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EMPLOYERS AND LAWYERS, WORKING TOGETHER

The Practical NLRB Advisor

Unpacking the Great Disconnect

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According to the latest Gallup survey, unions are more popular with the U.S. public now than at any time since 1965. When asked if they approve or disapprove of labor unions, 71 percent of respondents indicated their approval in the 2021 survey. This was up from 68 percent in 2020, and 64 percent in the last pre-pandemic poll. In fact, the 71-percent approval rating was only three percentage points short of the all-time high recorded in the 1950s, otherwise known as organized labor's halcyon days.

Contemporaneously, the National Labor Relations Board (NLRB) reported that its representation case filings (i.e., petitions seeking a vote for union representation) had increased by a whopping 57 percent in the first half of fiscal year 2021. Not only had petition filings increased dramatically, but unions had rolled up marquee electoral wins. Thus, the news media has repeatedly cited union election victories among discrete groups of employees working for household name corporations as evidence of organized labor's remarkable resurgence.

Cultural outlook, technology, and demographics also seem to have created a fertile landscape for organizing. Social media and other communication advances have already connected individual employees with their peers to a degree and level unimaginable just a generation ago. More young people are entering the workforce and bringing with them world views that would seem to favor unionization.

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BRIAN IN BRIEF

There has been no "long winter's nap" for U.S. labor law over the past several months. The mid-December departure from the National Labor Relations Board (NLRB) of Republican Member John F. Ring pretty much guaranteed a hectic year-end since the Board traditionally issues a spate of cases whenever a member is cycling off the federal agency. As this issue of the *Advisor* details, this time around was no exception.

December saw the Board issuing a host of controversial decisions and sharply divided opinions, and there is every reason to believe this troubling pattern will continue. At a recent meeting of the American Bar Association, the NLRB general counsel, who previously identified 53 issues currently settled by extant Board precedent that she contends must be reversed, noted that she only had 14 issues left that were lacking a case vehicle necessary to put those issues before a transparently pro-labor Board majority for decision. There is little doubt among stakeholders that she is likely to find those remaining vehicles.

These actions are not strictly confined to the NLRB. As the Board continues to issue controversial decisions, the judicial review of those decisions by the federal courts of appeal has already shown signs of ramping up. In what may be a precursor of greater involvement by the federal courts in labor policy and the administration of the National Labor Relations Act (NLRA), the first case argued in front of the Supreme Court of the United States this year was *Glacier Northwest,* a potential game-changer in NLRA practice.

And, never to be outdone, the Democratic-led U.S. Senate, in particular its Committee on Health, Education, Labor and Pensions (HELP), chaired by Senator Bernie Sanders, has given every indication that it intends to pursue an activist labor agenda.

With all three branches of government gearing up, and to again shamelessly steal another literary allusion, NLRB stakeholders have not only missed their winter nap, they are certainly not facing a "silent spring."

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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These younger workers are reportedly more disposed to collectivism and collective problem-solving. Surely, it seems, the air must be filled with Samuel Gompers' cigar smoke, and George Meany, John Lewis, and Sidney Hillman must again be walking among us. The rebirth of trade unionism must certainly be at hand.

Chipping away at the 'union popularity' narrative

But wait. How can all of this possibly square with the data released this winter by the U.S. Department of Labor's Bureau of Labor Statistics (BLS)? In mid-January, BLS published its annual report on union membership in the United States and the numbers simply do not correlate with the oft-repeated "resurgence and popularity" narrative. Indeed, the survey found that union membership for the combined public and private sector workforces had fallen to 10.1 percent—the lowest rate of union membership on record. The union membership rate among the private sector was no better, having fallen to an all-time low of 6.0 percent. These latest figures reflect the continuing steady decline in union membership among private sector employees. In the 1950's, nearly one-third of the private sector workforce in the United States was unionized. That rate has experienced an unbroken, decades-long decline to its present-day lows.

None of this is to remotely suggest that nonunion employers are no longer at risk of facing an organizing drive. Quite to the contrary, the exact opposite is true. Unions are fully aware of these statistical trends and understand that more organizing is their only path forward to continuing viability and financial stability. Likewise, none of this is to suggest that unionized employers are likely to face less contention or potential disruption in running their unionized businesses. Once again, the opposite is true. On both an individual and collective basis, organized labor continues to exert enormous influence over business operations and the overall economy. The significance of that influence has seemingly not been blunted by the continuing decline in membership levels. Also, the potential for economic disruption has not decreased either. It bears noting that in the same period when organized labor's membership level dropped to its lowest recorded level, the incidence of strikes and work stoppages reached the highest levels in recent memory.

False blame. The above caveats aside, what explains the disconnect between union's seeming popularity and its dismal and declining membership numbers? If one listened to organized labor, and its partisan political allies arguably masquerading as academics, the only possible explanations are that current law makes organizing too difficult and employers routinely thwart union organizing by continuously and seriously violating that law. This narrative, false as it is, has nonetheless been put forward to give cover to advocate for changes to current U.S. labor law.

