Ogletree Deakins

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The Practical NLRB Advisor

The looming dangers of a limitless agenda

In this Issue

The Ogletree Deakins Practical NLRB Advisor *typically aims to provide a snapshot of the current state of U.S. labor law along with practical insights for employers regarding compliance with the National Labor Relations Act (NLRA). In this issue, however, the* Advisor *is taking a small departure from that norm for its lead article. Instead, this issue aims to engage the National Labor Relations Board (NLRB) on some of the latest issues on the labor landscape.*

As has been documented thoroughly in the most recent Advisor *issues, as well as in a myriad of other legal publications, President Joe Biden's pick to serve as NLRB general counsel (GC), Jennifer Abruzzo, has outlined and repeatedly documented her intention to pursue the most radical, pro-union agenda in the nearly ninety-year history of the NLRB. Under the new GC's guidance, the agency has been set on a course of casting precedent, statutory language, and congressional intent to the wind in an effort to increase the density of organized labor while cultivating a seemingly anti-employer bias in the process. From misbegotten attempts to prohibit protected employer speech and calculated efforts to deprive employees from an informed choice and a secret ballot in matters of union representation, to signaling an intent to seek the reversal of a mountain of precedent, and injecting the NLRB into employment matters never envisioned by Congress, the GC's proposed agenda seems to have no limit.*

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BRIAN IN BRIEF

In *Chamber of Commerce of the U.S. v. Brown,* the Supreme Court of the United States made clear that the National Labor Relations Act (NLRA) contemplates that issues involving labor relations and union organizing will be attended by "uninhibited, robust, and wide-open debate." In that case, the Court found that a California law that attempted to constrain employer free speech was preempted by the NLRA, the text of which specifically evidenced the "congressional intent to encourage free debate on issues dividing labor and management." Indeed, the U.S. Congress added Section 8(c) for the express purpose of codifying an employer's free speech rights.

In 2021, the United States Court of Appeals for the D.C. Circuit, in *Trinity Services Group, Inc. v. NLRB,* reminded the National Labor Relations Board (NLRB) of the broad protections that Section 8(c) affords employer speech. The D.C. Circuit refused to enforce the Board's finding that an employer's erroneous claims regarding union malfeasance violated the Act, noting that Section 8(c) protects all employer speech provided only that it does not threaten employees with reprisal or unlawfully promise employees any benefits, and emphasizing that nothing in Section 8(c) requires the speech to be accurate.

When viewed against this backdrop, the present effort by the Board's general counsel (GC) to silence employers by outlawing so-called "captive audience" meetings, and even worktime interchanges between supervisors and employees, is hard to understand and arguably indefensible. There is no contextual qualifier to an employer's free speech rights in the statute, and the attempt to superimpose one is yet another indicator that the GC is running the NLRB off the tracks. Moreover, the GC's position that Section 7 of the NLRA gives employees the "right to refrain" from hearing what their employer has to say is so off the mark that one must wonder if it is advanced in good faith.

The position taken by the GC is yet another policy that seems to be motivated by an attempt to improperly tilt the playing field in favor of organized labor. The smart money says the GC will ultimately fail in this attempt. However, like so many others of her policy pursuits, this one could cause damage to all parties before the dust finally settles.

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" insights. 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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While no doubt the GC—and perhaps also the current Democratic Board majority—believe in the rectitude of these pursuits, the agency is not immune from the law of unintended consequences. The merits of the radical pro-labor agenda aside, two facts are inescapable. First, its pursuit will strain agency resources at a time when the Board is singularly ill-equipped to deal with such pressures. Second, and perhaps more importantly, it runs the very real risk of destroying the agency's credibility both with reviewing courts and its stakeholders.

Running the numbers

Although it attracts an outsized amount of attention, the NLRB is, by federal standards, a small agency. It currently has only a little more than 1,200 employees, including a mere thirty to thirty-five administrative law judges (ALJs). Those ALJs conduct trials and issue recommended decisions and orders in all contested unfair labor practice (ULP) cases.

[T]he GC's push to expand remedies coupled with an insistence on a "full remedy" in all settlements will unquestionably reduce the settlement rate and place enormous stress on the agency's limited resources.

The entire ALJ corps issues only about 200 decisions a year. Contrast this output with the fact that the average yearly number of ULP filings over the last decade has been between 16,000 and 20,000. While most of those cases are dismissed after investigation, more than 25 percent of the filings result in the issuance of a complaint. Nearly all of these cases are settled short of trial. Absent these settlements, some 5,000 to 6,000 cases per year would require trial and a decision from an ALJ corps able to handle only around 200 cases per year. These numbers amply demonstrate that without pre-trial settlement of the vast majority of meritorious ULP filings, the NLRB would likely grind to a halt.

