Labor Law Today

2019 | YEAR IN REVIEW

PERKINSCOIE

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INTRODUCTION

During 2019, the current National Labor Relations Board (the Board) majority started to hit its stride, overruling decisions handed down during the Obama Administration and returning to decades of precedent.

In addition to rolling back many of the 2014 election rule changes and reinforcing the rejection of micro-unit organizing, the Board issued decisions in cases reining in the previous Board's expansions on issues of the scope of protected concerted activity, property access, classification as employees, and more. Much of the Board's anticipated agenda, however, remains incomplete.

We submit this Year in Review to summarize the most noteworthy developments of 2019—as we head into a big election year, bringing political intrigue and mystery with it.

Throughout most of the year, the Board's three-member Republican majority became more active, returning to rules reversed by its predecessors.

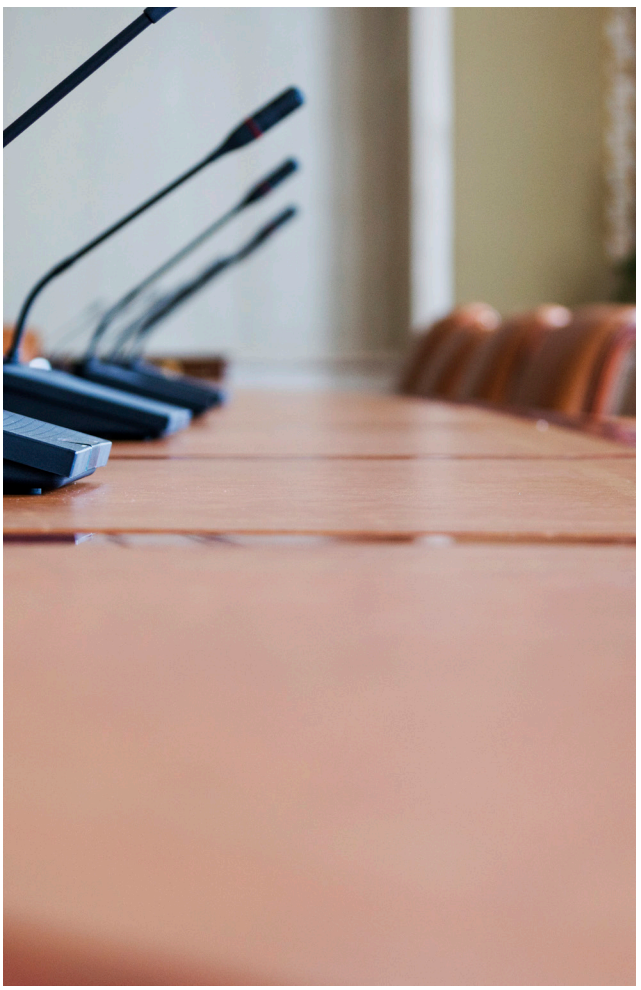
Changes in Board composition at year's end raise questions about its activity headed into a big election year.

For most of the year, four of the five seats on the National Labor Relations Board were occupied, providing a quorum—but like so much else in 2019, partisan politics loomed large over its agenda.

The five seats on the Board are traditionally filled by two Democrats, two Republicans, and a chairman of the current president's party. Throughout 2019, the Board had three Republicans, Chairman John Ring and Members William Emanuel and Marvin Kaplan, and a single Democrat, Member Lauren McFerran. In 2018, President Trump had renominated former Chairman Mark Gaston Pearce, a Democrat, to the fifth seat. In February 2019, however, Pearce withdrew his name from consideration when it became clear that Senate Republicans would not confirm him.

The absence of a second Democrat likely contributed to the slightly increased pace at which the current Board reversed significant Obama Board holdings in 2019. On December 16, 2019, Member McFerran's term expired. Therefore, there will very likely be a 3-0 Republican majority for the first eight months of 2020, at which time Member Kaplan's term expires.

The numbers matter to the extent that traditionally the Board has not reversed precedent in the absence of a three-vote majority; and, in *New Process Steel, LP v. NLRB*, 560 U.S. 674 (2010), the Supreme Court ruled that three members are required for a quorum allowing the Board to act at all. Both Chairman Ring and Member Emanuel previously worked at large employer-side law firms. There has been substantial pressure levied by Senate Democrats and presidential hopefuls for them to recuse themselves from cases, or even issues, involving a party their former respective firms represent, citing a conflict of interest. If either Emanuel or Ring has to recuse himself from a particular matter, the Board will be unable to act on it until a new member is nominated and confirmed by the Senate. ■



The Board revisits the 2014 expedited election rules and proposes other changes to its election procedures.

On December 13, 2019, the Board announced a number of changes to its representation election rules, many of which, to some degree or another, restored elements of the Board's procedures prior to the 2014 overhaul of these rules. The 2014 election rules had shortened the time between the filing of a petition and the conduct of an election from an average of 39 days to just 23 days, resulting in three to five percent increases in annual union success rates.

Among the changes announced by the Board:

- Pre-election hearings will be scheduled fourteen business days from the notice of the hearing/filing of the petition, as opposed to eight calendar days under the 2014 rules;
- The employer will be required to post the Notice of Petition within five business days after service, as opposed to two business days under the 2014 rules;
- Non-petitioning parties must file and serve the Statement of Position required by the 2014 rules within eight business days after service of the Notice of Petition, as opposed to the day before the hearing;
- The petitioner will now be required to file and serve a responsive Statement of Position three business days before the hearing;
- Disputes concerning unit scope and voter eligibility, including issues of supervisory status, will once again normally be litigated at the pre-election hearing;
- Post-hearing briefs may be filed again as a matter of right;
- The regional director will continue to schedule the election for the earliest date practicable, but not normally before twenty days after the decision and direction of election;
- Rather than waiting until after the election, a request for review may be filed within ten business days of a Decision and Direction of Election (DDE), and ballots will be *impounded* and remain unopened pending such review;
- The employer now has five business days to furnish the required voter list following the issuance of the DDE, as opposed to two business days under the 2014 rules;
- Election observers, whenever possible, should be current members of the voting unit; but, when no such individual is available, a party should select a current nonsupervisory employee;
- The regional director will no longer certify the results of an election if a request for review is pending or before the time has passed during which a request for review could be filed.

The final rule also makes a number of incidental changes in formatting requirements and terminology, and updates internal cross-references, consistent with earlier changes.

In August 2019, the Board commenced formal rulemaking to make three other significant changes to its election rules.

Prior to rolling back some of the 2014 rule changes, on August 12, 2019, the Board had issued a Notice of Proposed Rulemaking (NPRM) suggesting other modifications to its election rules.