For example, and once again confirming the adage that "Washington D.C. is the place where bad ideas never die," the Democrat-authored Protecting the Right to Organize (PRO) Act has just been reintroduced in Congress. This fundamentally pro-labor legislation has far more to do with ensuring higher levels of unionization and, thus, more money flowing into union coffers, than it does with any employee rights or benefits. A detailed discussion of the manifold problems with the PRO Act can be found in Issue 16 of the *Practical NLRB Advisor*. But more to the present point is the fact that the "union popularity and resurgence" narrative has been designed to foster its passage.

The reality behind the precipitous decline in union membership, however, is usually much more complex than the analyses of the pro-union movement.

Different questions, different results. One of the most fundamental problems with the "popularity myth" is that it lacks an explanation of the methodology utilized to yield the opaque results. Survey and poll results are only as good as the questions they ask. For example, almost all individuals will answer in the affirmative when asked if they believe employees should have a meaningful voice in the workplace. However, there is a quantum leap between that sentiment and whether those same individuals would favor adversarial bargaining through a third party as the best means to achieve that voice. The survey results are also extraordinarily dependent on the knowledge and life experience of the responder. Ask a group of individuals if puppies are cute and you will get an almost uniformly positive result. Ask the same question to a group whose puppies have just chewed through their best pair of shoes and you will most certainly get a very different result.

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The reality is that most respondents likely know little about labor unions and, as a result, their responses reflect more of a generalized support for labor management engagement than support for unionization. At best they convey abstract support for the *idea* of a union but very little concrete support for the *reality* of union representation.

Misleading data. The "union popularity" narrative is also based on extraordinarily misleading data. For example, we hear a great deal about the surge in petition filing. However, as a historical matter, petition filing in recent years, including this year, are a faint shadow of what they used to be. While in recent years the Board has received somewhere between 1,000 to 2,000 petitions per annum, even a cursory look at earlier periods of time such as the 1970s reveals that the Board was receiving 12,000 or more petitions annually.

In this context it is useful to remember that petitions get filed long before employers begin their "vicious and unlawful anti-union campaigns." Indeed, they are often filed before an employer has any idea that organizing activity is occurring. Given this fact, a more than ten-fold drop in petition filing cannot be explained away by the allegedly widespread and unlawful "union busting" campaigns in which labor apologists claim every employer engages. A little common sense and the application of Ockham's Razor yields the far more logical conclusion that the precipitous drop in petition filing is simply the result of a profound lack of interest in unionization among today's workforces. Employees these days simply are not buying what unions are selling.

The data relied upon to support the "surge in popularity" narrative is also selective and misleading. For example, even if the number of union election petitions and wins increased dramatically, the overall impact on union density would be negligible since the median size of bargaining units in which elections have been held over the last decade has consistently remained at about only 25 employees. Indeed, this year's petition "surge" is largely attributable to the filing of a host of petitions involving the small single-site operations of a single nationally known beverage purveyor.

Elections in large bargaining units (i.e., over 500 employees) are a rarity and most do not involve traditional blue-collar workers. Indeed, over the last decades, petitions involving large bargaining units have almost all involved graduate teaching assistants at colleges and universities—a fact that readily explains the constant push to classify these individuals as statutory "employees" rather than students.

Changes in attitude, nature of work. Even the examination of cultural trends and attitudes as being supportive of unionization has been so selective as to create an inaccurate conclusion. As noted earlier, younger workers may embrace the *idea* of collectivism but not its practice, and while they do see collaboration as a preferred problem-solving model, its usage is typically transactional and finite. That is entirely unlike a commitment to a collective and adversarial approach to employment that is typically both broad based and permanent. Further, while younger workers generally eschew the hierarchical and patriarchal nature of corporate employers, those very same qualities exist in abundance in the structure of most labor unions. Thus, just as some younger workers lack job engagement, they lack potential union engagement as well. In simple terms, they are not a generation of "joiners."

The nature of the workforce, and the very nature of work as well, have also changed dramatically since the ascendant days of trade unionism. While in past generations, individuals often worked their entire careers for a single employer, today it is rare to find an employee under 30 years old who has not worked for multiple employers already. The absence of a long-term engagement with a given employer not only dampens the interest in organizing, it also dilutes the efficacy of collective bargaining from the employee side.

In a similar vein, a generation or two ago, much labor was manual and unskilled in nature. As a result, employment was highly fungible and individual workers were readily replaceable. Little wonder that those individuals felt the need for some form of "job protection." In contrast, today's workforce is much more skilled and technical, and employees recognize that "job security" is largely a function of the skillset they bring to the table. This leads most down the path of individual-skills acquisition as opposed to collective efforts aimed at attempting to acquire broad-based contractual "security."

