Ogletree Deakins

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The Practical NLRB Advisor

Friends in high places

In this Issue

On the eve of his election, President Joe Biden promised to "be the most pro-union president you've ever seen." True to his word, his administration has thus far granted organized labor's every ask. Only 23 minutes into his presidency, and before his inaugural address was even finished, the White House demanded the resignation of National Labor Relations Board (NLRB) General Counsel (GC) Peter Robb—a lightning rod for union criticism. Robb respectfully denied the request, noting that he had been confirmed by the U.S. Senate to a statutory four-year term that did not expire until November 2021.

In an unprecedented and legally questionable move, President Biden dismissed Robb later that same day. The newly elected president then immediately named Peter Sung Ohr as the Board's acting general counsel. Previously the NLRB's regional director in Chicago, Ohr is perhaps best known as the author of the regional decision that found Division I college football players to be statutory "employees"—a finding eventually not adopted by the Board. Shortly after installing Ohr to the interim GC role, the White House next announced the nomination of Jennifer Abruzzo for the permanent post.

Never before, in the nearly 90-year history of the NLRB, had a president ever taken such action. Robb's firing and, consequently, the legitimacy of all subsequent actions by his replacement are already the subject of a host of legal challenges. Moreover, the timing and unprecedented nature of the action could hardly be a clearer harbinger of what the next four years will hold in terms of labor/management policy. ■

BRIAN IN BRIEF

When there is a change in executive power following a U.S. presidential election, it will typically take time for the new administration's policies to be reflected and advanced by the federal bureaucracy. A new administration will typically have "hold-overs" who occupy policymaking positions until it is able to shepherd its own policy makers through the U.S. Senate confirmation process, often utilizing "acting" personnel in the meantime who typically function as passive place holders.

The simple constraints of time cause every new administration to order its bureaucratic priorities, and reshaping policy at the National Labor Relations Board (NLRB) has traditionally not been at the top of any new president's to-do list. For example, although there were three vacant seats on the Board when former president Barack Obama was elected to office, it took his administration nearly 14 months to install a pro-labor majority on the five-member Board. Similarly, the Trump administration actively considered terminating "hold-over" NLRB General Counsel (GC) Dick Griffin before the end of his term but ultimately decided not to do so. As a result, Griffin remained as the Board's general counsel for 10 months into the Trump presidency.

President Joe Biden, however, has broken this historical pattern. Not only did his administration fire the incumbent general counsel before the end of his term, it replaced him with an "acting" general counsel who has been anything but passive. As noted in this issue of the *Practical NLRB Advisor*, acting GC Peter Ohr has been busily undoing a host of Trump-era policies. Although the new administration's pick for permanent general counsel has encountered some Senate headwinds, the pace of change is unaffected.

The new administration has also addressed the Board side. The first opportunity for President Biden to install a majority on the Board will not arrive until the expiration of Member William Emanuel's term in August. Nevertheless, the administration has already forwarded its nominees to the U.S. Senate. Gwynne Wilcox and David Prouty are longtime labor-side attorneys who, once confirmed, will decidedly tip the ideological balance on the Board. With a Democratic-controlled Senate, both should be promptly confirmed.

Joe Biden promised to be "the most the most pro-union president you've ever seen." Thus far, he has matched those words with actions.

Sincerely,

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About Ogletree Deakins' *Practical NLRB Advisor*

At Ogletree Deakins, we believe that client service means keeping our clients constantly apprised of the latest developments in labor and employment law. With the whirlwind of activity taking place at the National Labor Relations Board (NLRB) in recent years—affecting both unionized and nonunion employers—a quarterly newsletter focused on the NLRB is an essential tool to that end.

Ogletree Deakins' *Practical NLRB Advisor* seeks to inform clients of the critical issues that arise under the National Labor Relations Act and to suggest practical strategies for working successfully with the Board. The firm's veteran traditional labor attorneys will update you on the critical issues in NLRB practice with practical, "how to" advice and an insider's perspective. Assisting us in this venture are the editors of Wolters Kluwer Legal and Regulatory Solutions' *Employment Law Daily.*

The *Practical NLRB Advisor* does not provide legal advice. However, it does seek to alert employers of the myriad issues and challenges that arise in this area of practice so that they can timely consult with their attorneys about specific legal concerns.

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Acting GC takes bold pro-labor actions

Peter Sung Ohr has not been reluctant to use his controversial time as the top attorney for the National Labor Relations Board (NLRB) to take a series of actions favored by unions. Those initiatives include withdrawing a host of Trump-era guidance memos, initiating steps to withdraw from litigation prioritized by the Trump administration, and directing regional offices to focus litigation efforts on "inherently coercive" actions against "mutual aid and protection" activities by both union and non-union employers.

By encouraging more expansive and union-friendly litigation theories at the regional level, Ohr is teeing up cases for eventual Board decision. Those decisions will be made by a decidedly more pro-labor NLRB, as the current Republican-led Board is slated to flip to Democratic control sometime in the fall of 2021.

The great memoranda purge

Much of the NLRB's ground-level policy is set through general counsel (GC) memoranda that are circulated to, and provide guidance for, the Board's regional offices. Ohr wasted little time in using the memoranda route to undo Trump-era policies and to begin the process of significant policy change. On February 1, 2021, he issued GC 21-02, in which he completely rescinded 10 extant GC memos issued by his predecessor during the Trump administration. Ohr's consequential GC memo states that the National Labor Relations Act (NLRA) "makes clear that U.S. policy is to encourage the practice and procedure of collective bargaining and to protect the exercise by workers of their full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment."

While this is certainly not the first time a new GC has withdrawn some of a predecessor's pending memos after a change in political power, the swiftness and scope of Ohr's action plainly signals a decidedly pro-labor tilt. Among the withdrawn memos were directives and guidance addressing handbook rules; the legal standard in cases alleging a union's breach of the duty of fair representation; the rights of employees who choose to refrain from union membership; and the lawfulness of neutrality agreements and "whether they provide 'more than ministerial support' to the union's efforts to organize." While all of the rescissions will have repercussions, the following is a synopsis of the most noteworthy.