Moreover, despite how fractious and hotly contested most ULP complaints typically become, the NLRB's record in securing pre-trial settlement has always been exemplary. In 2021, for example, 96 percent of "merit" charges—or approximately 5,500 cases—were settled short of trial. A mere percentage point change in that settlement rate would have resulted in fifty to sixty more cases on the ALJ docket, which would represent a 25- to 30-percent increase to the ALJ's current average annual output.

The data on the Board-side is analogous to that on the ALJ-side. The five-member Board issues approximately 250 decisions per year, and these include both ULP cases and representation cases. Around sixty of these decisions wind up before a federal court of appeals each year, where the NLRB has traditionally enjoyed a win rate of more than 80 percent. In large measure, this impressive success at the appellate level has been the result of a high bar for review, as well as the fact that federal courts of appeal routinely grant considerable deference to agency decision-making.

Again, by federal standards, the NLRB's budget is also small, coming in at around $274 million annually. Decreasing case numbers have resulted in the Board being level-funded at this figure since 2014, and efforts by congressional Democrats to substantially increase the agency's appropriation over the years have failed. There is a similar effort this fiscal year as the agency's congressional allies are angling for an increase in the appropriation to $314 million. The current betting, however, is that there will be no such increase in the coming fiscal year—a prospect made exceedingly more likely if the Board continues to follow policies that artificially or recklessly increase costs and alienate members of Congress.

Stubborn realities cannot be ignored

Virtually every item on the GC's agenda runs straight into these stubborn realities, yet the approach seems to be to ignore them. It is an approach that appears perversely calculated to harm the NLRB in the long run. For example, the GC's push to expand remedies coupled with an insistence on a "full remedy" in all settlements will unquestionably reduce the settlement rate and place enormous stress on the agency's limited resources.

Similarly, the attempt to overturn extant precedent regarding such issues as joint employer and independent contractor status, the extent of the bargaining obligation, the right of union access, and the nature of protected activity, to name just a few, will result in an enormously increased caseload

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at the Board level, and similarly in the number of court appeals. These administrative and judicial resources will be similarly stressed by the GC's intended efforts to resuscitate questionable and long-dead legal theories, such as *Joy Silk's* backdoor card check and *Ex-Cell-O Corp.'s* "make-whole" bargaining remedy, as well as her desire to "re-visit" matters that have been largely settled in the federal courts, including, for example, the Board's jurisdiction over religious institutions and the scope of the bargaining obligation.

These efforts by the GC are already well under way. For example, the GC has already formally urged the Board to overturn its landmark *Ex-Cell-O Corp.* decision, in which the agency squarely refused to require make-whole relief in refusal-to-bargain cases, in a summary judgment motion filed in currently pending litigation, as well as in the issuance of other pending complaints seeking this remedy. Despite the fact that this issue has been a matter of settled law for more than fifty years, the GC argues that the 1970 decision is "ripe for reconsideration," and has gone as far as expressing her excitement about resurrecting the issue in a series of social media posts. We will be closely watching this case and expect others to follow suit as the GC continues to urge the Biden Board to adopt this and similarly radical positions.

Inundating the Board. The number and complexity of the issues the GC wants the Board to decide and the amount of precedent she wants reconsidered and reversed is so massive that it will almost certainly swamp the Board and result in much longer delays in the issuance of decisions and an ever-increasing case backlog. The resulting delays in the Board's resolution of cases would be a disservice to stakeholders.

Perhaps recognizing the perils of her litigation strategy, Abruzzo recently issued Memorandum GC 22-05, entitled "Goals for Initial Unfair Labor Practice Investigations." The GC states, amongst other things, that she is "eliminating the goal of requiring each Region to annually reduce the average number of days from filing of charge to disposition of the charge." The GC announced that as of June 1, 2022, the timeliness of initial ULP investigations will be assessed "based on the average number of days from filing of the charge until the Region either disposes of the charge or reaches a stopping point at which the Region can no longer advance the investigation pending the occurrence of some event beyond the Region's control," with the "overall goal" of an "average of 91 days or fewer."