The 'Big Government' effect. The impetus to organize on the presumption that doing so will lead to greater job benefits

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has largely been replaced by paternalistic governments that are mandating such benefits for employees without the necessity of the employees obtaining them through the difficult process of collective bargaining. Hours of work, fringe benefits, wages, working conditions, and the whole panoply of issues that were once grist for the collective bargaining mill are now being addressed by the U.S. Congress and federal executive agencies, as well as state legislatures and agencies. Big Government has essentially usurped the role of Big Labor.

The foregoing are just a few of the many reasons why organized labor is in continuing decline. Each explains much more persuasively the basis for this decline than the "union-busting" caricature of employers that some advocates of organized labor will claim. It is important to understand the real reasons for the decline, since some will use the narrative to justify a legislative abomination like the PRO Act that is repressive in many ways, hostile to certain fundamental rights, and representative of an ever more dangerous intrusion of the administrative state on the workings of a free society and free market. ■

As Member Ring departs, precedent-reversing continues

There is usually a flurry of case decisions issued on or around the end of a National Labor Relations Board (NLRB) member's term, and Member John F. Ring's departure from the Board on December 16, 2022, was no exception. Indeed, in the very last days of the Republican member's term, the Biden Board issued a slew of sharply divided decisions in which the Democratic majority continued down its path of overruling extant Board precedent and using its decisional authority to reject established law.

Make-whole remedy expanded to include 'direct or foreseeable' damages

On December 13, 2022, the Biden Board issued a divided 3-2 decision that fulfilled a top priority for the NLRB general counsel's (GC) pro-labor agenda by expanding, arguably beyond statutory limits, the remedies recoverable by successful charging parties in unfair labor practice (ULP) cases. In this decision, the Democratic-led Board announced that its make-whole remedy includes compensating employees "for all direct or foreseeable pecuniary harms suffered" as a consequence of labor violations.

Direct or foreseeable harms. The majority explained that the term "foreseeable harms" includes those for which an employer or union "knew or should have known would be likely to result from its violation of the" National Labor Relations Act (NLRA). The majority further expressly declined to limit its ruling to "extraordinary relief," and instead said that compensation for all foreseeable harms applies "in every case" in which the make-whole remedy applies, "regardless of the egregiousness of the violation or the respondent's past conduct."

Under the decision, in order to prove a claimed remedy, the GC's office will be required to present evidence demonstrating financial harm that is a direct or foreseeable consequence of the charged party's unfair labor practice. The employer or union facing the charge will then have an opportunity to rebut that evidence.

Speculatory damages overstep Board's authority. Dissenting members Ring and Marvin E. Kaplan argued that the majority's standard "opens the door to awards of speculative damages that go beyond the Board's remedial authority." They pointed out that the standard might permit recovery for any losses, "regardless of how long the chain of causation may stretch from unfair labor practice to loss."

Members Ring and Kaplan further argued that if the NLRB "strays into areas more akin to tort remedies" it faces potential issues with the Seventh Amendment of the U.S. Constitution. The majority may be concerned with that argument since they took great care to say it did not intend to institute "a policy or practice of awarding consequential damages, a legal term of art more suited for the common law of torts and contracts." To the contrary, the majority argued that while the make-whole remedy may resemble compensation for a private injury in a tort proceeding, the remedy is grounded in the Board's statutory authority in Section 10(c) of the NLRA to effectuate the purposes of the

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Act. Even if the Board does have the authority to order such remedies it will "invite protracted litigation over causation at compliance," the dissent argued.

Litigation landmine. Although the majority styled the decision as a clarification of the Board's *existing* make-whole remedy that is typically limited to backpay, the ruling significantly *expands* an employer's monetary liability, particularly in discharge cases. It will clearly make such cases more expensive, more complex, and more difficult to settle.

In evaluating ULP cases, employers will now need to consider this expanded range of remedies and its resulting potential monetary liability. Requiring an employer to compensate for "direct or foreseeable pecuniary harms" could significantly increase the size of awards in labor cases. The majority's decision is also likely to add an additional layer of litigation in labor cases in the form of backpay proceedings, which are likely to become far more frequent and the forum for determining such issues as foreseeability and causation of alleged harms for which the general counsel is seeking recovery.

More broadly, this decision is likely to increase the number of ULP charges filed and to make them more difficult to settle than they already are. These new remedies are certain to be part of the general counsel's settlement demands. Already, the general counsel has ordered prosecutors to seek "full remedies" in negotiated settlement agreements, including reimbursement for credit card late fees and for the loss of a home or car for failure to keep up with loan payments. Other remedies already secured in settlements include repaying the cost of baby formula because of the loss of lactation rooms in the workplace, issuing apology letters to reinstated employees, and mandated trainings for supervisors and managers. This will all unquestionably lead to more frequent and protracted litigation.

Resurrection of Obama Board's controversial bargaining-unit standard

The next day, on December 14, 2022, the Biden Board issued another divided 3-2 decision, this time placing a heavier burden on employers that face a union election petition that seeks to represent a discrete segment of its otherwise integrated workforce.

