Labor Law Today

2023 | YEAR IN REVIEW

PERKINSCOIE

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INTRODUCTION

In 2023, the National Labor Relations Board (the NLRB or Board) continued to expand employee rights and protections in the workplace. The new regulations included limiting employers' contract rights in relation to severance agreements, enhancing the employer penalties for repeat offenders and expanding remedies to employees, limiting an employer's ability to discipline employees when engaged in Section 7 activity, reinstating Obama-era standards, and highlighting the need to limit the use of artificial intelligence (AI) in the workplace.

The U.S. Supreme Court did give employers a momentous victory by holding that unions can be held liable for damages arising from strike activity. In doing so, the Court stated that striking workers must take "reasonable precautions to protect their employer's property from foreseeable, aggravated, and imminent danger due to the sudden cessation of work." Given the increase in strikes across the country, this decision places much-needed limitations on the right to strike.

We hope this year's report will help you stay abreast of this fast-paced and changing environment that affects almost all employers.

NLRB Rules Broad Confidentiality and Nondisparagement Provisions Violate NLRA

Confidentiality and nondisparagement provisions must be narrowly tailored or risk violating the National Labor Relations Act (the NLRA or Act), according to a February 2023 decision from the NLRB. Under the new rule articulated in McLaren Macomb, 372 NLRB No. 58 (2023), overly broad provisions interfere with employees' right to engage in protected activity under the NLRA.

Factual and Legal Background

The *McLaren Macomb* decision looked at severance agreements offered by a Michigan hospital to a group of furloughed employees. The agreements provided in relevant part:

Nondisclosure. At all times hereafter, the Employee promises and agrees not to disclose information, knowledge[,] or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents[,] and representatives.

Confidentiality Agreement. The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than [a] spouse, or as necessary to professional advisors.

The NLRB found these provisions violated Section 8 of the NLRA because such broad nondisparagement and confidentiality provisions may discourage employees from engaging in activity protected by Section 7 of the NLRA. Specifically, Section 7 protects employees' right to "discuss the terms and conditions of employment with coworkers." *Id.* at 6 (quoting *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007)). Section 7 also protects employees' rights to improve the terms and conditions of employment through outside channels, including reporting concerns to governmental agencies or the media.

Nondisparagement. Under the NLRA, employees have a right to critique employer policy so long as the communications are not so "disloyal, reckless, or maliciously untrue as to lose the Act's protection." *Emarco, Inc.*, 284 NLRB 832, 833 (1987). In *McLaren Macomb*, the NLRB took issue with the nondisparagement provision's breadth. The agreement prohibited employees from making "any statements to the Employer's employees or to the general public which could disparage or harm the image of the Employer—including, it would seem, any statement asserting that the Respondent had violated the Act." *McLaren Macomb*, 372 NLRB slip op. at 8.

The fatal flaws in the *McLaren* agreement's nondisparagement provision were threefold. First, the agreement did not limit the definition of "disparagement" consistent with the NLRA. Second, the agreement did not meaningfully limit whom employees were prohibited from discussing. The nondisparagement clause protected not only the employer but also "its parents and affiliated entities and their officers, directors, employees, agents, and representatives." Finally, there was no temporal limitation on the nondisparagement provision. In short, as drafted, the agreement prevented employees from saying virtually anything regarding anyone connected to the employer for all time. This, according to the NLRB, is impermissible.

According to guidance issued by NLRB General Counsel Jennifer A. Abruzzo in March, "a narrowly-tailored, justified non-disparagement provision that is limited to employee statements about the employer that meet the definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity, may be found lawful."

Confidentiality. The *McLaren Macomb* agreement's confidentiality provision was similarly broad and, thus, similarly problematic. Because the agreement prohibited employees from disclosing the terms of the agreement to any third party, employees were effectively prohibited from sharing information about the existence of a potentially unlawful agreement with the NLRB. In light of this fact, the NLRB concluded that "[t]he confidentiality provision has an impermissible chilling tendency on the Section 7 rights of all employees because it bars the subject employee from providing information to the Board concerning the Respondent's unlawful interference with other employees' statutory rights." *McLaren Macomb*, slip op. at 8 (citing *Metro Networks*, 336 NLRB 63, 67 (2001)). The NLRB also took issue with the confidentiality provision because its breadth "impairs the rights of the subject employee's former coworkers to call upon [the subject employee] for support in comparable circumstances." *Id.* at 9. As a result, the Board deemed the confidentiality provision unlawful.

As with the nondisparagement provision, the Board's general counsel subsequently advised that "[c]onfidentiality clauses that are narrowly-tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications may be considered lawful." Interestingly, the general counsel's guidance also suggests that requiring nondisclosure of a settlement agreement's financial terms may be permissible, but this interpretation appears to conflict with the Board's rationale in the *McLaren Macomb* decision.

Other potentially unlawful provisions. The general counsel's guidance advises that other terms in severance agreements may interfere with employees'

Section 7 rights. For example, nonsolicitation clauses, "broad liability releases and covenants not to sue," and cooperation requirements all risk violating the NLRA if drafted too broadly. Because no such provisions were at issue in *McLaren Macomb*, the Board has not officially addressed whether or under what conditions they are impermissible.

Unlawful offer. Finally, beyond simply rendering individual provisions illegitimate, the NLRB's decision is notable for its ultimate conclusion: An employer violates the NLRA when it *offers* an employee a severance agreement with offending provisions like those described above. It does not matter whether the employee accepts the agreement; simply offering an agreement with illegal provisions violates the law.

Additionally, the general counsel's memo confirms that the decision is effective retroactively: "[W]hile an unlawful proffer of a severance agreement may be subject to the six-month statute of limitation[s] . . . maintaining and/or enforcing a previously-entered severance agreement with unlawful provisions . . . continues to be a violation."

Who is Affected?

This decision affects virtually all private-sector employers (not just those with unionized workforces) but does not apply to agreements with every type of employee.

With a few specific exceptions (such as agricultural employers, airlines, and railroads), the NLRA applies to all nonretail businesses that have at least $50,000

in direct or indirect inflows or outflows and all retail businesses with gross annual revenues of at least $500,000. *See Siemons Mailing Serv.*, 122 NLRB 81 (1958); *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1958).

Although most employers are subject to the NLRA, the *McLaren Macomb* ruling does not affect these employers' agreements with every employee. Because the NLRB's decision is focused on protecting employees' Section 7 rights, it applies only to agreements between employers and nonsupervisory employees. Former employees also enjoy Section 7 rights, so employers offering agreements to former nonsupervisory employees (e.g., settlement agreements) should ensure that such offers comply with *McLaren Macomb*. See *McLaren Macomb* slip op. at 6 (citations omitted).

Agreements that employers intend to offer managers, independent contractors, or others who qualify as supervisors under the NLRA can likely remain as they are. That said, the general counsel's guidance notes that offering a severance agreement to a supervisor that "prevent[s] the supervisor from participating in a Board proceeding could also be unlawful."

McLaren Macomb significantly affects the way employers may communicate with employees. Employers now need to ensure that any communication to a nonsupervisory employee (including offer letters, confidentiality agreements, proprietary information, and invention assignment agreements, etc.) complies with the decision's expansive reading of the NLRA.

NLRB Outlines Enhanced Penalties for Repeat Offenders and Remedies for Employees

The NLRB has outlined a wide range of remedies for employers who repeatedly or egregiously violate federal labor law. In *Noah's Ark Processors LLC*, 372 NLRB No. 80 (2023), the Board held that the employer violated the NLRA by failing to bargain in good faith with its workers' union. Over the span of several years, the union filed numerous charges against the employer, alleging bad faith bargaining, retaliatory discharges, and unilateral changes to the terms and conditions of employment.

For remedies, the Board ordered that the employer (1) resume bargaining with the union and (2) hold meetings of employees, scheduled to occur at a time to ensure maximum attendance, where a notice will be read in both Spanish and English by the CEO or by a Board agent in the CEO's presence. Traditionally, when the Board found that an employer had engaged in egregious misconduct, it only issued a cease-and-desist order to the employer.

In the *Noah's Ark* decision, the Board discussed a nonexhaustive list of potential remedies it will consider in cases involving employers who have shown a "proclivity to violate" federal labor laws or who have engaged in "egregious or widespread misconduct." Such additional remedies include the following:

- Adding an Explanation of Rights to the remedial order.
- Mandating a meeting where the Notice and any Explanation of Rights are read and distributed to employees and possibly requiring the participation of supervisors in those meetings.
- Mailing the Notice and any Explanation of Rights to the employees' homes.
- Requiring a person who bears significant responsibility in the offending organization to sign the Notice.
- Publishing the notice with outlets that have broad circulation and local appeal.
- Requiring that the Notice/Explanation of Rights be posted for an extended period of time.
- Allowing Board representatives to inspect the respondent's bulletin boards and records to determine and secure compliance with the Board's order.
- Reimbursing the union's bargaining expenses, including making whole any employees who lost wages by attending bargaining sessions.

The Board's decision follows a memorandum issued by NLRB General Counsel, in which she urged regional offices to aggressively pursue the "full panoply" of penalties available for unfair labor practices committed by employers. While extraordinary penalties have typically been reserved by the Board for only the most

egregious repeat violators, employers may now be faced with a wide array of potential penalties in an increasing number of cases.

Increased Unfair Labor Practice and Petition Filings Continue at the NLRB in FY 2023

The NLRB has reported a sharp uptick of unfair labor practice charges filed in fiscal year 2023 (October 1, 2022 – September 30, 2023). The 19,854 charges filed during that period comprise the highest number seen by the NLRB since FY 2016. It represents a 10% increase in filings over FY 2022 (17,988) and approximately 32% over FY 2021 (15,081). The NLRB did not specify the number of charges associated with elections, established bargaining relationships, or other nonunion settings.

The NLRB also announced that 2,594 union representation petitions were filed in FY 2023, up from 2,510 in FY 2022 and 1,638 in FY 2021, representing a surge of approximately 58% over that period.

Moreover, the Board detailed a dramatic escalation in petition-for-election (RM petition) filings by employers in FY 2023. In the one-month period after the Board's union-friendly decision in *Cemex* (our guidance on *Cemex* can be found here), the Board received 28 RM petitions (of 62 total for FY 2023). The 62 FY 2023 RM petitions comprise the largest total recorded by the NLRB since 2014. By comparison, the NLRB received 32 RM petitions in FY 2022 and 34 in FY 2021. The next highest amount reported by the NLRB was 61 RM petitions filed in 2015.