Regarding the Board's "blocking charge" policy, the NPRM proposed discontinuing the current practice in favor of a "vote-and-impound" procedure. Elections would no longer be delayed indefinitely while the Board navigates its administrative investigation and litigation. Rather, the election would occur, but ballots would be impounded until the charges are resolved. In support of the proposed change, the Board stated that the vote-and-impound procedure would better protect employees' free choice than the current blocking charge policy by avoiding unnecessary and potentially lengthy delays. Member McFerran dissented, questioning why the Board should eliminate an "80-year old doctrine" and "require regional directors to run—and employees, unions, and employers to participate in—elections conducted under coercive conditions that interfere with employee free choice." Moreover, toward the end of the year, opponents of the change asserted that as much as one-third of the Board's statistical analysis of the actual delays caused by blocking charges was seriously flawed, and potentially fatal to this effort.

With respect to the Board's "voluntary recognition bar," the NPRM proposes returning to the rule of *Dana Corp.*, 351 NLRB 434 (2007), which held that employees who become represented by a union pursuant to a voluntary recognition agreement have a period of 45 days, after receiving notice, to reject union representation through a secret ballot election. *Dana Corp.* was overturned by Lamons Gasket, 357 NLRB 739 (2011), which required "a reasonable period" of time to pass before representation could be challenged. the Board defined "a reasonable period" of time as no less than six months, but no more than one year. In support of the Board's position that this proposed amendment would increase employee free choice, the Board stated that elections are a superior method for employees to express their will rather than voluntary recognition agreements, which are supported by authorization cards. Member McFerran dissented, stating that the proposed amendment would interfere with "the establishment of stable collective bargaining relationships by creating unnecessary procedural hurdles undermining a union that has already lawfully secured recognition."

Finally, the NPRM also suggested changes regarding the evidence required for construction industry parties to prove that Section 9(a) recognition has followed from a "pre-hire" agreement under Section 8(f). The NPRM proposes that proof of a Section 9(a) relationship would require positive evidence of majority employee support, like in all other industries, and could no longer be based on contract language alone. The change would overrule Staunton Fuel, 335 NLRB 717 (2001), in which the Board held that a construction industry union could establish Section 9(a) recognition by merely executing a collective bargaining agreement with the employer. Under *Staunton Fuel*, there was no need to provide evidence of majority support among employees beyond stating it in the language of the contract. Member McFerran dissented, stating that the amendment runs counter to well-established Board law and branding it a solution to a "non-existent problem."

In announcing these proposed amendments, Board Chairman Ring stated: "There are few more important responsibilities entrusted to the NLRB than protecting the freedom of employees to choose, or refrain from choosing, a labor organization to represent them, including by ensuring fair and timely Board-conducted secret ballot elections." He added that these proposed changes would "further the goal of protecting this vital freedom." Public comments on the NPRM were originally due by October 11, 2019; however, the time period was extended to December 10, 2019, and extended again through January 9, 2020. ■

The new joint-employer standard announced in the 2015 *Browning-Ferris* decision remains under challenge, and subject to erasure by rulemaking.

In 2015, the NLRB decided *Browning-Ferris Industries*, 362 NLRB No. 186 (2015), which held that joint-employer status can be found if an entity directly or indirectly controls, or reserves the authority to control, the essential terms and conditions of employment. Accordingly, joint-employer status under *Browning-Ferris* is based on the *right* to control, not on actual control. This new standard overturned decades of Board precedent—which required direct and immediate control. *Browning-Ferris* was expressly rejected and overruled in late 2017 by *Hy-Brand*, 365 NLRB No. 156 (2017), which declared it "a distortion of common law" and "contrary to the [National Labor Relations] Act." However, in early 2018, the Board vacated *Hy-Brand* and reinstated *Browning-Ferris* due to ethical concerns surrounding the decision. The Office of Inspector General (OIG) found that Member Emanuel's participation in the *Hy-Brand* decision was inappropriate inasmuch as his prior law firm had represented Browning-Ferris Industries in the earlier case.

The Board has since abandoned its efforts to restore the longstanding pre-*Browning-Ferris* standard via case decision and turned instead to rulemaking. On September 14, 2018, the NLRB published a Notice of Proposed Rulemaking (NPRM) regarding the current joint-employer standard. Under the proposed rule, an employer can be found to be a joint-employer only if it:

- Possesses and exercises substantial, direct and immediate control;
- The control is over the essential terms and conditions of employment; and
- The control is not merely "limited and routine."

Per the proposed rule, indirect influence and contractual reservations of authority would no longer be sufficient to establish a joint-employer relationship. At least 29,000 comments were submitted in response to the Notice.

On September 10, 2019, Representatives Bobby Scott (D-Va.) and Frederica Wilson (D-Fl.) sent a letter to the Board regarding this rulemaking process. They voiced concerns after reports surfaced suggesting the Board planned to contract with a private third party to review some of the numerous public comments on the proposed rule. The letter questioned whether inherently governmental functions of the Board were improperly being contracted out. On October 4, 2019, Board Chairman Ring responded, assuring Congress and the public that the contractor staff in no way participated in the "determination of agency policy," nor did they "determin[e] the content and application of regulations" or "participate in any analyses." Instead, the contractors merely helped with sorting and categorizing comments,

which is not an inherently governmental function that must be handled by Board staff.

In the midst of these issues regarding the NLRB's interpretation of the joint-employer standard, on April 1, 2019, the Department of Labor (DOL) issued its own notice of proposed rulemaking to define joint-employer status under the Fair Labor Standards Act (FLSA). Although the rules proposed by the NLRB and DOL are not interchangeable, they are largely consistent.

Both proposed rules:

> Examine the joint-employer relationship through the lens of "essential matters of employment," such as hiring, firing, directing, scheduling, rewarding and supervising;

> Determine joint-employer liability, at least in part, by assessing whether control of employees is "substantial and direct";

> Establish that merely reserving the right to exercise control over another entity's employees is not sufficient for liability; and

> Are less restrictive than the current joint-employer standard.

Just before Thanksgiving, the Trump Administration issued its updated Unified Agenda of Federal Regulatory and Deregulatory Actions, which included the latest government projections on these efforts. The Equal Employment Opportunity Commission indicated that it, too, intended to issue a Notice of Proposed Rulemaking on the issue soon, and the NLRB and DOL both indicated that they intended to issue their respective final rules before end of 2019. ■

In September, the Board threw out the micro-unit at Boeing South Carolina previously approved by the Regional Director and clarified a three-stage analysis for application of its traditional community-of-interest standards.

On September 9, 2019, the Board issued a decision styled *The Boeing Company*, 368 NLRB No. 67 (2019), finding that a micro-unit combining one classification of production-and-maintenance technicians and another classification of quality inspectors (totaling 178 employees) was inappropriate because the two classifications "do not share a community of interest with each other; and even if they did, they do not share a community of interest that is sufficiently distinct from the interests of the other production-and-maintenance employees excluded from the unit". The original decision cut out approximately 2,500 additional employees.

