs:

‘Even if we think you will win, we will still make you pay.’”

Thus, the D.C. Circuit held that an award of fees to the employer was justified and left no doubt as to its view of the Board’s conduct:

We recognize the Board’s unimpeded access to the public fisc means these modest fees can be dismissed as chump change. But money does not explain the Board’s bad faith; “the pleasure of being above the rest” does. See C.S. Lewis, *MERE CHRISTIANITY* 122 (Harper Collins 2001). Let the word go forth: for however much the judiciary has emboldened the administrative state, we “say what the law is.” *Marbury*, 5 U.S. (1 Cranch) at 177. In other words, administrative hubris does not get the last word under our Constitution. And citizens can count on it.

D.C. Circuit Judge Warned National Labor Relations Board to Stop Tolerating Racist and Sexist Behavior by Striking Employees

Around the same time as *Heartland*, a D.C. Circuit Court Judge also took the Board to task for allowing unions and represented employees to get away with otherwise intolerable behavior. Circuit Judge Millett’s concurring opinion in *Consolidated Communications v. NLRB*, 837 F.3d 1 (D.C. Cir. 2016), strongly criticized the Board

for “wink[ing] away...the very types of demeaning and degrading messages that for too much of our history have trapped women and minorities in a second-class workplace status.”

In *Consolidated Communications*, the D.C. Circuit largely upheld the findings of the Board that the employer unlawfully terminated and/or suspended a number of employees for strike-related misconduct. Applying the Board’s long-standing standards for protecting strikers’ conduct, the court concluded that most of the conduct at issue was not severe enough to lose protection under the NLRA and to warrant the discipline imposed by the employer. One particular incident, however, aroused Circuit Judge Millett’s passion: a striker grabbed his crotch and made obscene and intimidating gestures toward a female employee reporting to work.

Although Circuit Judge Millett agreed that this offensive, but isolated and fleeting, gesture was not so egregious as to forfeit the protection of the NLRA, she wrote a separate concurring opinion cataloguing recent examples of the Board’s countenance of racial epithets and older cases permitting misogynous vulgarities directed at women. Criticizing the Board for giving short shrift to “[c]onduct that is designed to humiliate and intimidate another individual because of and in terms of the person’s gender or race,” Circuit Judge Millett concluded her passionate concurrence:

To be sure, employees’ exercise of their statutory rights to oppose employer practices must be vigorously protected, and ample room must be left for powerful and passionate expressions of views in the heated context of a strike. But Board decisions’ repeated forbearance of sexually and racially degrading conduct in service of that admirable goal goes too far. After all, the Board is a component of the same United States Government that has fought for decades to root discrimination

out of the workplace. Subjecting co-workers and others to abusive treatment that is targeted to their gender, race, or ethnicity is not and should not be a natural byproduct of contentious labor disputes, and it certainly should not be accepted by an arm of the federal government. It is 2016, and “boys will be boys” should be just as forbidden on the picket line as it is on the assembly line.

But The Board Found An Ally In The Seventh Circuit: Court Invalidates an Arbitration Agreement’s Class and Collective Action Waiver

In May, the Seventh Circuit issued its decision in *Lewis v. Epic Systems Corporation*, Case No. 15-2997 (7th Cir., May 2, 2016), holding that an arbitration agreement providing “that covered claims will be arbitrated only on an individual basis” and that employees “waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding” impinges on employees’ Section 7 rights. The Seventh Circuit’s decision creates a split with the Fifth Circuit, which has repeatedly held that class and collective action waivers in arbitration agreements do not violate the National Labor Relations Act.

Since its decision in *D.R. Horton* in 2012, the Board has held that class and collective action waivers violate Section 8(a)(1) because the Act protects the right of employees to improve their working conditions through administrative and judicial forums. According to the Board, an “individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7 ... central to the [NLRA’s] purposes.” As such, in the Board’s opinion, by requiring employees to refrain from collective or class claims, waivers of those claims infringe the substantive rights protected by Section 7.

The Fifth Circuit reversed the Board's decision in *D.R. Horton*, holding that an employer commits no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing arbitration agreements. Late last year, the Fifth Circuit again reversed a Board decision finding that an employer committed an unfair labor practice by requiring employees to waive collective and class claims in *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

The Seventh Circuit, however, held that the employer's agreement "runs straight into the teeth of Section 7," and "[c]ontracts that stipulate away employees' Section 7 rights or otherwise require actions unlawful under the NLRA are unenforceable." In rejecting the employer's argument that the Federal Arbitration Act trumps the NLRA (and thus disagreeing with the Fifth Circuit), the Seventh Circuit found that:

There is no conflict between the NLRA and the FAA, let alone an irreconcilable one. As a general matter, there is "no

doubt that illegal promises will not be enforced in cases controlled by the federal law."... The FAA incorporates that principle through its savings clause; it confirms that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

... Illegality is one of those grounds. ...

The NLRA prohibits the enforcement of contract provisions like Epic's, which strip away employees' rights to engage in "concerted activities." Because the provision at issue is unlawful under Section 7 of the NLRA, it is illegal, and meets the criteria of the FAA's savings clause for nonenforcement. Here, the NLRA and FAA work hand in glove.

Recognizing that the decision would create a conflict in the circuits, the Seventh Circuit panel circulated its opinion to all active judges, but "[n]o judge wished to hear the case en banc." The issue would thus seem teed up for eventual Supreme Court resolution.



Department of Labor's New "Persuader Rule" Interpretation Finalized, Published and Struck Down by Court as "Defective to its Core"

DOL Issued Final Persuader Rule Significantly Narrowing the Advice Exemption

In March, the Department of Labor issued its final rule eviscerating the "advice exemption" to the so-called "persuader rule" in the Labor-Management Reporting Disclosure Act of 1959 (LMRDA). Almost five years after it published the proposed rule, the DOL announced that it was finally adopting "the proposed rule, with modifications, [providing] increased transparency to workers without imposing any restraints on the content, timing, or method by which an employer chooses to make known to its employees its positions on matters relating to union representation or collective bargaining."

In the Final Rule, the DOL asserted that:

section 203(c) (known as the "advice exemption") does not shield employers and their consultants from reporting agreements in which the consultant has no face-to-face contact with employees but nonetheless engages in activities behind the scenes (known as indirect persuader activities) where an object is to persuade employees concerning their rights to organize and bargain collectively.

