Labor Law Today

2021 | YEAR IN REVIEW

PERKINSCOIE

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INTRODUCTION

In early 2022, we find ourselves in a tumultuous period in labor history in what has become known as the "Great Resignation," as employees voluntarily leave an ever-tightening labor market at never-before-seen rates. Unionization efforts have shifted from the assembly lines and mines to the latte line and fulfillment center. Like the nation, the field of traditional labor law is in a state of upheaval, as employers whipsaw from an employer-friendly Trump administration to a National Labor Relations Board (the NLRB or Board) dominated by Biden administration appointees that appear intent on making a significant pro-employee correction. After decades of dormancy, union organizing campaigns now get vote-by-vote treatment in breathless articles in all major newspapers. Simply put, it has never been more interesting to work in the field of traditional labor law.

We submit this Year in Review to summarize the most noteworthy developments in 2021 and provide a look at what may be on the horizon in 2022, as we head into a period of major transformation in traditional labor law.

The Board's composition changed significantly during 2021, switching from a Republican to a Democrat-appointed majority.

The five seats on the Board are traditionally filled by two Democrats, two Republicans, and a chairman of the current president's party. At the end of 2020, the Trump White House packaged the renomination of member Marvin Kaplan with the return of member Lauren McFerran to join Chairman John Ring and member William Emanuel as the four members of the Board. In 2021, President Biden named member McFerran the new chairman of the Board, selected Jennifer Abruzzo to serve as the Board's General Counsel (GC), and filled two empty seats on the Board with Democrats following the expiration of member Emanuel's term. Accordingly, the Board is currently composed of five members: (1) member Ring (Republican and previous chairman, term expires 12.16.2022); (2) member Gwynne Wilcox (Democrat, term expires 08.27.2023); (3) Chairman McFerran (Democrat, term expires 12.16.2024); (4) member Kaplan (Republican, term expires on 08.27.2025); and (5) member David Prouty (Democrat, term expires 08.27.2026).

With a new Democratic majority, the Board reported significant increases in both recoveries and reinstatements during fiscal year 2021 (October 1, 2020, to September 30, 2021). For example, the Board recovered $56.8 million in back pay, fees, dues, and fines, and obtained reinstatement for 6,307 individuals in FY 2021. In comparison, during fiscal year 2020 the Board recovered only $39.3 million in back pay, fees, dues, and fines, and obtained reinstatement for 978 individuals. Additionally, the Board reduced the median age of pending cases by 15% from FY 2020, 54% since FY 2019, and 69% since FY 2018, for a new median age of only 72 days at fiscal year-end compared with 85 days in FY 2020, 157 days in FY 2019, and 233 days in FY 2018. Thus, the Board continues to emphasize efficiency and more timely processing of cases in accordance with its case-expediting program initiated in September 2018. However, despite the increases in efficiency, recoveries, and reinstatements, the Board issued only 243 decisions in contested cases in FY 2021, which is many fewer than the 374 decisions issued in contested cases during FY 2020.

The Board also issued over 170 rulings, orders, or notices in 2021 on a variety of matters, including requests for special permission to appeal and various motions and petitions. In addition, General Counsel Abruzzo was active in stating her views. Some notable examples include her memorandums on (1) seeking all available remedies to fully address unlawful conduct (GC Memo 21-06); (2) seeking full relief through settlement agreements (GC Memo 21-07); (3) ensuring rights and remedies for immigrant workers (GC Memo 22-01); (4) the General Counsel's position that student-athletes at academic institutions are employees (GC Memo 21-08); and (5) emphasizing the importance of utilizing Section 10(j) injunctions (GC Memo 21-05). Finally, the Board added a feature to its website to make tracking cases easier and more accessible to the public, launched a new Spanish website and two Spanish Twitter accounts, and reaffirmed its commitment to proactively reach out and engage the public (OM Memo 21-07). ■

Important Decisions From 2021

Scabby the Rat Lives to Fight Another Day—*Int'l Union of Operating Eng'rs, Local 150*, 371 NLRB No. 8 (July 21, 2021)

In *International Union of Operating Engineers, Local 150*, 371 NLRB No. 28 (2021), the Board affirmed unions' right to display banners and inflatable rats, but not without limitations. This decision marks the third time in recent months that the Board reaffirmed existing precedent that permits unions to display Scabby at demonstrations in front of businesses that do not employ those unions' workers.

For over three decades, Scabby the Rat has been a fixture at demonstrations staged by organized labor as a permissible form of union protest. In 2018, however, the NLRB under the Trump administration considered cracking down on the use of the giant rat. Before his ouster, former General Counsel Peter Robb argued in legal filings that Scabby is illegally "coercive" when used to shame a neutral party to a labor dispute. But the Biden administration replaced Robb with Peter Sung Ohr, who returned the NLRB to a more tolerant outlook toward the use of Scabby and other confrontational union tactics. In *Local 150*, the Board determined that a banner and inflatable rat displays "did not create any form of confrontation from which the members of the public could not simply 'avert [their] eyes.'" Moreover, the displays did not encourage customers, suppliers, and employees to take any specific action and allowed them to make their own decision as to how to react to the information. Accordingly, the Board determined that the mere use of Scabby in conjunction with other banners or displays was not coercive. As a result of this ruling, Scabby the Rat will likely remain a fixture at labor disputes for the duration of the current administration and employers can expect an uptick in the use of such displays.

Although *Local 150* entrenched Scabby as a familiar figure at union protests for the foreseeable future, it did not give carte blanche with respect to certain tactics and imposed two important limitations on unions' ability to pressure employers into recognizing them as workers' bargaining representatives. First, the Board determined that the use of banners and Scabby the Rat in combination with repeated ambulatory picketing crosses the line of coerciveness and violates the National Labor Relations Act (NLRA). Ultimately, the Board concluded that such activity was "coercive to a reasonable person attempting to engage in commerce with the [secondary employer] and induced or encouraged employees to withhold their labor or services from [the secondary employer]." Second, the Board reaffirmed long-standing Board precedent that a union can only picket an employer for a maximum of 30 days if it has not filed a recognition petition and is aiming to force that company to recognize the union as workers' exclusive bargaining agent.

Contract Bar Rule Upheld—*Mountaire Farms*, 370 NLRB No. 110 (Apr. 21, 2021)

The contract bar doctrine is an NLRB rule that prohibits a union decertification or representation election for employees who are already in a bargaining unit covered by an executed collective bargaining agreement (CBA) *unless* a petition is filed within a 30-day "window period" (typically between 60 and 90 days before the expiration of the collective bargaining agreement) or after either the collective bargaining agreement expires or the third anniversary of any collective bargaining agreement that is longer than three years—whichever comes first.

On July 7, 2020, the NLRB invited parties and interested amici curiae to file briefs in *Mountaire Farms*, 370 NLRB No. 110, regarding whether the long-standing contract bar doctrine should be rescinded, retained, or modified. Despite recognizing the diminished efficacy of the contract bar doctrine's current "window period," the NLRB ruled to uphold the contract bar doctrine as-is on April 21, 2021.

Legal Standard for Nontenure-Track Faculty Unionization Established—*Elon University*, 370 NLRB No. 91 (Feb. 18, 2021)

There is a new test to determine which faculty members qualify as managers for purposes of defining bargaining units. The Board's February 2021 decision in *Elon University and SEIU Workers United Southern Region* adopts a two-part inquiry. If both of the following questions are answered in the affirmative, faculty members in the petitioned-for subgroup are managers for purposes of collective bargaining.

Does a faculty body exercise effective control over certain areas of decision-making?

If so, is the petitioning subgroup included in that managerial faculty body based on the faculty's structure and operations?

To better understand how the Board arrived at this new test—and what the decision means for adjunct unions and universities moving forward—it is helpful to first review the specifics of the Elon case before zooming out to forecast implications for other institutions.