Ring's consequential term

John F. Ring was sworn in as chairman of the National Labor Relations Board in April 2018 and held that position until January 20, 2021, after which he remained a Board member. Ring's efforts to rebalance the labor policy landscape while chair of Trump's Republican-controlled Board are too numerous to list, but include the issuance of the agency's current joint-employer and employee-choice regulations, both of which the new Biden Board majority is currently attempting to undo. Member Ring also helped restore the Board's long-standing test for independent contractor status, which is yet another target for reversal by the current Board; made commonsense changes to the Board's 2015 election regulations; and clarified employer property rights.

The ruling, *American Steel Construction, Inc.*, overrules a decision issued by the Trump Board and revives the controversial *Specialty Healthcare* standard adopted by the Obama Board under which a party that contests a petitioned-for bargaining unit, and seeks to add additional employee classifications to the petitioned-for unit, must demonstrate that those excluded employees share an "overwhelming community of interest" with employees included in the petitioned-for unit.

In the case at hand, a steel manufacturer challenged a petition for election that sought to represent a unit of journeymen and apprentice field ironworkers. The company argued the smallest appropriate unit should also include painters, drivers, and inside fabricators at the site. The regional director properly applied the Trump Board's *PCC Structurals* standard and concluded that the petitioned-for unit was *not* the smallest appropriate unit because employees in the petitioned-for unit were not "sufficiently distinct" from the excluded employees. After the petitioner sought review, the NLRB invited briefs to address whether it should reconsider its standard to determine if a petitioned-for bargaining unit is an appropriate unit. (See more here).

Gerrymandered units get green light. It came as no surprise that the majority overturned *PCC Structurals* and its

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progeny and resuscitated the *Specialty Healthcare* standard. Under this standard, the NLRB will approve a petitioned-for unit if it: "(1) shares an internal community of interest; (2) is readily identifiable as a group based on job classifications, departments, functions, work locations, skills, or similar factors; and (3) is sufficiently distinct." A party that contests whether a petitioned-for unit is appropriate bears the burden to demonstrate that there is an "overwhelming community of interest" between employees included in the unit and those employees who are excluded from the unit.

Dissenting members Kaplan and Ring would have upheld the *PCC Structurals* standard in full and thus allowed regional directors to continue to consider the Board's "traditional community-of-interest factors" and weigh both the "shared and distinct interests" of petitioned-for and excluded employees without shifting the burden to demonstrate an "overwhelming community of interest." The dissenting members explained that excluded employees may be significantly impacted in their terms and conditions of employment without input when a closely related group of employees collectively bargains to an agreement. Following on this point, placing the "overwhelming community of interest" burden of proof on the party contesting the unit in effect gives undue weight to the unit preferred by the petitioning party to the detriment of other employees' Section 7 rights.

What does this mean for employers? In virtually all instances, a union's petitioned-for unit will be found appropriate under the *Specialty Healthcare* standard, which will, in turn, result in unions proceeding to certification elections in smaller bargaining units that are cherry-picked to increase the likelihood of the union's electoral success. Employers responding to an election petition that believe the smallest appropriate unit is broader than that described in the union's petition will shoulder a greater burden of proof to include additional employees in an election. Indeed, the decision will essentially allow unions to draw bargaining unit lines around workers that support the union—in effect creating gerrymandered units that maximize the prospect of a union electoral victory.

The return to the *Specialty Healthcare* standard marks a disturbing return to totally misplaced representation case priorities. While the new unit configuration rubric will no doubt result in more union certification wins and expanded union membership, it will come at the expense of "Balkanizing" an employer's workforce and having a decidedly negative impact on collective bargaining. Fashioning bargaining units in a way that facilitates rational bargaining is the statutory obligation of the Board. Configuring units to make it easier for unions to win Board certification elections is not among its statutory duties.

Off-duty third-party employees regain greater access rights for Sec. 7 activity

On December 16, 2022, the Board issued another 3-2 ruling promoting the Biden administration's pro-labor agenda. Reversing a prior decision by the Trump Board in an earlier iteration of this case, the NLRB reverted to its pre-2019 precedent on the balance between the rights of property owners and the rights of employees under Section 7 of the NLRA.

The Biden Board's decision, *Bexar County Performing Arts Center Foundation* (*Bexar County II*), held that a property owner may lawfully exclude from its own premises, off-duty workers who are employed by a third party and are exercising Section 7 rights, "only where the property owner is able to demonstrate that the contractor employees' Section 7 activity significantly interferes with the use of the property or where exclusion is justified by another legitimate business reason." As a result, employees will have greater access to a workplace not owned by their employers when engaging in activity such as labor protests or hand billing in a broad range of circumstances. The ruling reverses *Bexar County I* (discussed further here), on remand from the U.S. Court of Appeals for the D.C. Circuit, and reinstates the standard the Obama Board previously articulated in the 2011 decision, *New York New York Hotel & Casino*. The case has considerable significance in those increasingly common instances where employers/property owners have the employees of other employers working on their properties.