By Decision and Direction of Election dated May 21, 2018, the Regional Director had directed an election in a bargaining unit limited to two categories of workers—Flight Readiness Technicians (FRTs) and Flight Readiness Technician Inspectors (FRTIs)—primarily based at one stage of production at the employer's integrated aircraft manufacturing facility. After the petitioner prevailed in the election and the Regional Director issued a Certification of Representative, the employer filed a request for review asking the Board to find the petitioned-for unit inappropriate. On review, the Board agreed.

In concluding that the petitioned-for unit was inappropriate for collective bargaining, the Board clarified that its recent return to the traditional community-of-interest standard in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), imposed a three-step analysis for determining whether the petitioned-for unit is appropriate.

Under *PCC Structurals, Inc.*, the Board will:

1. Evaluate whether the members of the petitioned-for unit share a community of interest with each other;

2. Ascertain whether the employees excluded from the unit have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members; and

3. Consider guidelines the Board has established for appropriate unit configurations in specific industries.

The Board found that the petitioned-for unit failed at all three steps. The first step requires the members of the petitioned-for unit—FRTs and FRTIs—to share an internal community of interest and not be too disparate. Here, the Board found that the interests of the FRTs and FRTIs were too disparate because they belong to separate departments, do not share any supervision, have fundamentally different job functions, and share little interchange between their two classifications.

The second step requires a comparative analysis of excluded and included employees. The Board found, on balance, that the interests of excluded employees are not meaningfully distinct from and do not outweigh similarities with the interests of the petitioned-for employees. In prior decisions, the Board has observed that it is especially inappropriate to carve out a disproportionately small section of a large, functionally integrated manufacturing facility as a separate unit. With this consideration, the Board found it particularly compelling that the FRTs and FRTIs, which make up 178 employees of 2,700 total, have a high degree of functional integration with excluded employees on the employer's 787 airliner production line.

The third step considers, where applicable, guidelines that the Board has established for specific industries with regard to appropriate unit configurations; however, the Board found that there were no industry-specific guidelines applicable to this case.

Member McFerran, dissenting, disagreed with the majority's application of the purported additional steps—and reiterated her objection to the restoration of precedent via the *PCC Structurals* decision to begin with. Under the line of cases Member McFerran would continue to apply, she would have found the petitioned-for unit appropriate.

In November 2019, the International Association of Machinists and Aerospace Workers filed a lawsuit in the District Court for South Carolina against the NLRB, and each of its members, alleging that the Board exceeded its statutory authority in its issuance of the *Boeing* decision. ■

The current Board began to reverse Obama Board expansions of protected concerted activity, establishing a more narrow scope of protection.

The fact that a statement is made at a meeting, in a group setting or with other employees present will not automatically make the statement concerted activity.

In *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019), the Board overruled *WorldMark by Wyndham*, 356 NLRB 765 (2011), and reiterated the well-established rule that "individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor...."

In *Alstate*, an airport skycap was fired after briefly refusing to unload a French soccer team's van. When his supervisor alerted him and his co-workers to an airline customer's request to do so, the skycap complained:

"We did a similar job a year prior and we didn't receive a tip for it." When the van arrived, the skycap and his co-workers walked away. Other employees began to unload the van, and the skycaps joined them part of the way through to help complete the job. The skycaps were subsequently terminated for expressing indifference toward a customer.

The Board adopted the conclusion of the Administrative Law Judge (ALJ) that the respondent had not violated Section 8(a)(1) of the Act and dismissed the complaint. In so doing, the majority reiterated the standards set forth in the *Meyers Industries* cases, 268 NLRB 493 (1984) (*Meyers I*) and 281 NLRB 882 (1986) (*Meyers II*). The *Alstate* Board asserted an intent to "restore" this standard, which it viewed as having eroded:

> [A]n individual employee who raises a workplace concern with a supervisor or manager is engaged in concerted activity if there is evidence of "group activities"—e.g., prior or contemporaneous discussion of the concern between or among members of the workforce—warranting a finding that the employee was indeed bringing to management's attention a "truly group complaint," as opposed to a purely personal grievance.

In applying the *Meyers* standard to this case, the Board held that the skycap's grumbling was not concerted activity insofar as there was no evidence in the record that the tipping habits of airport patrons had been an issue of group concern or had been a topic of conversation among the employees; and, that there was no evidence that the comment was intended to initiate or induce group action. The Board concluded it was—as the skycap testified—"just a comment."

Forced to address a recent case which expanded the scope of protected activity, the Board expressly overruled *WorldMark by Wyndham*. In that case, the Board had ruled that an employee complaint about an announced dress code change, made to a supervisor during an impromptu group meeting of employees, constituted protected concerted activity. The *Alstate* Board distinguished the facts of its case, but also noted that *WorldMark by Wyndham* was incompatible with the *Meyers* standard, as not every complaint voiced in a group setting is a complaint relevant to a group.

Member McFerran issued a dissent, arguing that the skycap's conduct should have been protected. The dissent asserted that his comment would appear to any reasonable observer as intended to initiate a group objection regarding tips—compensation. Member McFerran would have applied *WorldMark by Wyndham*, in her view consistent with the *Meyers* cases, to find the skycap's activity concerted and thus protected.

"Activity which consists of mere talk must, in order to be protected, be talk looking toward group action .... [I]f it looks forward to no action at all, it is more than likely to be mere 'griping.'"

In *Quicken Loans*, 367 NLRB No. 112 (2019), the Board dismissed the complaint against an employer that terminated an employee who was party to a conversation in which a co-worker made profane complaints about a customer. The employee, a mortgage broker, was in a public restroom at his workplace. His co-worker, also a broker, was complaining that an old client had been routed to him for some issue and that the client should "quit wasting [his] f---ing time." The first broker expressed sympathy for his frustration. A supervisor in one of the bathroom stalls overheard the profanity-laced tirade and reported it to upper management, who in turn terminated the first broker.

The ALJ held that the broker was unlawfully terminated for participating in the conversation, which he deemed to be protected concerted activity.

The Board overturned the decision, declaring that the brief conversation focused only on a personal complaint about the customer call.

The Board noted:

> There is no record evidence that employees as a group had any preexisting concerns about the routing of customer calls. Further, [the broker's] credited testimony about his conversation with [the co-worker] does not support a finding that either employee was seeking to initiate or induce group action about this issue.

Moreover, the Board saw no evidence that the conversation had any goal to improve working conditions shared by the co-workers. Thus, the Board dismissed the complaint. Member McFerran joined in the unanimous decision, concluding that the bathroom conversation was not concerted activity—notwithstanding her dissenting views in *Alstate*.