If this pace of post-*Cemex* filings continues, FY 2024 would see a total of 336 RM petitions—more than five times the amount in FY 2023.

NLRB Reinstates Setting-Specific Standards to Evaluate Employee Abusive Conduct

On May 1, 2023, in *Lion Elastomers LLC*, 372 NLRB No. 83 (2023), the NLRB issued a 2-1 decision reinstating setting-specific standards to determine whether employers have violated the NLRA by unlawfully disciplining or discharging employees who allegedly engaged in "abusive conduct" in connection with activities protected by Section 7 of the Act. This decision will likely make it more difficult for employers to discipline employees who engage in abusive conduct in connection with Section 7 activities.

Employees' Section 7 Rights

Section 7 of the NLRA protects an employee's right to unionize and to engage in concerted activities regarding the terms and conditions of their employment. Accordingly, employers are generally prohibited from taking any adverse action against employees for engaging in these activities. An employee cannot, however, use the NLRA's protections as a free pass to engage in wrongdoing. That is, an employee generally cannot engage in abusive, discriminatory, or harassing conduct and then claim that they are exempt from discipline simply because their behavior occurred during activities that would otherwise be protected. Unsurprisingly, when an employee is disciplined or discharged for alleged abusive conduct in connection with a protected activity, the Board is often asked to determine whether the employee was actually discharged for this abusive conduct or if the discharge was simply an excuse to punish the employee for engaging in protected activities.

The Board's Previous Standards

Prior to 2020, to make this determination, the Board applied different standards depending upon the setting in which the allegedly abusive conduct occurred. These setting-specific standards were eliminated by the Board

in 2020 in *General Motors LLC*, 369 NLRB No. 127 (2020). In *General Motors*, the Board concluded that it would "properly find an unfair labor practice for an employer's discipline following abusive conduct committed in the course of Section 7 activity when the general counsel shows that the Section 7 activity was a motivating factor in the discipline, and the employer fails to show that it would have issued the same discipline even in the absence of the related Section 7 activity." Therefore, the setting in which the abusive conduct occurred was irrelevant. This setting-neutral standard was short lived.

Returning to the Pre-Trump-Era Standard

In *Lion Elastomers LLC*, the Board reversed its *General Motors* decision and returned to its previous setting-specific standards.

In this case, which the Board first considered in 2020, an employee had been disciplined and then discharged after he engaged in "heated speech" and made an "impolite statement" to a coworker while discussing working conditions with his employer. The employer claimed that the employee's offensive conduct justified his discipline and eventual termination. The Board disagreed and held that the employee's speech, although heated, was protected under the Act and ordered the employee to be reinstated. After the decision was issued, the employer filed a petition for review of the Board's order with the U.S. Court of Appeals for the Fifth Circuit. While the case was pending before the court, the Board issued *General Motors*. The Board then filed an unopposed motion requesting that the court remand the case to the Board to determine whether the *General Motors* decision would affect the case's outcome.

On remand, the Board overruled *General Motors* and declined to review its original decision in *Lion Elastomers*. In overruling *General Motors*, the Board repeatedly noted that conduct that occurs in the course of a protected activity—even if unpleasant—must be evaluated in the context of the protected activity and not as if it occurred separately in the ordinary workplace context. It noted that the NLRA, like Title VII of the Civil Rights Act of 1964, is not a civility code, and nothing in the Act requires an employee to be "civil" while exercising their rights. In fact, the Board reasoned that it should be expected that conversations involving wages or the terms and conditions of an individual's employment will be heated and invoke strong emotions.

Accordingly, whether an employee's "abusive conduct" in the course of a protected activity strips them of the Act's protections will be evaluated based upon the context in which it occurs:

- **Conduct toward management in the workplace** will be evaluated under the *Atlantic Steel* test, which considers four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.
- **Social media posts and most conversations among employees in the workplace** will be evaluated under a totality-of-the-circumstances test.
- **Picket-line conduct** will be evaluated under the *Clear Pine Mouldings* test, in which the Board considers whether, under all the circumstances, nonstrikers reasonably would have been coerced or intimidated by the picket line.

Importantly, the Board's decision does not prohibit employers from disciplining employees who engage in abusive conduct, even if this conduct occurs in the course of an otherwise protected activity. However, employers must tread carefully.

As a result of this decision, employers should review and revise any existing codes of conduct or behavior expectations to align with these standards and give clear examples of behavior that will not be tolerated. Before taking action against an employee for their abusive conduct, employers must now consider the context in which this behavior occurred.

NLRB General Counsel: Noncompete Agreements May Violate the National Labor Relations Act

On May 30, 2023, NLRB General Counsel Abruzzo issued GC Memo 23-08, setting forth her view that noncompete agreements contained in employment agreements and severance agreements violate the NLRA except in limited circumstances.

The General Counsel's Rationale

Section 7 of the NLRA protects employees' rights to self-organization, collective bargaining, and other concerted activities. Section 8(a)(1) of the NLRA prohibits employers from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. According to the general counsel, except in limited circumstances, offering, maintaining, or enforcing a noncompete agreement violates Section 8(a)(1) of the NLRA by chilling employees in the exercise of Section 7 rights. This is because:

- "Employees know they will have greater difficulty replacing their lost income [due to their noncompete] if they are discharged for exercising their statutory rights to organize and act together to improve working conditions."
- Employees' bargaining power is undermined in the context of lockouts, strikes, and other labor disputes.
- Former employees are unlikely to reunite at a competitor's workplace and thus cannot leverage their prior relationships to improve working conditions at the new workplace.

The general counsel identifies the following five specific types of activity protected under Section 7 that she contends are chilled by noncompetes:

1. **Threatening to resign** as a tactic to secure better working conditions because such threats would be futile given the known lack of employment opportunities for employees bound by a noncompete.

2. **Carrying out concerted threats to resign or concertedly resigning** to secure better working conditions because although the "Board law does not unequivocally recognize a Section 7 right to concertedly resign," the general counsel contends such a right should exist based on settled Board law, Section 7 principles, the NLRA's purposes, the Thirteenth Amendment to the U.S. Constitution, and "other federal laws" (citing a rule proposed by the Federal Trade Commission [FTC] that would ban noncompetes).
3. **Concertedly seeking or accepting employment with a local competitor** to obtain better working conditions, including a "lone employee's acceptance of a job as a logical outgrowth of earlier protected concerted activity" that led to the employee's discharge.
4. **Soliciting coworkers to work for a local competitor** because employees bound by noncompetes cannot act on the solicitations and because the solicitor might be subject to legal action for soliciting coworkers to breach their agreements.
5. **Seeking employment for the specific reason to engage in protected activity (a practice known as "salting"),** such as for union organizing purposes, which may involve obtaining work with multiple employers in a specific trade and geographic region.

The General Counsel Asserts Some Agreements Would Not Violate the NLRA

Although most noncompete agreements with workers who enjoy Section 7 rights would likely run afoul of the NLRA under the general counsel's opinion, she identifies narrow circumstances where such agreements might be permissible:

- **Agreements that are narrowly tailored to special circumstances justifying the infringement on employee rights.** The general counsel suggests that noncompetes narrowly tailored to "restraining the employee from appropriating valuable trade secret information and customer relationships to which the employee had access in the course of his employment," or noncompetes in circumstances where a former employee would otherwise have "an unfair advantage in future competition with the employer," might not violate the NLRA.

  However, according to the general counsel, an employer's desire to avoid competition from a former employee, to retain employees, or to protect investments in training employees are not circumstances justifying a noncompete. Similarly, noncompetes with "low-wage or middle-wage workers who lack access to trade secrets or other protectible interests" are not justifiable. For example, an agreement that would prohibit a low-wage worker for two years from working for any employer in the entire state engaged in the same business as their former employer is unreasonable. Additionally, noncompetes in states that ban noncompetes are also likely not justifiable.
- **Agreements that clearly restrict only an individual's managerial or ownership interests in a competing business**, without interfering with employees' Section 7 rights.
- **Agreements prohibiting independent contractor relationships**, except in industries where employees are commonly misclassified as independent contractors and the noncompete agreement would effectively prohibit employment relationships even though it nominally prohibits only independent contractor relationships.
- **Longevity bonuses** to protect employer training investments.

Employers should consult with experienced counsel to understand the memorandum's potential impact on their business. Although the Board has not officially adopted the general counsel's guidance and civil courts are not technically bound by it, the general counsel directed regional offices to apply her guidance to cases involving noncompete provisions and to seek "make-whole" relief for employees who can demonstrate lost opportunities for other employment, even absent any attempt by the employer to enforce the noncompete.

Moreover, employers should take note that noncompetes are subject to increased federal and state regulation, and employers should be mindful when offering or attempting to enforce noncompetes or similar restrictive covenants. The FTC's proposed rule that would ban nearly all noncompete agreements is cited as supporting authority in the general counsel's memorandum. The FTC is expected to vote on the proposed rule in April 2024. The general counsel also references memorandums of understanding that the NLRB entered in July 2022 with the FTC and the U.S. Department of Justice's Antitrust Division, which address the perceived anticompetitive effects of noncompete agreements. Employers should continue to monitor developments in this area and adjust accordingly.

NLRB Returns to Previous Standard for Determining Whether a Worker Is an Employee or an Independent Contractor

In *Atlanta Opera Inc.*, 372 NLRB No. 95 (2023), the NLRB issued a decision returning to an Obama-era standard used to determine whether a worker is an employee or an independent contractor under the NLRA. While employees have rights under the NLRA, independent contractors do not. Because of this, the shift in the NLRB's standard could lead to broader NLRA coverage.

The decision involved a union's April 2021 petition to represent makeup artists, wig artists, and hair stylists (collectively known as "stylists") at the Atlanta Opera. In June 2021, the director of one of the NLRB's regional offices determined that the stylists were employees with organizing rights, but the Atlanta Opera challenged that decision by filing a request for review by the Board. The Board granted review and invited the parties and interested amici to file briefs addressing whether the Board should continue to adhere to the independent contractor standard set out in *SuperShuttle DFW*, 367 NLRB No. 75 (2019), or whether some different test should replace it. Ultimately, a Board majority overruled *SuperShuttle* and reinstated the independent contractor test set out in *FedEx Home Delivery*, 361 NLRB 610 (2014) (*FedEx II*). The Board then determined that the stylists were employees under the Act.