Earlier ruling balanced parties' rights. In the original case, *Bexar County I,* the Trump Board sought to balance the rights of property owners and third-party employees and held that third-party employees are not generally entitled to the same access as a property owner's own employees. Off-duty third-party employees' "right to access the property is derivative of their employer's right of access to conduct

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business there." As such, off-duty third-party employees were only entitled to access for Section 7 purposes in cases where the "property owner cannot show that they have one or more reasonable alternative nontrespassory channels of communicating with their target audience."

Scale tilted to favor labor. In the latest iteration of the case, however, the Biden Board declared that *Bexar County I* did not strike the right balance, explaining that a "critical" part of employees' Section 7 rights "to organize, bargain collectively, and engage in other concerted activities for their mutual aid or protection," is to be able to exercise those rights "at the very place where they and their coworkers work." The majority argued that the standard in *Bexar County I* goes too far in that it "enables property owners to severely restrict off-duty contractor employees' access to its property to engage in Section 7 activity for reasons completely unconnected to the employer's interest in protecting its property." The majority also claims the *New York New York* standard ensures that third-party employees can exercise Section 7 rights, while property owners do not have to permit activity that causes a "significant interference" with their property rights or if they have legitimate business reasons to prohibit the activity.

Dissenting members Kaplan and Ring argued that the majority's decision was misplaced and wrongly prioritized the Section 7 rights of off-duty third-party employees "above the rights of property owners." The dissenters pointed out that the majority reverted to its standard in *New York New York*, which ignores one of the fundamental rights of property owners. Kaplan and Ring argued the majority "effectively gives contractor employees the same rights as the property owners' own employees and, more problematically here, ignores" prior precedent from the Supreme Court of the United States that "yielding of private property rights to accommodate nonemployees is only necessary in certain contexts."

A blow to property owners' fundamental right. The *Bexar County II* ruling will allow greater access by off-duty third-party employees to workplaces to conduct labor protests, hand out leaflets, or engage in other Section 7 activity. The ruling places the burden on property owners to show that the activity would be a "significant interference" or that there is some other "legitimate business reason" to prohibit it. While the majority styles this as a balance between property rights and employee Section 7 rights, it severely limits property owners' fundamental right to remove people from their properties. Property owners may want to review their lease agreements and rules and conditions for access.

Bright-line standard for employee interviews upheld despite court backlash

On December 15, 2022, the NLRB issued another significant—and once again divided—decision during Member Ring's final week. In *Sunbelt Rentals, Inc.*, the Biden Board reaffirmed its approval of the long-standing bright-line, *per se* standard for evaluating whether employer interrogations of employees in preparation for Board proceedings are lawful.

The *Johnnie's Poultry* standard dates back to 1964 and permits employer questioning of employees in preparation for Board proceedings only where the employer abides by the following safeguards: "[T]he employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees."

In the proceedings below, the administrative law judge found that the employer violated Section 8(a)(1) by interrogating two employees without fully complying with the *Johnnie's Poultry* safeguards. Specifically, the judge found that the attorney failed to tell the first employee his testimony would not affect his job and failed to tell the second his participation was voluntary. Thereafter, the Board invited briefing on the issue of whether it should overrule *Johnnie's Poultry*.

Overstepping authority? Dissenting members Ring and Kaplan argued that the Board lacked the authority to impose a *per se* standard that goes beyond the prohibitions established in the text of the NLRA. Five circuit courts of appeals, they emphasized, have rejected the *per se* approach delineated in *Johnnie's Poultry* and have denied enforcement of decisions applying it, including the court in *Johnnie's Poultry* itself. "It is the Board," they said, "that

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must defer to these authoritative determinations regarding the limits of its authority—not, as our colleagues would have it, the other way around."

Ring and Kaplan also advocated for a "rebuttable presumption standard" as an available alternative. Under that approach, "unlawful coercion would be rebuttably presumed where an employer fails to comply with the *Johnnie's Poultry* safeguards when questioning employees in preparation for a Board proceeding. The employer would then have the burden of rebutting the presumption by showing that its questioning was not coercive under the totality of the circumstances." This standard, the dissent argued, "respects judicial guidance about the limits of the Board's authority, preserves all the benefits of *Johnnie's Poultry*, and at the same time ensures that proper consideration is given to evidence that questioning was not coercive even though not all the *Johnnie's Poultry* safeguards were observed." ■

Board restricts use of common severance agreement clauses

In a decision of very broad practical consequence, the Biden Board, once again reversing Trump Board precedent, has changed the standard for determining whether an employer violates federal labor law by offering severance agreements to departing employees that include certain nondisparagement and confidentiality provisions. Under the new ruling, employers commit an unfair labor practice merely by offering severance agreements to employees covered under Section 7 "with provisions that would restrict employees' exercise of their NLRA rights." The case overrules Trump Board decisions that took a more holistic approach to evaluating severance agreements under the National Labor Relations Act (NLRA) in part because, "severance agreements do not, nor do they have the potential to, affect employees' pay or benefits or any other terms of employment that were in place before the employees were discharged."