SEIU Seeks to Represent Nontenure-Track Faculty at Elon

SEIU sought to represent a subgroup of Elon's faculty comprising "all nontenure-track faculty employees teaching at least one credit-bearing undergraduate course in one of the university's four undergraduate schools." 370 NLRB No. 91 at 1 (2021). Like many schools, Elon used a shared governance model; faculty may sit on committees that determine things ranging from admission requirements to faculty standards to courses of study. But nontenure faculty representation on these committees was vanishingly rare. In fact, nontenure faculty were entirely ineligible to serve on certain committees. And, as many as 107 of the 181 petitioned-for faculty were ineligible to vote at faculty meetings.

When SEIU first petitioned to represent a unit of Elon's nontenured faculty, the acting regional director found the petitioned-for employees were not managers. This determination rested on the "majority status rule" set out in *Pacific Lutheran University* and expanded in *University of Southern California*. *See* 361 NLRB 1404 (2014) (PLU); 365 NLRB No. 11 (2016) (USC). Importantly, *after* the acting regional director green-lit an election at Elon, the U.S. Court of Appeals for the District of Columbia Circuit rejected the USC subgroup majority status rule as incompatible with *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). *See Univ. of So. Cal. v. NLRB*, 918 F.3d 126 (D.C. Cir. 2019).

When Elon filed a request for review of the acting regional director's decisions in its case, the Board granted review "solely with respect to the managerial status of the petitioned-for class," because "it raised a substantial issue with respect to the continued application of the Board's majority status rule as articulated in *Pacific Lutheran*." 370 NLRB No. 91 at 1.

Board Reexamines—and Reframes—Existing Standard

Under *PLU*, faculty are managers if they exercise actual control over or make effective recommendations regarding specified areas of university operations. Specifically, *PLU* identified five areas of consideration: the primary areas, which include academic programs, enrollment management policies, and finances; and the secondary areas of academic policies, and personnel policies and decisions. *See Pacific Lutheran Univ.*, 361 NLRB at 1417, 1420. Of particular relevance to the *Elon* case, a footnote in *PLU* said "[i]n those instances where a committee controls or effectively

recommends action in a particular decision-making area, the party asserting that the faculty are managers must prove that a majority of the committee or assembly is faculty. If faculty members do not exert majority control, [the Board] will not attribute the committee's conduct to faculty." *Id.* at 1421, fn. 36. This so-called "majority status rule" was extended in *USC* to apply to a subgroup of specified faculty, not just the faculty as a whole.

But, as noted above, the D.C. Circuit recently rejected the Board's reading of the majority subgroup status rule in *USC* as incompatible with *Yeshiva*. *See* 918 F.3d at 127, 136-140.

Though the Board now adopts the D.C. Circuit's two-part test to determine which faculty are managerial employees, *PLU*'s five areas of consideration still factor into the analysis. Specifically, the second question looks at "the structure of the university decision-making and where the faculty at issue fit within that structure." 370 NLRB No. 91 at 6. Though a more fact-intensive inquiry, the new test still looks at what facets of university operations the subgroup may influence and how it may influence them. In short, the question is not "whether a particular faculty subgroup at a university has a mathematical majority in some relevant part of the university's decision-making apparatus, but whether the subgroup has an effective voice in the formulation and determination of [the university's] policy." 370 NLRB No. 91 at 8 (internal quotations omitted).

Evolving Standards Under President Biden

Although the *Elon* decision was welcome news for adjuncts at Elon specifically, some unions expressed concern the new test could restrict adjuncts' bargaining rights moving forward. The challenge is that faculty who *do* have meaningful roles in shared governance may not be entitled to collective bargaining rights under the new test. The decision "pits, to some degree, adjuncts' participation in shared governance against their potential job security and other collectively bargained working conditions." Colleen Flaherty, "Tweaking" Which Adjuncts Can Form Unions, *Inside Higher Ed* (Feb. 25, 2021).

And, of course, the Board's position may evolve further in light of the newly restored 3-2 Democratic majority under President Biden. Lauren McFerran, whom President Biden appointed Board chairman, authored a concurrence in *Elon*, which may illuminate the new Board's thinking. McFerran noted nontenure faculty "face unique barriers to participation on committees and other faculty bodies," emphasizing the Board "must be alert to low participation by members of a faculty subgroup in university committees [because] [i]t may well betray their marginalized role within the university and their lack of meaningful voice in university governance." 370 NLRB No. 91 at 13. She also highlighted the importance of examining ways in which tenure and nontenure faculty interests diverge, noting "[n]ot all faculty members conform to the *Yeshiva* ideal, especially in contemporary universities." *Id.*

Takeaways for Universities

In light of the new standard, institutions that challenge adjunct union bids will likely participate in longer, more intense litigation to determine whether nontenure faculty meaningfully participate in school governance. The new test is, necessarily, a more fact-intensive inquiry and the burden is on employers to show that faculty members effectively control university policies.

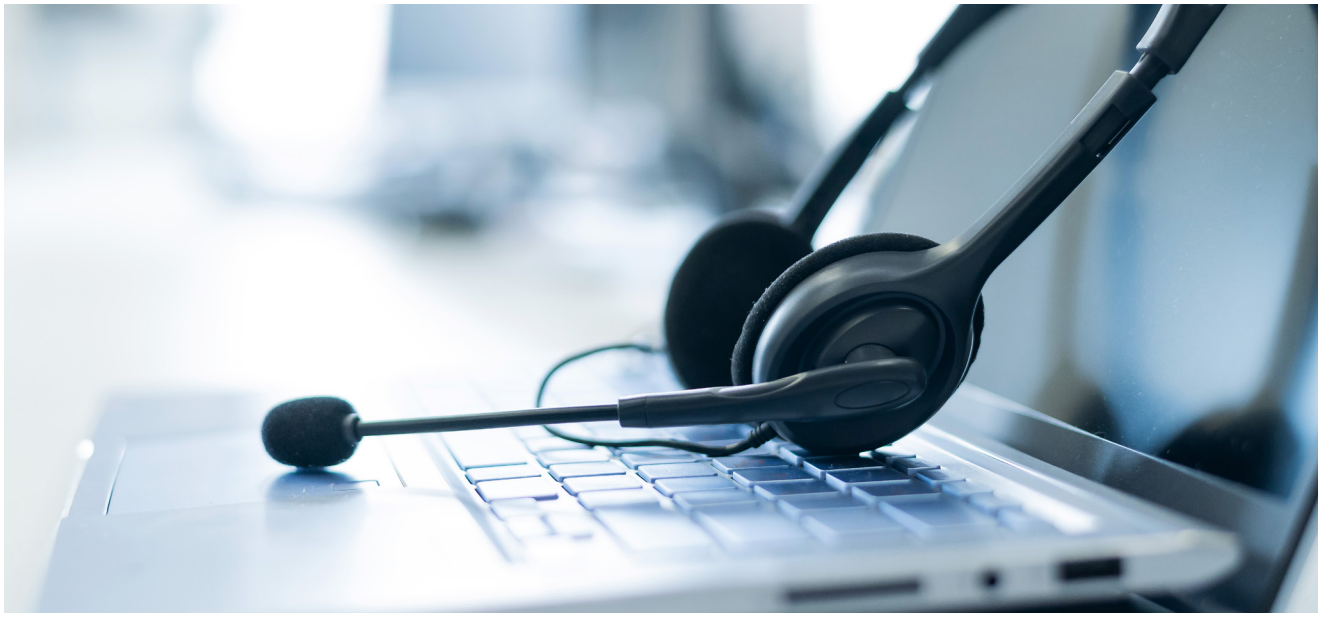
Employee Blogging Ban Upheld—*David Saxe Productions, LLC*, 370 NLRB No. 103 (April 5, 2021)

In *David Saxe Productions, LLC*, 370 NLRB No. 103 (2021), the Board clarified the law on nondisparagement and nonsolicitation policies in employer handbooks.

In *David Saxe*, the Board upheld an employer's blogging/nondisparagement policy, holding the employer's legitimate interest in preserving its reputation and goodwill outweighed any adverse impact on employees' rights under Section 7 of the NLRA. The Board applied the balancing test previously articulated in *Boeing Company*, 365 NLRB No. 154 (2017).