Factors for Employee Determination. The readopted *FedEx II* test applies a list of the following 10 common-law factors to use when determining whether an individual is an independent contractor or an employee:

1. Extent of control by the employer.
2. Whether the individual is engaged in a distinct occupation or business.
3. Whether the work is usually performed under the direction of the employer or by a specialist without supervision.
4. Skill required in the occupation.
5. Whether the employer or the individual supplies instrumentalities, tools, and place of work.
6. Length of time for which the individual is employed.
7. Method of payment.
8. Whether the work is part of the regular business of the employer.
9. Whether the parties believe they are creating an independent contractor relationship.
10. Whether the principal is in business.

The list of common law factors is nonexhaustive and the Board also considers whether the evidence tends to show that the individual is, in fact, rendering services as an independent business. Further, no single factor determines whether an individual is properly an independent contractor or an employee. Rather, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." The *FedEx II* test considers "a range of dimensions" in the relationship that cannot be boiled down to one overriding factor.

By returning to the *FedEx II* standard, the Board overruled its Trump-era decision, *SuperShuttle*, which applied the same 10 common law factors but primarily focused on whether a worker had entrepreneurial opportunity for economic gain or loss. Under *SuperShuttle*, "where the common-law factors, considered together, demonstrate that the workers in question are afforded significant

entrepreneurial opportunity," the Board would likely find that the workers were independent contractors.

Now, entrepreneurial opportunity may still be relevant as one aspect considered among the common law factors, but the assessment only considers a company's constraints on a worker's independence to engage in actual entrepreneurial opportunity instead of theoretical entrepreneurial opportunity.

When discussing the practical implications of their decision, the Board majority wrote:

> Neither the common law, nor the policies of the Act, support the *SuperShuttle* Board's expansive view of how "entrepreneurial opportunity" should operate to exclude workers from statutory coverage. Indeed, the explicit policy of the Act is "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . ." Sec. 1, 29 U.S.C. § 151. In light of that policy, exclusions from statutory coverage should be interpreted narrowly, not expansively, as the Supreme Court has made clear.

In his dissent, Board Member Marvin Kaplan lauded the *SuperShuttle* standard as "the most effective measure" for the independent contractor/employee determination. He argued that the revived *FedEx II* approach "wrongfully diminished the significance of entrepreneurial opportunity" and he challenged the ability of the *FedEx II* standard to withstand review by the circuit courts.

Ultimately, this shift back to the *FedEx II* standard will likely make it more difficult for companies to show that workers are independent contractors under the NLRA.

NLRB Adopts New Legal Standard for Evaluating Work Rules

On August 2, 2023, the NLRB issued its opinion in *Stericycle, Inc. and Teamsters Local 628*, 372 NLRB No. 113 (2023), overruling the legal standard for evaluating work rules previously announced in *Boeing Co.*, 365 NLRB No. 154 (2017), and later clarified in *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019).

Stericycle instituted work rules on personal conduct, conflicts of interest, and confidentiality of harassment complaints. The administrative law judge (ALJ) analyzed Stericycle's work rules under the *Boeing* test and ultimately held that Stericycle violated Section 8(a)(1) of the NLRA by maintaining impermissibly overbroad work rules.

In *Stericycle*, the Board considered whether to overrule the *Boeing* standard and issue a new legal standard for evaluating facial challenges to work rules. Before issuing its opinion, the Board sought briefing from the parties and amici on *Boeing* due to "the ubiquity of work rules and the importance of ensuring that such rules do not operate to undermine employees' exercise of their rights under the Act."

The *Boeing* standard split work rules into three categories: (1) rules that are lawful to maintain because either they do not interfere with the exercise of Section 7 rights or their potential impact on such rights is outweighed by legitimate justifications; (2) rules that warrant individualized scrutiny; and (3) rules that are unlawful to maintain because they interfere with the exercise of Section 7 rights, and the adverse impact on those rights is not outweighed by legitimate justifications.

Notably, General Counsel Abruzzo's *Stericycle* brief requested the Board overturn *Boeing* and return to the standard announced in *Lutheran Heritage Village—Livonia*, 343 NLRB 646 (2004). In contrast to *Boeing*, a facially neutral work rule violates Section 8(a)(1) under

the *Lutheran Heritage* standard if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Abruzzo also expressed concern in her brief about the *Boeing* test being forgiving of overbroad work rules, overly complicated in its application, and skewed heavily in favor of employers.

In its opinion, the Board noted that "the primary problem with the standard from *Boeing* and *LA Specialty Produce* is that it permits employers to adopt overbroad work rules that chill employees' exercise of their rights under Section 7 of the Act." *Boeing* placed too little weight on the burden a work rule could have on an employee's Section 7 rights while giving too much weight to employer interests. *Boeing* also did not require employers to narrowly tailor their work rules to promote legitimate, substantial interests while avoiding burdening employee rights. Further, *Boeing* created a category of work rules that are always lawful to maintain, which further concerned the Board.

Taking a cue from Abruzzo's brief, the Board adopted a modified version of the *Lutheran Heritage* legal standard. The new *Stericycle* standard requires the general counsel to prove that a challenged rule has a reasonable tendency to chill employees from exercising their Section 7 rights. "[I]f an employee could reasonably interpret the rule to have a coercive meaning, the General Counsel will carry her burden, even if a contrary, noncoercive interpretation of the rule is also reasonable." If the general counsel carries her burden, the rule is presumptively unlawful. Next, the burden shifts to the employer to rebut the presumption and prove "that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule." Should the employer carry its burden, the rule will be found lawful to maintain.

In light of the Board's adoption of a case-specific, pro-employee legal standard on work rules, employers should evaluate their current work rules and employee handbooks for potential infringement on employees' Section 7 rights.

NLRB Changes Procedures for Representation Elections Back to 2014 NLRB Rule

On August 24, 2023, the NLRB adopted a rule changing the procedures for representation elections. This new rule comes after the U.S. Court of Appeals for the District of Columbia struck down parts of a 2019 rule that governed the procedures for representation elections. In March 2023, the NLRB rescinded the parts of the 2019 rule vacated by the D.C. Circuit.

The NLRB's new rule on election procedures substantially rescinds the 2019 provisions and returns election procedures back to a 2014 NLRB rule. The NLRB states it is making the changes to streamline the representation case process, expedite the election process, and resolve representation questions more efficiently.

The changes include:

- The pre-election hearing will be scheduled to open eight calendar days from the Notice of Hearing. Previously, the pre-election hearing opened 14 business days from the Notice of Hearing.
- Regional directors have discretion to postpone a pre-election hearing for up to two business days upon request of a party showing special circumstances and for more than two business days upon request of a party showing extraordinary circumstances. Under the 2019 rule, regional directors could postpone a pre-election hearing for an unlimited amount of time upon a showing of good cause.
- A nonpetitioning party's Statement of Position responding to the petition will generally be due to be filed by noon on the business day before the opening of the pre-election hearing.
- Regional directors have discretion to postpone the due date for the filing of a Statement of Position for up to two business days upon a showing of special circumstances and may postpone the due date to file the Statement of Position for more than two days only in exceptional circumstances.
- A petitioner is required to respond orally to the nonpetitioning party's Statement of Position at the start of the pre-election hearing. Previously, the 2019 rule required a petitioner to file and serve a responsive written Statement of Position three business days prior to a pre-election hearing.
- An employer has two business days after service of the Notice of Hearing to post the Notice of Petition for Election in conspicuous places in the workplace and to electronically distribute it to employees if the employer customarily communicates with its employees electronically. Previously, an employer had five business days to post the notices.
- Regional directors gain greater power to exclude evidence that is not relevant to determining whether there is a question of representation issues related to individual eligibility and inclusion issues.
- Parties may file post-hearing briefs with the regional director or a hearing officer after pre-election and post-election hearings only with special permission. Previously, parties were entitled to file briefs up to five business days following the close of a hearing.
- There is no longer a 20-business-day waiting period between the decision and the direction of an election. Regional directors are required to schedule elections at the earliest date practicable.

The Board believes the new rules, which became effective on December 26, 2023, allow the Board to effectively fulfill its duties to ensure employees can quickly and fairly exercise their representation rights.

NLRB Announces New Standards for Union Recognition

On August 25, 2023, the NLRB issued a decision in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023), upending decades of precedent regarding the representation election process. Per the decision, "[A]n employer violates Section 8(a)(5) and (1) [of the NLRA] by refusing to recognize, upon request, a union that has been designated as a Section 9(a) representative by a majority of employees in an appropriate unit unless the employer promptly files a petition pursuant to Section 9(c)(1)(B) of the Act (an RM petition) to test the union's

majority status or the appropriateness of the unit, assuming that the union has not already filed a petition pursuant to Section 9(c)(1)(A)."

Under the Board's new standard, an employer "confronted with a demand for recognition may, instead of agreeing to recognize the union, and without committing an 8(a)(5) violation, promptly file a petition pursuant to Section 9(c)(1)(B) to test the union's majority support and/or challenge the appropriateness of the unit or may await the processing of a petition previously filed by the union." However, "[I]f the employer commits an unfair labor practice that requires setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order." The analysis of whether a bargaining order is warranted does not turn "on speculation about the impact of an employer's conduct on an election held at some future date, but rather on whether the employer has rendered a current election (normally the preferred method for ascertaining employees' representational preferences) less reliable than a current alternative nonelection showing."

By implementing this new process, the Board discarded its practice of allowing employers to insist on a Board-conducted election as a precondition to an enforceable statutory bargaining obligation. The Board also explicitly overruled its *Linden Lumber* decision, which held that an employer does not violate Section 8(a)(5) "solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election." *See Linden Lumber Division, Summer & Co.*, 190 NLRB 718 (1971), *rev'd sub nom Truck Drivers Union Local No. 413*, 487 F.2d 1099 (D.C. Cir. 1973), *aff'd*, 419 U.S. 301 (1974). The Board did not, however, reinstate the *Joy Silk* doctrine, under which an employer would violate Section 8(a)(5) and (1) by refusing to bargain upon request with a union that had majority support, absent a showing that the employer had good faith doubt as to the union's majority status.