Justifying the Final Rule's interpretation of the "advice exemption," the DOL claimed that:

it is important for employees to know that if the employer claims that employees are family — a relationship will be impaired, if not destroyed, by the intrusion of a third party into family matters — it has brought a third party, the consultant, into the fold to achieve its goals. Similarly, with knowledge that its employer has hired a consultant, at

substantial expense, to persuade them to oppose union representation or the union's position on an economic issue, employees may weigh differently a claim that the employer has no money to deal with a union at the bargaining table.

The rule modified the "advice exemption" by revising the instructions to forms filed by employers (Form LM-10) and labor relations consultants (Form LM-20) to report persuader agreements and arrangements. According to those instructions, reports would be filed if the labor relations consultant undertook activities falling within the following categories:

A consultant engages in direct contact or communication with any employee, with an object to persuade such employee; or

A consultant who has no direct contact with employees undertakes one or more of the following activities with an object to persuade employees:

Planning, Directing, or Coordinating Supervisors or Managers. This includes both meetings and other less structured interactions with employees. Examples include the consultant planning, directing or coordinating which employees they meet; where they meet; when they meet; for how long they meet; the topics discussed and the manner in which they are presented; the information gathered from the employees and how they should gather it; debriefing with the supervisor to orchestrate the next steps in the campaign; and identifying materials to disseminate to employees.

The Provision of Persuader Materials. This covers the providing of materials or communications to the employer, in oral, written, or electronic form, for dissemination or distribution to employees. However, a consultant's revision of employer-created materials, including edits, additions, and

translations, if an “object” of the revisions is to ensure legality as opposed to persuasion, does not trigger reporting. On the other hand, if the revisions are intended to increase persuasiveness of the material, then the reporting obligation is triggered. Where a consultant merely provides an employer with “off-the-shelf” material selected by the employer from a library or other collection of pre-existing materials prepared by the consultant for all employer clients, then no reporting is required as long as the consultant does not play an active role in selecting the materials for its client’s employees based on the specific circumstances faced by the employer-client.

Conducting a Seminar for Supervisors or Other Employer Representatives. Seminar agreements must be reported when the consultant develops or assists the attending employers in developing anti-union tactics and strategies for use by the employer’s supervisors or other representatives. A consultant who merely solicits business by recommending that the employer hire the contractor to engage in persuasive activities does not trigger reporting. In no case is the employer required to file a Form LM-10 for attendance at a multiple-employer union avoidance seminar.

Developing or Implementing Personnel Policies or Actions. According to the DOL, reporting is only required if the consultant develops or implements personnel policies, practices, or actions for the employer that have as an object to, directly or indirectly, persuade employees (e.g., the identification of specific employees for disciplinary action, or reward, or other targeting, based on their involvement with a union representation campaign or perceived support for the union, or implementation of personnel

policies or practices during a union organizing campaign). For example, if the consultant, in response to employee statements about the need for a union to protect against firings, develops a policy under which employees may arbitrate grievances, reporting would be required. However, if the grievance process was set up in response to a request by employees – without any history of a desire by them for union representation – or as a policy developed as part of a company’s startup of operations, without any indication in the agreement or accompanying communications that the policy was established to avoid union representation of the employer’s workforce, no reporting would be required.

The final rule, however, provided that:

no reporting is required by reason of a consultant merely giving “advice” to the employer, such as, for example, when a consultant offers guidance on employer personnel policies and best practices, conducts a vulnerability assessment for an employer, conducts a survey of employees (other than a push survey, i.e., one designed to influence participants and thus undertaken with an object to persuade), counsels employer representatives on what they may lawfully say to employees, conducts a seminar without developing or assisting the employer in developing anti-union tactics or strategies, or makes a sales pitch to undertake persuader activities. Reporting is also not required for merely representing an employer in court or during collective bargaining, or otherwise providing legal services to an employer.

In addition, the DOL eliminated the term “protected concerted activities” from the definition of “object to persuade employees” provided in the proposed rule. Instead, reporting was required only for agreements in which the consultant engages in activities with an object to persuade employees concerning representational and collective bargaining activities, but not “other protected concerted activities.”

Trade associations were given somewhat different treatment under the Final Rule. As a general rule, trade associations would only be required to report in two situations: 1) where the trade association’s employees serve as presenters in union avoidance seminars or 2) where they undertake persuader activities for a particular employer or employers (other than by providing off-the-shelf materials to employer-members).

The DOL estimated the average cost of compliance to be \$151.14 per Form LM-20 for labor consultants, and \$226.70 per Form LM-10 for employers — figures challenged by critics as absurd.

Three Lawsuits Immediately Challenged the Final ‘Persuader Rule’

Various law firms, business groups, and associations immediately filed lawsuits in three jurisdictions challenging the Final Rule’s modification of the “advice exemption.”

The first lawsuit was filed on March 30, 2016, one week after the Rule was issued, in the Eastern District of Arkansas by the National Association of Manufacturers, other industry groups, and a law firm. The lawsuit asserted that the Rule:

- ▶ “infringes on the right of those who seek to give labor relations advice to employers, including the Plaintiff associations, attorneys, and other third party consultants...to render such advice without fear of criminal penalties for failing to file the reports newly required by the Rule”;
- ▶ violates the plaintiffs’ First Amendment rights of Freedom of Speech and Freedom of Association; and
- ▶ infringes on the confidentiality of the plaintiffs’ attorney-client communications and impermissibly invades the attorney-client relationship.

The second lawsuit, filed by a group of labor and employment law firms and an association of management-side labor and employment law firms, was filed on March 31, 2016, in the District of Minnesota. The Minnesota lawsuit, raising similar claims, asserts that the Rule “is an impermissible viewpoint-based regulation of speech” as it “singles out for regulation communications that are ‘anti-union.’”

The National Association of Home Builders and the National Federation of Independent Business (NFIB) filed the third challenge in the Northern District of Texas. In the Texas lawsuit the plaintiffs asserted:

[The new rule] is without statutory authority, is in direct conflict with specific existing statutory provisions, is contrary to Constitutional provisions, and usurps, without legal authority, the right of States to regulate the attorney-client relationship. It will require practicing attorneys to either violate DOL’s new federal “interpretation” of federal law or state ethics rules on disclosure of attorney-client information. DOL’s new rule

illegally interferes with the right of Plaintiff's employer-members to obtain confidential legal advice and impedes their right to communicate with employees about unions and workplace issues.