The impugned policy prohibited certain negative blog posts by employees if such posts "may harm or tarnish the image, reputation and/or goodwill of [the company]" and further prohibited "discriminatory, disparaging, defamatory or harassing comments when blogging." The holding follows the Board's recent treatment of similar nondisparagement policies.

The Board also upheld the employer's outside nonsolicitation policy, which required employees to refer to the human resources department any solicitation requests by "outside



people or organizations." In so holding, the Board affirmed that Section 7 does not create rights for nonemployees seeking access to a workplace.

Finally, the Board held a rule prohibiting alteration of employee email signature blocks did not violate Section 8(a)(1) of the NLRA because, among other reasons, the rule applied regardless of the nature or content of the email, which precluded a finding of discrimination.

The decision provided needed clarity on the lawfulness of nondisparagement and nonsolicitation policies in our social media–heavy world. Employers considering drafting such policies should do so in consultation with experienced counsel.

Selective Email Policy Enforcement Barred—*Communication Workers of America, AFL-CIO v. NLRB*, Nos. 20-1112 and 20-1186 (D.C. Cir. July 23, 2021)

Communication Workers of America, AFL-CIO v. NLRB, Nos. 20-1112 and 20-1186 (D.C. Cir. July 23, 2021), cautions employers that selective enforcement of email policies can render them ineffective in prohibiting employees from sending union-related emails to company distribution lists.

A customer service representative at T-Mobile's call center emailed hundreds of her coworkers from her work computer and work email address, inviting them to contact her outside of work hours and to join union organizers at a social gathering after work. After several employees notified human resources, the call center director emailed all employees apologizing for the email, stating that T-Mobile does not allow mass communications for any nonbusiness purpose, that employees can only use social networks "off the job," and that it is not appropriate to discuss union issues while employees are supposed to be working. The employee's manager met with the employee and told her anything union-related could not be sent while on the clock or while the recipients were on the clock using the company's email system, and anything union-related could not be discussed within work areas.

T-Mobile contended that the employee's email violated T-Mobile's Acceptable Use Policy (restricting use of the email system to work-related communications), its No Solicitation or Distribution Policy (prohibiting solicitation during work time), and its Enterprise User Standard (restricting unauthorized use of distribution lists). The General Counsel contended these policies were disparately enforced against the union because mass emails by other employees previously went unreprimanded—including an email by an employee who had lost his phone charger, announcements of personal milestone events (e.g., birthdays), emails alerting employees to free food available in the office and employee events, like lip-sync contests, and free sports ticket offers.

T-Mobile argued it never allowed employees to send mass emails for personal benefit or for the benefit of an outside organization, and that the comparator emails were for the business purpose of improving employee morale.

The administrative law judge (ALJ) found T-Mobile had violated Section 8(a)(1) by disparate application of its policies, finding the email was neither junk mail nor solicitation, and T-Mobile failed to produce any evidence that it had enforced the prohibition against mass emails against any other employee. The ALJ also found T-Mobile had violated employees' Section 7 rights by promulgating and maintaining overly broad rules including prohibiting employees from discussing union issues during work time—rules which it found were never previously communicated to employees.

On appeal, the full Trump Board upheld the interference finding on the basis T-Mobile told employees they could not talk about the union during work time, but reversed all other determinations. The Board agreed with T-Mobile that the comparator emails were business-related for the purposes of improving camaraderie among its workforce. The Board also noted that T-Mobile had "never permitted emails in favor of a specific union or against union activity."

The union petitioned the D.C. Circuit for review, and the D.C. Circuit overturned the Board's decision, holding the employee's email did not violate T-Mobile's policies. The court agreed the email was neither junk mail nor solicitation. It also held there was no evidence of a T-Mobile policy prohibiting employees from sending mass emails—particularly in light of its lack of enforcement against other mass emails—and that T-Mobile had not produced any evidence that it had ever previously enforced the Enterprise User Standards against unauthorized use of distribution lists. It rejected T-Mobile's contention that the comparator emails were for a business purpose instead of a personal purpose. As such, the court held that substantial evidence did not support the Board's determination that the employee was "disciplined for a reason other than that she sent a union-related email."

The D.C. Circuit emphasized "the consistency of an employer's responses to union-related and non-union employee conduct is measured not by whether the employer or Board can identify a legitimate, union-neutral distinction *after the fact* that the employer might lawfully have drawn, but by reference to the policies the employer *actually had in place* and the reasons on which it *in fact relied* for the action challenged as discriminatory." (Emphasis added.) For example, if the expressed rationale is to bar use of the company's system for personal reasons, that policy and practice needs to be applied uniformly against all emails for personal reasons.

T-Mobile signals a warning to employers who selectively enforce nondistribution and nonsolicitation policies against union activity. Employers can likely expect a more rigorous scrutiny of discipline issued for violation of nonsolicitation and nondistribution policies under the new Board. Employers should take some steps to ensure discipline for violation of these types of policies is justified, including the following:

- Reviewing nonsolicitation and nondistribution policies to ensure they are drafted to explicitly prohibit neutral conduct (i.e., the distribution of mass emails for nonbusiness purposes).
- Rigorously applying such policies in a neutral fashion to both union and nonunion activities. Even small exceptions to these policies can result in unfair-labor-practice determinations when the policies are enforced against pro-union communications.
- Ensuring stated reasons for discipline are consistent with and identify the written policy, as the D.C. Circuit has signaled that post ad hoc reasons that differ from the written policy or expressed enforcement rationales relied upon at the time of discipline are not the appropriate metric.

Legality of Prohibiting Employees' Workplace Recordings—*AT&T Mobility*, 370 NLRB No. 121 (May 3, 2021)

In *AT&T Mobility LLC*, 370 NLRB No. 121 (2021), then-NLRB majority (members Ring and Emanuel) held that AT&T could lawfully maintain a no-recording policy which precluded employees from recording telephone or other conversations with coworkers, managers, or third parties, unless those recordings were approved in advance by the legal department, required by business needs, and fully compliant with the law and any other applicable employer policy. The Board found the policy lawful under *Boeing Co.*, 365 NLRB No. 154 (2017) and considered it a *Boeing* category 1(b) rule.

A *Boeing* category 1(b) rule is a rule that is facially neutral and could potentially interfere with Section 7 rights, but when examined, the employer's legitimate business justifications outweigh the potential adverse impact on those protected rights. The business justifications for the no-recording policy in *AT&T Mobility* were that AT&T had a duty under federal law to safeguard customer information and the content of customer communications. The Board found those interests to be persuasive and compelling and thus upheld the policy as lawful.

Although the Board found the policy lawful because the business justification outweighed the potential impact on Section 7 rights, it also found that AT&T unlawfully applied the policy to a specific employee. The Board found AT&T applied the policy unlawfully when it threatened to hold an employee acting as a union steward "accountable" for recording a termination meeting for another employee. When finding AT&T unlawfully applied the no-recording policy, the Board stated that although the no-recording policy was soundly based on statutory and regulatory duties to safeguard customer information, the recorded meeting was held for the sole purpose of effecting a discharge decision. There was no evidence that private customer information, which was the business justification for the rule, was—or was likely—to be mentioned in that meeting. Under those circumstances, the Board found that the employee was engaged in protected union activity when he recorded the termination meeting, notwithstanding the fact that his recording violated a lawful workplace rule. The Board declined to decide whether the employee's act of recording would have retained the NLRA protection had private customer information been mentioned during the recorded meeting.

After finding AT&T unlawfully applied the policy, the Board considered whether unlawful application of a lawful policy renders the policy unlawful. The Board found it did not. In doing so, the Board overruled, in part, its decision in *Lutheran Heritage Village Livonia*, 343 NLRB 646 (2004), which had held that a rule "applied to restrict" Section 7 rights is unlawful. The Board reasoned that this standard conflicts with the *Boeing* analysis by ignoring legitimate (and often compelling) interests of employers in maintaining lawful work rules.