The GC also announced that she is "reimplementing Impact Analysis as a tool to manage the timely processing of unfair labor

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GC's 'update' on recent remedies

In a recently issued memorandum, Memorandum GC 22-06, entitled "Update on Efforts to Secure Full Remedies in Settlements," GC Abruzzo declared that "Regions have done an excellent job implementing the settlement approach, as articulated in Memorandum GC 21-07." In GC 21-06, she instructed regional directors to "request from the Board the full panoply of remedies available" in unfair labor practice cases. Notably, GC 22-06 includes an attachment containing new default language to be used by regions in both "pre-complaint" and "post-complaint" settlements in the GC's continued efforts to ensure her full-remedies goal.

The latest memo further notes that "Regions have secured compensation for derivative economic harm, including reimbursing fees for late car loan payments and late rent, payment of monthly interest on the loan a discriminatee took out to cover living expenses, the cost of baby formula due to the loss of a workplace breast pumping station, and the cost of a [sic] retrofitting a discriminatee's car to make it usable in a new job." The memo touts other examples of recent settlement terms, including "[l]etters of apology to reinstated employees" and "[p]ermitting union use of employer bulletin boards."

The memo, however, is noticeably silent on how this "no compromise" settlement posture has, and will, affect the overall settlement rate, and what the posture has done with respect to the time from a merit determination to a final disposition. When the insisted-upon remedy is the same as, and in some cases even *greater* than that which an unsuccessful respondent would face after trial, much of the incentive to settle is simply gone. It seems axiomatic that the GC's current settlement posture is bound to decrease the settlement rate and inordinately delay case dispositions.

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practice cases toward the 91-day goal, but with some key changes to the Impact Analysis system." Significantly, she assigned Category 3 cases (which she describes as those with the "highest impact") a target investigation time of 105 days, explaining these cases "generally have taken longer to investigate than Category 1 and 2 cases" (which now have target times of forty-nine days and ninety-one days, respectively).

Jettisoning precedent, pursuing controversial legal theories, and favoring organized labor are actions bound to raise considerable pushback and provide a target-rich environment for congressional critics of the Board.

The irony appears to be lost on the GC. While her memo correctly notes that delays in case dispositions hurt all parties, she fails to state that her own policies are likely to substantially delay disposition for many litigants. Additionally, by lengthening the actual time target for certain cases, and by changing the nature of the events that stop the case-processing clock, her memo effectively seeks to change the definition of "delay" from *actual* delay to an abstract administrative concept. The proper measure of "delay," however, should be determined from the litigant's perspective. In that instance, it is simply the amount of time from the filing of the charge to its final disposition. The *reality* is that for many litigants that time is going to substantially increase, regardless of how the time is characterized for administrative purposes.

The risk of judicial skepticism. Of all the downsides, perhaps the most harmful is that the GC's radical agenda will inevitably spawn more federal court appeals and run the risk of decreasing federal court respect for NLRB decision-making. Why, for example, would a reviewing court give any deference to an agency that makes 180-degree changes to its legal reasoning and conclusions on key questions each time the administration changes, including on seemingly settled issues such as what is an employer, who is an employee, what is the bargaining obligation, and what activities are protected? Why would a reviewing court extend deference to an agency that is relying on legal theories that were discarded or abandoned fifty or more years ago or that issues decisions contrary to the federal court's own precedent?

These considerations are particularly important given the growing judicial skepticism regarding the so-called "administrative state." The quasi-legislative authority of unelected and unaccountable agency bureaucrats and the degree of deference accorded to agency decision-making are rightly coming under increasing judicial scrutiny. Such concerns were plainly reflected in the recent decision by the Supreme Court of the United States, *West Virginia v. Environmental Protection Agency*, in which the high court ruled in a 6-3 decision that the Clean Air Act did not give the Environmental Protection Agency the authority to issue certain rules limiting greenhouse gas emissions in power plants.

Flip-flopping "precedent," the attempted revival of moribund legal theories and the disregard of court precedent provide ample reason for reviewing courts to refuse enforcement of Board decisions. This would not only increase the number of appeals and decrease the Board's success rate, but, more importantly, it would erode respect for the Board's decision-making by the federal judiciary. And, if the Board loses legitimacy in the appellate courts, its mission risks becoming fatally compromised.

The appropriations effect. The current agency agenda not only stresses the Board's limited resources, it also serves to alienate many of those who are directly responsible for its funding. Jettisoning precedent, pursuing controversial legal theories, and favoring organized labor are actions bound to raise considerable pushback and provide a target-rich environment for congressional critics of the Board. Ultimately, such actions run directly counter to any aspirations for an increased budget. Why, after all, would Congress want to again fund the agency's nit-picking of employer handbooks for purported violations predicated on wholly hypothetical harm and based on the uninformed and nonexpert opinion of a bare majority of Board members? Why would Congress reward an agency that increases its caseload only through the artifice of repeatedly challenging and reconsidering the bulk of its own precedent? Why would appropriators underwrite the costs involved in pursuing radical and moribund theories?