Handbook rules post-*Boeing*. Ohr rescinded GC 18-04, a memo issued by Robb in June 2018 that instructs NLRB regions to place various types of workplace rules into the three categories set out in the Board's *The Boeing Company* decision issued in 2017. Ohr stated that he was rescinding the memo because "it is no longer necessary, given the number of Board cases interpreting *Boeing* that have since issued."

By withdrawing GC 18-04 and its guidance for *Boeing*, Ohr has effectively removed an employer's ability to rely on

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Partisanship on full display

Shortly after installing Ohr to the interim GC role, the White House next announced the nomination of Jennifer Abruzzo for the permanent post. Abruzzo is a former NLRB attorney who at the time of her nomination served as a special counsel for the Communications Workers of America and also served on the Biden transition team.

Following a shaky performance during her Senate confirmation hearing, in which she appeared less than forthcoming about her role in orchestrating the firing of Robb, the U.S. Senate Committee on Health, Education, Labor & Pensions (HELP) was deadlocked 11-11 in its vote to send her nomination to the full Senate. Abruzzo was not favorably reported out of committee because of the tie vote, so Senate Democrats will need to use the "discharge" procedure to get her nomination to the Senate floor.

If Abruzzo eventually gets a floor vote, she will likely be confirmed along strictly partisan lines, with Vice President Kamala Harris casting the deciding vote. As of publication, these anticipated actions have not yet taken place. However, the divisiveness on display with the Abruzzo nomination is certainly a precursor of more partisanship to come.

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the announced standards in determining and defending workplace rules. The withdrawal no doubt anticipates an eventual reversal of policy through future Board decision making. Board Chair Lauren McFerran, a frequent dissenter in Trump-era handbook cases, remains the only Democrat on the five-member Board. However, the majority is scheduled to change by the fall of 2021 and McFerran, along with her two new Democratic colleagues, seems likely to revive the Obama-era practice of parsing and fly-specking employer handbooks and policies. The withdrawal of GC 18-04 contemplates such change.

Neutrality agreements. The acting GC also withdrew GC 20-13, a memo in which Robb directed regions to issue complaints in neutrality agreement cases wherever the assistance provided by the employer under the agreement is "more than ministerial." Neutrality agreements, which employers most often accept under pressure or duress, have expanded over time to go far beyond simple employer "neutrality" in the face of union organizing efforts. These agreements have increasingly involved employers providing actual organizing assistance to unions, such as turning over employee name lists and granting workplace access to employees.

Under the guise of a neutrality agreement, unions and employers have also entered into "framework" agreements that often trench on substantive terms of employment. These arrangements arguably violate the NLRA since they result in an employer dealing with a union that has not demonstrated its majority status. Robb and the Trump administration had sought to rein in such agreements that facilitate "top-down" organizing and interfere with the principles of employee free choice.

Clearly, President Biden intends for his Democratic-led Board to allow a much broader range of employer-generated organizing assistance, and Ohr's rescission of GC 20-13 will help effectuate that goal. Observers fully expect that unions will, in turn, ramp up their efforts to obtain such agreements through increased utilization of "corporate campaign" strategies and other forms of economic and reputational pressure tactics.

Union culpability. In the neutrality context, Ohr's position clearly favors a union's organizing ability over employee free choice. The preference for union "rights" over employee rights and protections is made even more apparent by the acting GC's withdrawal of his predecessor's memos dealing with union culpability in duty of fair representation (DFR) cases, including GC 19-01, GC 19-05, and GC 20-09. All three memos were designed to enhance an employee's ability to successfully pursue claims against his or her union where the union failed to fairly represent the employee. The first two memoranda narrowed a union's "mere negligence" defense in DFR cases and the third established a burden-shifting analysis calculated to enhance an employee's chances for meaningful remediation. The memos were a decidedly sore spot with organized labor, which uniformly welcomed Ohr's decision to rescind them.

Union finances. Ohr's GC memo also withdrew two of Robb's memoranda that were designed to better protect the rights and financial interests of employees who may not wish to become union members and pay full monthly union dues. Those memos rankled unions since they threatened to impede their cash flow.

In GC 19-04, Robb delineated safeguards to preserve and enhance employees' right to revoke their dues authorizations. He also urged the Board to hold that unions must tell employees the amount of money they would save by opting to pay only an "agency fee" rather than full monthly union dues. The former general counsel also issued GC 19-06, in which he sought to further protect employees who pay an agency fee as opposed to full monthly union dues. The memo provided that in calculating the agency fee, unions bear the burden of demonstrating legitimately "chargeable" expenses. Agency fee payers can only be required to pay a fee for expenses that are attributable to bargaining and contract administration, and while other expenses (e.g., donations, political contributions and lobbying expenses) may be included for those employees who pay regular monthly dues, they cannot be properly included in any agency fee.

Withdrawal of operations directives

In addition to the withdrawal of these policy-oriented GC memos, Ohr orchestrated the recission of a pair of Trump-era operations-management memoranda (OMs). Issued by Associate to the General Counsel Beth Tursell on February 2, 2021, OM 21-04 first withdraws OM 19-05,

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a memorandum in which Robb gave regional directors the latitude to note a respondent's failure to cooperate in an unfair labor practice (ULP) investigation in any subsequently issued complaint. This ability to "flag" a respondent's lack of cooperation was designed as an option in lieu of seeking an investigatory subpoena. The new memo directs regions to continue to solicit charged-party cooperation in ULP investigations. "Going forward, charged party cooperation or lack thereof should *not"* be referenced in any subsequent complaint. (Emphasis added.) By rescinding the option of noting the lack of cooperation in any complaint, most observers believe the memo will result in the increased use of investigatory subpoenas.

The new operations directive also rescinds Robb-era OM 20-06, which vested final approval for regional staff personnel to engage in outreach, speaking engagements, and recruiting activities with Washington, D.C., headquarters officials. Under OM 21-04, this approval authority is returned to individual regional directors. Robb's approach was a minor example of the push to centralize decision-making in Washington, D.C., and a source of irritation among regional directors.