All three lawsuits sought to enjoin the Rule pending a final decision on the merits and an order vacating the challenged rule.

First Court Decision Cast Doubt on Rule, But Declined to Enjoin

The first decision in the three pending lawsuits, the District Court for the District of Minnesota's decision in *Labnet Inc. d/b/a Worklaw Network et al v. U.S. Department of Labor et al.*, Case No. 16-cv-00844 (D. Minn., June 22, 2016), held that:

plaintiffs are likely to succeed in their claim that portions of the new rule conflict with the LMRDA. But the Court nevertheless declines to enjoin or stay the new rule after weighing the factors identified by the Eighth Circuit....

The Court found that the plaintiffs were likely to prevail on the first count of their suit – that the new interpretation conflicts with Section 203 of the LMRDA. Specifically, the Court found flawed DOL's effort to properly define the categories of behavior that are and are not reportable under the new standard:

By starting with the premise that, if something is persuader activity, it cannot possibly be advice, DOL ends up struggling mightily to define as non-advice activity that any reasonable person would define as advice. And in the course of that struggle, DOL ends up drawing lines that are simply incoherent.

The Court noted the inability of the DOL's counsel at oral argument to properly characterize hypothetical examples posed by the Court. Notwithstanding the Court's critical findings on this count, the Court nevertheless

decided that there was no risk of irreparable harm in allowing the attempted enforcement of the rule during the pendency of the litigation. Therefore, the Court declined to enjoin the new rule.

Somewhat surprisingly, the Court also rejected the remaining arguments made by the plaintiffs: that the new rule violated attorney-client privilege and the First Amendment; was vague, overbroad, arbitrary and capricious; and that it violated the Regulatory Flexibility Act.

Federal District Court in Texas Issued Nationwide Injunction Against DOL's New Persuader Rule

The second decision in the three suits was far less restrained. Calling the DOL's Final Rule "defective to its core," the District Court for the Northern District of Texas issued a nationwide injunction on June 27, 2016. This ruling in *National Federation of Independent Business et al. v. Perez*, 16-cv-00066 (N.D. Tex., June 27, 2016), came just days before the July 1, 2016 date on which the New Rule's most problematic reporting requirements would have become fully effective.

In a sweeping decision, the District Court for the Northern District of Texas determined that the plaintiffs challenging the New Rule established a "substantial likelihood of success on the merits" on numerous claims:

- ▶ The New Rule "exceeds DOL's authority under the LMRDA by effectively eliminating the statute's Advice Exemption contrary to the plain text of Section 203(c)," a finding consistent with the decision of the District Court of Minnesota;
- ▶ The New Rule is "arbitrary, capricious, and an abuse of discretion," because in the hundreds of pages of rulemaking documentation the DOL never explains why it chose to abandon its longstanding interpretation of the "Advice Exemption" now;
- ▶ The New Rule's reporting requirements unreasonably conflict with state rules governing the practice of law, and violate the attorney-client privilege;

- ▶ The New Rule “violates free speech and association rights protected by the First Amendment”;
- ▶ The New Rule is unconstitutionally vague in violation of the due process clause of the Fifth Amendment”;
- ▶ The New Rule violates the Regulatory Flexibility Act as DOL likely understates its annual economic impact by billions of dollars according to former DOL Chief Economist, Diana Furchtgott-Roth.

The court further ruled that the New Rule would cause irreparable harm to the plaintiffs by “[r]educe[ing] access to full, complete, un-conflicted legal advice and representation,” and “burden[ing] and chill[ing] First Amendment rights.....” On balance, the court held the DOL would suffer no harm from the “delay[ed] implementation of an invalid rule.” Accordingly, the court granted the injunction:

The United States of America, its departments, agencies, officers, agents and employees, including Thomas E. Perez, Secretary of the United States Department of Labor, and Michael J. Hayes, Director of the Office of Labor-Management Standards, are hereby enjoined on a national basis from implementing any and all aspects of the United States Department of Labor’s Persuader Advice Exemption Rule (“Advice Exemption Interpretation”), as published in 81 Fed. Reg. 15,924, *et seq.*.... The scope of this injunction is nationwide.

On November 16, 2016, the Court made its injunction permanent. At year’s end, an appeal by the government remained pending before the Court of Appeals for the Fifth Circuit. Few think that the incoming administration will prosecute that appeal, likely closing the door on this ill-conceived policy for good.

Yet Another Example of Unconstitutional Overreach – The President’s Contractor Blacklisting Order – Enjoined by Court Just Before Effective Date

Administration Released Final Blacklisting Regulations for Government Contractors

On Wednesday, August 24, 2016, the administration published the Federal Acquisition Regulatory Council’s final rule and the Department of Labor’s guidance implementing the July 31, 2014 “Fair Pay and Safe Workplaces” Executive Order 13673. The “blacklisting” Order and its implementing regulations would subject existing and prospective government contractors to a broad new set of record-keeping, reporting and compliance requirements. Failure to fulfill these obligations and exhibit compliance with all applicable federal and state labor laws would expose the contractor to the prospects of disqualification, suspension, or debarment.

The final rule closely tracked the proposed rule issued in May 2015, and thus still required offerors on contracts or subcontracts estimated to exceed \$500,000 to disclose “any administrative merits

determination, arbitral award or decision, or civil judgment” against the contractor under the following fourteen enumerated federal statutes and Executive Orders (labor law violations), for the three years preceding the contract bid:

- ▶ the Fair Labor Standards Act (FLSA);
- ▶ the Occupational Safety and Health Act of 1970 (OSHA);
- ▶ the Migrant and Seasonal Agricultural Worker Protection Act (MSPA);
- ▶ the National Labor Relations Act (NLRA);
- ▶ the Davis-Bacon Act;
- ▶ the Service Contract Act;
- ▶ Executive Order 11246 (Equal Employment Opportunity);
- ▶ the Rehabilitation Act of 1973;
- ▶ the Vietnam Era Veterans’ Readjustment Assistance Act of 1972 and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974;
- ▶ the Family and Medical Leave Act (FMLA);
- ▶ Title VII of the Civil Rights Act of 1964 (Title VII);
- ▶ the Americans with Disabilities Act of 1990 (ADA);
- ▶ the Age Discrimination in Employment Act of 1967 (ADEA); and
- ▶ Executive Order 13658 (Minimum Wage for Contractors).