Issues like the review of employer handbooks dominated the Obama Board's decisional agenda as it repeatedly sought to resolve what it framed as *crucial* labor/management issues,

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such as whether requiring employees to conduct themselves in a civil manner violated federal law. When not preoccupied with parsing handbooks, the Obama Board also set about overturning long-settled precedent in a series of controversial cases. In the main, these follies were subsequently corrected by the Trump Board, which returned the Board to long-settled principles.

The agency now looks poised to once again repeat this folly with even greater breadth and frequency. There is a real question as to whether congressional appropriators will or should fund efforts spent on useless exercises and whether they should or will fund reversals of extant precedent or the resuscitation of controversial and defunct legal theories. If the prospect for substantially increased funding for the Board seems questionable now, it looks downright bleak for at least the next two fiscal years since Republicans appear likely, at the least, to regain the majority of the U.S. House of Representatives following the 2022 mid-term elections.

Credibility at stake

But of all these negative consequences spawned by the current Board agenda, nothing will be more destructive than its impact on its stakeholders, and most particularly those on the management side. Despite the fact that labor-management relations are often contentious and divisive, most disputes are typically resolved without recourse to job actions or protracted litigation. ULP charges are routinely settled short of trial and union election results accepted by the parties. In no small measure, the viability of these outcomes rests on the perception of stakeholders that the NLRB is a fair arbiter of ULP claims and an unbiased and neutral administrator of its election processes.

In short, the system works because although often grudgingly given, the agency has credibility with the stakeholder community. Credibility drives compliance, and credibility is the agency's most important asset. However, the agency's current course, if unaltered, appears destined to destroy that irreplaceable asset. ■

The war on captive audience meetings

For more than seventy years, the National Labor Relations Board (NLRB) has recognized that employers have the right under the National Labor Relations Act (NLRA) to require their employees to attend meetings for the purpose of discussing their statutory rights, including the right of employees to refrain from forming unions. These meetings often include education on the union election process, the legal implications of forming a union, and a discussion of how recognizing a union can impact the exchange of information and ideas between the employer and the employee. These meetings arguably allow employers to tell their side of the story, share factual information with employees about their rights under the NLRA, and balance arguments advanced by organized labor during campaign efforts.

Throughout the years, the NLRB has issued decisions clarifying what an employer is permitted to discuss during these meetings, including prohibitions against engaging in improper threatening or coercive speech in violation of the NLRA. However, that which was once considered settled law has recently come under fire in both the federal and state sectors. A detailed discussion is set forth below, with insider input from James J. Plunkett, a shareholder in the Ogletree Deakins Washington, D.C. office; John T. Merrell, a shareholder in the firm's Greenville, South Carolina, office; and William C. Ruggiero, John G. Stretton, both of whom are shareholders, and Chelsea R. Sousa, an associate, in the firm's Stamford, Connecticut office.

GC seeks to change seventy-year-old precedent

On April 7, 2022, NLRB General Counsel (GC) Jennifer Abruzzo signaled her clear intent to change the Board's position and find captive audience meetings illegal by issuing memorandum GC 22-04, entitled "The Right to Refrain from Captive Audience and other Mandatory Meetings." In the memo, Abruzzo takes the position that "the Board years ago incorrectly concluded that an employer does not violate the Act by compelling its employees to attend meetings in which it makes speeches urging them to reject union representation." She further stated that "[f]orcing employees to listen to such

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employer speech under threat of discipline … plainly chills employees' protected right to refrain from listening to this speech in violation of Section 8(a)(1)(A)."

Protection of employees' right to refrain. Abruzzo's request is in response to the 1948 Board decision in *Babcock & Wilcox Co.*, that she said "incorrectly concluded that an employer does not violate the Act by compelling its employees to attend meetings in which it makes speeches urging them to reject union representation." The seventy-year-old ruling, she argues, discourages employees from exercising their right to refrain from listening to such speech. Thus, the GC intends to urge the Board to "adopt sensible assurances that an employer must convey to employees in order to make clear that their attendance is truly voluntary." She further claims the proposed initiative "will appropriately protect employers' free-speech rights to express views, arguments, or opinions concerning the employees' exercise of Section 7 activity without unduly infringing on the Section 7 rights of employees to refrain, or not, from listening to such expressions."