In a Board press release following the decision, Chairman Lauren McFerran commented, "The *Cemex* decision reaffirms that elections are not the only appropriate path for seeking union representation, while also ensuring that, when elections take place, they occur in a fair

election environment. Under *Cemex*, an employer is free to use the Board's election procedure, but is never free to abuse it—it's as simple as that." In *Cemex*, the Board concluded that the employer committed more than 20 acts of unlawful misconduct during the critical period between the filing of a petition and an election. Further, the employer was subject to a bargaining order under both the Supreme Court's decision in *NLRB v. Gissel Packing Co.* and its new standard governing cases involving a demand for recognition.

This decision underscores the need for employers to proactively develop labor response strategies so they can respond promptly to any demands for recognition. It also emphasizes the need for quality supervisor training on lawful responses to organizing activity to ensure that employers do not inadvertently commit any unfair labor practices during the critical period.

NLRB Decision in *Cemex* Results in Need for Employer Vigilance in Post-Demand for Recognition

In *I.N.S.A., Inc. & United Food & Com. Workers Int'l Union Loc.* 1445, No. EASTHAMPTON, MA, 2023 WL 6194144 (Sept. 21, 2023), the Board retroactively applied the new *Cemex* framework to issue a bargaining order in response to the employer's discharge of organizers and key supporters during the election process, resulting in a serious interference with the election process.

The employer in *I.N.S.A.* is a cannabis company that cultivates, manufactures, and dispenses cannabis and

cannabis-related products. It owns and operates retail stores throughout Massachusetts, including in Salem. Employees of the Salem store began their organizing efforts in December 2021. An organizer set up an encrypted group chat that amassed participation of 22 of the Salem store's 28 employees. Through a link to the union's website distributed in the group chat, by mid-January 2022, 20 out of 28 of the store's inventory employees had digitally signed an authorization card. Based on the level of support, the lead organizer sent the employer a demand letter signed by all 20 employees who signed the authorization card asking the employer to voluntarily recognize and bargain with the union as the employees' chosen representative. On January 14, a group of employees presented the store manager with a copy of the letter. After the employer failed to voluntarily recognize the union, the organizer filed a petition for an election.

The union petitioned for an election, which it lost. Between the letter and the finalization of the count, the union alleged the employer engaged in objectionable conduct affecting the results of the election. In particular, the union argued that the employer engaged in the following: holding mandatory meetings to discourage employees from supporting the union; soliciting employee grievances and promising employees increased benefits and improved terms and conditions of employment if they refrained from supporting the union; orchestrating unprecedented and repeated visits to the store by its owners and high-level managers, creating the impression of surveillance; threatening employees with various adverse consequences if the union were to win the election; informing employees that they would not receive performance reviews and related wage increases until after the election; restricting employees from talking about unions while allowing employees to discuss other, nonwork-related topics; discriminatorily enforcing work rules and policies; disciplining and discharging employees because they engaged in union activities; and implementing a wage increase for all employees following the election.

After the Board found the employer did engage in certain unfair labor practices, the union argued that the severity of the unfair labor practices warranted a bargaining order rather than an order for a rerun election. The Board applied the *Cemex* framework to determine that a bargaining order was warranted. Under *Cemex*, a remedial bargaining order is appropriate when (1) the employer refuses the union's request to bargain, (2) the union had, in fact, been designated as representative by a majority of employees, (3) in an appropriate unit, and (4) the employer then commits unfair labor practices requiring the election to be set aside.

The Board found all four elements were present and ordered the remedial bargaining order. First, the Board found the employer refused the valid January 14 demand for recognition request, which contained 20 authenticated signatures out of 28 workers. This satisfied the first three elements.

The last element, whether the employer commits unfair labor practices requiring the election to be set aside, was also met. Board precedent established that an election will be set aside when an employer violates Section 8(a)(3) of the Act during the "critical period" between the filing of an election petition and the election, unless the violations are so minimal it cannot be concluded that the misconduct affected the election results. To determine whether the conduct could affect the results of an election, the Board considers all relevant factors, including the number of violations, their severity, the extent of dissemination, the size of the unit, the closeness of the election (if one has been held), the proximity of the conduct to the election date, and the number of unit employees affected.

Applying *Cemex*, the Board found that some remedies, "no matter how serious, are, in many cases, incapable of rectifying the harm that can be caused to the election process." So-called "nip in the bud" discharges of union supporters were found by the Board to be particularly harmful to the organizing and election process. Thus, as a result of the employer's "swift and decisive reaction, including selective and disparate enforcement of previously ignored rules and policies against the organizers and key supporters [which] clearly was intended to send a message to the other Unit employees who supported or were contemplating

supporting the Union that such support could result in their discipline or discharge," the Board held that a remedial bargaining order was the only appropriate remedy.

In *3 Corners, LLC & Quality Logistics & Installation d/b/a Qli Int'l, & Gen. Teamsters, Airline, Aerospace & Allied Emps., Warehousemen, Drivers, Constr., Rock & Sand, Loc. 986 a/w Int'l Bhd. of Teamsters*, No. JD(SF)-26-23, 2023 WL 6226274 (Sept. 25, 2023), the NLRB ordered the employer to retroactively apply the new *Cemex* framework to its dispute with a union. To summarize the pertinent facts: In staffing a new warehouse, an employer outsourced warehouse work to another company in the middle of its existing employees' union organizing efforts. During the open support campaign and before the planned meeting to sign workers' authorization cards, many of the existing employees were discharged. A few days later, the workers met and, in addition to signing authorization cards, discussed potential unfair labor practice charges. The following day, the Teamsters union filed a representation petition with the NLRB seeking to represent a unit of the company's warehouse attendants and warehouse receiving clerks. Six months later, the union requested that both the employer and the outsourced company voluntarily recognize the union as the collective bargaining representative of the warehouse employees and, either individually or as joint employers, commence collective bargaining negotiations with the Teamsters. Neither company agreed to do so.

The Board made a finding that the companies had engaged in certain unfair labor practices. Recognizing the unusual situation the union was in—the employer was accused of a variety of unfair labor practices that occurred *before* a majority of unit employees had designated the union as their collective bargaining representative—the Board ordered the employer to remedy the unfair labor practices and then apply the framework outlined in *Cemex*. The Board pointed out that two options existed: either the employer could recognize the union or the election petition would be processed and an election held. "What occurs then[] will be based upon Respondent Circa's subsequent conduct and/or the election results."

These decisions underscore the need for employers to proactively develop labor response strategies so that they can respond promptly and lawfully to any demands for recognition. They also emphasize the need for quality supervisor training on lawful responses to organizing activity, including in the lead-up to a demand, to ensure that employers do not inadvertently commit any unfair labor practices during the critical period that would irreparably harm the election process.

NLRB Reaffirms That the General Counsel's Burden of Proof to Show Employer Animus Toward Union Activity Under the *Wright Line* Framework Has Not Been Heightened

Where it is alleged that an employer has violated the NLRA by taking an unlawful adverse action against an employee and the question is whether the adverse action was motivated by animus or hostility toward union or other protected activity, the NLRB has—for more than 40 years—applied the *Wright Line* framework. Under that framework, the NLRB's general counsel initially bears the burden of showing that (1) the employee engaged in union or other protected activity, (2) the employer had knowledge of the union or other protected activity, and (3) the employer harbored animus toward the union or other protected activity.

Until 2019, when the Trump-era NLRB issued the *Tschiggfrie Properties* decision, it was generally understood that, under the *Wright Line* framework, evidence of employer animus did not have to relate to the employee's own specific protected activity; rather, even circumstantial evidence of an employer's generalized hostility toward union or other protected activity was sufficient. However, the Board's 2019 *Tschiggfrie Properties* decision sought to clarify the *Wright Line* framework and, in doing so, caused confusion regarding whether the general counsel must present evidence of particularized animus toward an employee's own protected activity.

This issue of whether *Tschiggfrie Properties* heightened the general counsel's burden of proof under the *Wright Line* framework came to a head in the Board's *Intertape Polymer Corp.* decision issued August 25, 2023.

372 NLRB No. 1331. In *Intertape Polymer Corp.*, an administrative law judge (ALJ) found that an employer did not violate the NLRA by suspending and issuing disciplinary notices to a union steward and union committeeman, which were challenged at hearing on the basis that this discipline was motivated by animus toward the employees' union activity.

In challenging the ALJ's decision before the Board, the general counsel in *Intertape Polymer Corp.* argued that *Tschiggfrie Properties* improperly heightened the general counsel's burden under *Wright Line* by adding a requirement that the general counsel must establish a particularized animus toward the employee's own protected activities. The general counsel argued that this heightened standard contributed to the ALJ finding no violation of the NLRA in this matter. Accordingly, the general counsel asked that the Board overrule *Tschiggfrie*.

Though the Board disagreed that *Tschiggfrie* officially altered the *Wright Line* framework, it agreed that the *Tschiggfrie* decision "caused significant confusion" regarding whether the *Wright Line* framework had been altered. Accordingly, to clear up this confusion, the Board held that "the Board in *Tschiggfrie* did not revise the *Wright Line* framework by adding a requirement that the General Counsel must show particularized motivating animus towards an employee's own protected activity." The Board then explicitly reaffirmed that evidence of an employer's improper motive may still be shown by either direct or circumstantial evidence of generalized animus toward union or other protected activity.

NLRB Expands Employers' Duty to Bargain Before Changing Terms and Conditions of Employment

On August 26, 2023, the NLRB issued two Board decisions, *Wendt Corporation*, 372 NLRB No. 135, and *Tecnocap LLC*, 372 NLRB No. 136, expanding employers' duty to bargain and limiting their ability to unilaterally change the terms and conditions of a unionized workforce.

These decisions overruled *Raytheon Network Centric System*, 365 NLRB No. 161 (2017), and *Mike-Sell's Potato Chip Co.*, 368 NLRB No. 145 (2019), which had provided employers with greater ability to make unilateral changes during contract negotiations if the changes

were consistent with past practice. Specifically, under *Raytheon*, an employer could defend against an unfair labor practice charge by showing its "actions did not materially vary in kind or degree from the parties' past practice."

In *Wendt*, the Board held that employers can no longer make discretionary unilateral changes during contract hiatus periods and first contract negotiations simply by citing a past practice of making such changes. The Board explained that permitting employers to justify discretionary unilateral changes as a past practice during these time periods undermined the collective bargaining process and was inconsistent with *NLRB v. Katz*, 369 U.S. 736 (1962). In *Katz*, the Supreme Court held that the NLRA does not permit a material change "informed by a large measure of discretion."