Employer Considerations Under AT&T Mobility

Moving forward, employers should keep in mind that lawful no-recording policies can still be applied in a manner that unlawfully restricts an employee's Section 7 rights. When contemplating discipline for violation of a no-recording policy, employers should consider the context in which the employee violated the rule. If the employee's violation can reasonably be interpreted as exercise of a Section 7 right, employers should refrain from discipline to prevent running afoul of the NLRA. Management should also receive training to seek advice regarding violations of no-recording policies when employees may be recording the following:

- Unsafe or hazardous working conditions.
- Discussions about employment terms and conditions.
- Potential inconsistencies in applying workplace rules.

In *AT&T Mobility*, the Board did not decide whether the act of recording the meeting would have retained the NLRA's protection had private customer information been mentioned during the meeting. However, employers should still craft no-recording policies with legitimate business justifications in mind. Under the current standard, the Board will perform a weighing test and consider whether the business justification outweighs the potential adverse impact on Section 7 protected rights to determine whether the policy is lawful to begin with. Employees should also ensure the business justification is legitimate and applicable to their organization.

State Law Overlap

Employers should also keep in mind that it is not just the NLRA that regulates workplace recordings—state law does as well. When it comes to workplace recordings, employers should consider whether the jurisdiction they are in requires consent of the person or persons being recorded. In one-party consent states, an employee can record a conversation if they are a party to the conversation. If they are not a party to the conversation, they can record it if one person that is a party to the conversation consents. In two-party consent states, more appropriately referred to as all-party consent states, everyone in the conversation must consent before a recording can occur. Most states (38 and the District of Columbia) are one-party consent states. Therefore, in most jurisdictions a no-recording policy is not enforceable under state law.

Accordingly, in most workplaces, employees could record without anyone else's permission absent an employer policy.

Will the Biden Board Change Things?

The current state of the law permits facially neutral no-recording policies where important employer justifications that outweigh the potential adverse impact on Section 7 rights exist. However, under the Biden Board, the state of the law on workplace recordings is likely to change. First, the Board is now majority Democratic. Majority Democratic Boards are historically employee-friendly and tend to place more weight on employee Section 7 rights than employer rights. Second, current Chairman Lauren McFerran dissented in the *AT&T Mobility* case stating that the *Boeing* decision is fundamentally flawed because it permits employers to maintain work rules that chill employees in their exercise of protected rights without narrowly tailoring those rules to serve demonstrated, legitimate interests. Chairman McFerran specifically pointed to the fact that AT&T did not limit the no-recording policy to work time and/or conversations in work areas or even to conversations on AT&T premises.

Chairman McFerran also stated that AT&T could protect its legitimate interests with a much narrower rule by making it a violation of company policy to record customer information or data. Chairman McFerran disagreed with the majority's decision to overrule the "applied to restrict" test in *Lutheran Heritage*, explaining that when a rule is used to commit an unfair labor practice, rescission of that rule provides an effective assurance to employees that it will not be used again to interfere with their rights. Finally, GC Memo 21-04, released August 12, 2021, lays out the legal precedents and case-handling processes that new NLRB General Counsel Abruzzo may advocate changing during her term. The memorandum reveals Abruzzo's intent to revisit the *Boeing* decision.

Given Chairman McFerran's dissent in *AT&T Mobility* and General Counsel Abruzzo's GC Memo 21-04, the lawful limits of no-recording policies are likely to change in the coming years and may return to the pre-*Boeing* test set forth in *Lutheran Heritage*. Employers may want to consider implementing more conservative no-recording policies based on Chairman McFerran's dissent.

Union Organizers' Access to California Farmworkers—*Cedar Point Nursery v. Hassid* (U.S. Supreme Court)

Supreme Court Holds Regulation Permitting Labor Organizations to Enter Property to Solicit Unionization Support Constitutes a "Taking" in Violation of the Fifth Amendment

On June 23, 2021, the U.S. Supreme Court held that California's access regulation, which grants labor organizations a "right to access" an agricultural employer's property in order to solicit support for unionization, is a "taking" under the Takings Clause of the Fifth Amendment. The Fifth Amendment's Taking Clause, which is applicable to the states through the Fourteenth Amendment, prohibits the government from taking property for public use "without just compensation."

The Court differentiated between two types of takings: physical takings and the imposition of regulations that restrict a property owner's ability to use his or her land. Physical takings are assessed under a per se rule, which requires that the government "pay for what it takes." To determine whether a use restriction amounts to a taking, the Court generally applies the more "flexible approach set forth in *Penn Central Transportation Co. v. New York City*, 438 U. S. 104, considering factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action."

California Code of Regulations Title 8, Section 20900 provides that "agricultural employers must allow union organizers onto their property for up to three hours per day, 120 days per year." The question before the Court was "whether the access regulation constitutes a per se physical taking under the Fifth and Fourteenth Amendments."

In its 6-3 decision, the Court reversed the U.S. Court of Appeals for the Ninth Circuit's ruling and remanded the case for further proceedings, finding that "California's access regulation appropriates a right to invade the growers' property and therefore constitutes a per se physical taking" because "[r]ather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties (here union organizers) the owners' right to exclude." The Court clarified that although the "taking" is not permanent, "the duration of the appropriation bears only on the amount of compensation due."

Justice Stephen Breyer, in his dissenting opinion, countered that the California regulation does not "appropriate" anything; it regulates the employers' right to exclude others. The dissent also cautions "that treating the access regulation as a per se physical taking will endanger a host of state and federal government activities involving entry onto private property." However, the majority clarified its decision by explaining that: (1) the Court's holding does not eliminate the distinction between trespass and takings because "isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right," (2) "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights, including traditional common law privileges to access private property" such as the privilege to enter property to "effect an arrest or enforce the criminal law under certain circumstances" or individuals' privilege to "enter property in the event of public or private necessity," and (3) "the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking." For example, under the Court's holding, "government health and safety inspection regimes will generally not constitute takings." The Court concluded that none of these conditions undermined its determination that California's access regulation gives rise to a per se physical taking. Therefore, while the Court's decision may open the door for businesses or landowners, including those outside of California, to challenge other regulations that grant access to private property, the Supreme Court's exceptions will likely limit the ruling's breadth.

General Counsel Says That Some NCAA Athletes Are Considered Employees Under the NLRA

On September 29, 2021, NLRB General Counsel Abruzzo issued GC Memo 21-08 explaining that "certain Players at Academic Institutions" (sometimes referred to as student-athletes) are employees under the NLRA. The memorandum also reinstated GC Memo 17-01 and further explained that, where appropriate, the General Counsel will allege that

misclassifying employees as "student-athletes" and leading them to believe that they do not have statutory protections is a violation of Section 8(a)(1) of the NLRA.

In addition to finding support for her conclusions based on the broad language of Section 2(3) of the NLRA, the NLRA's underlying policies, Board precedent, and common law, the General Counsel explained that recent developments in the Supreme Court, National Collegiate Athletic Association (NCAA) regulations, and the societal landscape demonstrate that traditional notions of amateur athletes have changed.

- First, in *NCAA v. Alston*, 141 S. Ct. 2141 (2021), the Supreme Court held that NCAA rules limiting education-related compensation violate antitrust law, unanimously recognized that college sports is a profit-making enterprise, and rejected the NCAA's defense based on amateurism. Justice Brett Kavanaugh, in his concurrence, went further and questioned "whether the NCAA and its member colleges can continue to justify not paying student athletes a fair share" of the billions of dollars in revenue that athletes generate and suggested that colleges and athletes could resolve the questions regarding compensation by "engag[ing] in collective bargaining." *Id.* at 2168.
- Second, on June 30, 2021, the NCAA suspended its name, image, and likeness (NIL) rules for Players at Academic Institutions, which means that student athletes may now profit from endorsements, autographs, and public appearances.
- Third, the General Counsel explained that Players at Academic Institutions engaged in collective action at unprecedented levels in 2020 following the murder of George Floyd and the COVID-19 pandemic, and that activism concerning racial justice and safety issues directly relates to terms and conditions of employment and is therefore protected concerted activity.