The new OM also notes that further guidance will be forthcoming to "address[] the need for more vigorous outreach, especially to the non-traditional labor communities." This latter proposal is likely to be viewed by the management community as an attempt by the NLRB to directly encourage unionization efforts and to compromise its neutrality.

Scaling back push to deflate Scabby

Continuing his concerted effort to undo Robb's initiatives, Ohr has also sought dismissal of all cases involving the allegedly coercive effect of deploying the inflatable rodent, "Scabby the Rat," during strikes and pickets. In separate motions filed in two separate cases currently before the NLRB, Ohr asked the Board to remand the pending complaints to the regional director to be withdrawn and the charges dismissed or, alternatively, for the Board to dismiss the complaints. In one of the cases, the Republican-led Board had solicited amicus briefs from stakeholders, with Member McFerran (now NLRB chair) dissenting.

The cases address whether the display of the gigantic inflatable rat violates the NLRA's secondary activity provisions. Ohr argues it does not and wants to roll back his predecessor's quest to rid the labor world of Scabby. In each case, an administrative law judge (ALJ)

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Two union attorneys tapped for NLRB

On May 26, 2021, President Joe Biden announced his intention to nominate Gwynne Wilcox to fill the lone vacant seat on the National Labor Relations Board (NLRB). Wilcox is currently a senior partner at a union-side law firm and also serves as associate general counsel for the largest local of the Service Employees International Union (SEIU). Before entering private practice, she worked in the NLRB's Manhattan office as a field attorney.

If confirmed, Wilcox would be the first Black woman to serve as a member of the NLRB. She would take the seat held by former chair Mark Gaston Pearce, whose term expired in 2018, and join current Chair Lauren McFerran as the second Democrat on the Board. Regardless of what happens with her nomination, Republicans will maintain a majority on the Board until late August 2021, when Republican member William Emanuel's term expires.

The seat vacated by Member Emanuel will likely also be filled by a union attorney. On June 22, 2021, President Biden announced his intention to nominate David Prouty to the seat when it becomes open at the end of the summer. Like Wilcox, Prouty has close ties with the SEIU, and currently serves as general counsel for its Local 32BJ. He also previously served as general counsel for a professional sports organization union and UNITE HERE. In addition, Prouty was a member of the NLRB's union advisory panel from 1997 to 1998.

Change in power by fall? The Democratic-led U.S. Senate will likely confirm Wilcox's nomination to the currently vacant seat as well as Prouty's nomination to Member Emanuel's seat after he departs in August. Thus, it is possible the NLRB could have a Democratic majority by early fall of 2021. As noted, the acting GC has already implemented multiple pro-labor initiatives, and it is very likely that the new Board majority will soon flex its adjudicatory and rulemaking authority to make many more labor-friendly changes.

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recommended dismissal of the complaint as it pertained to the six-foot inflatable rat. However, when Robb was serving as GC, he urged the Board to overrule its own precedent, reverse the ALJ, and find that the union's use of inflatable rats "was tantamount to picketing, or constituted otherwise coercive conduct, to unlawfully pressure neutral employers to cease doing business with the primary employer in the labor dispute."

Reverse course. In support of his motions to withdraw or dismiss the two pending complaints, Ohr argued that the union's conduct in both cases is lawful under the Board's holdings in *Eliason* and *Brandon II*, as well as the reasoning of *every* federal court to consider the issue. While Ohr's observation may be accurate, it is largely the result of majority happenstance. No Republican Board member has agreed that the use of Scabby does not run afoul of the NLRA, and judicial approval of Board cases finding that it does not violate the Act has been largely predicated on the courts' deferral to the NLRB's "expertise." Legalities aside, it is now clear that Scabby will have free rein for the next four years as regions will not be issuing any complaints over its use.

Shutting the barn door

The Scabby litigation is by no means the only instance where Ohr has injected himself into ongoing litigation in an effort to reverse the outcome previously sought by Robb. For example, in *Mountaire Farms, Inc.*, the Board solicited amicus briefing on the question of whether it should make modifications to the Board's "contract bar" doctrine, which generally prohibits the processing of any election petition (including a decertification petition) while a collective bargaining agreement is in force. The doctrine involves the traditional tension between employees' free choice in choosing or decertifying their bargaining representatives and maintaining "labor/management stability" by insulating an incumbent union from replacement or ouster. The current policy is tilted in favor of the latter.

Pursuant to the Board's invitation, Robb filed an amicus brief arguing in favor of some minor adjustments to the doctrine that would better safeguard free choice. Ohr, however, sought and obtained leave to withdraw the Robb amicus. The Board, apparently seeing the "writing on the wall," not only granted leave, but in a decision dated April 21, 2021, abandoned the notion of tweaking the contract bar rule at all. (A discussion of the decision appears on page 14).

Consistent with his recission of Robb's memoranda regarding "neutrality agreements," discussed above, Ohr has also intervened in two cases and sought the dismissal of complaints that had already been issued involving such agreements. In the first case, involving a hotel and a UNITE HERE local union, Ohr unilaterally withdrew a complaint and brought about the dismissal of a case alleging that a neutrality agreement in place between the parties resulted in unlawful organizing assistance to the respondent union. Ohr took similar action with respect to another complaint involving a Boston hotel and its neutrality agreement with another UNITE HERE local. Ohr's actions seem destined to expand the scope of permissible neutrality agreements and to increase the frequency with which unions will exert economic and reputational pressure to obtain them.

Prosecutorial focus on 'fundamental' employee rights

In another significant move, Ohr issued GC 21-03 on March 31, 2021, calling on agency leaders to effectuate the NLRA via vigorous enforcement of the "mutual aid or protection" and "inherently concerted" doctrines. Ohr stated that as a result of the COVID-19 pandemic, health and safety issues have become more prevalent at the workplace, and his memo "focuses on protecting employees' fundamental rights by examining an interrelated framework of basic, yet pivotal, legal constructs."