The Board is reconsidering the standards for determining whether profanity, or racist or sexist comments, made in the course of otherwise protected activity, lose the protection of the Act.

On September 18, 2018, an ALJ issued a decision in *General Motors LLC*, 14-CA-197985 and 14-CA-208242, finding that the employer violated the Act by suspending an employee who directed a profane outburst at his supervisor during a meeting regarding union activity. Under the four-factor test set forth in *Atlantic Steel*, 245 NLRB 814 (1979), the ALJ found the outburst was not egregious enough to lose the protection of the Act. The judge, however, then found that two other outbursts by the employee lost the protection of the Act: one, when he directed racially charged language at his supervisor; and another when he loudly played profane, racially charged music lyrics as the supervisor entered or left the room.

On September 5, 2019, the Board invited parties to submit briefs to allow reconsideration of the holdings in *Plaza Auto Center*, 360 NLRB 972 (2014), *Pier Sixty*, LLC, 362 NLRB 505 (2015), and *Cooper Tire*, 363 NLRB No.

194 (2016). All of these cases, to one extent or another, preserved the protection of extremely profane or racially offensive language by employees. Briefs were due November 19, 2019.

Facebook comments and "likes" by and among employees is sufficiently concerted activity.

In *Roseburg Forest Products Co.*, 368 NLRB No. 124 (2019), the Board unanimously upheld an ALJ's finding that an employer violated Section 8(a)(1) of the Act by suspending and discharging an employee for engaging in protected concerted complaints about safety and working conditions prior to and during a meeting with management. Two Board members also found that the discipline violated Section 8(a)(3) because the employer acted in response to his communication with fellow employees on a union-moderated Facebook page.

During a spate of nearby forest fires, the employer's management made a decision to close off doors and windows to its manufacturing plant, causing temperatures inside the plant to be uncomfortable. An employee who had complained about the situation to his supervisors also posted the following on the union's Facebook page:

> Apparently closing all of the doors and windows will help keep the smoke out of the plant. Even though the plant isn't sealed and there isn't a filtration system. This is the level of stupidity that our management team has elevated to [sic]

Eighteen co-workers reacted to the post by either "liking" the post or posting emoji stickers on it. A group member responded, "Yeah, close all the windows and doors, but forget about all the holes and cracks in the walls," to which the original employee replied: "My point exactly." Another co-worker responded, "That was done sunday and it lasted til 11. Smoke found its way in the air and wasn't moving so around noon 30 they called it. What's it look like outside over there? It was a blanket that day." [sic] Finally, a couple of other employees posted about the conditions of the plant and management's decision to close the plant for part of the previous weekend.

Applying the *Meyers* standards, the Board held that the discharged employee:

> Clearly engaged in protected activity by complaining about the smoke in the Riddle Plant and management's response to it. He complained orally to employees and supervisors, and on the Union's Facebook page, about the smoky conditions, exacerbated by the hot environment closing the doors and windows created. Undeniably, his concerns were shared by other employee union members, as the Facebook string, including employees' reactions to [his] posts, shows.

Moreover, the Board noted that a related individual's complaint to his supervisor and his affirmation of his Facebook post during a meeting with management were "logical outgrowth[s] of the concerns of the group" and therefore were also protected, concerted activity. ■

The Board has restored earlier precedent protecting employer property rights, rolling back the previous Board's expansion of union rights to property access.

"To state the obvious, employees of an onsite contractor are not employees of the property owner."

In *Bexar County Performing Arts Center*, 368 NLRB No. 46 (2019), the Board majority reversed an ALJ's conclusion that the respondent violated Section 8(a)(1) of the Act by barring off-duty employees of an onsite contractor from leafleting on its property. In so doing, the Board overruled *New York New York Hotel & Casino*, 356 NLRB 907 (2011), and held clearly that contractor employees are not generally entitled to the same access rights under Section 7 as the property owner's own employees.

The Board held:

> A property owner may exclude from its property off-duty contractor employees seeking access to the property to engage in Section 7 activity unless (i) those employees work both regularly and exclusively on the property, and (ii) the property owner fails to show that they have one or more reasonable nontrespassory alternative means to communicate their message.

Relying on the principles articulated in the Supreme Court's opinion in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the Board explained that "nontrespassory alternative means to communicate" could include the use of adjacent public property, newspapers, radio, television, billboards, and social media. Dissenting, Member McFerran would have applied *New York New York Hotel & Casino* to find that the respondent violated Section 8(a)(1) by barring access to employees whose leafleting occurred in a public area and caused no interference with patrons.

Property owners may prohibit nonemployee union activity while allowing a range of nonemployee charitable, civic, and commercial activities.

In *Kroger Mid-Atlantic*, 368 NLRB No. 64 (2019), the Board restored the standard set forth in *Jean Country*, 291 NLRB 11 (1988), preserving the rights of property owners to allow access to a broader range of organizations while prohibiting union activities by nonemployees. The decision overruled *Sandusky Mall Co.*, 329 NLRB 618 (1999), *enf. denied in relevant part* 242 F.3d 682 (6th Cir. 2001), and similar cases based on its view that these cases improperly stretched the *NLRB v. Babcock & Wilcox, Inc.*, 351 U.S. 105 (1956), discrimination exception.

The Board explained the applicable standard thusly:

> To establish that a denial of access to nonemployee union agents violated the Act under the Babcock discrimination exception, the General Counsel must prove that an employer denied access to nonemployee union agents while allowing access to other nonemployees for activities similar in nature to those in which the union agents sought to engage. Consistent with this standard, an employer may deny access to nonemployees seeking to engage in protest activities on its property while allowing nonemployee access for a wide range of charitable, civic, and commercial activities that are not similar in nature to protest activities.

Dissenting, Member McFerran argued that the judge properly found a violation based on long-standing precedent. She asserted that the majority incorrectly reached out to decide an issue that was not required to resolve the case, ignoring the ALJ's motive-based determination that easily supported a violation.

An employer may post its property against nonemployee distribution of union literature as long as it does not discriminate.

In *UPMC Presbyterian Hospital*, 368 NLRB No. 2 (2019), in a split decision, the Board held that the employer was entitled to remove nonemployee organizers from a cafeteria open to the public. In so doing, the Board majority overruled *Ameron Automotive Centers*, 265 NLRB 511 (1982), and *Montgomery Ward & Co.*, Inc., 256 NLRB 800 (1981), *enfd.* 692 F.2d 1115 (7th Cir. 1982). The Board held that an employer does not have a duty to allow the use of its facility by nonemployees for promotional or organizational activity:

> The fact that a cafeteria located on the employer's private property is open to the public does not mean that an employer must allow any nonemployee access for any purpose. Absent discrimination between nonemployee union representatives and other nonemployees—i.e., "disparate treatment where by rule or practice a property owner" bars access by nonemployee union representatives seeking to engage in certain activity while "permit[ting] similar activity in similar relevant circumstances" by other nonemployees—the employer may decide what types of activities, if any, it will allow by nonemployees on its property.