The GC said in the memo that she will ask the NLRB to protect employees in two situations: (1) when employees are "forced to convene on paid time," and (2) when employees are "cornered by management while performing their job duties." Abruzzo contends that for both situations, employees "constitute a captive audience deprived of their statutory right to refrain, and instead are compelled to listen by threat of discipline, discharge, or other reprisal—a threat that employees will reasonably perceive even if it is not stated explicitly."

In accordance with the memo, the NLRB's regional offices have begun issuing complaints against employers for holding mandatory meetings to discuss unionization with employees.

Taxes as a weapon against employer speech

Meanwhile, with the Protecting the Right to Organize (PRO) Act stalled in the U.S. Congress, Democratic and Independent lawmakers have turned to the tax code to help advance President Joe Biden's pro-labor policy agenda.

The recently introduced "No Tax Breaks for Union Busting (NTBUB) Act" (S. 4192) would prohibit employers from deducting business expenses that result in a complaint issued by the NLRB or that relate to so-called "captive audience meetings," among other activities.

The bill also would establish an Internal Revenue Service reporting requirement for "[a]ny employer who attempts to influence the employer's employees with respect to labor organizations or labor organization activities." Like the failed "persuader" rule, the bill is an attempt to discourage employers from speaking to employees about the pros and cons of unionization. The bill is unlikely to gain traction in the U.S. Senate.

Connecticut amends free speech statute

In late May 2022, Connecticut Governor Ned Lamont signed into law a bill that significantly limits an employer's ability to speak directly with its employees. Passed by the Connecticut General Assembly earlier in the month, Public Act No. 22-24 (Substitute Senate Bill No. 163), "An Act Protecting Employee Freedom of Speech and Conscience," amends Connecticut's employee free speech statute, Conn. Gen. Stat. Section 31-51q, effective July 1, 2022.

Most notably, the law makes it unlawful for employers to require employees to attend meetings to discuss "political matters," a term that includes "the decision to join or support any … labor organization." This provision is intended to outlaw captive audience meetings.

The law also expands the parameters under which a civil action may be commenced. Under Section 31-51q, employees may sue for damages when they are subject to "discipline or discharge" for exercising free speech rights under the First Amendment of the U.S. Constitution and the Connecticut equivalent—subject to certain exceptions. The amendments expand that right of action, permitting a civil action upon the "threat" of discipline or discharge, apparently even if those threats do not result in an adverse employment action.

Overview of the legislation. In several ways, the amendments to Connecticut's free speech statute accord with arguments advanced by GC Abruzzo in Memo GC 22-04. The amendments generally prohibit employers from

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subjecting, or threatening to subject, employees to "discipline or discharge" for the following conduct:

- Exercising "rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state [of Connecticut], provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer"
- Refusing to "attend an employer-sponsored meeting with the employer or its agent, representative or designee, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters," or to "listen to speech or view communications, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters"

The legislation defines "[p]olitical matters" as "matters relating to elections for political office, political parties, proposals to change legislation, proposals to change regulation and the decision to join or support any political party or political, civic, community, fraternal or labor organization." It defines "[r]eligious matters" as "matters relating to religious affiliation and practice and the decision to join or support any religious organization or association."

Public Act No. 22-24 does not prohibit "casual conversations between employees or between an employee and an agent, representative or designee of an employer, provided participation in such conversation is not required." The term "casual conversations" is not defined, and the legislation does not provide guidance relating to how an employer may or should regulate such conversations with employees.

The law allows employees to sue employers in court for alleged violations. Employees may seek a variety of damages, including "the full amount of gross loss of wages or compensation, with costs and such reasonable attorney's fees as may be allowed by the court."

Now what?

Connecticut's new law will likely be subject to legal challenge, most notably on the ground that it is preempted by the NLRA. However, until a court rules on the legality of the law, employers in Connecticut must now weigh the risks of engaging in mandatory meetings and consider how to limit exposure to a potential lawsuit alleging a violation of Section 31-51q.

In the meantime, as the NLRB's top prosecutor is actively seeking to make captive audience meetings illegal, it is not just Connecticut employers that face a labor landmine. Employers may want to be cognizant of what President Biden's NLRB may view as newly expanded rights provided to employees to be free from captive meetings. For example, many employers may want to review their social media policies or other workplace rules regulating employee conduct that address permissible speech. They may also want to note the restriction against requiring employees to attend meetings, the primary purpose of which is to discuss political or religious matters. This could include "state of the business" speeches, where attendance is required, and current events are discussed.