Section 7 of the NLRA grants employees the right to engage in "concerted" activities for the purpose of "mutual aid or protection." Ohr explained that the latter element "'focuses on the *goal* of concerted activity,' specifically 'whether there is a link between the activity and matters concerning the workplace or employees' interests as employees.'" (Emphasis in original.) Here, the Board analyzes whether an activity is for "mutual aid or protection" using an objective standard. This means that employees' subjective motives are irrelevant. "The 'mutual aid or protection' clause covers employee efforts to 'improve their lot as employees through channels outside the immediate employee-employer relationship,' as well as activities 'in support of employees of employers other than their own,'" Ohr noted.

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Precursor actions. In addition to union activity and labor organizing, Section 7 protection "may also cover the fundamental precursor actions that form the cornerstone of any other actions the employees may take, like discussing or protesting wages, hours, and working conditions," Ohr announced. Further, "employee advocacy can have the goal of 'mutual aid or protection' even when the employees have not explicitly connected their activity to workplace concerns," including "employees' political and social justice advocacy when the subject matter has a direct nexus to employees' 'interests as employees.'" The GC memo provided these examples:

- "a hotel employee's interview with a journalist about how earning the minimum wage affected her and employees like her, and how legislation to increase the minimum wage would affect them;
- a 'solo' strike by a pizza-shop employee to attend a convention and demonstration where she and others advocated for a $15-per-hour minimum; and
- protests in response to a sudden crackdown on undocumented immigrants and the possible revival of workplace immigration raids."

"Going forward, employee activity regarding a variety of societal issues will be reviewed to determine if those actions constitute mutual aid or protection under Section 7 of the Act," Ohr instructed.

Ohr explained that in each of these examples, "the employees' conduct had the objective goal of improving their workplaces and concerned issues within their employer's control, like payment of wages and employers' willingness to hire immigrants."

All avenues to be fully utilized. "Going forward, employee activity regarding a variety of societal issues will be reviewed to determine if those actions constitute mutual aid or protection under Section 7 of the Act," Ohr instructed. "I look forward to robustly enforcing the Act's provisions that protect employees' Section 7 rights with full knowledge that recent decisions issued by the current Board have restricted those protections," the acting GC continued, pointing to the majority opinions in two 2019 decisions by the Republican-led Board during the Trump administration that applied "mutual aid or protection" narrowly. Despite those two rulings, "the Board majority has left avenues for demonstrating mutual aid or protection that should be fully utilized," Ohr said.

"Protected, concerted activity—either standing alone or as a precursor to organizational activity—begins with a conversation among employees," and "[r]ecognizing this, the Board has long described concerted activity 'in terms of interaction among employees,'" Ohr observed.

"However expressed, the touchstone of concert revolves around employees' intention to band together to improve their wages or working conditions," the acting GC explained. "Thus, employees may act in concert when discussing shared concerns about terms and conditions of employment, even when the discussion 'in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.'"

Group action? "While contemplation of group action may be indicative of concerted activity, it is not a required element," Ohr noted. "Employee discussions of certain 'vital elements of employment' often raise concerns that are pivotal to their collective interests, which, in some circumstances, may spur organizational considerations. Concern about these crucial common issues may render group discussions inherently concerted, 'even if group action is nascent or not yet contemplated,'" the acting GC said, adding that "magic words" are not required for concertedness to attach. In addition, "a finding of concerted activity" does not depend on "the extent to which other employees agree with the complaint or join in the protest."

"The Board has adopted this 'settled doctrine' of inherent concert for decades, noting that unit employees' right to protect their fundamental, collective interest in these central issues, 'could be rendered meaningless if employers were free to retaliate against employees on the ground that the retaliatory action was directed only at a discussion,'" according to Ohr. While in recent years the Board has

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narrowed the circumstances under which individual complaints are considered concerted activity, Ohr said the doctrine of inherent concert "retains its vigor."

"Vital categories of workplace life." The GC memo also described certain circumstances in which the Board has found employee discussions to be "inherently concerted where they involved only certain vital categories of workplace life," including discussions about wages or wage differentials, changes in work schedules, and job security. The memo also states that the Board's "Division of Advice has further concluded that discussions about workplace health and safety and racial discrimination may be inherently concerted."

Going forward. Ohr said that going forward, he "will be considering these and other appropriate applications of the inherently concerted doctrine in suitable cases," with the focus on "the means to safeguard employee rights to engage in protected, concerted activity in order to redress an employer's retaliatory response." He opined that doing so will serve U.S. policies, as set forth in the NLRA, to "'eliminate the causes of certain substantial obstructions to the free flow of commerce […] by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.'" (Ellipses in original.) ■

A signal to unionized and nonunionized employers

Ohr's actions clearly signal a return to the Obama-era approach in which the coverage of the NLRA and its statutory protections and proscriptions were viewed as broadly as possible. The thrust of this policy was to "revitalize" the Act as the principal labor/management statute and to extend its reach to both unionized and nonunionized employers. The current initiative is plainly designed to do the same, and to increase the number and scope of claims susceptible to adjudication under the NLRA. For all employers, particularly nonunion employers that have little exposure to the NLRB, the federal agency is likely to occupy a more prominent position on the legal landscape. For those employers that deal with the Board on a regular basis, Ohr's first few months should serve as a clear indicator of things to come. The pendulum will no doubt swing in favor of organized labor.

Short tenure may bring longtime ramifications. Two things are worth noting about Ohr's tenure so far. First, he has managed to effectuate more policy changes in less than four months than most Board general counsels do in an entire four-year term. Borrowing famed white-collar criminal defense attorney Brendan Sullivan's line, Ohr, upon being named, promised that he would not be "a potted plant." However, in the long run the agency and all of its stakeholders might have been better served by less dramatic activism.

Recognizing the power of the position, the U.S. Congress made the position of NLRB general counsel one that required full vetting, hearing, and confirmation by the U.S. Senate. Individuals serving in an *acting* capacity are subject to none of those specifically designed safeguards. Instead, they occupy their position as the result of singular—and purely partisan—fiat. Under such circumstances, effectuating swift and sweeping policy change does not inspire confidence in the stability or neutrality of the agency.