Applying this standard, the Board majority found that the employer did not discriminate by removing nonemployee union organizers from the cafeteria. The Board noted that the organizers were engaged in blatant promotional activity, and there was evidence which showed the employer had previously prohibited nonemployee third-party organizations from soliciting and distributing in its cafeteria.

Dissenting, Member McFerran argued that the Board threw long-standing, judicially approved precedent against discrimination into doubt by permitting the employer to expel union representatives from a hospital cafeteria that is open to the public based entirely on their union affiliation.

The Board explained that a discriminiation or retaliation violation requires a particularized nexus between the employer's union animus and the adverse employment action at issue.

In *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019), the Board addressed the long-standing *Wright Line* standard for analyzing alleged discrimination charges to clarify that the General Counsel no longer satisfies its initial burden of proof with evidence of *any* animus toward the union or other protected activity. Rather, the standard requires establishment of a specific connection or nexus between the employer's anti-union animus and the discharge—"evidence of the [employer's] general hostility toward the Union is not sufficient, on its own, to prove discriminatory motivation."

Section 8(a)(3) of the Act prohibits an employer from discriminating against employees to encourage or discourage membership in any labor organization. The Board has previously found that an employer's motives are often a mix of legitimate and discriminatory reasons, and it long ago established a procedure in *Wright Line* to deal with such mixed-motive cases. *See Wright Line*, 251 NLRB 1083 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981). The oft-used *Wright Line* standard is a burden-shifting framework that imposes a specific initial burden comprising three elements on the General Counsel to determine whether an employer has unlawfully retaliated against an employee for union activity.

In the *Tschiggfrie* case, the General Counsel issued a complaint based on a charge filed by the union alleging the employer violated Sections 8(a)(1) and (3) when it discharged an employee, among other things. In applying *Wright Line*, the ALJ described the General Counsel's burden to put on *prima facie* evidence of: (1) the employee's union or other protected activity; (2) the employer's knowledge of that activity; and (3) the employer's anti-union animus or animus against protected activity. The ALJ did not require the General Counsel to prove a connection between anti-union animus and the specific adverse employment activity to meet the initial burden under *Wright Line*.

The Board unanimously adopted the ALJ's finding that the employer unlawfully discharged the employee, but the panel members differed on the appropriate characterization of the General Counsel's *Wright Line* burden with the majority agreeing with the ALJ's statements. The employer petitioned the United States Court of Appeals for the Eighth Circuit to review the Board's order. The Eighth Circuit declined to enforce the Board's order, finding that the Board did not hold the General Counsel to the proper burden under *Wright Line* where motive is at issue. The Eighth Circuit held the Board misapplied *Wright Line* by failing to require a nexus between the employer's anti-union animus and its decision to discharge, and it remanded the matter to the Board for a decision consistent with its findings.

The Board thus took the opportunity in its November 2019 decision to clarify the General Counsel's burden under *Wright Line* and explained it is inherently a causation test that requires more:

> To meet the General Counsel's initial burden, the evidence of animus must support finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee.

The evidence may be direct or circumstantial, but it must rise to the level of a "motivating factor[,]" meaning the General Counsel has "a burden to persuade 'that antiunion sentiment *contributed* to the employer's decision.'" The Board illustrated, for example, that an isolated one-on-one threat directed at someone other than the discriminatee and involving someone else's protected activity may not be sufficient to satisfy the test. The Board went on to explain that "[t]he General Counsel does not *invariably* sustain his burden of proof under *Wright Line* whenever, in addition to protected activity and knowledge thereof, the record contains any evidence of the employer's animus or hostility toward union or other protected activity." And, the Board overruled any prior case to the extent it suggested the General Counsel automatically satisfied its burden by producing any evidence of employer animus or hostility to union or protected activity. ■

The Board abandoned the "clear and unmistakable waiver" standard by which it considered whether unilateral action was permitted during a collective-bargaining agreement.

In *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), the Board determined that the "contract coverage" standard, and not the "clear and unmistakable waiver" standard, should be used when determining whether a unilateral action taken by an employer is permitted by a collective-bargaining agreement.

The Board considered whether a respondent violated Section 8(a)(1) and (5) of the Act by implementing five work policies without first bargaining with the union. The employer argued that this unilateral implementation was permitted by the parties' previously negotiated collective-bargaining agreement.

When determining whether a unilateral implementation is permitted by a collective-bargaining agreement, the Board has traditionally applied the "clear and unmistakable waiver" standard. Under this standard, unilateral actions made by employers violate the Act unless a contractual provision contained in the collective-bargaining agreement unequivocally and specifically permits the type of action at issue. *MV Transportation* overruled this standard and replaced it with the "contract coverage" standard.

The newly adopted "contract coverage" standard provides that the Board will examine the plain language of the collective-bargaining agreement, applying the ordinary principles of contract law, to determine whether the company's unilateral action is within the scope of the contractual language granting the employer the right to act unilaterally.

The majority reasoned that this "contract coverage" standard is more consistent with the purposes of the Act because it: (1) encourages parties to foresee and resolve potential labor-management issues through comprehensive collective bargaining; (2) will end the Board's practice of selectively applying exacting scrutiny to contract provisions that give employers the right to act unilaterally; (3) will end the Board's practice of sitting in judgment on the substantive terms of a collective-bargaining agreement, contrary to Supreme Court precedent; (4) ensures that the Board's interpretation of contractual language remains within its limited authority; and (5) discourages forum shopping by channeling unilateral-change disputes into grievance arbitrations, as Congress intended. ■

Late in the year, the Board overruled *Purple Communications*, returning to employers the right to control e-mail systems.

With its decision in *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), the Obama Board effectively created a Section 7 right for employees to use their employer's e-mail system for union activities. The Board majority characterized the *Purple Communications* decision as "carefully limited" in that the right was only for employees who already had access to their employer's e-mail system and the protection only applied during "nonworking time." But in reality, it invited potential for far-reaching practical and precedential impact on evolving and future technologies.

Purple Communications overruled the Board's decision in *Register Guard*, 351 NLRB 1110 (2007). *Register Guard* permitted employers to impose neutral restrictions on employees' non-work-related use of their e-mail systems, even if those restrictions limited the use of those systems for communications regarding union activities or other protected concerted activity. As a result of the abrupt change of course in *Purple Communications*, many employers may have revised policies on non-business use of corporate e-mail and have begun to question whether a wider range of other rules governing use of company equipment and/or property may be at risk in future decisions.