In *McLaren Macomb*, issued on February 21, 2023, the Democratic Board majority ruled that an employer violated Section 8(a)(1) of the NLRA by offering severance agreements that contained the following provisions to a group of permanently furloughed employees:

> **Confidentiality Agreement.** The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.
>
> **Non-Disclosure.** At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

Rejecting prior precedent issued by the Trump Board permitting the use of such terms, the Biden Board majority found the nondisparagement and confidentiality provisions unlawful because they interfered with, restrained, and coerced employees in the exercise of their Section 7 rights under the Act. Importantly, the Board found that by conditioning receipt of severance benefits on acceptance of the nondisparagement and confidentiality provisions, the employer violated Section 8(a)(1) of the Act by proffering the severance agreements in the first instance. Member Marvin E. Kaplan filed an opinion dissenting in part.

Policy flip-flop. Historically, the Board evaluated confidentiality and nondisparagement clauses by "carefully scrutiniz[ing] the language" of the provisions to determine if they "broadly required" the employee to waive certain Section 7 rights. In the early 2000s, the Board determined that confidentiality and nondisparagement provisions are unlawful when they prohibit employees from cooperating

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with the Board in investigations and litigation of unfair labor practice charges. In 2020, the Board issued two decisions that shifted the focus to the circumstances under which the employer presented the severance agreements to employees. In doing so, the 2020 decisions permitted the use of confidentiality and nondisparagement provisions in severance agreements, provided the circumstances surrounding the severance did not involve an employee discharged in violation of the Act or another unfair labor practice evidencing animus towards the exercise of Section 7 activity.

The Board in *McLaren Macomb* disagreed with the 2020 methodology and found it did not take the actual language of the severance agreement into account. Relying on its prior precedent, the Board determined "a severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and that employers' proffer of such agreements to employees is unlawful."

Far-reaching decision. In doing so, the Board found the nondisparagement provision at issue violated employees' Section 7 rights because "[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the Act." The Board further reasoned that the provision prohibited "any statement asserting that the [employer] had violated the Act"; encompassed "employee conduct regarding any labor issue, dispute, or term and condition of employment"; and chilled "efforts to assist fellow employees, which would include future cooperation with the Board's investigation."

Similarly, the Board found that the confidentiality provision at issue violated employees' Section 7 rights because it precluded employees from "disclosing even the existence of an unlawful provision contained in the agreement," thereby tending to coerce employees from filing unfair labor practice charges or assisting the NLRB in an investigation. The Board also determined the confidentiality provision to be unlawful because it prohibited employees from discussing the severance agreement with former coworkers who may receive similar agreements, as well as union representatives or other employees seeking to organize.

Caveat. Importantly, the Board's decision in *McLaren Macomb* applies to only nondisparagement and confidentiality provisions presented to nonmanagerial employees with Section 7 rights under the Act. Section 2(11) of the NLRA defines who qualifies as a "supervisor" (i.e., a manager); that definition hinges on a number of factors, including, but not limited to, whether the employee has authority to hire, fire, discipline, or responsibly direct the work of other employees. Further, the Board acknowledges but does not clearly define how to "narrowly tailor" a forfeiture of Section 7 rights.

Widespread confusion. The decision has spawned significant concern and confusion among employers and employment law practitioners. For example, to what type of agreements do these principles apply? Are settlement agreements subject to the same analytical framework, and if so, how will that impact the ability to resolve employment claims? How can an employer's legitimate business concerns in obtaining such clauses be addressed? Is there any "safe harbor" language that can be included to remain compliant with the NLRA? Unfortunately, the Board's decision provides little to no guidance in these critical areas and raises far more questions than it answers. For its part, the Board seems wholly unconcerned with the practical ramifications of its decision and with the far-reaching effect it is likely to have not only with respect to severance situations, but more importantly, with respect to employment dispute resolution. ■

A closer look

In the next issue of the *Practical NLRB Advisor*, we will take a closer look at this important decision, which may fundamentally change how and when employers use confidentiality and nondisparagement provisions in both union and nonunion settings. We will also explore the ramifications of this decision in the broader employment law context and attempt to offer some practical guidance. Lastly, we will be continuing to monitor and report any subsequent case developments to see if the Board provides any much-needed clarification with respect to the application of this latest bombshell decision.

SCOTUS ponders preemption, strikers' property destruction

The first case of the new year to be argued before the Supreme Court of the United States was *Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174*, the only traditional labor law case on the Court's docket this term. The case is potentially very significant both in legal and practical terms as it deals with both the legal concept of federal preemption and the practical issue of an employer recovering damages for strike-related economic loss.

The case involves a cement delivery company whose employees, while represented by the Teamsters union, struck the company over a bargaining dispute. When the employees went out on strike some of the employer's product had already been batched and loaded onto the company's cement trucks and, as a result, when the employees ceased working some of the employer's product and equipment were lost and/or damaged.