Second, despite the unprecedented number of policy changes that have been made, one is hard-pressed to find any that directly benefit the intended beneficiaries of the NLRA—the employees. Quite to the contrary, almost all the changes—from limiting employee free choice to weakening *Beck* rights—directly benefit labor unions, *at the expense of employee rights.* If this pattern continues, we may indeed be looking at the "most pro-union" administration in history, but we will decidedly not be looking at one that is "pro-employee."

Biden's labor task force seeks union surge

In yet another effort to advance his pro-labor policy agenda, on April 26, 2021, President Joe Biden signed Executive Order (EO) 14025 creating the "White House Task Force on Worker Organizing and Empowerment." In a fact sheet announcing its formation, the Biden administration described the task force as the first "comprehensive approach to determining how the executive branch can advance worker organizing and collective bargaining." It will be composed of some 20 cabinet members and federal agency heads with Vice President Kamala Harris serving as chair and Secretary of Labor Marty Walsh serving as vice chair.

According to the fact sheet, "[T]he Task Force will endeavor to achieve the following four goals:

1. **Lead by example** by ensuring that the federal government is a model employer with respect to encouraging worker organizing and collective bargaining among its workforce.
2. **Facilitate worker organizing across the country** by taking an all-of-government approach to mobilize the federal government's policies, programs, and practices to provide workers the opportunity to organize and bargain collectively.
3. **Increase worker power in underserved communities** by examining and seeking to address the particular challenges to worker organizing in jurisdictions with restrictive labor laws; the added challenges that marginalized workers in many communities encounter, including women and people of color; and the heightened barriers to organizing workers in certain industries.
4. **Increase union membership** across the United States to grow a more inclusive middle class and provide workers the opportunity to come together for the purpose of mutual advancement, the dignity of worker and workers, respect, and the fair compensation they deserve."

According to the fact sheet, the EO instructs the task force to deliver suggestions "within 180 days" regarding two primary concerns. "First, how can *existing* policies, programs, and practices be used to promote worker organizing and collective bargaining in the federal government? And second, where are *new* policies needed to achieve the Task Force's mission and what are the associated regulatory and statutory changes needed?" (Emphasis in original.) The task force will also consult and collaborate with the National Labor Relations Board (NLRB), the U.S. Federal Labor Relations Authority (FLRA), the National Mediation Board, labor organizations, and other individuals and groups involved in the workers' rights movement.

A matter of interpretation? The order cites as the motivation for the task force its perception that the federal government has never fully implemented the National Labor Relations Act (NLRA) policy of encouraging worker organizing and collective bargaining. But does the stated policy of the NLRA authorize the Biden administration to go as far as it has said it wants to go? The creation of the task force has certainly drawn praise from organized labor, while others have questioned whether the NLRA allows the federal government to take such an active role in unionization efforts and suggested that the White House is overstepping.

Beyond the observation that the "encouragement" of collective bargaining is circumstantially limited, it also bears noting that the NLRA does not contain language "encouraging" unionization as a matter of federal policy. The policy embodied in the Act is for the federal government to "protect" the rights of employees to engage in organizing, not for the federal government to encourage those employees to do so. The notion that the federal government has a proper role in actively seeking to "increase union membership" has never been a policy goal of federal labor law. Nonetheless, the Biden administration appears ready to adopt policies aimed at increasing the level of union membership, not merely protecting the right of employees to engage in *self-organization.* This policy change is likely to serve as the rationale or justification for decisions in which agencies such as the NLRB depart from their traditionally "neutral" role in organizing matters.

'Proudly pro-union'

The direction of federal labor policy for the next four years is now abundantly clear. At the task force's first meeting, held on March 13, 2021, Vice President Harris said, "we are proudly a pro-union administration." She described the purpose of the task force as "doing two things, essentially: looking at what we can do to take on and address the work the federal government already has the capacity to do around protecting collective bargaining, protecting workers rights, protecting the quality of

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life of working people in the federal government, and doing it in a way that we also look at what we must do to ensure that working people can organize—that they can negotiate."

Turning to the pandemic, Harris said that in many ways, it "has marked a new era" in the history of the United States. "This pandemic has been an accelerator—meaning for those for whom things were bad before, they're even worse," she said. "We have seen that if we do not protect workers' rights—things like paid leave, worker safety, retirement—that all of us pay a price," Harris continued. "So let's look at this moment and the work that we can collectively do, in a way that really is about work that can have intergenerational impact at the beginning of this new era."

For his part, Walsh said that "[o]rganized workers are good for our economy." According to the labor secretary, "the decline of union membership is a problem. And you can see the decline in the middle class as you see the decline in the union membership across our country for the last 50 or so years." ■

State AGs slam PRO Act's elimination of right-to-work laws

A coalition of 14 state attorneys general (AGs) registered their opposition to H.R. 842, the Protecting the Right to Organize Act of 2021 (also known as the PRO Act), currently before the U.S. Congress. The coalition specifically notes that the proposed federal legislation would invalidate state right-to-work laws currently in place in 27 states and would preclude other states from adopting such laws in the future.

Right-to-work laws prohibit employers and unions from entering into contracts that require employees to become members or pay dues to any union as a condition of their employment. For more than 75 years, the National Labor Relations Act (NLRA) has contained statutory language specifically authorizing individual states to enact such right-to-work laws. However, under one of its provisions, the PRO Act would overturn this long-standing state right and permit collective bargaining agreements to require all union-represented employees to, at a minimum, contribute fees to the labor organization for the cost of such representation notwithstanding a state law to the contrary.

State laws protect employee choice

On April 2, 2021, the AGs sent a letter to U.S. Senate leaders outlining their opposition to the PRO Act, citing the elimination of right-to-work laws and arguing that employees should not have to face the choice of paying union dues or losing their jobs. "Forcing someone to be a member of a union against their will and then confiscating their pay for the gain of union leadership is the antithesis of the democratic principles on which this country was founded," the attorneys general said.