Following consideration of extensive briefing by amici, on December 16, 2019, the Board overruled *Purple Communications* in *Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (2019).

The Board relied heavily on previously long-standing precedent, including Supreme Court cases, to reaffirm the *Register Guard* standard:

> [W]e have determined that *Purple Communications* must be overruled. We hold instead that an employer does not violate the Act by restricting the nonbusiness use of its IT resources absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other, or proof of discrimination.

Under that standard, employees have no statutory right to use employer equipment, including IT resources, for Section 7 purposes.

Consistent, however, with the principles of the *Republic Aviation v. NLRB*, 324 U.S. 793 (1945) Supreme Court case, the Board recognized that there may be instances in which an employer's e-mail system is the only reasonable means for employees to communicate with one another. The Board ruled that such exceptions will be considered on a case-by-case basis.

Once again, Member McFerran dissented, arguing that overruling *Purple Communications* would "turn back the clock on the ability of employees to communicate with each other at work." ■

The Board settled that mandatory arbitration agreements in and of themselves do not violate the Act—but improperly restrictive language in such agreements can.

In 2019, the Board, through a series of cases, generally held that mandatory arbitration agreements, on their own, do not violate the Act. Still, employers should avoid mandatory arbitration agreements containing improperly restrictive language as that language could create a violation.

In *Cordua Restaurants, Inc.*, 368 NLRB No. 43 (2019), the Board considered issues of first impression following the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), which held that class-action waivers do not violate Section 8(a)(1) of the Act. Specifically, the Board examined: (1) whether the Act prohibits employers from promulgating mandatory arbitration agreements in response to employees opting in to collective action; and (2) whether the Act prohibits employers from threatening to discharge employees who refuse to sign a mandatory arbitration agreement. The Board majority found that the Act contains no such proscriptions. However, Member McFerran dissented and would have affirmed the ALJ's conclusions that the respondent violated Section 8(a)(1) by promulgating a revised arbitration agreement in response to employees' protected concerted activity and by threatening employees with reprisals for raising concerns regarding the agreement.

In *Briad Wenco, LLC d/b/a Wendy's*, 368 NLRB No. 72 (2019), the Board applied the analytical framework set forth in *The Boeing Company*, 365 NLRB No. 154 (2017),and found that the respondent's mandatory arbitration agreements did not violate Section 8(a)(1) because, when reasonably interpreted, the arbitration agreements did not potentially interfere with employees' right to access the Board and its processes.

The agreements at issue provided that "[a]ny claim, controversy or dispute" shall be resolved through binding arbitration, but contained effective "savings clause" language, which precluded interference with employee rights. This savings clause language provided that nothing in the agreements was to be construed to prohibit the filing of any charge or participating in any proceeding conducted by an administrative agency, including the Board. This unconditional and sufficiently prominent savings clause language made it so that the agreements could not be reasonably interpreted to interfere with employee rights.

In *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019), the Board examined an arbitration agreement and found it had violated the Act. In examining the case on remand from the D.C. Circuit Court, the Board found that the respondent's arbitration agreement violated Section 8(a)(1) because it entirely restricted access to the Board and its process. The Board held that, "as a matter of law, there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employees' access to the Board or its processes." ■

The Board restricted the recent expansion of the definition of "employees" subject to the Act.

Decades-old common-law agency test restored to determine whether workers are employees or independent contractors.

In *SuperShuttle DFW*, 367 NLRB No. 75 (2019), the Board affirmed the Acting Regional Director's dismissal of a representation petition, finding that the respondent's franchisees were excluded from the Act's coverage as independent contractors. The decision overruled *FedEx Home Delivery*, 361 NLRB 610 (2014), adopting Member Johnson's dissent in that case to criticize the decision to the extent it:

> Fundamentally shifted the independent contractor analysis, for implicit policy-based reasons, to one of economic realities, i.e., a test that greatly diminishes the significance of entrepreneurial opportunity and selectively overemphasizes the significance of 'right to control' factors relevant to perceived economic dependency.

The Board further noted that Congress explicitly rejected an "economic dependency" standard in 1947.

In *SuperShuttle DFW*, the Board observed that the franchisee drivers' ownership of their vehicles, the method of their compensation, and their significant control over their daily work schedules and working conditions provided them with significant entrepreneurial opportunity. The Board decided those factors, along with the absence of supervision and the parties' understanding that the franchisees are independent contractors, outweighed the factors supporting employee status.

Misclassification alone does not constitute a violation of the Act.

In *Velox Express, Inc.*, 368 NLRB No. 61 (2019), the Board applied *SuperShuttle DFW* to affirm an ALJ decision that the workers at issue were, in fact, employees and not independent contractors. But the Board dismissed an allegation that the respondent independently violated Section 8(a)(1) by, in itself, misclassifying its drivers as independent contractors. The Board held clearly that misclassification, standing alone, does not violate the Act:

> An employer's mere communication to its workers that they are classified as independent contractors does not expressly invoke the Act. It does not prohibit the workers from engaging in Section 7 activity. It does not threaten them with adverse consequences for doing so, or promise them benefits if they refrain from doing so. Employees may well disagree with their employer, take the position that they are employees, and engage in union or other protected concerted activities. If the employer responds with threats, promises, interrogations, and so forth, then it will have violated Section 8(a)(1), but not before.

The Board also noted that the "free speech" provisions of Section 8(c) of the Act privilege employer's announcement of that classification to the workers, even if it is legally incorrect.

High-profile California state law codifies narrower test at odds with common-law standard.

In October 2019, California Governor Gavin Newsom signed AB5 into law, codifying the California Supreme Court's 2018 decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal.5th 903 (2018).

AB5 and *Dynamex* adopt the "ABC test," which considers all workers to be employees unless the hiring business demonstrates that all three of the following factors are established:

> That the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact.

> That the worker performs work that is outside the usual course of the hiring entity's business.

> That the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

The law is expected to overhaul business models in numerous industries heavily dependent on freelancers and contingent workers—and particularly the "gig" and new tech economies—in the state. In the closing hours of 2019, business groups filed suit to enjoin the law from becoming effective. ■

The Board's Division of Advice has begun providing additional practical guidance in the application of the new standard in handbook and work rules cases.

Under the test announced by the Board in *The Boeing Company*, 365 NLRB No. 154 (2017), the Board will find a rule unlawful if it explicitly restricts employees' protected concerted activity. If the rule is not expressly unlawful, however, the Board balances two things: (1) the rule's potential impact on protected concerted activity; and (2) the employer's legitimate business justifications for maintaining the rule. If the justifications for the rule outweigh the potential impact on employees' rights, the rule will be held lawful.