Additionally, in *Wendt*, the Board reaffirmed the principle that an employer may not defend a unilateral change by relying on an asserted past practice that existed *before* employees were represented by a union.

In *Tecnocap*, the Board overruled a different aspect of *Raytheon* not addressed in *Wendt*. The Board in *Tecnocap* overruled *Raytheon*'s holding that a past practice developed under a management rights clause authorizing discretionary unilateral employer action permits continued unilateral conduct following expiration of the clause. The Board in *Tecnocap* explained that the *Raytheon* holding damaged the collective bargaining process by forcing unions to bargain to regain terms of employment lost to post-expiration unilateral changes and discouraging unions from agreeing to management rights clauses in the first place. Accordingly, after *Tecnocap*, employers can no longer make discretionary unilateral changes pursuant to an expired management rights clause.

Employers should think carefully before making unilateral changes to the terms or conditions of employment during contract negotiations or following expiration of a contract. Following these decisions, employers are much more limited in their ability to rely on past practice as a defense for making unilateral changes.

NLRB Returns to the Totality of Circumstances Test for Protected Concerted Activity

On August 31, 2023, the NLRB overruled its 2019 *Alstate Maintenance* decision and returned to a "totality of circumstances" standard for when a person's actions, performed in front of coworkers, could be considered "concerted" under the NLRA.

In *Miller Plastic Products, Inc.*, 372 NLRB No. 134 (2023), the employee at issue had claimed that he was terminated for questioning COVID-19 protocols imposed by the employer, including the employer's decisions to hold an in-person, all-employee meeting at the beginning of the pandemic and to remain open following emergency orders from the Commonwealth of Pennsylvania. The employee individually raised his concerns, which included personal health concerns resulting from the employee's medical history, during the all-employee meeting and to various manager-level employees afterward. He was terminated shortly thereafter for "poor attitude, talking, and lack of profit."

The Alstate Maintenance Standard

Under the prior *Alstate Maintenance* standard, a 2019 Trump-era ruling, the analysis for determining whether an employee statement, made in front of coworkers, constituted "concerted activity" required application of a five-factor test, which asked the following:

- Was the statement made during an employee meeting that was called by the employer to announce a

decision affecting wages, hours, or some other term or condition of employment?

- Did the announced decision affect a number of employees attending the meeting?
- Did the employee who spoke up do so to protest or complain about the decision, not merely to ask questions about how the decision had been or would be implemented?
- Did the employee protest or complain about the decision's effect on the workforce generally, not solely about its effect on the speaker?
- Did the meeting present the first opportunity for employees to address the decision, so that the speaker had no opportunity to discuss it with other employees beforehand?

The employee in *Miller Plastic Products* had raised personal health concerns during the meeting and had inquired into the planned implementation of the employer's COVID-19 protocols. These arguably fell outside of the *Alstate Maintenance* standard.

The "Totality of Circumstances" Test

In *Miller Plastic Products*, the NLRB rejected the *Alstate Maintenance* five-factor test for concerted activity, determining that it "imposed significant and unwarranted restrictions on what constitutes concerted activity" under the NLRA. Instead, the NLRA will now require employers to engage in a factual analysis "based on the totality of record evidence." Potential concerted activity may now include spontaneous and informal statements made outside of employer-initiated meetings and may also include statements phrased as questions rather than merely in the form of a protest or complaint. Even errant remarks may now constitute protected concerted activity if they induce future group action.

Due to the inherent flexibility of the totality of circumstances standard, more employee actions now fall under the umbrella of protected concerted activity. Individual actions that appear to not be concerted in any way, for instance, may be found to be concerted if they later spark group action or complaints. The new standard thus makes it harder for employers to know with any certainty whether individual employee actions will be viewed by the NLRB as protectable concerted activity.

NLRB Overrules Precedent to Confirm That Section 7 Protects Advocacy for Nonemployees

In *American Federation for Children, Inc.*, 372 NLRB No. 137, issued on August 31, 2023, the Board overruled its prior decision in *Amnesty International*, 368 NLRB No. 112 (2019), and expanded the scope of Section 7 protections to include an employee's advocacy for a former colleague.

Charging party Sarah Raybon was an employee of American Federation for Children (AFC) who advocated among her coworkers for a former colleague who was awaiting rehire pending resolution of issues related to her immigration status. AFC had previously agreed to sponsor the former colleague's work permit and was holding her prior position open for her, but when a new manager was hired, Raybon was concerned that the new manager would jeopardize the former colleague's rehire. Raybon thus began encouraging her coworkers to join her in lobbying the organization to ensure their former colleague was rehired. Raybon claims she was forced to resign in retaliation for this advocacy and for raising concerns about her new manager.

The ALJ dismissed Raybon's claims, concluding that Raybon did not act concertedly and that Raybon's conduct was not "for the purpose of . . . mutual aid or protection" under *Amnesty International* because the former colleague was not a statutory employee under the Act. The general counsel took exception and, in considering the matter, the Board reversed the ALJ.

First, the Board found that Raybon engaged in concerted activity by seeking coworker support to advocate for the rehiring of the former colleague, regardless of whether the coworkers Raybon spoke with advocated on behalf of their former colleague "or even agree[d] with Raybon about [the former colleague's] importance to the organization." Instead, it was "sufficient that Raybon sought out fellow employees in an effort to induce them to join her in advocating to management for [the colleague's] rehire."

Next, the Board found that the former colleague was a statutory employee under the Act, reaffirming precedent that job applicants are statutory employees and that an applicant's work eligibility generally has no bearing on their status as an applicant.

Instead of ending its analysis there, however—as the dissent suggested it should have—the Board proceeded to overturn *Amnesty International*, determining that the proper inquiry as to whether an employee engaged in conduct for the purposes of mutual aid or protection was whether the employee sought to "potentially aid and protect themselves, whether by directly improving their own terms and conditions of employment"—for example, by hiring a high-quality applicant or nonemployee who would improve the work environment—"or by creating the possibility of future reciprocal support from others in their efforts to better working conditions." Under this "alternative" inquiry, the Board found that Raybon's conduct was "for the purpose of . . . mutual aid or protection" even if the former employee was not a colleague, and thus, the conduct was protected by Section 7.

NLRB General Counsel: Workplace Discussions of Race Are Protected Under the NLRA

On February 27, 2023, the NLRB Office of the General Counsel released a previously confidential advice memorandum setting forth its position that workplace discussions about racial discrimination are protected as concerted activity under Section 7 of the NLRA and, therefore, employees who engage in such discussions are protected from employer retaliation under the NLRA.

The general counsel considered a case where a clinical physician at a medical school alleged that her teaching privileges were revoked and her contract was not renewed in retaliation against her for (1) facilitating a discussion with a small group of students and a fellow staff member about institutional racism and racial bias in the medical field, during which she shared her own experiences with racism in the medical field and criticized an email from the school's dean concerning a recent nearby shooting; and (2) tweeting about the classroom discussion, her suspension, and the medical school's investigation into her discussion with students while asking her followers to "retweet and augment [her] voice."

The general counsel concluded that both the doctor's in-classroom discussions and her tweets were protected as "concerted activity" under Section 7 of the NLRA and that the medical school violated Section 8(a)(1) of the Act by suspending and eventually terminating her for engaging in these activities.

The general counsel noted that, to be protected under Section 7 of the Act, an employee's conduct must be both "concerted" and "for the purpose of . . . mutual aid or protection." Concerted activity includes statements by a lone employee seeking to initiate, induce, or prepare for group action, as well as statements to management communicating a group complaint. These types of communications are deemed to be for the purpose of mutual aid or protection if they seek to improve conditions for a group of employees and not just the speaker's individual circumstance.

First, the general counsel determined that the classroom conversation was a protected activity because it was "inherently concerted." The advice memo detailed legally recognized areas of protected activity, including discussion of wages, changes in work schedules, and job security. According to the general counsel, the discussion of racism in the workplace is a "logical and necessary extension" of the protected activity doctrine. The topics of conversation—systemic racism, racial bias in the medical profession, and the criticism of the dean's email—broadly affected the faculty as a whole, and at least one other faculty member was present for this conversation. Although a faculty member found some comments during the conversation inappropriate, the advice memo noted that the faculty member's feelings were "immaterial" because "fellow employees need not agree with the message or join the employee's cause for there to be concert." Second, the conversation was for the "mutual aid and protection" of all employees because working to end systemic racism benefits all employees.

The general counsel similarly determined that the public tweets were also concerted activity because they were a "logical outgrowth" of the classroom discussion insofar

as they highlighted issues of racial discrimination in medicine, which was the centerpiece of the classroom discussion. The tweets also discussed the issues of race and racism in medicine, a discussion which, as detailed above, the general counsel found to be an inherently concerted activity. The fact that the doctor also asked viewers to "share" her tweets further implicated her call for group action. Indeed, the advice memo noted that the "4,300 likes, over 2,100 retweets and hundreds of replies to the tweet" evidenced the concerted nature of the activity because many of those who interacted with the tweet were "undoubtedly" statutory employees.

Finding the activity protected, the general counsel turned to the adverse action prong and determined that the employer's animus toward the meeting and the tweets, among other factors, established that the doctor's discharge resulted from the protected actions. Accordingly, the general counsel recommended that a complaint should be issued alleging that the medical school unlawfully suspended and discharged the doctor for engaging in protected activity in violation of Section 8(a)(1). As this report is being prepared, the Board itself has not yet ruled on this issue.

The advice memo shows that the general counsel is now wading into areas of the law traditionally governed by Title VII and other equal employment provisions. Accordingly, both unionized and nonunionized employers must exercise special consideration and caution before disciplining an employee who has engaged in internal—as well as public—discussions related to discrimination, bias, or inequality. Importantly, the general counsel may consider such conversations to be protected activity even if other employees do not agree with the sentiments expressed during the conversation or find the comments to be inappropriate. Further, public social media posts accusing employers of racism can be deemed concerted activity and, under the general counsel's view, the popularity of the posts can be seen as evidence of the concerted nature of action even if statutory employees have not joined.