The information reported would then be considered by the contracting agency’s contracting officer when making responsibility determinations during the contract award process. The final rule created four new categories of labor law violations — i.e., “serious,” “repeated,” “willful,” and “pervasive” violations — that may be considered evidence of “a lack of integrity or business ethics” sufficient to disqualify a contractor from consideration for a contract. Covered contractors and subcontractors would be required to update all

this information every six months during the term of a contract.

As a result, the final rule established a standard under which contract awards, disqualification, and suspension could be based entirely on administrative allegations — before those allegations were fairly and fully adjudicated. For example, contractors would be required to report NLRB complaints issued against them, but NLRB complaints are not final determinations on the merits. Rather, they are merely preliminary findings of probable cause that a violation has occurred, against which employers have the right to defend themselves, including the right to challenge evidence at a hearing and confront witnesses under oath. Indeed, in some instances, the employer has complied with the law but the regional director issues a complaint in an effort to ask the Board to change the law.

Finally, the final rule would also require inclusion of contract language under which the contractor declines to obtain or enforce pre-dispute arbitration agreements for Title VII, sexual assault or harassment claims; and, would require covered contractors and subcontractors to provide certain employees with additional wage and hour information every pay period.

In response to extensive critical comment during the rulemaking process, the administration tweaked the Final Rule in a few respects:

- ▶ It postponed the reporting of violations of “equivalent” state laws, pending a separate future rulemaking.
- ▶ It required subcontractors to disclose details regarding their labor law violations and remedial actions directly to the DOL for review and assessment, instead of putting that responsibility on the prime contractor.
- ▶ The obligations would be phased in over a thirteen month period between September 2016 and October 2017.

Before the Final Rule, NLRB Began Collecting Information to Enforce Order

On July 1, 2016 – well before the Final Rule was even issued – the Office of the General Counsel for the National Labor Relations Board issued a memorandum (OM 16-23) stating that beginning that date the Board would collect data to be reported to a federal database to comply with the Executive Order. To comply with the Order, the NLRB announced an intention to collect and record four additional data points in its NxGen case management system, which would ultimately be available to the Labor Compliance Advisors created by the Order. The NLRB would begin to collect and record the following information:

- ▶ Is the charged party employer a federal contractor now or in the past? If so, its Commercial and Government Entity (“CAGE”) number;
- ▶ The charged party employer’s Data Universal Numbers System (“DUNS”) number, if it has one;
- ▶ The charged party employer’s four-character DUNS number suffix (DUNS+4), if it has one; and
- ▶ The charged party employer’s Employer Identification Number (EIN) or Taxpayer Identification Number (TIN).

The Board developed a form requesting this information from the employer to be sent once the Regional Director determines to issue a complaint based on an unfair labor practice charge. The form would be transmitted via email containing the following language:

The Region has made a determination to issue a complaint in the above-referenced case, absent prompt settlement. ...

Please be advised that if you reach a resolution of this matter before the Region issues a complaint, such as by entering a pre-complaint informal settlement agreement with the Regional Director, no information on this case will be forwarded to this database.

You are requested to complete the Form 5554 and submit it to the Agency.... This Form provides certain information to assist with administration of the Fair Pay Safe Workplaces Executive Order.

The information you provide will be forwarded to the database accessed by Labor Compliance Advisors in making their decisions regarding contracting, only if the Regional Director issues a complaint in this matter. If a complaint issues in this matter and you have not provided the requested information, the NLRB will transmit the information it does have about the case, along with notification that the NLRB requested you to provide additional information and you failed to do so. This information may be considered by the Labor Compliance Advisors in assessing whether the charged party employer will be eligible to contract with the federal government.

The Board thus transparently acknowledged its intention to leverage the threat of lost contract opportunities to pressure contractors into early settlements.

Federal District Court Enjoined Reporting and Arbitration Requirements in Administration's Contractor Blacklisting Rules; Allowed Paycheck Transparency Provisions to Stand

On October 24, 2016 – the eve of its effective date – a federal judge in Texas enjoined most parts of the Federal Acquisition Regulatory (FAR) Council's final rule implementing President Obama's "Fair Pay and Safe Workplaces" Executive Order. The court's Order in *Associated Builders and Contractors of Southeast Texas et al. v. Rung et al.*, Case No. 1:16-cv-00425 (E.D. Tex. Oct. 24, 2016), blocked the reporting and arbitration agreement provisions, pending further litigation of the case; but, declined to enjoin the "paycheck transparency" provisions of the rule.

In issuing the injunction, U.S. District Judge Marcia Crone asserted that the plaintiffs enjoy a likelihood of success on the merits insofar as the implementation of this regulatory scheme exceeded the authority granted to the President and executive branch agencies. Not only do the named labor laws provide their own respective enforcement procedures and penalties, the Judge noted:

The Order and Rule appear to conflict directly with every one of the labor laws they purport to invoke by permitting disqualification based solely upon 'administrative merits determinations' that are nothing more than allegations of fault asserted by agency employees and do not constitute final agency findings of any violation at all.

The Judge found merit too in the plaintiffs' arguments that the rule violated a contractor or bidder's First Amendment rights to be free from "compelled speech," and their Due Process rights, including under the Fifth Amendment

to the U.S. Constitution. The court found infringement of these constitutional rights sufficient to establish irreparable harm, while noting the government will suffer no harm by simply being required to continue to administer the procurement process in the same manner as it has for decades. Moreover, Judge Crone held that the rule's prohibition against arbitration agreements likely conflicted with the Congressional enactments contained in the Federal Arbitration Act. Thus, all these provisions were enjoined by the Order.

Without much further detailed explanation, the Order simply indicated that the plaintiffs failed to establish a substantial likelihood of success on their challenge to the paycheck transparency provisions, on the other hand, and thus, an injunction was denied as to that portion of the final rule. Accordingly, effective January 1, 2017, federal contractors are required to provide a wage statement document each pay period to each employee showing:

- ▶ The total number of hours worked in the pay period;
- ▶ The number of those hours that were overtime hours;
- ▶ The rate of pay;
- ▶ The gross pay; and
- ▶ Any additions or deductions, itemized and separately identified.