Employer response

Employers confronted by a union organizing drive now face a difficult dilemma. Should they abandon their free speech rights and not hold employee meetings to detail their views on unionization, or should they press ahead with such meetings knowing that it will almost certainly result in an NLRB complaint? While employers typically modify their behavior to avoid a confrontation with the NLRB, in this instance (anecdotally at any rate), there appear to be several employers that have decided the GC's position is simply wrong, and that the benefit of discussing unionization with their employees outweighs the almost certain risk of an unfair labor practice (ULP) complaint.

This position is not the result of some reflexive defiance. It is predicated on the belief that the GC's position will not withstand legal scrutiny. Such employers are not without persuasive legal arguments that the GC is simply wrong in her view. First, they note that in her zeal, the GC has seemingly forgotten that the NLRA was specifically amended to add Section 8(c), the so-called employer free speech provision. Section 8(c) expressly provides that an employer's expression of its views without threat of reprisal or force or promise of benefit cannot be the basis for any violation of the statute. The GC's position would, as a practical matter, render this express protection provided by Congress a nullity.

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Second, employers have argued effectively that the GC's entire theory is predicated on a blatant misconstruction of the NLRA's statutory language. Specifically, the GC argues that under Section 7 of the Act, employees cannot be required to listen to employer speech because it would contravene the right of employees "to refrain." As employers have argued, what the GC seems to misconstrue is that Section 7's "right to refrain" and its correlative "right to engage in" expressly *apply to concerted activity.* Thus, the NLRA only protects the right to refrain from engaging in concerted activity. In the context of a "captive" audience meeting or a "cornered" conversation, the "activity" in question is the employer's exercise of its free speech rights. Such exercise is clearly *not* concerted activity. Instead, it is the singular activity of the employer. Accordingly, the language of Section 7 does not afford any right to employees "to refrain" from this type of activity.

Despite having these persuasive arguments, employers that hold group or individual meetings as described in the GC's memo will very likely be subject to the issuance of a ULP complaint or meritorious election objections whenever such claims are alleged.

High costs to pay. Despite having these persuasive arguments, employers that hold group or individual meetings as described in the GC's memo will very likely be subject to the issuance of a ULP complaint or meritorious election objections whenever such claims are alleged. Unfortunately, there will be no resolution of this dilemma for employees until either the Board or the federal courts of appeal decide this issue.

This result illustrates the practical problems caused by the GC's agenda. Her position will unquestionably spawn more litigation and add costs to the parties and the agency. In addition to direct financial costs, it will consume valuable time and other resources for both the parties and the agency itself. Finally, it will result in lengthy delays in reaching a final resolution of Board-supervised union elections. These may be high costs to pay to try to reverse law that has been around for seventy years, and to do so on the basis of a theory that is seemingly weak. ■

GC memos address interagency coordination, immigrant protections

The National Labor Relations Board's (NLRB) general counsel (GC) has directed the agency's regional offices to take certain actions aimed at boosting the agency's enforcement efforts. Most recently, the Division of Operations-Management issued two new memoranda: OM 22-08, entitled "Promoting Productive Collective Bargaining Through NLRB-FMCS Collaboration," issued on April 27, 2022, and OM 22-09, entitled "Ensuring Safe and Dignified Access for Immigrant Workers to NLRB Processes," released on May 2, 2022. In addition, the NLRB has executed memorandums of understanding with both the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) Antitrust Division.

Board coordination with FMCS. In support of GC Jennifer Abruzzo's continuing efforts to collaborate with other federal agencies, OM 22-08 instructs regional directors to "integrate the services of the FMCS [Federal Mediation and Conciliation Service] more directly into our processes." The memorandum directs regions to provide parties (i.e., employers and employees) with notice of the FMCS's services relating to collective bargaining of an initial contract and in cases involving allegations of bad-faith bargaining. The memorandum also instructs regional directors to consider requiring FMCS-sponsored training and/or involvement in collective bargaining as potential remedies in unfair labor practice cases.

MOUs with FTC and DOJ. On July 19, 2022, GC Abruzzo and FTC Chair Lina M. Khan executed a memorandum of understanding (MOU) forming a partnership between the two agencies that is calculated to "promote fair competition and advance workers' rights," according to an NLRB statement on the issuance of the MOU. Under the MOU, the NLRB and

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the FTC aim to closely collaborate by sharing information, conducting cross-training for staff at each agency, and partnering on investigative efforts within each agency's authority. The memo is in response to the interagency collaborations outlined in the White House Task Force on Worker Organizing and Empowerment report.