NLRB Clarifies "Craft" Unit Analysis

In a decision released February 2, 2023, *Nissan North America, Inc.*, 372 NLRB No. 48 (2023), the Board clarified the standard for approving union representation elections among "craft" units.[1] A craft unit is a bargaining unit consisting of a "distinct and homogeneous group of skilled journeymen craftsmen, who, together with helpers or apprentices, are primarily engaged in the performance of tasks which are not performed by other employees, and which require the use of substantial craft skills and specialized tools and equipment." Workers that are often part of craft units include welders, electricians, tool and die makers, and machinists.

In *Nissan*, the International Association of Machinists and Aerospace Workers, District Lodge 1888, filed a petition seeking to represent approximately 86 tool and die maintenance technicians employed at the *Nissan* automobile manufacturing facility located in Smyrna, Tennessee. The union contended that the tool and die maintenance technicians were an appropriate craft unit. Following a hearing, the NLRB acting regional director (ARD) determined that the tool and die technicians were not a craft unit because there was no formal training or apprentice program. The ARD also found that even if the tool and die maintenance technicians could be considered a craft unit, the petitioned-for unit would still be inappropriate due to the community of interest they shared with other employees whom the union did not seek to represent. The ARD found that the only appropriate unit was the plant-wide unit of all production and maintenance employees.

[1] Perkins Coie represented the employer in this case.

On review, the Board disagreed with the ARD. When determining whether a petitioned-for craft unit is appropriate, the Board examines the factors set forth in *Burns & Roe Services Corp.*, 313 NLRB 1307, 1308 (1994). Those factors are (1) whether the employees take part in a formal training or apprenticeship program, (2) whether the work is functionally integrated with the work of the excluded employees, (3) whether the duties of the petitioned-for employees overlap with the duties of the excluded employees, (4) whether the employer assigns work according to need rather than on craft or jurisdictional lines, and (5) whether the petitioned-for employees share common interests with other employees. However, the Board does not limit its inquiry solely to these factors and will determine the appropriateness of the craft unit sought in the light of all factors present in the case. This includes "traditional" community-of-interest factors. The traditional factors include whether the employees (1) are organized into a separate department; (2) have distinct skills and training; (3) have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; (4) are functionally integrated with the employer's other employees; (5) have frequent contact with other employees; (6) interchange with other employees; (7) have distinct terms and conditions of employment; and (8) are separately supervised.

Considering the *Burns* factors, the Board found that the ARD erred in two respects. First, the Board clarified that, contrary to the ARD's determination, a formal training or apprentice program is merely a factor in the analysis but is not a prerequisite to craft unit status. Second, the Board found that the ARD was incorrect to assume that even if the tool and die maintenance technicians constituted a craft unit, some further inquiry was required. Instead, when a petitioner contends that a petitioned-for unit is a craft unit, the analysis begins and ends with the craft unit factors set forth in *Burns*. There is no need to examine, as the ARD did, whether the petitioned-for unit is "sufficiently distinct" from or shares an "overwhelming community of interest" with other employees. This is because "sufficiently distinct" and "overwhelming community of interest" are parts of standards that have been applied when a petitioner seeks a "subdivision" of one of the units enumerated in the text of Section 9(b). Because craft units are among the enumerated units, such precedent is inapplicable. Moreover, "sufficiently distinct" is part of a standard the Board recently overturned.

Applying the *Burns* factors, the Board found that the tool and die maintenance technicians constituted a craft unit because of their high skill level and performance of the functions traditionally associated with the tool and die craft. They are the only employees who perform those traditional tool and die functions, and any overlap with other employees was with respect to ancillary, lesser-skilled duties. Additionally, tool and die work is assigned on a craft basis, rather than according to need. The tool and die technicians constitute a separate administrative grouping, have separate supervision, have minimal interchange with other employees, and are among the highest-paid employees at the facility. Although the tool and die technicians had some regular contact and functional integration with at least some excluded employees, the Board found that neither factor warranted significant weight. This is because although some lines could not run until damaged dies were repaired by the tool and die maintenance technicians, a significant amount of tool and die work could be completed in the dedicated tool and die works areas without contact with other employees. The Board determined that the factors disfavoring craft status, such as a lack of a current apprenticeship or other formal training program and some similar terms and conditions, were significantly outweighed by the other factors favoring craft status.

Having concluded that the tool and die maintenance technicians constitute a craft unit, the Board found that no further inquiry was needed. It reversed the ARD's finding that the appropriate unit was a unit of all production and maintenance employees, reinstated the petition, and remanded the case to the ARD for further processing.

Minnesota, Maine, and New York Ban Captive Audience Meetings

In 2023, Minnesota, Maine, and New York enacted legislation prohibiting employers from holding captive audience meetings. These are meetings that communicate employer opinions on religious or political matters and that employers require employees to attend. Political matters include the decision whether to support or join a labor organization. Accordingly, these captive audience bans are viewed as pro-labor, as they prevent employers from making the case as to why employees may not want to vote in favor of union representation.

Captive audience meetings have long been upheld as a lawful exercise of employer free speech rights under Section 8(c) of the NLRA. In 1948, the NLRB in *Babcock & Wilcox Co.*, 77 NLRB 577 (1948), held that mandatory group meetings are lawful under Section 7 of the NLRA. However, in April 2022, NLRB General Counsel Abruzzo released GC Memo 22-04 stating that mandatory captive audience meetings violate the NLRA. The memo directed the agency's regional offices to pursue unfair labor practice charges against employers to ultimately reverse *Babcock & Wilcox Co.*

Oregon, Wisconsin, Connecticut, Minnesota, Maine, and New York have enacted legislation that prohibits employers from taking an adverse employment action against employees who refuse to attend captive audience meetings. The bans in Oregon and Wisconsin on captive audience speeches took effect in 2010. Connecticut enacted a similar law that took effect in July 2022, with Maine, Minnesota, and New York all enacting similar legislation the following year.

The laws in Oregon, Wisconsin, and Connecticut faced legal challenges. In 2010, Wisconsin and business associations stipulated to not enforce the law after several business associations brought a suit challenging the law. In 2021, Oregon's law survived a challenge from President Trump's NLRB, which claimed that Oregon's law is preempted by the NLRA, after the U.S. District Court for the District of Oregon dismissed the suit on standing grounds. Also, Connecticut is currently subject to a pending lawsuit by the U.S. Chamber of Commerce and other business organizations challenging the law on preemption and free speech grounds. Like previous laws that banned captive audience speeches, the laws recently enacted in Maine, Minnesota, and New York are likely to face legal challenges.

In 2024, other states may also enact prohibitions on captive audience meetings. In both California and Vermont, bills banning captive audience meetings passed in their respective state senates in 2023.

Employers should carefully monitor future NLRB decisions, state legislation, and lawsuits challenging captive audience prohibitions before undertaking any adverse employment action related to captive audience meetings. With both the NLRB taking on this issue and several states enacting laws prohibiting captive audience meetings, employers should tread carefully before imposing such meetings—especially in the context of a union campaign.

The Summer (and Autumn) of Strikes

In 2023, Americans witnessed an increase in walkouts and strikes, including high-profile strikes by writers and actors in Hollywood and by workers employed by the Detroit 3 automakers in Michigan, Ohio, and Missouri. Workers cited inflation, job security, and protection against new technologies—including AI—as reasons for striking. In total, hundreds of thousands of U.S. workers walked out between May and November 2023.

Of the major strikes in 2023, none lasted longer than the Writers Guild of America (WGA) strike, which stretched for 148 days from May 2 until September 27. WGA workers cited a stagnation in writers' wages compared to previous decades, in part caused by an overall reduction of residual payments typically paid to writers involved in broadcast media. Writers also worried about the recent

introduction of AI, such as ChatGPT, into mainstream consciousness and feared that production companies would use such tools to replace their work.

The Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) went on strike for similar reasons in July 2023. Most notably, actors sought an increase in residual payments and protection from the use of AI to digitally "re-create" performances without compensation. The SAG-AFTRA strike ended on November 9, 2023.

The United Auto Workers (UAW) began striking the Detroit 3 U.S. automakers—Ford, General Motors, and Stellantis—on September 15, 2023. Although the UAW represents over 145,000 workers, the strike began with approximately 13,000 workers walking out at sites in Wayne, Michigan; Toledo, Ohio; and Wentzville, Missouri. Over the next month, more than 30,000 additional UAW workers walked out at sites in Michigan, Illinois, and Texas. The UAW referred to its strategy as a "stand-up strike," threatening that additional workers would strike if negotiations did not progress.

The primary goal of the UAW strike was to increase wages, with an initial demand of up to a 40% boost. The union further demanded the implementation of cost-of-living adjustments tied to inflation, a shorter workweek, and the mandate of unionization of factories involved in the production of electric vehicles. By the end of October 2023, all three automakers agreed to an approximately 25% increase in wages over a four-and-a-half-year contract.

Proposed Rule Would Clarify Participation of Employee Representatives on OSHA Walkaround Inspections

On September 6, 2022, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) released a Notice of Proposed Rulemaking to amend existing regulations by clarifying the types of employee-authorized representatives who can accompany OSHA's physical inspections of the workplace (also called "walkaround inspections"). The public comment period closed on November 13, 2023.

Specifically, OSHA proposes two revisions of 29 CFR 1903.8(c). (1) clarifying that the representative(s) authorized by employees may be an employee of the employer or a third party; and (2) clarifying that a third-party representative authorized by employees may be reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace by virtue of their knowledge, skills, or experience. The latter is intended to make clear that the employees' options for third-party representation during OSHA inspections are not limited to individuals with skills and knowledge similar to that of the two examples provided in existing regulatory text ("an industrial hygienist or a safety engineer").

History of Policy

On February 21, 2013, an OSHA letter of interpretation (the Fairfax Memo) concluded that workers at a worksite without a collective bargaining agreement may (1) designate a union or community organization representative to act as their "personal representative" for purposes of the Occupational Safety and Health Act and (2) designate a union or community organization representative to act on their behalf during a walkaround inspection. OSHA relied on its regulations and the Field Operations Manual in effect at that time, citing 29 CFR § 1903.8 as support for allowing employee representatives to join inspections. OSHA conceded, however, that most employee representatives will be employees of the employer being inspected, and that § 1903.8(c) places clear limitations on this authority. The text of the standard reads: "The representative(s) authorized by employees shall be an employee(s) of the employer. However, if in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the Compliance Safety and Health Officer during the inspection."