On March 14, 2019, the Division of Advice (Division) made public Advice Memoranda applying the *Boeing* test in connection with a few earlier matters.

In *ADT, LLC*, Case No. 21-CA-209339, the Division considered allegations that numerous employer handbook policies violated Section 8(a)(1), and concluded that: (a) a dress-code rule was lawful; (b) personal-cell-phone rule was unlawful; (c) confidential-information rule was lawful; and (d) media-relations rule was lawful.

A dress code prohibiting "inappropriate commercial advertising or insignia" was held lawful. The Division noted that this phrase was used in just one of twenty-two bullets explaining the policy, all of which were within the express context of "maintaining a professional, business-like appearance."

A rule prohibiting use of personal cell phones "during working hours" was held unlawful as an overly broad restriction.

Employees generally have a right to communicate with each other during meals and breaks and other non-working time during their shifts.

The Division dismissed allegations regarding a "confidential information" policy that directed employees to "exercise a high degree of caution" in handling such information. The definition of confidential information included "employee information, including name, address…and similarly personally identifiable information," along with numerous additional sensitive financial, proprietary and health-related topics. The Division concluded that the rule's limitation to employees who had work-related access provided context that would prevent employees from reasonably interpreting the rule restricted Section 7 activity.

Finally, a media relations rule was held lawful because of extensive context provided to define and clarify the employer's legitimate interests at issue—i.e., limiting who may speak on the employer's behalf.

In connection with *Nuance Transcription*, Case No. 28-CA-216065, the Division recommended issuance of complaint on a number of handbook policies. The Division noted that the handbook's policy restricting use of e-mail systems to business purposes only was unlawful under then-current Board law. Rules prohibiting release of information about the handbook's content and payroll information were also determined to be unlawful. ■

The Board has sought to effect change via methods more lasting than adjudication of cases—by formal rulemaking and administration of operational changes.

Rulemaking to exclude students from the definition of "employees".

On September 23, 2019, the Board published a Notice of Proposed Rulemaking (NPRM) in furtherance of a rule that would exempt undergraduate and graduate students who perform compensated services in connection with their studies from the definition of "employee" in Section 2(3) of the Act. This is an issue on which the Board has swung back and forth via case decisions issued during each successive presidential administration.

In *Brown University*, 342 NLRB 483 (2004), the Board returned to long-standing precedent holding that graduate teaching assistants and proctors were not employees, reasoning that they were primarily students performing their jobs as part of their degree and primarily for their educational benefit. In *Columbia University*, 364 NLRB No. 90 (2016), the Board once again reversed course and ruled that student teaching assistants *could* be classified as employees under the Act. The *Columbia* decision created a bright-line rule that "the payment of compensation, in conjunction with the employer's control, suffices to establish an employment relationship for purposes of the act," regardless of whether another relationship exists between the student and the school. The constant shifting back and forth has created significant instability within labor and education policy alike.

The NPRM states simply:

> Under the proposed rule, students who perform services at a private college or university related to their studies will be held to be primarily students with a primarily educational, not economic, relationship with their university, and therefore not statutory employees. *Brown University,* 342 NLRB at 487

Comments and replies were due at the very end of the year.

Mandatory e-filing: General Counsel Memorandum GC 20-01 announces new policy.

On October 22, 2019, the General Counsel issued a GC Memorandum announcing a new policy that all affidavits, correspondence, position statements, documentary or other evidence in connection with unfair labor practice or representation cases processed in Regional offices must be submitted through the Agency's electronic filing (e-filing) system. The requirement does not apply to the filing of unfair labor practice charges or petitions in representation proceedings, although parties are "encouraged" to use the system for them as well.

The General Counsel explained that the procedural changes were consistent with the filing requirements of most federal courts; provided a streamlined procedure by which documents are received and stored; and would reduce agency time and effort in scanning and filing. Ultimately, the General Counsel asserted the time saved by the automated filing process would "allow Agency employees to devote more time to substantive case-handling matters, in furtherance of the General Counsel's initiative to reduce case processing time."

The requirements were effective immediately, but the Memorandum also announced a 90-day grace period, stretching through early 2020. ■

Congressional Democrats introduced a sweeping, comprehensive bill to overhaul federal labor law.

In May 2019, Democratic legislators introduced the Protecting the Right to Organize (PRO) Act (H.R. 2474, S. 1306), with 100 co-sponsors in the House and 40 in the Senate. The bill contains many provisions similar to the Employee Free Choice Act (EFCA), which failed to pass several times a decade ago, and many additional pro-labor provisions. The bill may fairly be characterized as organized labor's wish list. More realistically, it is potentially intended to set the extreme boundary of a debate over labor law reform, but it is more likely intended as a "key vote" for legislators and presidential hopefuls entering the 2020 election season.

The bill would:

- Authorize civil monetary penalties against employers for unfair labor practices (ULP);
- Impose liability on corporate directors and officers who participate in violations of workers' rights or have knowledge of and fail to prevent such violations;
- Require pursuit of preliminary injunctions in wide a range of ULP cases;
- Give the Board the power to enforce its own rulings like other federal agencies, instead of waiting for a decision from the Court of Appeals;
- Authorize a private right of action for violations of workers' rights;
- Prohibit employers from requiring workers to attend workplace meetings where union representation is to be discussed;
- Remove the legal prohibition on secondary boycotts;
- Require mandatory interest arbitration to settle first contracts after 150 days of negotiations;
- Prohibit companies from using permanent replacement workers to operate during economic strikes;
- Overrule *Briad, Cordua, Epic Systems*, forbidding employers from requiring employees to sign mandatory arbitration agreements;
- Outlaw state "Right to Work" statutes;
- Protect "intermittent" strikes;
- Overrule *Velox*, making misclassification in itself a ULP violation;
- Prevent workers from being denied remedies due to their immigration status;
- Codify the *Browning-Ferris* joint-employer standard.
- Restore the invalidated Obama-era Persuader Rule; and
- Require all employers to post notices informing workers of their rights under the National Labor Relations Act.

The bill passed a House committee vote along party lines on September 25, 2019, and no further action has been taken in either chamber since then. ■

Seventh Circuit Court of Appeals upheld a local ordinance permitting town to deflate Union's large inflatable rat.

In *Construction & General Laborers Union No. 330 v. Town of Grand Chute*, Case No. 18-1739 (2019), the Court of Appeals for the Seventh Circuit allowed a Wisconsin town's enforcement of its zoning codes against a union's protest. The Laborers set up an informational picket in front of a local business that was not paying area standard wages and benefits. The union's efforts included the posting of a twelve-foot-tall inflatable rat, known as Scabby.