Moreover, if the contractor is treating an individual performing work as an "independent contractor" as opposed to an employee, the contractor must provide a separate written document to the individual notifying the individual of this classification by the contractor. The full text of the paycheck transparency provisions is located at Section 52.222-60 of the Federal Acquisition Regulation.

Extreme Expansion of Scope of “Protected Concerted Activity” Pushed by Board to Ensnare Increasing Number of Typical and Innocuous Employee Handbook Policies

The Board And Its Administrative Law Judges Continued to Attack Workplace Civility Measures

The Board and its ALJs this year continued their assault on entirely typical and reasonable employer handbook policies — particularly, policies intended to prohibit profanity or abusive behavior in the workplace. These cases illustrate the current Board’s broad view of “protected concerted activity,” and the expansive application of the *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), standard. Unless and until the next Board restores some sensibility to its application of this standard, employers must continue to be mindful that enforcing a work rule that in any way, shape or form could be interpreted by any stretch of the imagination, under any single set of circumstances, to interfere with employee concerted activity may not pass muster with the Board. Furthermore, employee handbooks or workplace policies intended to preserve workplace civility and decorum, protect confidential information broadly, or prohibit false or misleading statements on social media will likely be found unlawful.

ALJ Struck Down Workplace Civility Rule, Ban on Photography at Las Vegas Casino

An ALJ struck down several workplace rules at a casino in Las Vegas, including a rule that prohibited “inappropriate conduct;” and another rule — ubiquitous in the gaming industry — prohibiting photography on the casino floor. In *Wynn Casinos LLC*, Cases No. 28-CA-155984 and -157203 (Sept. 26, 2016), the ALJ found that the casino’s rule encouraging employees

to “[d]isplay[] appropriate behavior at work” and prohibiting employees from “engaging in misconduct on or off-duty that . . . materially and adversely affects job performance or tends to bring discredit to [the casino]” was ambiguous and overbroad and could “chill” employees’ exercise of Section 7 rights. Although the ALJ recognized that certain forms of speech can be prohibited — such as abusive, injurious, or threatening language — the ALJ found that the rule failed to make clear that it was limited to such non-protected speech.

The ALJ also found that a rule prohibiting employees from taking photographs or making recordings on the casino floor was overbroad and not narrowly tailored. Bans on photography are common at casinos to protect patron privacy, gaming integrity and the safety and security of patrons and employees alike. The ALJ still found that the rule was not narrowly tailored to protecting legitimate interests, but rather would lead a reasonable employee to interpret the rule as prohibiting photographic recording of working conditions.

ALJ Found Handbook’s “Personal Business,” Additional Provisions Violated the Act

In *Casino Pauma*, Case No. 21-CA-161832 (July 18, 2016), an ALJ found that an employer violated the National Labor Relations Act (the “Act”) by maintaining employee handbook rules that: (1) prohibited employees from conducting “personal business” while on the employer’s premises; (2) banned solicitation if it caused “discomfort or unreceptiveness”; (3) required the posting of a disclaimer for online content about work issues; and (4) required the employer’s approval for solicitations “in support of any causes.”

Of note, the ALJ concluded that the prohibition against conducting “personal business” “while at work” was unlawful, as it could reasonably be read to restrict employee communications about a union or other protected rights in non-work areas and on non-work time. Consistent with longstanding NLRB precedent regarding solicitation rules, the “while at work” restriction was held overly broad because it banned protected activity during lunch, breaks, and before and after work. But the ALJ also particularly noted that the boundaries of impermissible “personal business” left too much to question in an employee’s mind to allow.

The employer’s online disclaimer rule – another fairly common company regulation – which required employees posting online content about work issues to include a disclaimer that the opinions being posted were the employee’s and not the employer’s, similarly failed to pass muster. The ALJ seemed particularly concerned that the rule would require the employee not only to provide a disclaimer, but also to “identify themselves and their job positions, and refrain from mentioning guests, vendors, clients or fellow employees without their approval.” He found these warnings could

reasonably be read by employees to restrict the free exercise of their Section 7 right to comment to fellow employees and others, including union representatives, about their work-related complaints concerning wages, hours and working conditions.



Policy Prohibiting False or Misleading Statements in Social Media Held Unlawful

In *Chipotle Services LLC d/b/a Chipotle Mexican Grill*, 364 NLRB No. 72 (Aug. 18, 2016), the Board found that Chipotle violated Section 8(a)(1) of the National Labor Relations Act (NLRA) by maintaining its social media policy. Specifically, the two challenged provisions of the social media policy were:

“If you aren’t careful and don’t use your head, your online activity can also damage Chipotle or spread incomplete, confidential, or inaccurate information,” and “You may not make disparaging, false, misleading, harassing or discriminatory statements about or relating to Chipotle, our employees, suppliers, customers, competition, or investors.”

The Board adopted the ALJ finding that the policy against spreading false or misleading statements was unlawful. False statements only lose their NLRA protection if the employee had a malicious motive

in making these statements, meaning that the employee knew these statements were false, or that the employee had reckless disregard for their truth or falsity. Accordingly, the ALJ and Board viewed this provision as overly broad and infringing on protected activity. Similarly, the Board agreed with the ALJ that the social media policy did not define “confidential” and thus the word is “vague and subject to interpretation, which could easily lead employees to construe it as restricting their Section 7 rights.” As for “disparaging,” the ALJ noted, ultimately with Board approval, that prohibiting disparaging statements “could easily encompass statements protected by Section 7” and that the Board “has found rules prohibiting derogatory statements to be unlawful.”

Interestingly, notwithstanding these findings, the Board reversed the ALJ’s conclusion that the company violated the Act by directing an employee to delete several tweets from his personal Twitter account. The ALJ believed the employee’s Twitter interactions with customers and executives, criticizing the employer’s wages and employee performance, were protected concerted activities under Section 7 – even if the employee had not consulted his colleagues before posting them because they sought to initiate, to induce or to prepare for group action, or could be considered to be complaints brought to the attention of management. While Chairman Pearce agreed with this finding, Members Hirozawa and McFerran did not – with little explanation.