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The employer brought a state-court tort action against the union seeking compensation for the strike-related damage to its product and equipment. In essence, the employer alleged that the union had timed and conducted the work stoppage in such a way as to be sure to inflict maximum economic damage to the employer's business. The union countered by claiming that just like with any strike, there were consequential economic losses to the employer, but such losses are not actionable. The union also denied any effort to maliciously time or conduct the strike.

Gray area between what's protected. The underlying legal principles involved in such cases are relatively easy to state but often difficult to apply. First, when a union or unionized employees engage in behavior designed to intentionally cause economic harm to an employer, such conduct is not protected under the National Labor Relations Act (NLRA). For example, if striking employees were to slash the tires of their employer's trucks, such misconduct would be unprotected by federal law and actionable by the harmed employer.

However, where economic damage is merely a consequence of otherwise legitimate strike activity it is protected under the Act. For example, if a grocery store's employees strike, then some of the store's perishable goods may become unsalable by virtue of the employees' absence from the workplace. Those consequential types of economic loss are not actionable by the employer since the underlying activity (i.e., the strike itself) is protected by federal law. Between the slashed tires and rotting bananas, however, there is a huge gray area in which the activity may or may not be protected.

The preemption quagmire. The second concept at play in the *Glacier* case is that of federal preemption, and most particularly that branch of preemption uniquely applicable to labor disputes called *Garmon* preemption. Under the preemption doctrine, where federal law evidences an intention on the part of Congress to exclusively regulate certain activity then federal law preempts, or effectively ousts, the various states from jurisdiction to regulate that same activity. *Garmon* preemption is a specific form of preemption which holds that where the essence of a state court claim involves conduct that is "*arguably protected"* under the NLRA, then the resolution of those claims lies exclusively within the ambit of federal law as administered by the National Labor Relations Board (NLRB).

The facts in *Glacier* illustrate the interplay of these concepts and the practical difficulty often found in unpacking them. As noted, the employer filed a state-court tort action against the union seeking monetary redress for the strike-related damage and losses. Among other actions, the union sought to dismiss the lawsuit on the ground that the strike behavior that resulted in the damage was "arguably protected" under the NLRA and therefore preempted.

To further complicate matters, while the lawsuit was pending in the state court, the NLRB issued an unfair labor practice complaint predicated on its own

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post-investigation conclusion that the conduct in question was protected. Although the issuance of the complaint was not a final determination by the NLRB, the union successfully argued that it certainly was enough to conclude that the underlying activity was "arguably protected" and thus the state court action was preempted. The Supreme Court of the State of Washington ultimately agreed and held the state court was ousted of jurisdiction to decide the tort claims by virtue of *Garmon* preemption.

Potential significance. The Supreme Court granted *certiorari* to hear an appeal of the case, which is a move some observers believe may signal an intent by the Court majority to revisit the preemption doctrine generally and *Garmon* preemption in particular. If the justices do choose to follow this legal path the aftermath could prove significant.

It is notoriously difficult to predict where the Court may be headed based on what transpires during oral argument. However, the oral argument in *Glacier* largely centered on which entity gets to make the decision, in the first instance, as to whether conduct is "arguably protected." Is it the state court when it applies federal law in determining whether or not to grant the union's motion to dismiss on preemption grounds? Or is it the NLRB when it decides to issue a complaint that rests on its determination that the underlying conduct is "arguably protected"?

The fact that *certiorari* was granted, coupled with what many believe to be a growing belief in the federal judiciary that administrative agencies should not be accorded unfettered deference with respect to their legal determinations, suggest the Court may come down on the side of giving state courts the initial bite of the proverbial legal apple. The practical consequence of such a determination could prove significant since the question of potential union liability for strike-related damages would then lie, in the first instance, in a state courtroom rather than the more union-friendly confines of an NLRB regional office.

The Court will issue its decision in *Glacier* at the end of its current term and the decision will be closely followed by advocates on both sides of the labor law bar. ■

Other NLRB developments

Federal court decisions

D.C. Cir.: Board's 2019 election rule partially invalid. The U.S. Court of Appeals for the D.C. Circuit found that a statutory provision in the National Labor Relations Act (NLRA) calling for direct review in federal appellate courts of National Labor Relations Board (NLRB) orders regarding unfair labor practices (ULPs) did not divest a district court of jurisdiction over the American Federation of Labor and Congress of Industrial Organizations' (AFL-CIO) challenge to rules that were exclusively concerned with the Board's 2019 changes to its regulations governing union elections. However, the district court erred in invalidating all five provisions of the 2019 election rules as contrary to the Administrative Procedure Act because the NLRB did not seek public comment on the changes. The D.C. Circuit affirmed the invalidation of the rules regarding the eligible employee-voters list, the timeline for certification of election results, and election-observer eligibility. However, the remaining two rules regarding pre-election litigation of voter eligibility and the timing of the date of an election "were validly promulgated without notice and comment" since they were "principally 'internal house-keeping' rules." Dissenting in part, Judge Neomi Rao would have upheld all five rules (*American Federation of Labor and Congress of Industrial Organizations v. National Labor Relations Board*, January 17, 2023).