A code enforcement officer directed the union to deflate the rat, as it violated the town's sign ordinance. The union challenged the action in court, alleging that application of the ordinance violated the union's First Amendment rights. The Court of Appeals agreed with the trial court on remand that the ordinance "was content neutral" and that it wasn't enforced in a discriminatory way:

> The Union gives us no reason to doubt the district court's findings of fact, which we can disturb only if we find them to be clearly erroneous.... Indeed, no evidence indicated that [the officer] was anything but systematic in his enforcement of the 2014 Ordinance.

Pre-election raffles with cash prizes remain disfavored.

In *Valmet, Inc.*, 367 NLRB No. 84 (2019), the Board set aside an employer election win because raffling off a cash prize was found to be objectionable conduct. In advance of an election, the employer drafted a multiple-choice quiz regarding the union. First prize in the contest was $900—styled as "one year's worth of union dues"—and second prize was $450.

The Board held unanimously that the raffle was an objectionable promise of benefit under the applicable standard:

> To determine whether a raffle involves a promise or grant of benefit that would improperly affect employees' free choice, the Board applies an objective standard under which it examines several factors, including "(1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit."

Because the promised benefits were substantial, there was no history of previously running such contests, and the contest was held barely outside the 24-hour period prior to the election, the Board found it objectionable.

Unions cannot charge objecting nonmembers dues for lobbying costs.

In *United Nurses & Allied Professionals (Kent Hospital)*, 367 NLRB No. 94 (2019), the Board held that the union violated Section 8(b)(1)(A) by charging nonmember objectors for any lobbying expenses. The Supreme Court decision *Communication Workers v. Beck*, 487 U.S. 735 (1988), held that a union may compel nonmembers to contribute certain fees associated with "performing the duties of an exclusive representative." So-called "*Beck*" objectors can comply with a union security clause by paying at least that much in lieu of membership.

The Board held:

> The challenged lobbying expenses for the seven bills here cannot be charged to the nonmembers because, though they may in general relate to terms of employment or may incidentally affect collective bargaining, the lobbying activity is not part of the

union's statutory collective-bargaining obligation and, therefore, is nonchargeable.

Member McFerran agreed with other aspects of the decision, but she dissented from this element of the holding. She would have found some lobbying expenses chargeable on an expenditure-by-expenditure basis when germane to the typical core "representative" activities—collective bargaining, contract administration, or grievance adjustment.

Dues-checkoff provisions may be discontinued upon expiration of a contract.

In *Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139 (2019), the Board held that an employer's statutory obligation to deduct and remit union dues ends upon expiration of the collective-bargaining agreement containing a checkoff provision. The decision overrules *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015), and returns precedent to the standard under *Bethlehem Steel*, 136 NLRB 1500 (1962):

> In sum, we find that a dues-checkoff provision properly belongs to the limited category of mandatory bargaining subjects that are exclusively created by the contract and are enforceable through Section 8(a)(5) of the Act only for the duration of the contractual obligation created by the parties.

Member McFerran dissented, criticizing this as one of a number of recent Board decisions permitting employers to make unilateral changes in terms and conditions of employment.

Proponents of labor argue that this case, along with *Kent Hospital* (above) and the earlier decision of the Supreme Court in *Janus v. AFSCME*, 201 L. Ed. 2d 924 (2018), impairs the ability of labor unions to fund their activities on behalf of employees.

At least certain neutrality agreements may violate the Act.

The National Right to Work Legal Defense Foundation filed charges against a Seattle hotel and union alleging that a "neutrality agreement" between the parties violated the Act. In *Embassy Suites by Hilton*, Case No. 19-CA-227623, and *Unite Here! Local 8 (Embassy Suites)*, Case No. 19-CB-227622, the Region initially dismissed the charge allegations concerning the neutrality agreement, citing that there was "no evidence that the agreement entered into by the Employer and the Union violates current Board law."

The Foundation appealed, and by letter dated November 20, 2019, General Counsel Peter Robb sustained the appeal in part, writing:

> We concluded that the Employer arguably violated Sections 8(a)(1) and (2) of the Act by entering into and maintaining a neutrality agreement with the Union that provides for more than "ministerial aid" to the Union during its organizing campaign.

Accordingly, the matters were remanded to the Region for further action consistent with the findings. ■

How will the Board's composition impact its agenda?

As noted above, there are just three members remaining on the Board—all Republicans inclined to continue to roll back some of the expansions of the previous Democrat-controlled Board. Should any one of them have to recuse from a particular case, the Board would not have the three votes traditionally required to overrule precedent. Moreover, if not due to recusals, the Board will certainly lack a quorum to act when Member Kaplan's term expires in August 2020. Might the White House propose a package at that point, offering to nominate one Republican and one Democrat? Will the President seek to fill only the Republican seat? Or might the G.O.P. be comfortable heading into the 2020 elections with a dormant Board?

What impact will the 2020 elections have?

The 2020 election cycle will be one of the most intense and hotly contested political events in our recent history. President Donald Trump (R) built part of his shocking 2016 victory on the support of white working-class voters—including union members throughout the Midwest. While institutional union leadership has been no fan of his agenda, it is uncertain the extent to which his support may or may not have eroded amongst the rank and file.

The field of Democratic candidates in 2020 remains large, and while most of the candidates are viewed as friends of Labor, there certainly seem to be some who are viewed as more strident union allies than others. Expect these candidates to drive the public discussion of labor issues as they jockey for the party nomination.

And as always, the prospect of divided government will have an impact on legislation and oversight alike.

How and when will the Board act on its Joint-Employment rulemaking?

Just weeks before the end of the year, the Board directed an ALJ to approve the pending settlements resolving several complaints issued on dozens of charges against McDonald's and various franchisees located in New York, Philadelphia, Chicago, Indianapolis, Sacramento, and Los Angeles. Central to these cases was the allegation that the corporation and the individual franchises were joint employers of the franchises' employees. But, the broader rulemaking regarding the joint-employment standard under the Act remained pending. The Board announced an intention to finalize the rule by the end of the year, but it had not yet acted as of our publication date. If the Board acts, as expected, to restore the common law standards pre-dating *Browning-Ferris*, we might anticipate legal challenges through the courts, if for no other reason than to attempt to delay implementation beyond the November 2020 elections.

Will the Board issue additional revisions to its representation election rules?

The amended rules announced in the closing weeks of 2019 should become effective during April of 2020. It will be interesting to watch whether we see an uptick in organizing activity through the Board in the weeks leading up to the changes, with unions seeking to squeeze advantage out of the waning 2014 rules.

Beyond these rules, however, the Board's rulemaking remains pending on the three other proposed changes. Revision of the Board's "blocking charge" rule would likely be the most impactful change, as it would prevent parties from filing frivolous charges just to delay elections. ■

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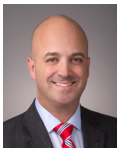

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