OSHA argued that "reasonably necessary" means the representative will make a "positive contribution to a thorough and effective inspection." OSHA noted that

such contributions could include the representative's experience and skill or the presence of someone who speaks a language other than English, if relevant.

A business federation sued OSHA, claiming that the interpretation letter amounted to a legislative rule adopted without notice and comment and violated the Administrative Procedure Act (APA). *Nat'l Fed'n of Indep. Bus. V. Dougherty*, No. 3:16-CV-2568-D (N.D. Tex. Feb. 3, 2017). After the court found that the federation could proceed with its lawsuit stating a claim upon which relief could be granted, the Trump administration rescinded the guidance set forth in the Fairfax Memo on April 25, 2017, and simultaneously removed from the OSHA Field Operations Manual an instruction that "workers without a certified or recognized bargaining agent may authorize third-party organizations and/or individuals to be their representatives during an inspection."

Implications

If the proposed rule takes effect in its current form, employees—including those at nonunion locations—will find it significantly easier to add representatives to OSHA site inspections. The change would likely also increase the propensity for organizing campaigns, giving unions, and other workers' advocacy groups a foothold from which campaigns could be launched.

In addition, the proposed rule raises concerns about third-party access to sensitive information at a worksite and third-party influence to expand the scope of an OSHA inspection based on the "plain view doctrine," which permits OSHA to investigate hazards in areas beyond the initial scope of an inspection if the OSHA investigator observes a hazard in plain view.

Labor Concerns Regarding the Use of Artificial Intelligence

Legislatures and enforcement agencies are increasingly concerned with the use of employment technologies in the workplace, including AI, surveillance tools, and other algorithmic management tools. The use of such technology has many labor implications for employers, including concerns that the use could violate the NLRA, trigger requirements under a collective bargaining agreement, and prompt employees to engage in technology-related bargaining efforts with employers.

The Duty to Bargain

On October 31, 2022, NLRB General Counsel Abruzzo issued GC Memo 23-02 discussing the increased use of technology by employers and its impact on employees' rights under the NLRA, including the duty to bargain under Section 8(a)(5). Section 8(a)(5) of the NLRA states that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." This means that once employees have chosen a union to represent them, the employer is legally obligated to engage in good-faith collective bargaining with the union.

The duty to bargain encompasses a wide range of employment terms, including wages, working hours, and other terms and conditions of employment, such as policies and practices concerning the use of technology. The general counsel emphasized that when employees have union representation, employers are required to provide information about and engage in collective bargaining over the implementation of technology capable of tracking employees and their use of the data collected. Examples of tracking technology include wearable devices, security cameras, radio-frequency identification badges, GPS tracking devices, keyloggers, software that takes screenshots, webcam photos, and audio recordings. The general counsel refers to this collective group of tracking tools as algorithmic management, meaning "a diverse set of technological tools and techniques to remotely manage workforces, relying on data collection and surveillance of workers to enable automated or semi-automated decision-making."

The general counsel argues that an employer's refusal to bargain before using algorithmic management tools can be a violation of Section 8(a)(5) of the NLRA, as established in prior NLRB rulings. In *Anheuser-Busch*, the NLRB found that the employer committed an unfair labor practice when they installed hidden surveillance cameras without notice to the union, failed to provide requested information to the union in a timely manner, and disciplined employees based on information obtained from the hidden cameras. *Anheuser-Busch, Inc.*, 342 NLRB 560, 560 (2004). The NLRB ruled that the employer violated Section 8(a)(5) of the NLRA by failing to bargain with the established union prior to the installation and use of surveillance cameras in the workplace. *Id.* The general counsel argues that the same may result from employers' use of AI and other algorithmic-management tools.

In response to the increased use of technology, the general counsel proposed a framework to protect employees from electronic monitoring and automated management tools that may interfere with employees' rights under the NLRA, based on well-settled Board principles. These principles include balancing the employer's legitimate business needs against employee rights and requiring employers to disclose their monitoring practices to employees.

Abiding by Collective Bargaining Agreements

Unions often bargain for language in collective bargaining agreements (CBAs) that outline their rights and roles concerning the adoption and implementation of new technology. Unions may be eager to assert these rights as employers attempt to introduce new technologies, including AI. The general counsel highlighted an article published by the UC Berkeley Labor Center in November 2020 discussing CBA provisions that address employers' use of technology in the workplace. In the article, "Union Collective Bargaining Agreement Strategies in Response to Technology," the author highlights several technology-related provisions often found in CBAs that employers should be aware of.

Some of the most notable technology-related provisions include:

- The right to information and advanced notification about any proposed technological changes.
- The right to negotiate with management regarding the effects of new technology on jobs and the strategy for introducing such technology before implementation.
- The right to participate in decision-making surrounding the adoption of new technologies.
- Restrictions on how management can introduce new technologies.
- Job displacement clauses addressing how employers will deal with job loss resulting from technological changes.
- Job protection or job security clauses that protect existing employees, particularly those with seniority, from job loss due to new technologies.
- Wage and benefit protection clauses that aim to maintain wage levels and work hours in the face of technological changes.
- Job restructuring and increased productivity clauses that focus on changes in working conditions, such as workload, tasks, responsibilities, work schedules, or the pace of work as a result of technological changes.
- Workforce training clauses that require employers to provide training for new technology.

Some unions have begun exercising their bargaining rights related to the use of AI. Most notable are the AI provisions negotiated by the Writers Guild of America (WGA) after 11,500 screenwriters, later joined by actors, went on strike in May 2023. Writers were concerned about job security, specifically regarding the possibility of sharing credit with or losing credit to AI-generated material. Writers have since reached an agreement that allows them to use AI if the company consents to it, but the company cannot require a writer to use AI. In addition, studios cannot use AI to write or edit scripts.

Actors represented by the SAG-AFTRA union were also concerned about job security. Actors were worried that they could lose control of their likenesses or be replaced by AI-generated images. SAG-AFTRA has reached a deal that allows studios to use AI to create digital replicas of actors, but the studios must have the actor's consent and must pay the actor for the days they would have had to work.

Proposed Legislation and White House Response

The NLRB general counsel is not the only official concerned with the growing use of AI, surveillance, and algorithmic-management tools in the workplace. Legislatures have introduced a number of technology-related federal and state laws aimed at protecting employees' rights under the NLRA. Most notably, U.S. senators Bob Casey, D-PA, Cory Booker, D-NJ, and Brian Schatz, D-Hawaii, introduced the federal Stop Spying Bosses Act in February 2023. The Stop Spying Bosses Act, if passed, would require employers to disclose to workers and job applicants any workplace surveillance by the employer, including (1) what data is collected, (2) how the data is used, and (3) how such surveillance affects workers' performance assessments.

Employers would also be prohibited from using workplace surveillance for certain purposes, including to (1) monitor a worker's activities related to a labor organization, (2) collect a worker's health information that is unrelated to the worker's job duties, (3) monitor a worker who is off duty or in a sensitive area, or (4) use an automated decision system (e.g., machine learning (ML) or AI) to predict a worker's behavior that is unrelated to the worker's job.

The White House is also concerned with the implications of AI for workers, unions, the quality of jobs, and the future of work. On June 30, 2023, the Biden-Harris administration convened a listening session with labor leaders who raised concerns about the use of AI, including employers' use of AI to monitor and collect data on workers. While no action was taken at the listening session, White House officials emphasized that government and employers need to collaborate with

unions to fully understand the risks for workers and how to effectively mitigate potential harms.

Accordingly, employers should use caution before implementing technology capable of tracking employees and using data collected by tracking technologies so as not to violate the NLRA or other federal, state, and local laws. Employers should also consult established CBAs to understand their obligations to union-represented employees concerning the use of technology.

NLRB Lifts Election Protocols Related to the COVID-19 Pandemic

A memorandum from the NLRB's general counsel on May 16, 2023, lifted suggested manual election protocols that were issued on July 6, 2020, in response to the COVID-19 pandemic.

The memorandum emphasized that regional directors have authority delegated by the Board to make decisions about when, how, and in what matter elections should be conducted. The general counsel stated that regional directors should decide how to conduct elections on a case-by-case basis, but suggested the following election protocols:

- Individuals should not participate in person in a manual election if they have COVID-19 or have symptoms of COVID-19.
- Individuals should promptly notify the Board agent assigned to a case if they test positive for COVID-19 within 10 days after an election or in-person meeting.
- Individuals should wear a well-fitting, high-quality mask if the CDC, state, or local health authorities determine a mask requirement is necessary in the location a manual election is held. If masks are required and the region or employer has a supply of high-quality masks, it is strongly encouraged that they be offered to all election participants.
- Individuals participating in manual elections in other locations should wear a mask at their choosing.
- Individuals participating in manual elections are encouraged to practice social distancing and use hand sanitizer when available.

NLRB ALJ Rules Employer Violated NLRA by Increasing Wages and Benefits to Nonunion Employees

In September 2023, an ALJ at the NLRB ruled in a recommended decision and order that Starbucks Corporation violated the NLRA by implementing increased wages and benefits for employees in the United States who were not represented by a union and were not seeking union representation.

Union organizing began at Starbucks locations in Buffalo, New York, in late August 2021. Although Starbucks typically increased hourly wage rates every January, in October 2021, the company announced that wage and benefits increases would take effect August 29, 2022. The company did not grant these increases to its three Buffalo stores where employees sought union representation. These increases were the subject of a prior ruling by an NLRB ALJ.

Thereafter, Starbucks continued to face heightened waves of union activity and elections throughout the country. In May 2022, the company announced that effective August 1, 2022, it would raise pay and benefits for its hourly nonunion workforce. The NLRB general counsel filed a complaint alleging Starbucks violated the NLRA, describing two specific violations. First, the complaint alleged that the company violated Section 8(a)(1) and (3) of the NLRA by intentionally withholding wage and benefit increases in response to union organizing. Second, the complaint alleged that the company also violated Section 8(a)(1) by making "unlawful announcements promising to address [employees'] concerns, informing them that union organizing was futile and informing that that only nonunion partners would receive the new pay and benefits."

Starbucks responded that the general counsel did not establish the company acted with an "anti-union motive," saying that it actually acted to comply with federal labor law. The company also contended that its communications were protected by Section 8(c) of the NLRA, which permits "non-coercive employer speech opposing union organization," and that the statements were not "disseminated" to "employees" within the NLRA's meaning.