If sustained by the NLRB and courts, GC Memo 21-08 will have significant implications for all institutions with NCAA student-athletes as these individuals are now considered employees under the NLRA. Although the NLRA applies only to private colleges and universities and does not apply to public institutions, the General Counsel explained that "[b]ecause Players at Academic Institutions perform services for, and subject to the control of, the NCAA and their athletic conference, in addition to their college or university, in appropriate circumstances I will consider pursuing a joint employer theory of liability." GC Memo 21-08 at fn. 34. This means the General Counsel "will consider pursuing charges against an athletic conference or association even if some member schools are state institutions." *Id.*

Finally, in addition to recognizing that student-athletes are employees under the NLRA, the General Counsel explained that she "will continue to maintain the prosecutorial position that student assistants, as well as medical interns and non-academic student employees, are protected by the Act." *Id.* at fn. 2. Overall, GC Memo 21-08 has far-reaching applications for all universities and will likely change the landscape of college sports.

D.C. Court of Appeals Rejects NLRB's Test for Determining When Property Owners Can Stop On-Site Contractor Employees From Engaging in Protected Activity

On August 31, 2021, the U.S. Court of Appeals for the District of Columbia unanimously rejected the NLRB's application of a Trump-era test for determining when property owners can bar on-site contractors' employees from engaging in protected activity on their property. *NLRB v. Local 23, American Federation of Musicians*, No. 20-1010 (D.C. Cir. Aug. 31, 2021).

The Board Established a New Test in 2019

In 2019, the Trump-era Board ruled in *Bexar County Performing Arts Center Foundation*, 368 NLRB 46 (2019), that workers did not have the right to engage in union organizing and similar activities on private property where they worked but which was not owned by their employer. Musicians of the San Antonio Symphony had distributed union literature to passersby before a ballet performance at the Tobin Center, where the musicians performed. The musicians were not employees of the Tobin Center, but rather, employees of the symphony that leased the center for its concerts. After the Tobin Center staff asked the symphony musicians to move across the street from its plaza to distribute literature, the symphony union filed an unfair labor practice charge against the Tobin Center, claiming violation of the musicians' Section 7 activity rights.

The Board announced a new standard, expanding the circumstances in which a property owner could bar an on-site contractor's employees from its property for organizational activity. It held that a property owner could exclude off-duty contractor employees seeking to engage in Section 7 activities *unless* (1) those employees work both "regularly and exclusively on the property" and (2) the property owner fails to show that they have "one or more reasonable nontrespassory alternative means to communicate their message." This new test overruled the Board's prior test established in *New York New York, LLC*, 356 NLRB 907 (2011). Under that standard, a property owner could exclude a contractor's employees who were regularly employed on the property and who sought to engage in Section 7 organizational activity only where the owner was able to demonstrate that the employees' activity significantly interfered with his use of the property or where exclusion was justified by another legitimate business reason.

Upon applying its new test, the Board found that the symphony employees did not work "regularly" at the Tobin Center because they only worked on site 22 weeks each year. It compared the presence of the symphony workers for only 22 weeks out of the year to a contracted employee who stocked vending machines once every week all year round. The Board also found the symphony musicians did not work "exclusively" at the Tobin Center because they performed at other venues throughout San Antonio. The Board further determined the symphony members did have other means of communicating their message—via the sidewalk across the street and through traditional and social media. It therefore held the Tobin Center could exclude the contractor nonemployees from its property.

D.C. Court of Appeals Held the Board Arbitrarily Applied Its 2019 Test

On appeal, the D.C. Court of Appeals rejected the Board's application of the new test. Under the first prong, the court held the Board had arbitrarily defined "regularly" to mean the frequency of the employees' work by counting the number of weeks the musicians were present on site. The court noted in the Board's example that a vending machine worker was not present on site as frequently as the symphony workers in any given year despite being present once a week. It held the Board did not explain how its new test corresponded to an employee's connection to the property.

The court also held the Board's analysis of "exclusivity" under the first prong was arbitrary. The Board's logic failed to exclude workers with only a marginal presence on the owner's property while excluding others who had a substantial presence on the property.

Under the second prong of the test, the court found that even though the Board had reasonably placed the burden on the property owner to show employees had an alternative means of distribution, it never asked the Tobin Center to prove it met that burden. In turn, the musicians could not rebut that they did not have alternative means of distribution. Having rejected the application of the test, the court remanded the case back to the Board to decide whether to proceed with another analysis under the test or develop a new test altogether.

More Protected Activity to Be Expected

The court's decision follows a Board decision earlier this year, discussed above, involving "Scabby the Rat" and two eight-foot banners that a union had placed at the entrance of a large trade show. The union had placed Scabby the Rat, an inflatable 12-foot-tall rat with fangs and bloody eyes, and two large banners at the entrance of a trade show criticizing both a manufacturer for safety violations and a neutral employer for doing business with the manufacturer. In July 2021, the Board held that the union's use of Scabby the Rat, without more, did not violate Section 8(b)(4)(ii)(B) of the NLRA because it did not "threaten, coerce, or restrain" the neutral employer. The Board's Scabby the Rat decision and the D.C. Circuit's decision this year will likely embolden unions across industries to engage in more protected activity at worksites and beyond, even if they are not on their employers' sites. Property owners and employers alike should expect more union activity going forward. ■

What's On The Horizon

Marty Walsh Takes the Helm at the Department of Labor

Upon taking office in January 2021, President Biden nominated Boston Mayor Marty Walsh as secretary of labor; Walsh was confirmed by the Senate on March 22, 2021. A former head of the Boston Building and Construction Trades Council, Walsh enjoys broad union support, and his appointment signaled that Biden would prioritize the interests of organized labor.

Since resigning his building trades leadership position in 2013 to launch his mayoral campaign, Walsh has used his public office to advance a worker-friendly agenda. Walsh made new housing a top priority, wrestled with improving the city's schools, and tried to address persistent complaints about systemic discrimination, declaring racism to be a public health emergency in the city and assigning a task force to look at police reforms.

Significantly, Walsh and Biden have strong personal ties. Not only did Biden speak at the mayor's 2017 inauguration, but the two have been spotted together in Boston at numerous events. "He's a friend and knows Joe: They've worked together on numerous occasions," AFL-CIO President Richard Trumka stated. "They have the relationship I think is necessary."

"Working people, labor unions, and those fighting every day for their shot at the middle class are the backbone of our economy and of this country," Walsh tweeted in January 2021. "As Secretary of Labor, I'll work just as hard for you as you do for your families and livelihoods. You have my word."

Given President Biden's long-standing ties with labor leaders and his support for the right to organize, the appointment of Walsh—the first union member to serve in this role in nearly a half century—signaled loud and clear that Biden's administration would seek to implement the sweeping pro-worker agenda he made a focus of his campaign.

President Bident Appoints a New NLRB General Counsel

President Biden's first act upon being sworn in was to fire Trump-appointed NLRB General Counsel Peter Robb. Robb still had more than 10 months remaining on his Senate-appointed four-year term as General Counsel. Breaking with long-standing tradition, President Biden informed Robb that he was expected to resign or face being fired. Robb refused to resign and was fired the same day.

The U.S. Supreme Court has long held that the president maintains the constitutional authority to remove executive branch appointees. *See generally Myers v. United States*, 272 U.S. 52, 106 (1926). Separation-of-powers–related questions regarding the bounds of the president's authority have typically turned on whether, and to what extent, Congress can limit the president's at-will removal powers and impose "for cause" requirements for removal of Senate appointees.