"[I]ssues of common regulatory interest" are outlined in the agreement to include "labor market developments relating to the 'gig economy' and other alternative work arrangements; claims and disclosures about earnings and costs associated with gig and other work; the imposition of one-sided and restrictive contract provisions, such as noncompete and nondisclosure provisions; the extent and impact of labor market concentration; the impact of algorithmic decision-making on workers; the ability of workers to act collectively; and the classification and treatment of workers."

One week later, on July 26, 2022, the NLRB also entered into a separate MOU with the DOJ Antitrust Division, which identifies key activities in order to promote coordination between the two agencies. First, the MOU discusses the creation of "agency liaisons" who will meet regularly to ensure interagency collaboration and exchange of information. The MOU also addresses interagency cooperation with respect to information sharing; training, education and outreach; consultation and coordinated enforcement programs; and referrals between the NLRB and the Antitrust Division. The MOU also provides guidance regarding protecting the confidentiality of "non-public information" shared between the agencies.

Immigration status protections. In a follow-up to Abruzzo's November 8, 2021, Memorandum (GC 22-01), "Ensuring Rights and Remedies for Immigrant Workers Under the NLRA," OM 22-09 implements an initiative aimed at facilitating safe and dignified access to NLRB processes for immigrant workers. Regional directors and other staff have been directed to distribute a fact sheet to all witnesses (attached to the memo and available in English and Spanish) advising them "that immigration status is not relevant to whether there has been a violation of the NLRA," "that information obtained during NLRB investigations is protected," and that a charging party or witness can ask the NLRB to seek immigration relief for employees at a worksite if necessary to protect employees participating in NLRB processes or exercising their rights under the NLRA. The memo also directs Board agents to verbally provide this information to witnesses before taking their testimony and assure them that the agency will not inquire about immigration or work authorization status. Information officers who assist individuals with preparing and/or filing a charge are also instructed to provide a copy of the fact sheet along with the draft of the charge. ■

Other NLRB developments

Circuit court decisions

3rd Cir.: Publisher's social media post was not threatening. The U.S. Court of Appeals for the Third Circuit has ruled that the National Labor Relations Board (NLRB) erred in concluding that a public social media message that the publisher of *The Federalist* posted to his private account violated Section 8(a)(1) of the National Labor Relations Act (NLRA). The post stated: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." The appeals court concluded that substantial evidence did not support the Board's conclusion that the employer unlawfully threatened employees with "'unspecified reprisals'" if they were to engage in union activity. If the Board had considered the "full context" of the tweet, including the timing of the tweet and the publisher's editorial content, "it could not have concluded that a reasonable FDRLST Media employee would view the [post] as a threat of reprisal." In particular, the employer "is a tiny media company," and "[t]he image evoked—that of writers tapping away on laptops in dimly-lit mineshafts alongside salt deposits and workers swinging pickaxes—is as bizarre as it is comical." Accordingly, the Third Circuit concluded that, based on the words of the post alone, "we cannot conclude that a *reasonable* FDRLST Media employee would view [the publisher's] tweet as a plausible threat of reprisal" (emphasis in original) (*FDRLST Media, LLC v. National Labor Relations Board*, May 20, 2022).

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8th Cir.: Employer unlawfully discharged 'wildcat' strikers. The U.S. Court of Appeals for the Eighth Circuit upheld an NLRB finding that a meat processor unlawfully discharged ten employees who engaged in a work stoppage aimed at enforcing seniority pay provisions previously negotiated by a union in a holdover collective bargaining agreement (CBA). Substantial evidence supported the Board's conclusion that the work stoppage was protected because the employer "'has not proven that the ten employees attempted to circumvent their union and bargain directly with the employer.'" Also, the employees were not attempting to bargain for terms separate from the union's negotiation for a successor CBA, "rather, the work stoppage was an attempt to enforce seniority pay provisions the [u]nion previously negotiated in the holdover CBA." There was no evidence the union opposed or did not support the employees. The Eighth Circuit also upheld the Board's finding that the employer "did not declare a *valid* impasse and therefore unilateral implementation of its last, best, and final offer violated Sections 8(a)(1) and (5)" (emphasis in original) (*National Labor Relations Board v. Noah's Ark Processors, LLC*, April 22, 2022).