Non-Union Employee’s Profane, Public Complaints About Client Deemed Protected.

In *Quicken Loans, Inc.*, Case Number 28-CA-146517 (Mar. 17, 2016), an ALJ found that an employer violated the act by disciplining a banker who used profanity and complained about a client in an office reception area restroom, open to customers as well as employees. The employee complained to a co-worker about a new client that “should get in touch with a f***ing Client Care

Specialist and quit wasting his f***ing time.” A supervisor who overheard the conversation thereafter sent an email to all employees in the Company’s Arizona’s office stating, “Under no circumstances should we be discussing the pay we receive, in an area that a client or potential client could ever hear us. . . . Never, EVER should we be swearing in the bathroom especially about clients.” The company then terminated the banker and disciplined the co-worker.

The ALJ found that the two employees were discussing “common concerns regarding terms and conditions of their employment,” including how calls are forwarded and whose responsibility it was to field calls with the goal of improving terms and conditions of employment. As the conversation was protected, the termination and warning violated the Act. The ALJ also found that the company had improperly questioned the employee because rather than ask whether he had engaged in any specific misconduct, he was asked whether he saw the office-wide email and if “he had any part in the situation that went down.” This questioning was considered to be coercive and to violate Section 8(a)(1). Exceptions to the ALJ decision were pending at year’s end.

Union Steward’s Profane Outburst in Grievance Hearing Found Protected.

In *United States Postal Service*, Case No. 364 NLRB No. 62 (July 29, 2016), a Board majority found that an employer unlawfully disciplined a union steward for cursing and menacing a supervisor during a grievance hearing. The Steward told a company representative that she was “being an ass,” then became frustrated and began to “pepper her language with profanity.” When the company representative stated the meeting was over and attempted to leave, the Steward stood up, tipping her chair back in the process, stepped toward the representative, shook her finger and said, “I can say anything I want. I can swear if I want. I can do anything I want.” The majority stated that the steward’s conduct, albeit obnoxious, was not so opprobrious as to cause her to lose the protection of the Act.



The Board Opened the Door (Again) to Organizing Among Previously Exempt “Employees” in Education

Board Flip-Flopped Once Again by Holding That Graduate Teaching Assistants Can Be Statutory Employees Covered by the NLRA

The National Labor Relations Board once again reversed course and overturned longstanding precedent to rule that student teaching assistants can be classified as employees under the National Labor Relations Act in *Columbia University*, 364 NLRB No. 90 (2016). In a 3-1 decision, the Board found that its 2004 decision in *Brown University*, 342 NLRB 483 (2004), “deprived an entire category of workers of the protections of the Act without a convincing justification,” and thus expressly held that “students who perform services at a university in connection with their studies are statutory employees” under the NLRA.

The Board’s *Brown University* decision marked the return to long-standing precedent that graduate teaching assistants and proctors were not employees, reasoning that graduate teaching assistants were primarily students; that these students performed their jobs as part of their degree program; and the roles were designed primarily for the students’ educational benefit, not the university’s. Moreover, *Brown* highlighted that the students’ “compensation” was actually a form of financial aid and tuition assistance. Disagreeing, the Board in *Columbia University* created a bright-line rule that “the payment

of compensation, in conjunction with the employer’s control, suffices to establish an employment relationship for purposes of the act,” regardless of whether another, noneconomic relationship exists between the parties.

The Board in *Columbia University* also held that allowing student employees to unionize promoted the goals of federal labor policy without compromising academic freedom or raising serious concerns under the First Amendment. In reaching that conclusion, the Board relied on anecdotal evidence to conclude that “no major disasters have arisen because of [graduate student] unions” in other settings and that “examples of collective bargaining in practice appear to demonstrate that economic and academic issues on campus can indeed be separated.” The Board also noted that there was no empirical evidence showing that collective bargaining would “harm mentoring relationships between faculty members and graduate students.”

Applying this new rule, the Board found that Columbia University exercised sufficient control over the teaching assistants to transform them into employees under the NLRA. The Board focused on the fact that the university directed and oversaw the assistants’ teaching activities and the assistants were subject to corrective counseling or removal if they did not meet the university’s teaching standards.

The Board also highlighted that the parties had a primarily economic relationship, and the student assistants performed a majority of the university's overall teaching obligations, which, according to the Board, was "one of a university's most important revenue-producing activities." The Board also found that the assistants received compensation in the form of either stipends or financial aid, sufficient to trigger an employment relationship.

However, the Board declined to address a number of concerns that Columbia University raised about how collective bargaining would work in educational contexts, including whether student demands would interfere with academic decisions regarding class size, time, length, location and exam structure. In response, the Board merely noted that "the Board's demarcation of what is a mandatory subject of bargaining for student assistants, and what is not, would ultimately resolve these potential problems."

Member Miscimarra was the lone dissenter, arguing that the majority's holding ignored the reality of the university setting and improperly elevated labor issues over countervailing nonemployment factors. He thus asserted that the "paramount goal" for student assistants was to obtain a degree and that labor unrest could seriously undermine the educational experience.

In any event, an election was held on December 7 & 8, 2016, with polling at a number of campus locations. The December 9, 2016 Tally of Ballots indicated that 1,602 votes were cast in favor of UAW representation; 623 votes were cast against; and 647 ballots were challenged.

Board Found Two Charter Schools were Private Corporations, Not Public Schools

In two separate decisions issued on August 24, 2016 (*The Pennsylvania Virtual Charter School*, 364 NLRB No. 87 (2016), and *Hyde*

Leadership Charter School—Brooklyn, 364 NLRB No. 88 (2016)), the National Labor Relations Board decided that charter schools are not public schools but rather private corporations, therefore falling under the Board's jurisdiction. In support of its decisions, the Board concluded that the schools were private corporations whose governing Board members are privately appointed and removed, and were neither created directly by the state nor administered by individuals who are responsible to public officials or the general electorate. As a result, the Board likened the schools to government contractors, as the governments provide the funding but do not control or operate the schools.

Member Miscimarra dissented, asserting that regardless of whether charter schools are operated by a private or public employer, charter schools "operate as K-12 public schools, they are substantially regulated under state and local laws, and they are overseen by state and local authorities." As such, Member Miscimarra asserted that the Board should decline jurisdiction over all charter schools because charter schools have an insubstantial effect on interstate commerce and the Board's exercise of jurisdiction over charter schools would lead to instability and confusion.