Opponents of President Biden's actions argue that he exceeded his executive authority by removing Robb without cause, likely citing to *Humphrey's Executor*, which upheld a "for cause" limitation on the president's exercise of removal powers in relation to appointed heads of independent agencies. *Humphrey's Executor v. United States*, 295 U.S. 602, 631-32 (1935). President Biden's proponents, on the other hand, will point to *Seila Law v. Consumer Financial Protection Bureau*. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211 (2020). In *Seila*, the Supreme Court struck down a "for cause" limitation on the president's ability to remove the Senate-appointed director of the Consumer Financial Protection Bureau (CFPB), reasoning that such a limitation would violate constitutional separation-of-powers doctrine and noting that "the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead." *Id.*

How a challenge to President Biden's removal of Robb might play out is unclear. At least one federal court has signaled, in

dicta, that federal labor law gives the president authority to fire the NLRB General Counsel without cause. *Goonan v. Amerinox Processing, Inc.*, 121CV11773NLHKMW, 2021 WL 2948052, at *5 (D.N.J. July 14, 2021). The constitutional separation-of-powers issue was not addressed in *Goonan*, though. The NLRB has also declined to weigh in on the issue, despite employers' attempts to challenge the authority of Robb's interim replacement on grounds that Robb's removal was improper.

In any event, President Biden's appointee for the General Counsel role, Jennifer Abruzzo, was confirmed by the Senate in July. The tightly contested confirmation vote split the Senate along party lines, requiring a tie-breaking vote from Vice President Kamala Harris. Although opponents continue to challenge President Biden's actions regarding Robb, Abruzzo's appointment has ushered in a new era at the NLRB.

Abruzzo wasted no time clarifying NLRB priorities during her term. In a memo issued on August 12, 2021, Abruzzo laid out three high-level priorities: (1) close review of Trump-era cases and Board decisions that overruled prior precedent; (2) specific initiatives and legal issues that also require close examination, despite not being the subject of recent adjudication; and (3) case-handling matters traditionally submitted to the General Counsel's office for advice. Per the memo, some of the subjects that the regional offices (Regions) are required to submit to the General Counsel's office for advice include:

- Employer handbook rules.
- Confidentiality provisions/separation agreements and instructions.
- What constitutes protected concerted activity.
- Employee status.
- Duty to bargain.
- Section 7 rights.

It seems clear—and not terribly surprising—that Abruzzo's term will focus, in substantial part, on overturning Trump-era decisions and reinstating prior precedent. Abruzzo has also pushed the Regions to seek all available remedies for violations of the NLRA, signaling the expected shift to a more active and robust enforcement approach from the General Counsel's office and administration of the Regions as compared to Robb's tenure.

Two September 2021 NLRB General Counsel "Expanded Remedy" Memos—What Do They Mean for Employers' Future Unfair Labor Practices?

In a shot across the bow to unionized employers, on September 8, 2021, NLRB General Counsel Abruzzo issued GC Memo 21-06, which strongly encourages Regions to seek "new and alternative remedies" in complaints made to the NLRB regarding unfair labor practices (ULPs). These new and alternative remedies dramatically expand the categories of remedies which may now be sought in ULP cases.

For example, monetary damages for a ULP were previously limited to the actual compensation an employee lost due to a ULP. Now, pursuant to GC Memo 21-06, in unlawful termination cases, Regions are directed to seek consequential damages, front pay, and liquidated back pay, as well as additional new remedies in cases involving firings of undocumented workers.

In cases involving unlawful conduct committed during a union organizing drive, GC Memo 21-06 instructs Regions to seek increased union access to employees; reimbursement of organizing costs; expanded obligations regarding NLRB notices; training of employees, including supervisors and managers, on employees' rights under the NLRA and/or compliance with the Board orders; visitorial and discovery clauses to assist the agency in monitoring compliance with NLRB orders; and other remedies.

In cases alleging unlawful failures to bargain, GC Memo 21-06 instructs Regions to seek remedies including, without limitation, mandatory bargaining schedules setting the frequency and length of bargaining sessions, progress reports on bargaining status, reimbursement of negotiation expenses, and reinstatement of unlawfully withdrawn bargaining proposals.

Not only did the General Counsel encourage Regions to seek the expanded remedies referenced above in ULP cases, but, on September 15, 2021, she issued GC Memo 21-07,

which encourages Regions to include these expanded remedies, among others, in ULP settlement agreements.

In addition, GC Memo 21-07 instructs that, "with very limited exceptions," Regions should return to the practice of incorporating aggressive default language in all ULP settlement agreements. This default language requires employers to agree that if the employer breaches the settlement agreement, the General Counsel may reinstate the complaint that was settled and file a motion for summary judgment with the Board. The employer forfeits the ability to challenge the claims in the complaint. GC Memo 21-07 additionally encourages Regions to reject nonadmission clauses in settlement agreements, require letters of apology, and expand distribution of notices, among other recommendations.

Together, these memorandums significantly raise the stakes in ULP cases while simultaneously making settlements more challenging for employers.

The NLRB Confirms Duty to Bargain Over Vaccine/Testing Mandates

As the government issued a series of vaccine mandates in 2021, unionized employers found themselves pushed in one direction by the federal mandate and in the other by a potential duty to bargain. The list of considerations for when and how to implement COVID-19 vaccine or testing mandates is long for any employer but is made more complex if required changes come with a bargaining obligation.

On November 10, 2021, the NLRB General Counsel's office issued GC Memo 22-03 outlining bargaining obligations under the Occupational Safety and Health Administration's (OSHA) Emergency Temporary Standard to Protect Workers from Coronavirus (ETS). The GC memo states that "covered employers would have decisional bargaining obligations regarding aspects of the ETS that affect terms and conditions of employment" and contends that the ETS "clearly affects terms and conditions of employment" because of its potential to affect the continued employment of employees subject to the rule.

Despite acknowledging the lack of a duty to bargain where a change in the terms and conditions of employment is statutorily mandated, the General Counsel highlighted the discretion afforded to employers in complying with the ETS and the duty to bargain that arises as a result. Because employers can choose to mandate either vaccination or regular testing for those who decline the vaccine, an employer "may not act unilaterally so long as it has some discretion in implementing" statutory requirements.

The General Counsel's memo did not address collective bargaining agreements that permit an employer to establish these types of rules without bargaining, which could be a possible exception to this rule. Yet even a strong management rights provision might be found not to apply to COVID-19-related vaccines and testing, given the novel and sensitive concerns involved, and given the Biden-appointed NLRB majority's likely move from the management-friendly "contract coverage" standard to the prior, more restrictive "clear and unmistakable" waiver test. Under the latter, a union would have had to expressly agree to allow the employer the authority to promulgate a vaccination and testing policy without bargaining.

Going further, the General Counsel noted that even where the ETS does not provide employers any discretion, employers are required to bargain over the *effects* of their decision to implement changes under the ETS. As the Board held in *Blue Circle Cement*, 319 NLRB 954, 954 n.1, 958-59 (1995), *enforcement denied mem.*, 106 F.3d 413 (10th Cir. 1997), even where an employer can unilaterally change policies pursuant to federal law, failure to bargain over the effects of the change can constitute a violation of Section 8(a)(5) of the NLRA.

Examples of these types of effects may include (but are not limited to) methods for confirming vaccination status, time frames for employees to get vaccinated, decisions about who conducts and who pays for the vaccination and testing, paid time off entitlements (e.g., for testing, for vaccination, or for adverse reactions to vaccine), medical and religious accommodations, consequences of noncompliance, and incentives to encourage vaccination. To satisfy the effects bargaining requirement, the employer must provide notice of the policy in advance of implementation, even if the CBA permits implementation of the policy.

In short, failure to bargain and reach agreement, or impasse over the effects of ETS-compliant policies or an employer's decision about how to comply with the ETS where it is afforded discretion, may constitute an unfair labor practice.

The PRO Act—Overview and Update

On March 9, 2021, the U.S. House of Representatives passed the Protecting the Right to Organize Act of 2021 (PRO Act). Only five Republican representatives voted in favor of the PRO Act. Thus, the bill is unlikely to advance in the Senate since Democrats do not control the Senate by enough votes to overcome a filibuster.