NLRB rulings

Late-arriving ballots were not sufficient reason to review conduct of mail-ballot election. A divided three-member panel of the NLRB denied an employer's request for review of a regional director's decision that overruled its objections relating to the conduct of a mail-ballot election. The ballots at issue had been due in the regional office by October 29, 2021, sixteen days after they were mailed, but the region received only three ballots by the scheduled ballot count on November 2, 2021. Although there were fourteen eligible voters, the regional director certified the union based on only the three received ballots. The employer identified six employees who would testify that they mailed ballots in a timely manner, but they did not arrive at the regional office in time for the count. The regional director refused to consider any of the late-arriving ballots.

Denying the employer's request for review, the Board majority "share[ed]" dissenting Member John F. Ring's concern about the "late delivery of many mail ballots after the ballot count," but ultimately concluded "that the Regional Director's decision not to count the late-arriving ballots was fully consistent with Board precedent and policy and did not constitute an abuse of discretion." The Board observed that, in mail-ballot elections, the agency "already provides a grace period for ballots that may have, for example, been affected by a mail service delay, by generally permitting ballots received after the due date, but before the count, to be opened and tallied." Dissenting in part, Member Ring argued that "under the exceptional circumstances of this case," the region

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Fifth Circuit finds Biden's removal of formal GC not unlawful

The U.S. Court of Appeals for the Fifth Circuit rejected an employer's challenge to the legitimacy of President Joe Biden's removal of former NLRB general counsel (GC) Peter B. Robb ten months before his term was set to expire, explaining that in enacting the NLRA, "Whereas Congress clearly and unequivocally provided removal protections to the Board Members, it did not grant those same protections to the General Counsel." Specifically rejecting the employer's contention that the four-year term specified for the GC indicated protection from removal, the Fifth Circuit relied on Supreme Court of the United States precedent that, "'when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" On the merits, the appeals court held that substantial evidence supported the NLRB's findings that the employer acted unlawfully by refusing to bargain with a union after it was certified as the exclusive bargaining agent of unit employees following an election. The record did not support the employer's contention that an alleged union agent had any involvement with the organizing campaign or that two union representatives engaged in unlawful "electioneering" (*Exela Enterprise Solutions, Inc. v. National Labor Relations Board*, April 22, 2022).

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should have been directed to open and count the ballots rather than disregard them (*CenTrio Energy South LLC*, April 28, 2022).

Union recognition was unlawfully withdrawn during extended certification year. A divided three-member panel of the NLRB accepted the findings of an administrative law judge (ALJ) that an employer violated Section 8(a)(5) and (1) of the NLRA when it unlawfully delayed the commencement of bargaining for almost three months, refused to furnish requested employer cost information regarding existing benefit plans, and stated that it would not consider any proposal for a union-administered benefit plan. The Board also adopted the ALJ's finding that the employer unlawfully withdrew recognition from the union but did so for a different reason than the ALJ. The ALJ ruled that the withdrawal was unlawful because it was based on a "tainted" disaffection petition.

The Board held that apart from the question of "taint," the employer "was not permitted to withdraw recognition when it did, regardless of whether the [u]nion retained majority support and regardless of whether employee disaffection from the [u]nion was caused by the [employer's] unfair labor practices." Significantly, "the withdrawal of recognition here came during an insulated period when a union's majority status may not be challenged: the extended certification year made necessary by [the employer's] unlawful delay in bargaining following Board certification, as well as its other bargaining violations." Member John F. Ring filed a separate opinion dissenting in part in which he argued that the petition was in fact "untainted" and he "would therefore sever the withdrawal-of-recognition allegation and remand it to the judge to determine whether the signatures on the disaffection petition established that the [u]nion had actually lost majority status" (*J.G. Kern Enterprises, Inc.*, April 20, 2022). ■

NLRB asked to decide whether misclassification is standalone NLRA violation

NLRB General Counsel Jennifer Abruzzo has issued a complaint against a shipping container distributor in which she seeks to overturn the NLRB's 2019 decision in *Velox Express, Inc.*, in which the Board unequivocally held that "an employer's misclassification of its employees as independent contractors does not violate the Act." The complaint in the instant action alleges that the employer violated the NLRA by misclassifying drivers as independent contractors, amongst other things, and seeks an order requiring the company to reclassify the drivers as employees and award them damages for harm suffered as a result of the misclassification.

Before issuing its decision in *Velox*, the Board issued a briefing solicitation seeking input on the issue of "[u]nder what circumstances, if any, should the Board deem an employer's act of misclassifying statutory employees as independent contractors a violation of Section 8(a)(1) of the Act?" Though the 2019 Board held that the employer's misclassification of its employees as independent contractors did not by itself violate the NLRA, the current Board majority may have a more favorable view of the novel "misclassification is a violation" theory that Abruzzo has chosen to again place before squarely before it.

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