NLRB's General Counsel Set the Table to Argue that Student Athletes Are Employees Under the Act

In an advice memorandum issued on September 22, 2016, the National Labor Relations Board's Office of the General Counsel declined to issue a complaint against Northwestern University for maintaining certain football team rules that were alleged to have violated the Act. The rules at issue were a social media policy, a policy limiting disclosure of strategies and player injuries, a dispute resolution procedure, and a rule for communicating with the media set forth in the University's Football Handbook.

Given that the Board refused to exert jurisdiction over a representation petition covering Northwestern's football employees, the General Counsel's decision was not surprising. However, the General Counsel did not base its decision on the potential complexities that could arise if it found student athletes are statutory employees under the Act.

Instead, the General Counsel asserted that "it would not effectuate the policies and purposes of the NLRA to issue complaint in this case because the Employer, although still maintaining that athletic scholarship football players are not employees under the NLRA, modified the rules to bring them into compliance with the NLRA and sent the scholarship football players a notice of the corrections, which sets forth the rights of employees under the NLRA." With this explanation, it appears that, in the absence of Northwestern modifying its rules, the current General Counsel was prepared to assert that student athletes at private universities are statutory employees and entitled to all the protections of the Act even if the Board is not willing to let student athletes unionize.

States Continued to Debate Right-To-Work Expansion

West Virginia Judge Temporarily Enjoined Right-to-Work Law

In *West Virginia AFL-CIO v. Tomblin*, Nos. 16-C-959 to 16-C-969 (Kanawha Cnty. Cir. Ct., Aug. 10, 2016), a county judge issued a temporary injunction blocking the state's enforcement of its new right-to-work law. The law, known as the Workplace Freedom Act, just took effect on July 1 and prohibits union security clauses—i.e., collective bargaining provisions that require all unit employees to pay union dues. West Virginia was the 26th state to enact a "right-to-work" statute.

The AFL-CIO and a coalition of other unions are challenging the statute on the ground that it violates the West Virginia constitution. The judge found that the challengers were able to show that the statute could harm workers, and was also concerned by the fact that the statute included criminal penalties. Various motions, including cross-motions for summary judgment remained pending at year's end.

Federal Judge Upheld Wisconsin Right to Work Law, But State Court Challenge is Still Pending

On the other hand, in *Operating Engineers Local 139 v. Schimel*, No. 2:16-cv-00590 (E.D. Wis. Sept. 26, 2016), U.S. District Judge J.P. Stadtmueller upheld Wisconsin's right to work law enacted in 2015. The lawsuit was brought by two local unions of the International Union of Operating Engineers claiming that the law violated the National Labor Relations Act and unconstitutionally took something of value from the unions without compensation. The union's latter claim was based:

on the interplay between: (1) the union's obligation under federal law to fairly represent all persons in the bargaining unit, and (2) Wisconsin's prohibition on the collection of representation fees. ... In other words, the plaintiffs claim that in being compelled to provide equal representational services to non-dues-paying and non-representation fee-paying persons within their bargaining unit, [the Wisconsin law] effectuates a "taking" of their property.



Relying on the Seventh Circuit’s recent decision upholding Indiana’s right to work law, *Sweeney v. Pence*, 767 F.3d 654 (7th Cir. 2014), Judge Stadtmueller granted judgment in favor of the state. In *Sweeney*, the Seventh Circuit, in a 2-1 decision, affirmed dismissal of the challenge to Indiana’s similar right to work law on the grounds that it was not preempted by the NLRA, and while not necessary to its decision, concluded that the statute did not constitute a taking. The Seventh Circuit concluded that the Indiana law did not constitute an unconstitutional taking because:

“the union is justly compensated by federal law’s grant to the Union the right to bargain exclusively with the employer.”

In other words, Indiana’s right to work law did not constitute a taking because, under the NLRA, the plaintiffs’ federal duty to fairly represent all unit employees during the collective bargaining process was “compensated” by their exclusive “seat at the negotiation table.”

As the parties did not dispute, and the Court agreed, that *Sweeney* all but controlled the disposition of the case, the court found that the Wisconsin law was not preempted by the NLRA and did not work an unconstitutional taking.

Interestingly, in *Machinists Local 1061 v. Walker*, No. 15CV628 (Dane County, Wis., Cir. Ct., filed Mar. 10, 2015), a state circuit court struck down the law as unconstitutional in April, but the state appeals court put that ruling on hold in May as it considers the case. In 2017, we should likely expect, as the

Schimel decision called them, further chapters “in the ongoing, national debate about the role that labor unions play in the modern workplace and the extent to which they may be regulated by both state and federal governments....”

Virginia Voters Rejected Right to Work Amendment to Constitution on Election Day 2016

On November 8, 2016, voters in the Commonwealth of Virginia considered – and rejected – “Question 1,” a legislatively referred constitutional amendment to incorporate a “right to work” provision into the constitution. Virginia already has a “right to work” statute on the books, at Sec. 40-1.58, et seq., of the Virginia Code, but lawmakers expressed concern that future legislatures could repeal the law too easily, or otherwise decline to enforce it fully. Accordingly, the ballot question proposed:

Should Article I of the Constitution of Virginia be amended to prohibit any agreement or combination between an employer and a labor union or labor organization whereby (i) nonmembers of the union or organization are denied the right to work for the employer, (ii) membership to the union or organization is made a condition of employment or continuation of employment by such employer, or (iii) the union or organization acquires an employment monopoly in any such enterprise?

Over 2 million voters – approximately 53.6% voters casting ballots – rejected the proposal, according to the latest figures.



2017 Political Outlook & What to Watch For

What Will President Trump's NLRB Look Like?

On Inauguration Day, the NLRB will have two Republican vacancies, with the term of the only remaining Republican, Philip Miscimarra due to expire at the end of 2017. The two Democrats on the Board, on the other hand, are serving terms into late 2018 and 2019. It would seem the first order of business might be to address the Republican vacancies, which can be filled by the incoming President, with the approval of the Senate. Similarly, the term of National Labor Relations Board General Counsel Richard Griffin – the former head lawyer for the International Union of Operating Engineers, and an aggressively pro-union GC – does not expire until November 2017. Whether or not President-Elect Trump will have an opportunity to replace him before then is an open question, as some speculate that Griffin may opt to serve out the remainder of his term.