The letter points out that the Supreme Court of the United States long has upheld state right-to-work laws and that such laws have been enacted by more than half of the states. "Our Nation has always been one of opportunity that rewards individual choice, ingenuity, and initiative," the attorneys general wrote. "Our laws have long preserved the ability of employees to speak for themselves, to make informed decisions, and to work without being forced to pay fees to third parties."

Duty to uphold. The attorneys general note further that they "are responsible for upholding the laws" in their states, including "[o]ne such law [that] guards the freedom of employees to keep their jobs regardless of whether they decide to pay union dues or not." But the PRO Act's provision would override their states' right-to-work laws, the attorneys general said. "Accordingly, we respectfully urge Congress not to enact the PRO Act, particularly those provisions negating the Right-to-Work Laws," the AGs wrote.

Other 'unacceptable' provisions

In addition to the provisions effectively overturning right-to-work laws, the states' top attorneys objected to "[o]ther concerning provisions of the PRO Act [that] include[:]

(1) Federal imposition of the so-called 'ABC Test' for distinguishing employees from independent contractors—a proposal recently rejected by 58 percent of California voters;
(2) the legalization of secondary boycotts by unions, tactics which have been outlawed since passage of the Taft-Hartley Act;

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(3) a mandate that employers turn over sensitive personal information of employees to union organizers, including home addresses, home and cell phone numbers, and personal email addresses, without the employees' consent;
(4) an overbroad definition of 'joint employer' that would, among other things, cause the employees of franchisees to be deemed employees of the franchisor, regardless of how the franchisor and franchisee have chosen to structure that relationship by contract; and
(5) giving unions the right to use an employer's private email system for organizing and other 'protected concerted activity.'"

The letter is signed by the attorneys general of Alabama, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Oklahoma, South Carolina, Utah, and West Virginia. ■

Other NLRB developments

Circuit court decisions

7th Cir.: Winery's banning of "Cellar Lives Matter" vest violated NLRA. A winery employer failed to show special circumstances justified directing a cellar employee to stop wearing his vest, on which he had written "Cellar Lives Matter" on the back to express support for the union, the U.S. Court of Appeals for the Seventh Circuit found, enforcing a National Labor Relations Board (NLRB) order finding the winery had engaged in unfair labor practices. Following a union election certifying a local Teamsters chapter as the collective bargaining representative, the winery refused to engage with the union and challenged its certification before the NLRB. With tensions running high, the employee decided to express his support for the union by wearing the aforementioned vest. He "explained that he devised the slogan because he thought it was both true and catchy—drawing upon the well-recognized Black Lives Matter movement." The Seventh Circuit also affirmed the Board's order finding the winery violated the National Labor Relations Act (NLRA) by maintaining a policy that limited bonus eligibility to nonunion employees (*Constellation Brands U.S. Operations, Inc. d/b/a Woodbridge Winery v. National Labor Relations Board*, March 30, 2021).

8th Cir.: Road supervisors not NLRA "statutory supervisors." The NLRB "did not act arbitrarily or capriciously" in concluding that an employer "failed to show road supervisors were statutory supervisors, certifying the union, and finding that [the employer] committed an unfair labor practice" in refusing to bargain with the union. Rejecting the employer's insistence that the road supervisors were statutory supervisors because they disciplined or effectively recommended the discipline of van operators, the U.S. Court of Appeals for the Eighth Circuit observed that the parties' collective bargaining agreement (CBA) did not contain "a progressive discipline policy" and the employer's evidence was "'too vague, limited, and conflicting to establish the role that the road supervisors' warnings' played within the purportedly progressive discipline system." Further, substantial evidence supported the Board's finding that the employer "failed to show road supervisors have the authority to effectively recommend discipline based on the completion and submission of [road observation reports]" (*Transdev Services, Inc. v. National Labor Relations Board*, March 16, 2021).

9th Cir.: Janitorial employees did not engage in unlawful secondary picketing. The NLRB erred in finding that janitorial employees lost the protection of the NLRA by engaging in unlawful secondary picketing of the office building where they worked, the U.S. Court of Appeals for the Ninth Circuit ruled in granting a union's petition for review and remanding the case for further proceedings. Though the Board focused on one sentence in the picketers' leaflets referring to a tenant, the court found "[t]he combination of the picket signs and the leaflets, considered in their entirety, clearly disclosed that the employees' dispute was with [their employer] and not with any of the buildings' tenants." Thus, substantial evidence did not support the Board's finding that the employees' picketing "constituted secondary, as opposed to primary, activity" (*Service Employees International Union Local 87 v. National Labor Relations Board*, April 28, 2021).

D.C. Cir.: Board arbitrarily refused to retroactively apply new precedent. In a case involving a union's

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challenge to the employer's withdrawal of recognition, the NLRB's refusal to retroactively apply the intervening change in Board law adopted in *Johnson Controls* was "erroneous, arbitrary, and capricious," the U.S. Court of Appeals for the D.C. Circuit ruled. In *Johnson Controls*, the Board held that an employer "may rely on the majority signatories in the [decertification] petition it has in hand to proceed to withdrawal [of recognition from a union]." The Board also expressly determined "that it must apply the rule 'retroactively to all pending cases in whatever stage, unless retroactive application would work a manifest injustice.'" Yet in the instant action, the Board declined to apply *Johnson Controls* retroactively and instead departed from its own established precedent without "hav[ing] justified not only a reasoned departure from its own precedent, but also its choice of a remedy punishing the employees by depriving them of their right to choose their own representatives because of an allegedly unfair labor practice on the part of their employers" (*Leggett & Platt, Inc. v. National Labor Relations Board*, February 19, 2021).

D.C. Cir.: Claim employer created unlawful "'company union'" revived. The D.C. Circuit revived a union's claim that a nationwide cell phone service provider violated the NLRA when it implemented a program in its customer-service call centers under which employee representatives brought employee feedback and concerns to management for consideration and discussion. The appeals court found that in order to determine whether the program created a "labor organization" that the company "unlawfully dominated and supported in violation of Section 8(a)(2)," the NLRB must reconcile "dueling lines of Board precedent concerning the definitional requirement that a 'labor organization' must exist for the purpose, at least in part, of 'dealing with' an employer concerning conditions of work." Thus, the case was remanded to afford the NLRB an opportunity to explain "what the record must show for the Board to find that an organization made group proposals, as opposed to engaging in mere brainstorming." Additionally, the court noted the Board had properly found that "given the years-long duration of [the union's] organizing campaign, [the employer's] creation of [the worker group] did not warrant an inference that it would reasonably have the tendency to erode employee support for union organizing" (*Communications Workers of America, AFL-CIO v. National Labor Relations Board*, April 16, 2021).