Pursuant to NLRB precedent, the ALJ noted that "an employer has a right to treat represented and unrepresented employees differently, so long as the different treatment is not discriminatorily motivated." However, "[s]uch conduct will be found to violate the Act . . . where there is independent evidence of an unlawful motive for the grant of benefits."

In response to the general counsel's first argument, Judge Mara-Louise Anzalone determined that "the evidence establishes that [Starbucks'] conduct in withholding wage and benefit increases from union and unionizing employees was calculated to discourage union activity and support within the meaning of Section 8(a)(3) and (1) of the Act." Judge Anzalone rejected the company's defenses, including that "granting the increases to unionizing partners would have run afoul of its duty to refrain from interfering with an ongoing organizing campaign."

Regarding the general counsel's second argument, Judge Anzalone ruled that other than certain statements directed at the company's management, Starbucks' communications to employees about the wage increases and benefits amounted to independent violations of Section 8(a)(1) of the NLRA.

Based on the findings, Judge Anzalone recommended, among other things, that the company extend the wages and benefits to the union employees retroactively from the date they were granted to other employees as well as to make other payments, such as for back pay.

As of November 3, 2023, Starbucks had filed exceptions with the NLRB contesting Judge Anzalone's opinion and order. The company maintains that employers cannot make unilateral changes to wages or benefits for employees in unionized or organizing stores. Employers with mixed union and nonunion workforces will want to pay particular attention to the NLRB's determination and any potential court appeals. In light of this ruling, employers who wish to grant wage and/or benefit increases to their nonunion employees (to the exclusion of unionized employees), particularly during actual or potential union organizing, will want to work with counsel to avoid running afoul of the NLRA.

NLRB General Counsel Issues Memorandum Regarding Electronic Monitoring and Algorithmic Management of Employees

On October 31, 2022, NLRB General Counsel Abruzzo released GC Memo 23-02 addressing what she describes as "the potential for omnipresent surveillance and other algorithmic-management tools to interfere with the exercise of Section 7 rights by significantly impairing or negating employees' ability to engage in protected activity and keep that activity confidential from their employer, if they so choose." Memo 23-02 urges the Board to apply the Act to protect employees from "intrusive or abusive electronic monitoring and automated management practices that would have a tendency to interfere with Section 7 rights."

In an age when employers are increasingly using technologies such as "wearable devices, security cameras, and radio-frequency identification badges" to monitor or manage employees, General Counsel Abruzzo seeks to ensure that "intrusive or abusive methods of electronic surveillance and automated management do not unlawfully interfere with, restrain, or coerce employees in the exercise of their Section 7 rights by stopping union and protected concerted activity in its tracks or preventing its initiation." General Counsel Abruzzo goes on to state that employers "commonly retaliate against employees for exercising their Section 7 rights," and employees' right to privacy is necessary to their exercise of their guaranteed organization rights under the Act.

Memo 23-02 encourages the Board to "adopt a new framework" to protect employees from electronic monitoring and automated management that could interfere with Section 7 rights. The framework General Counsel Abruzzo sets forth states that in "appropriate cases," the Board should "find that an employer has presumptively violated Section 8(a)(1) where the employer's surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act." If the employer establishes that the "practices at issue are narrowly tailored to address a legitimate business need," Memo 23-02 suggests that the Board should balance the interests of the employer and the interests of the employees to determine whether the employer's practices are permitted. If the employer's business need does outweigh the employees' Section 7 rights, Memo 23-02 urges the Board to require the employer to disclose to employees what technologies it uses, the reasons it uses the technologies, and how it uses the information obtained from those technologies, so that employees can "intelligently exercise their Section 7 rights."

In light of this guidance, employers should tread carefully when implementing and utilizing electronic surveillance and algorithmic management technologies in order to avoid interfering with or creating the perception of interfering with employees' Section 7 rights.

Supreme Court Clarifies Rule for Suing to Recover for Property Damage Related to a Strike

Employers received a significant win in securing the right to respond to strikes resulting in damaged property with court actions for damages. On June 1, 2023, the Supreme Court ruled in *Glacier Northwest v. Teamsters*, 598 U.S. 771, 143 S.Ct. 1404 (2023), that the NLRA does not preempt an employer's state-law tort claim that a union intentionally destroyed the employer's property during a labor dispute. This decision built on the existing limitations on the right to strike and will make it easier for employers to pursue damage claims against unions in state court.

The *Glacier* decision stemmed from a 2017 labor dispute in Washington state between Glacier Northwest—a concrete manufacturer—and workers represented by Local 174 of the Teamsters union. After the parties' collective bargaining agreement expired, the union called for a work stoppage. As alleged in the complaint, the union ordered Glacier's delivery drivers to strike after concrete had been freshly mixed and loaded for delivery. Glacier instructed drivers to finish their in-progress deliveries because concrete is considered highly perishable and will eventually harden, even in a rotating drum, causing significant damage to the trucks carrying it. But the union directed drivers to ignore that instruction,

and some drivers returned with fully loaded trucks. As a result, Glacier had to scramble to resolve the situation and properly dispose of the concrete before it hardened in and damaged the trucks. Glacier was ultimately able to prevent damage to its trucks but incurred costs in doing so, and the concrete that was mixed that day was rendered useless.

The Supreme Court held that the right to strike is limited when workers fail to take "reasonable precautions to protect their employer's property from foreseeable, aggravated, and imminent danger due to the sudden cessation of work." The Court determined that the drivers "prompted the creation" of the concrete and that such conduct constituted affirmative steps to endanger Glacier's property as opposed to reasonable precautions to mitigate the risk. In such scenarios, the Court held that the NLRA does not arguably protect such strike conduct and, thus, such tort claims are not preempted by federal law.

NLRB Reverts to Obama-Era Joint Employer Rule

On October 26, 2023, the NLRB released a final rule that addresses the standard under which two entities may be considered joint employers under the NLRA. The final rule took effect on December 26, 2023, and will not be applied retroactively.

In issuing its final rule, the NLRB rescinded the joint employer rule adopted in 2020. The 2020 rule declined to extend joint employer status unless the alleged joint employer exercised "substantial direct and immediate control" over the employees' "essential terms and conditions of employment." Instead, the NLRB's new rule focuses less on the *actual control* over employees' terms and conditions of employment (a primary focus of the 2020 rule) and more on the *right to control* employees' terms and conditions of employment. In other words, reserved control is an important factor under the NLRB's new joint employer analysis.

Under the new rule, entities will be considered joint employers of a group of employees if each entity has an employment relationship with the employees and they share or codetermine one or more essential terms and conditions of employment. To *share or codetermine* means for an employer "to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both)."

The NLRB considers the following to be essential terms and conditions of employment: (1) wages, benefits, and other compensation; (2) hours of work and scheduling; (3) the assignment of duties to be performed; (4) the supervision of the performance of duties; (5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline; (6) the tenure of employment, including hiring and discharge; and (7) working conditions related to the safety and health of employees.

If considered a joint employer under the new rule, an entity can be required to collectively bargain with its union-represented joint employees over the essential terms and conditions it possesses (whether exercised or not) or exercises (indirectly or directly) the authority to control. Joint employers may also be subject to labor picketing that would otherwise be illegal in the absence of joint employer status and liable for unfair labor practices committed by the other employer.

WHAT TO EXPECT IN THE YEAR AHEAD

In 2021, NLRB General Counsel Abruzzo issued a Mandatory Submissions to Advice memorandum (GC Memo 21-04), in which she announced her legal priorities. By publishing the 2021 priority list, the general counsel made clear her intent to seek charges and interpretation of the NLRA on 46 legal issues. General Counsel Abruzzo has now updated the NLRB's 2021 priority list in GC Memo 23-04 (March 20, 2023), narrowing the NLRB's priorities to 15 remaining issues. In the memorandum, she also reiterated her intent to publish advice regarding "surveillance or algorithmic management" (GC Memo 23-02). The general counsel has already issued advice memorandums from the 2023 priority list, including:

- **Johnson Controls.** On August 3, 2023, the general counsel issued an advice memorandum regarding the continued applicability of *Johnson Controls, Inc.*, 368 NLRB No. 20 (2019), which established a framework for deciding anticipatory withdrawal cases. This advice memorandum found there were "no sufficiently related merit allegations warranting going forward to make this case an appropriate vehicle to urge the Board to overrule *Johnson Controls*."
- **Surveillance or Algorithmic Management.** In April 2023, the general counsel published an advice memorandum that considered whether an employer's use of dashboard cameras interfered with or prevented an employee from engaging in protected activity. The advice memorandum found insufficient evidence to determine a violation of Section 8(a)(1) of the NLRA and included a brief discussion of the factors the NLRB will consider when analyzing whether employee surveillance violates the Act.

Additional issues on the 2023 priority list include:

- **Hoodview Vending Co.** Whether *Hoodview Vending Co.*, 359 NLRB 355 (2012), remains applicable, i.e., whether the inherently concerted doctrine applies to nonwage issues such as health and safety, insurance coverage, racism, gender or age-based discrimination, and sexual harassment.
- **United Nurses & Allied Professionals.** Whether *United Nurses & Allied Professionals (Kent Hospital)*, 367 NLRB No. 94 (2019), remains applicable, i.e., whether unions may "provide non-member Beck objectors with verification that the financial information disclosed to them has been independently audited and that lobbying costs are not chargeable to such objectors."
- **United States Postal Service.** Whether *United States Postal Service*, 371 NLRB No. 7 (2021), remains applicable, i.e., whether employees have a Weingarten predisciplinary-interview right to information, such as the questions that will be asked in the interview.
- **Service Electric Co.** Whether *Service Electric Co.*, 281 NLRB 633 (1986), remains applicable, i.e., whether an employer may unilaterally set terms and conditions for replacement employees that are superior to those given to the striking unit employees.

GC Memo 23-04 includes the full list of NLRB priorities.

In 2024, employers can continue to expect the NLRB to take aggressive positions to protect and expand worker rights and protections while expanding the penalties available against employers. Employers should continue to be vigilant about staying compliant with this evolving area of law, including by subscribing to Perkins Coie's publications highlighting key changes in the law and decisions issued by the NLRB and courts.

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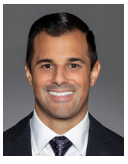

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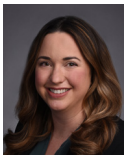

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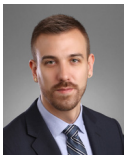

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