Assuming the Board is returned to its full complement sometime in early 2017, there is some debate as to the extent to which the Board may embark upon the similar path of reversing all of the previous Board's reversals of their predecessors. The President-Elect is certainly receiving advice and counsel consistent with more traditional Republican, and pro-business, policy positions. But he has also shown no hesitation to depart from partisan expectations. Moreover, he received a substantial amount of voting support from union members. The AFL-CIO's exit polls suggested that he trailed Sec. Hillary Clinton by a margin of just 51-43 among union households.

Will the Incoming Administration Roll Back the Labor Regulations of the Last?

In December, President-elect Donald Trump tagged CKE Restaurants CEO Andrew Puzder to serve as Secretary of Labor in his upcoming administration. Puzder, also an attorney, has consistently been a vocal critic of the proliferation of government regulation during President Obama's tenure. There is no shortage of Obama administration labor law regulations that the incoming DOL leadership might very well rescind – including the Department's Persuader Rules, and the Department's & FAR Council's Fair Pay & Safe Workplaces Regulations.

Because the Democrats will still hold sufficient Senate seats to filibuster legislative action to reverse these policies, any such rescissions will likely need to go through the extensive rulemaking process. The DOL rulemaking process will require a notice and comment period, the need for a reasoned analysis for why the repeal or revision was necessary, and a 60-day waiting period. It will take time and will likely be subject to judicial challenge by pro-labor entities. Alternatively, it is possible that the incoming administration could decide not to defend these rules, to the extent they are currently enjoined and being litigated, and could consent to a settlement and court order reversing the implementation of these rules.

Will Legislation to Curtail the National Labor Relations Board Make a Comeback in 2017?

In 2015 and 2016, Republicans in Congress made legislative efforts to rein in what they deemed to be anti-employer overreach by the National Labor Relations Board. In the House of Representatives, Republicans advanced a bill to reverse the Board's new joint employer definition established in *Browning-Ferris*. The bill sought to restore the traditional definition of joint employment under Federal labor laws, limiting the term to those entities that have "actual, direct, and immediate control" over employees. The Republican Congress also previously attempted to override the Board's "quickie election" procedures. With President Obama in the White House, however, Congress' efforts were dead on arrival.

With Donald Trump winning the election, expect Republicans' efforts to curtail the Board's activism to once again gain steam. Rep. Virginia Foxx (R-N.C.) will serve as the next chairwoman of the House Committee on Education and the Workplace and she has made clear that, at the least, she wants to roll back the Board's expanded joint employer standard. On the other hand, Democratic proposals such as card check legislation and increased penalties against employers for violations of the NLRA are likely to go nowhere fast with Republicans in control of the White House, the Senate, and the House of Representatives.

Will Right To Work Expand Further, and How Much?

Following the 2016 election, more states are expected to enact right-to-work legislation. Kentucky Republicans campaigned on right-to-work and won, gaining control of the state house of representatives. Governor Matt Bevin and the state senate already support right-to-work legislation. Missouri, where outgoing Governor Jay Nixon previously vetoed right-to-work legislation, also may join Kentucky in becoming a right-to-work state in 2017. Missourians elected Republican Eric Greitens, who vowed to sign right-to-work legislation into law. Additionally, New Hampshire is poised to become a right-to-work state in 2017. Incoming Republican Governor Chris Sununu will likely sign a right-to-work bill that has repeatedly passed the Republican legislature, only to meet with a Democrat veto. It is plausible even that the Congress will consider legislation to incorporate right to work into the National Labor Relations Act, but any such measure would certainly face a Democrat filibuster in the Senate.

LABOR AND EMPLOYMENT ATTORNEYS



Richard Hankins, Partner
+1 404 443 5727
rhankins@mcguirewoods.com



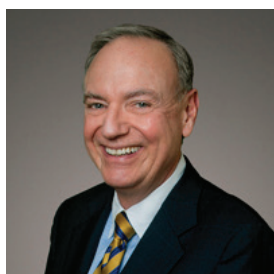
Seth Borden, Partner
+1 212 548 2180
sborden@mcguirewoods.com



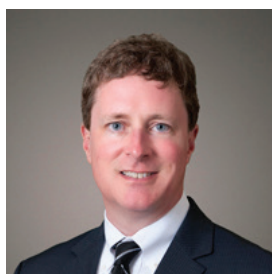
Brennan Bolt, Partner
+1 404 443 5725
bbolt@mcguirewoods.com



Gary Marshall, Partner
+1 804 775 1013
gmarshall@mcguirewoods.com



Mike DiMattia, Partner
+1 212 548 7009
mdimattia@mcguirewoods.com



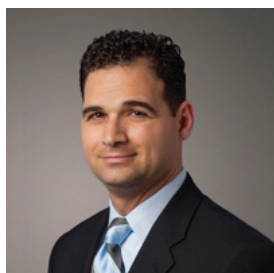
Dana Rust, Partner
+1 804 775 1082
drust@mcguirewoods.com



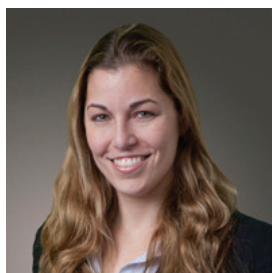
Chris Michalik, Partner
+1 804 775 4343
cmichalik@mcguirewoods.com



John McDonald, Partner
+1 704 343 2276
jmcdonald@mcguirewoods.com



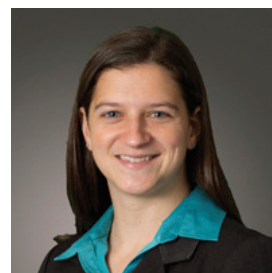
Peter Milianti, Partner
+1 312 750 2765
pmilianti@mcguirewoods.com



Sabrina Beldner, Partner
+1 310 956 3419
sbeldner@mcguirewoods.com



Igor Babichenko, Associate
+1 804 775 7617
ibabichenko@mcguirewoods.com



Summer Speight, Associate
+1 804 775 1839
sspeight@mcguirewoods.com



David Leishman, Associate
+1 312 750 8680
dleishman@mcguirewoods.com

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