NLRB must reassess affirmative bargaining order. Although substantial evidence supported the NLRB's determination that a concrete company committed an unfair labor practice by discharging the two mechanics who worked in its small repair shop in retaliation for their organizing activity, the Board must reconsider an affirmative bargaining order directing the employer to reopen the shuttered shop, to rehire the mechanics, and to bargain with the union that had sought to represent them. Granting in part the employer's petition for review, the D.C. Circuit remanded the case for the Board to reconcile its determination that the repair shop was closed "for the purpose of chilling union activity … with the clear evidence that the [repair] operation was shut down because of the termination of the Company's lease for the space in which [the shop] was housed[.]" Amongst other things, the appeals court also directed the Board to explain, "[W]hat legal authority allows the Board to compel the restoration of a company operation that no longer exists and for which there is no adequate space to house the operation within any of the company's existing facilities?" (*RAV Truck and Trailer Repairs, Inc. v. National Labor Relations Board*, May 11, 2021).

NLRB rulings

Rule unlawfully barred discussions of wages. An employer violated Section 8(a)(1) of the NLRA when it discharged an employee because he exercised his Section 7 rights by complaining about an unlawful rule, set forth in an employee handbook, that prohibited employees from discussing wages, which the NLRB explained "is a core substantive right protected by the Act." The Board emphasized that "[a]lthough [the employee] signed the handbook that unlawfully required him to waive his right to discuss wages and working conditions, he continued to protest the validity of the rule and to refuse to waive his rights." Moreover, the "meeting that culminated in [the employee's] discharge largely was an argument between [him] and [the company owner] over the expressly unlawful rule." Accordingly, "[the owner's] abrupt discharge of [the employee] in this context was plainly motivated, at least in part, by [the employee's] ongoing protest and refusal to waive his rights." Because the employer failed to show that he would have been discharged absent his protected activity, the decision of the administrative law judge (ALJ) was affirmed (*SW Design School, LLC dba Interns4Hire.com*, February 10, 2021).

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Handbook with CBA-covered terms didn't violate NLRA. An employer did not violate Sections 8(a)(5) and (1) of the NLRA by unilaterally distributing an employee handbook to bargaining unit employees that contained policies that were "inconsistent with several provisions in the parties' collective-bargaining agreement, including those involving attendance, overtime, time off, work rules, discipline, grievance procedures, and the employee probationary period." Noting that "[t]he handbook stated on the first page that '[s]ome benefits may not apply to union team members and in some cases these policies may be impacted by collective bargaining agreements,'" a divided NLRB panel concluded that "the handbook makes clear at the outset that the collective-bargaining agreement affected the policies in the handbook, and that some terms might be different for union-represented employees," and thus it "'was clearly not intended to modify, alter or change the existing contract.'" In a partial dissent, Chair Lauren McFerran disagreed with this aspect of the decision, arguing that "Board precedent firmly establishes that the Respondent violated its duty to bargain by unilaterally distributing to bargaining unit employees a handbook that conflicted with the parties' agreement concerning several terms and conditions of employment, and addressed other mandatory subjects of bargaining not expressly addressed by the parties' agreement" (*Stericycle, Inc.*, February 17, 2021).

Enforcing dress code to bar union buttons unlawful. By enforcing its branded apparel guidelines against employees to ban the wearing of union buttons, an employer violated Section 8(a)(1) of the NLRA, the NLRB ruled in rejecting the employer's contention "that enforcement of the policy was justified by its desire to 'enhance the customer experience and project a positive public image of Respondent to its customers.'" The Board explained, "[t]his argument fails as employees did not encounter customers at the Respondent's facility, and, in any event, the Board has long held that customer engagement alone is not a special circumstance justifying the banning of union insignia." On the other hand, citing due process grounds, the Board reversed the ALJ's finding that the employer violated Section 8(a)(1) by maintaining appearance guidelines after concluding that the employer "did not have adequate notice of the allegation, and it was not fully litigated" (*Indiana Bell Telephone Company, Inc.*, February 25, 2021).

Board won't determine lawfulness of acting general counsel's appointment

The NLRB declined a charging party's invitation to take up a challenge to the lawfulness of President Joe Biden's appointment of Acting General Counsel Peter Sung Ohr after removing former general counsel (GC) Peter Robb before his term was set to expire. In the underlying action, an ALJ dismissed allegations that a respondent had "violated Section 8(b)(1)(A) of the [NLRA] by sending overbroad and false or misleading evidence-preservation letters to or through the Charging Party's legal counsel." The charging party and then-GC Robb separately filed exceptions to the dismissal, but after his appointment as acting GC, Ohr filed a motion to withdraw the exceptions.

In its opposition to that motion, the charging party challenged the validity of Ohr's designation. However, the Republican-majority Board all agreed in concluding "that reviewing the actions of the President is ultimately a task for the federal courts." Moreover, "even assuming, arguendo, that the Board would have jurisdiction to review the actions of the President, it would not effectuate the policies of the Act to exercise this jurisdiction. … It is for the courts, not the Board, to make the initial and final determinations on the issues presented here" (*National Association of Broadcast Employees and Technicians*, April 30, 2021).