The PRO Act contains several notable provisions that negatively affect employers:

1. Many states have "right-to-work" laws that allow workers to opt out of a union and not pay union dues. The PRO Act essentially nullifies "right-to-work" laws by allowing unions to collect union dues from employees that opt out of the union.
2. During union elections, many employers hold company-sponsored meetings with mandatory attendance to discuss the implications of union representation. The PRO Act prohibits these informational meetings and allows employees to cast ballots at a location other than company property.
3. It is not unusual for unions and employers to have difficulty reaching an agreement for a first contract. Now, if the parties are unable to agree to a first contract, the employer can impose its last offer as the terms and conditions of employment. The PRO Act would diminish the employer's bargaining position by instead allowing newly certified unions to seek arbitration and mediation to settle impasses in first contract negotiations.
4. The PRO Act would prohibit employers from using an employee's immigration status against the employee when determining the terms of the employee's employment.
5. The PRO Act changes the definition of "joint employer" under the NLRA, expanding the number of companies with potential liability under the NLRA.
6. The PRO Act also redefines "supervisor" under the NLRA to include more frontline leaders as nonsupervisory "employees" who can be represented by a union. This would subject more employees to the NLRA's coverage and prevent employers from relying on frontline leaders to communicate about unions during union campaigns.

7. The PRO Act would give employees the right to use an employer's electronic communications system, email, and computer hardware to organize or engage in protected concerted activity.
8. The PRO Act sets forth the "ABC test" as the appropriate test for determining independent contractor or employee status under the NLRA. This is discussed in more detail below.
9. The PRO Act prohibits employers from entering into or attempting to enforce "any agreement, express or implied, whereby … an employee undertakes or promises not to pursue … any kind of joint, class, or collective claim arising from or relating to the employment of such employee." Thus, the PRO Act would prohibit arbitration agreements with individual employees that require arbitration of class action claims and require employers to restructure employment agreements accordingly.
10. Finally, the PRO Act would establish enhanced monetary penalties for both companies and executives that violate workers' rights. Under the PRO Act, corporate directors may also be held liable.

While we view the odds of the PRO Act's passage as low, it is worth noting that the Biden administration appears to support the PRO Act.

The Future of Independent Contractors Under the PRO Act

One major change proposed by the PRO Act is a new distinction between employees and independent contractors under the NLRA. The PRO Act expands the definition of employees under the NLRA by adopting the "ABC test." Under the ABC test, a worker is considered an employee and not an independent contractor unless: (1) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact; (2) the service is performed outside the usual course of the business of the employer; and (3) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

Several states have adopted the ABC test to distinguish between employees and independent contractors under state statutes related to wages, maximum hours, and unemployment. One of the most noteworthy examples of this is California's utilization of the ABC test for wage-and-hour purposes in Assembly Bill 5 (AB 5), which was enacted in 2019. This legislation received substantial criticism and made it extremely difficult to classify a worker as an independent contractor. AB 5 was eventually amended to expand the number of available exceptions.

If the PRO Act is signed into law without the sort of exceptions found in California's AB 5, the NLRA would suddenly have jurisdiction over many individuals that have been previously classified as independent contractors. Obviously, this would be a boon to unions, which could suddenly unionize an ever-expanding part of the workforce that has historically been out of reach of organizers. While application of the ABC test proposed by the PRO Act would be limited to the NLRA, critics are concerned that this would be a stepping stone to utilization of this test in other federal employment laws.

An Update on the Biden Administration's White House Task Force on Worker Organizing and Empowerment

With much fanfare, on April 26, 2021, President Joe Biden signed an Executive Order (EO) establishing the White House Task Force on Worker Organizing and Empowerment (the Task Force), which is "dedicated to mobilizing the federal government's policies, programs, and practices to empower workers to organize and successfully bargain with their employers." The Task Force is chaired by Vice President Harris and vice chaired by Secretary of Labor Marty Walsh.

The EO directs the Task Force to make recommendations within 180 days regarding how both existing and new policies in the federal government can promote worker organizing and collective bargaining.

On October 20, 2021, consistent with the EO and the Task Force recommendations, the U.S. Office of Personnel Management issued guidance recommending actions federal agencies are "strongly encouraged" to take in the hiring and on-boarding process to support union organizing. According to the guidance, agencies are strongly encouraged to: (1) include in job postings information about whether the position is included in a bargaining unit; (2) include the local or chapter number of the union representing the unit position; (3) engage local unions in the agency and provide unions an opportunity to be part of the orientation process; and (4) provide new bargaining unit employees information regarding their rights under Federal Service Labor-Management Relations Statute.

While the EO signaled the Biden administration's ongoing alliance with organized labor, the ultimate results were more bark than bite. The Task Force made recommendations about how federal agencies can be more labor-friendly, but its end results will have little or no direct effect on private industry.

Ongoing Imposition of Mail-In Elections

Traditionally, union representation elections have been held in person (called "manual elections"). They have been strongly favored by NLRB because they: (1) permit in-person supervision, (2) promote employee participation, and (3) are tangible representations of the employees' right to choose (or abstain from choosing) representatives for collective bargaining. Manual elections generally take place at either the employees' workplace or some other appropriate location. Regional directors have discretion to direct a mail-ballot election in three situations: (1) where eligible voters are scattered over a wide geographic area; (2) where eligible voters' schedules are scattered such that they are not present at a common location at common times; or (3) when there is a strike, lockout, or picketing in progress.

The COVID-19 pandemic caused the NLRB to expand the use of mail-ballot elections pursuant to the "extraordinary circumstances" exception and to consider the circumstances meriting a mail-ballot election. The Board issued guidance for its regional directors in its decision *Aspirus Keweenaw*, 18-RC-263185, 370 NLRB No. 45 (2020).

Though still "reaffirm[ing] the Board's long-standing policy favoring manual elections," the Board laid out six circumstances warranting a regional director directing a mail-ballot election due to the COVID-19 pandemic:

1. The regional agency office tasked with conducting the election is operating under "mandatory telework status."

2. Either the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5% or higher. Though the Board identified its preference for county-level metrics, regional directors are encouraged to use geographic data that is better and more applicable if it exists, so long as they cite and explain the determination.

3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size. Nonmandatory guidance, alone, is insufficient to direct a mail-ballot election. The Board also notes that travel restrictions that may not be applicable to Board agents traveling for elections (because as federal government employees, they are considered to be performing an essential service) are similarly insufficient to direct a mail-ballot election.

4. The employer fails or refuses to commit to abide by the GC Memo 20-10 protocols. The failure of an employer requesting a manual election to agree to abide by the protocols supports the direction of a mail-ballot election. Regional directors are also cautioned against approving safety protocols beyond those in the GC Memo 20-10 that would create the perception of one party's control over employee access or the interference of free choice.

5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify by affidavit its current status. The employer must submit its certification along with its submission regarding election arrangements. The employer has a duty to supplement its initial submissions regarding any changes up to the day of the election itself.

   In *Rush University Medical Center*, 13-RC-272731, 370 NLRB No. 115 (2021), the Board clarified that this factor required a showing that COVID-19 cases at the facility would reasonably be expected to affect the conduct of a manual election. Considerations include whether the number of COVID-19 cases, or the likelihood that those cases will result in unit employees being exposed to COVID-19, indicates that a manual election would pose a threat to health or safety; or current COVID-19 cases among unit employees would result in their disenfranchisement by a manual election.

6. Other similarly compelling considerations. In *Rush University Medical Center*, 13-RC-272731, 370 NLRB No. 115 (2021), the Board noted that the emergence of new COVID-19 variants without corresponding changes in prevention strategies by the Centers for Disease Control (the CDC) do not constitute "similarly compelling circumstances."

Regional directors have discretion to consider other relevant factors adapted to the "peculiar conditions" of each case, but should normally exercise discretion within the NLRB's

guidelines. The NLRB issued GC Memo 21-01 to summarize the *Aspirus Keweenaw* holdings, superseding all other instructions on the propriety of mail-in or manual ballot elections other than GC Memo 20-10.