Split NLRB allows confidentiality of arbitration proceeding. Though an employer's maintenance of a mandatory arbitration agreement violated the NLRA by restricting employees' right to file charges with the NLRB, a divided Board panel found that "[r]easonably interpreted, the provision requiring that arbitral 'proceedings' be confidential is not materially different from the provision, found lawful in *California Commerce Club*, requiring that arbitration be conducted on 'a confidential basis.'" The Board further found that "the confidentiality requirement [did not] violate the Act insofar as it pertain[ed] to arbitration proceedings, including hearings, discovery, and awards" but was unlawful with respect to the requirement that settlements remain confidential. Chair McFerran dissented in part, opining

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that the ruling "reinforces a disturbing trend in the modern American workplace." She observed that "'[b]oilerplate, coercive employment contracts are now widely used for many (if not the majority of) private sector, non-unionized employees in the United States, including lower-wage hourly workers,'" many of which "also impose confidentiality restrictions that keep workers from seeking support from their coworkers, third parties, and the government in their attempts to redress wrongs and improve working conditions" (*Dish Network, LLC,* March 18, 2021).

Failure to send duplicate ballot kits not unlawful. A regional director erred in finding that voters were potentially disenfranchised when they were not sent duplicate ballot kits after they failed to properly sign the return envelope containing their executed ballots in a mail-ballot representation election, the NLRB ruled. "[P]articularly during a time when the postal service was experiencing severe delays," it was "implausible to conclude that [the mailing] procedures could have been completed on time." The Board also found that the regional director incorrectly concluded that an altered ballot should be counted for the union as the director "necessarily had to resort to speculation as to the possible meaning of the voter's physical alteration to the ballot at issue here" (*XPO Logistics Freight, Inc.*, March 23, 2021).

Employees lawfully told to keep investigative interviews confidential. In a divided 2-1 panel decision in which Chair McFerran filed a separate opinion dissenting in part, the NLRB reversed an ALJ's finding that an employer violated Section 8(a)(1) of the NLRA by instructing witnesses to keep their investigative interviews confidential. The Board majority disagreed with the ALJ's finding that the "directives were unlawfully unlimited in time and place because they did not include an express statement that employees could talk with others after the investigation was over." Rather, the majority explained, "there is no evidence or allegation that the directives were given pursuant to a general company policy or rule, that they applied to anyone other than the employees interviewed during the specific investigation of the allegations against [the eventually discharged employee], or that the directives prevented those employees, or any other employees for that matter, from discussing the events giving rise to the investigation." Thus, the "employees would reasonably understand that the confidentiality restriction was limited to the duration of the investigation" (*Alcoa Corp.*, April 16, 2021).

NLRB: Contract-bar doctrine will remain in place, for now. After considering various arguments and proposals set forth in the parties' and *amici* briefs, a four-member NLRB announced that it "decided not to modify the [contract-bar] doctrine at this time." Under the doctrine's current application, a valid collective bargaining agreement ordinarily bars a representation petition during the term of the agreement, but for no longer than three years. While the Board shared concerns with some of the parties and stakeholders that the relevant start date for the so-called "window period" to file a petition "may not always be readily ascertainable under the contract-bar doctrine in its current form," it found "a sufficiently compelling case has not been made for any particular proposed modification." Moreover, because a union-security clause in the parties' collective bargaining agreement in the underlying case was "merely ambiguous," as opposed to being "clearly unlawful," the Board concluded that it barred a decertification petition. Member John F. Ring filed a separate opinion dissenting in part (*Mountaire Farms, Inc.*, April 21, 2021). ■

SCOTUS decision in union access case favors farmers

The Supreme Court of the United States ruled in a 6-3 decision that an access regulation promulgated by California's Agricultural Labor Relations Board, which grants union organizers the right to access the premises of agricultural employers under certain circumstances, constitutes a "*per se* physical taking under the Fifth and Fourteenth Amendments." Writing for the majority, Justice Roberts explained "[t]he essential question is … whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." Justice Breyer filed a dissenting opinion, joined by Justice Sotomayer and Justice Kagan. The decision and possible NLRA implications will be discussed in a future issue of *The Practical NLRB Advisor* (*Cedar Point Nursery v. Hassid*, June 23, 2021).

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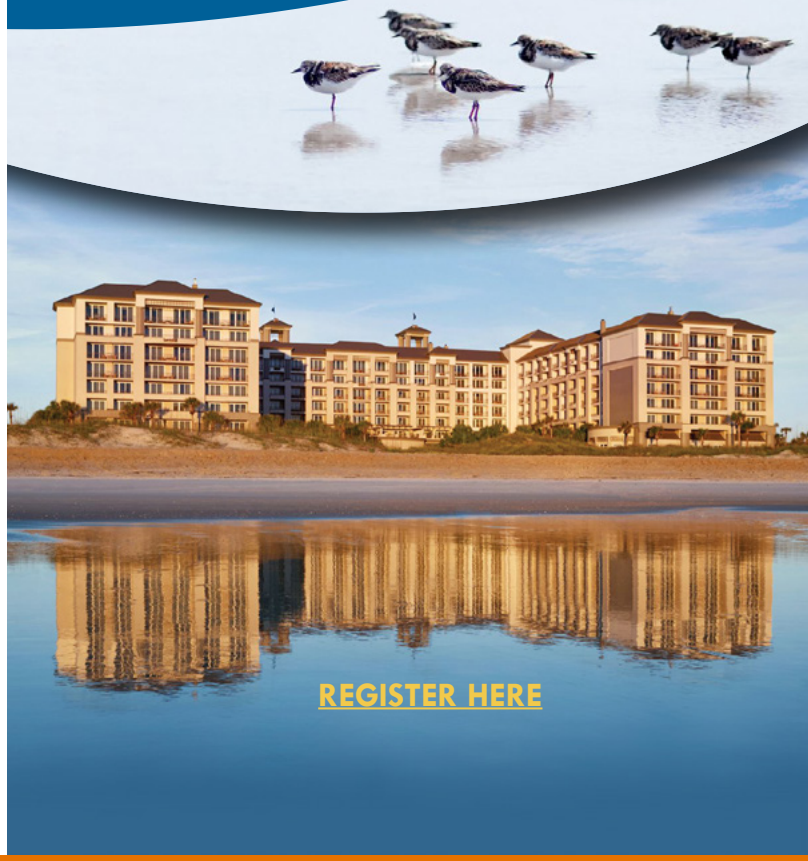

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