The Board in *Aspirus Keweenaw* emphasized that the presumption toward manual elections is supported by data that manual elections promote greater participation in the election process. For example, from October 1, 2019, to March 14, 2020, 85.2% of eligible voters cast a ballot in the 508 manual elections conducted, while only 55% of eligible voters cast a ballot in mail-ballot elections during the same period. The data from March 15, 2020, through September 30, 2020, shows that although participation in mail-ballot elections rose to 72.4% in the 432 elections conducted, the turnout was still much higher in the 46 manual elections conducted (92.1%). Nevertheless, at least one Board member (concurring in the result) advocated for default mail-ballot elections, certainly for the length of the pandemic, but also advocated for "expanding and normalizing other ways to conduct representation elections on a permanent basis, including mail, telephone, and electronic voting" to bring the NLRB and its elections "into the modern age."

Since the decision in *Aspirus Keweenaw*, the Board has also weighed in on other mail-ballot election issues. In *Professional Transportation, Inc.*, 370 NLRB No. 132 (2021), the Board held that an election would be set aside if evidence showed that a party solicited one or more ballots (including collecting and otherwise handling them) in a way that affected the determinative number of votes. As the effect of COVID-19 and its variants drags on, NLRB regional offices show no signs of returning to traditional manual elections, even in workplaces where the employees have long ago returned to in-person work. Employers should expect mail-in elections to be the law of the land through the end of the pandemic.

Microutnits—Are We Headed Back to the *Specialty Healthcare* Standard?

Given the recent changes to the Board's composition, many are questioning whether the Board will abandon its current method of determining the appropriateness of micro-units and revert back to the *Specialty Healthcare* standard. Currently, the Board uses the traditional community-of-interest test to determine whether a microunit is appropriate. The test looks to "whether employees in the proposed unit share a community of interest *sufficiently distinct* from the interests of employees excluded from the unit to warrant a separate bargaining unit." *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at 11 (2017) (emphasis in original). Conversely, the Board's *Specialty Healthcare* standard held that petitioned-for units would be found appropriate unless there was an "overwhelming" community of interest between the petitioned-for unit and excluded employees. *See Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011). Since the *Specialty Healthcare* standard is more likely to result in finding that a petitioned-for unit is appropriate, unions and other labor leaders hope that a return to this standard will enable them to organize smaller groups of employees at large production facilities. Given the pro-labor tilt of the current Board and the Biden administration's commitment to organized labor, it is expected that the Board will abandon the traditional community-of-interest test and reinstate *Specialty Healthcare*.

That said, the Board has not yet confronted the issue and regional directors continue to apply the traditional community-of-interest test. For example, on February 19, 2021, the International Association of Machinists and Aerospace Workers (IAM), District Lodge 1888, filed a representation petition seeking to represent a unit of approximately 87 tool and die maintenance technicians at Nissan's Smyrna, Tennessee, facility. Nissan asserted that the petitioned-for unit was inappropriate and that the only appropriate unit was a wall-to-wall unit consisting of approximately 4,300 production and maintenance employees. Following a 10-day hearing and submission of briefs, the acting regional director issued a Decision and Direction of Election that applied the traditional community-of-interest test and found that the petitioned-for unit was not appropriate. While the acting regional director explicitly applied the traditional community-of-interest test, it also signaled that the petitioned-for unit would not be appropriate under *Specialty Healthcare*, writing, "the petitioned-for Tool and Die Technicians share an *overwhelming* community of interest not only with the rest of the Stamping Shop, but with the Production Technicians and Maintenance Technicians throughout the facility." *Nissan North America, Inc.*, Case No. 10-RC-273024 (Reg. Dir., June 11, 2021) (emphasis added). Once the unit was expanded,

the union could not show adequate support and the petition was dismissed. The union subsequently appealed, arguing that the tool and die maintenance technicians constitute an appropriate craft unit. Interestingly, the union's appeal does not argue that *Specialty Healthcare* should be reinstated or that the petitioned-for unit would be appropriate under that test. The Board has not yet ruled on the union's appeal.

Will the NLRB Go After Restrictive Handbook Policies for Nonunion Employers?

On January 4, 2021, in *Medic Ambulance Service, Inc.*, the Board upheld six social media rules in a company's employee handbook. At first glance, the decision appears to reinforce the employer-friendly standards first outlined in the NLRB's 2017 decision in *Boeing Co.*, 365 NLRB No. 154. In *Boeing*, the NLRB held that "when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (1) the nature and extent of the potential impact on NLRA rights, and (2) legitimate justifications associated with the rule." 365 NLRB No. 154, slip op. at 3.

However, Member Lauren McFerran (now chair of the NLRB), the lone Democrat on the three-member panel deciding *Medic Ambulance Service, Inc.*, wrote a strong dissent that may portend a shift in NLRB policy now that the Board has flipped from a Republican to Democratic majority under the Biden administration.

In *Medic Ambulance Service, Inc.*, the Board upheld six social media rules in the company's employee handbook prohibiting or limiting:

1. Inappropriate communications.
2. Disclosure of confidential information.
3. Employees' use of the company's name in social media posts.
4. Posting photos of coworkers.
5. Sharing employee compensation information.
6. The use of social media to disparage the company or others.

For each of these six rules, the Republican majority found that an objectionably reasonable employee would not read the rule as prohibiting NLRA-protected activity under Section 7 of the Act. For example, the Board reasoned that the rule prohibiting the sharing of employee compensation information was lawful notwithstanding employees' rights under Section 7 to share wage information since the handbook policy was drafted to protect only "the *company's* confidential information." 70 NLRB No. 65, slip op. at 4 (emphasis in original). Accordingly, an objectively reasonable employee would understand that the policy does not restrict "their right to discuss their wages with each other or to disclose them to a union." *Id.*

Member McFerran's dissent strongly denounced *Boeing* and its progeny cases and argued that each of the six work rules upheld by the majority should be found unlawful as infringing on employees' Section 7 rights. For instance, McFerran criticized the majority's decision to uphold the rule prohibiting employees from using social media to disparage the company on the basis that the majority was essentially holding that all "nondisparagement rules related to social media use are always lawful—no matter how they are written, and no matter what specific justifications the employer offers (or fails to offer) for its rule." 70 NLRB No. 65, slip op. at 7. Regarding the rule prohibiting the sharing of employee compensation information, McFerran wrote that the majority's explanation "is nonsensical." *Id.* at 11.

McFerran concluded her dissent by arguing that *Boeing* was decided incorrectly and the "majority's analysis of this rule neatly captures the Board's current approach to evaluating work rules: heads, the employer wins; tails, the employees lose. Any portion of a rule that clearly infringes on Section 7 rights is saved by the rule as a whole if some legitimate purpose for the rule can be discerned or ascribed. And if the rule as a whole clearly infringes Section 7 rights, then any portion of the rule with a legitimate purpose saves the entire rule."

Since *Medic Ambulance Service, Inc.,* was decided, two Biden-nominated members have joined McFerran on the Board to form a 3-2 Democratic majority. It is thus possible, or even likely, that the Board, under McFerran's leadership, will revisit *Boeing* and its progeny before 2024 and more heavily scrutinize nonunion employers' handbooks and policies. ■

What to Expect in 2022

Similar to past presidential administrations, the Biden administration took steps during its first year in office to place key players in pivotal roles, making 2022 a critical year for execution for the Biden-era Board. Unionized employers need to stay on top of Board decisions and General Counsel memorandums that are intended to return the labor landscape to a pro-employee era. The Board was extremely active in 2021 as evidenced by the amount of back pay and fines collected, and the number of employees reinstated. Employers can expect the Board to set its sights in 2022 on surpassing the relief obtained for employees in 2021.

As noted above, there were critical developments and Board decisions in 2021 pertaining to social media, communications, and nondisparagement and nonsolicitation employment policies and procedures. All employers should review and audit their relevant policies and practices to ensure compliance with the ever-changing landscape.

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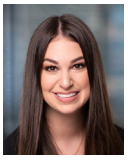

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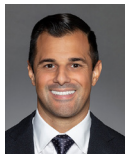

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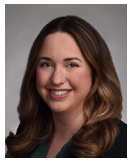

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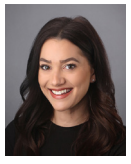

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