7th Cir.: Union dues arrangement did not violate member's speech rights. The U.S. Court of Appeals for the Seventh Circuit held that a union's deduction of a teacher's dues did not violate her First Amendment rights under *Janus v. AFSCME, Council 31* since the teacher voluntarily joined the union and consented to the withdrawal of union dues from her paycheck. A recent decision by the Seventh Circuit was controlling and had "ruled that *Janus*'s reasoning was limited to nonmembers who were being forced to subsidize union speech with which they had chosen not to associate." Thus, once an employee

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signs a membership agreement and agrees to pay union dues, a court is not required to look for further "'clear and compelling evidence'" of the agreement. The Seventh Circuit also observed in the instant action that the teacher's union membership "is established by contract, and the First Amendment does not immunize agreements from ordinary contract law principles" (*Baro v. Lake County Federation of Teachers Local 504*, January 6, 2023).

The Board majority also held that the employer was required to bargain over both its decision and its effects once the [COVID-19] emergency passed, thus expanding an employer's obligation to bargain with a union in the aftermath of such "exigent circumstances."

9th Cir.: Appointment of GC was valid. The U.S. Court of Appeals for the Ninth Circuit held that President Biden validly appointed the general counsel (GC) of the NLRB and thus that the GC had the authority to issue a ULP charge on which the Board found that an employer unlawfully refused to recognize and bargain with the elected representative of a unit of registered nurses. The Ninth Circuit held that "the President may remove the Board's General Counsel at any time and for any reason," rejecting the employer's contention that the GC's acts were "*ultra vires* and void" because Biden could not remove the previous GC, Peter Robb, without cause during the four-year term to which he had been appointed. The decision is in accord with a ruling by the U.S. Court of Appeals for the Fifth Circuit, the only other federal appeals court yet to address the issue (*National Labor Relations Board v. Aakash, Inc.*, January 27, 2023).

NLRB rulings

Exigent circumstances delayed bargaining duty during pandemic. A three-member panel of the NLRB held in a partly divided opinion that a nursing home's initial unilateral decisions to increase employee wages and hire nonunit employees to perform unit work were not unlawful because, at the time that the employer made these changes, "conditions created by the COVID-19 pandemic presented an extraordinary and unforeseen imminent threat to human life that required the Respondent to take immediate action."

The Board majority also held that the employer was required to bargain over both its decision and its effects once the emergency passed, thus expanding an employer's obligation to bargain with a union in the aftermath of such "exigent circumstances." Dissenting, Member Marvin E. Kaplan argued that the Board had previously applied the exigent circumstances exception to eliminate the obligation to engage in decisional bargaining, not delay it (*Metro Man IV, LLC dba Fountain Bleu Health and Rehabilitation Center, Inc.*, December 28, 2022).

Discharge of nurse who left during surgery unlawful. A divided NLRB panel upheld a decision by an administrative law judge (ALJ) finding that an employer violated Section 8(a)(3) and (1) of the NLRA by discharging a nurse who left an operating room during a surgery to which she and another nurse were assigned and engaged in concerted activity with a group of coworkers and union representatives. Based on the employee's "extensive union activity and the Respondent's knowledge of that activity," the ALJ properly found that a causal connection existed between the employee's protected activity and the employer's termination of her employment. Additionally, the employer "did not meet its *Wright Line* rebuttal burden, as it failed to prove it would have discharged [the nurse] even absent her union activity." Dissenting, Member John F. Ring would have found that the employer did nothing unlawful when, after it conducted "an appropriate investigation," it discharged the employee "for patient abandonment" (*New York Presbyterian Hudson Valley Hospital*, December 5, 2022).

Partial closing aimed to chill union organizing violated NLRA. On remand from the D.C. Circuit, the NLRB reaffirmed its prior finding that an employer shuttered its auto repair shop for the purpose of chilling union activity at its concrete business. The Board found the employer sought to "chill unionism" by closing its repair shop, and "that it was reasonably foreseeable that [the concrete facility] employees would fear that their own jobs would be at risk if they continued in their unionization effort." However, the Board found that its "reopen and restore" order was no longer appropriate, and consequently its

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previously issued bargaining order no longer necessary, given there was no existing lease, the employer's remaining facilities were insufficient, and the shop had not functioned as a business in over four years. Member David M. Prouty, dissenting in part, would not have reversed the restoration and bargaining orders (*RAV Truck and Trailer Repairs, Inc.*, December 14, 2022).

Employer's 'unreasonable' bargaining strategy unlawful. A divided NLRB panel held that an employer violated Section 8(a)(5) and (1) of the NLRA by failing to bargain in good faith due to its refusal to discuss economic subjects of bargaining with a union until all non-economic subjects were resolved. The majority explained that "the Board and courts have long held that an employer violates Section 8(a)(5) and (1) by insisting on the resolution of all non-economic subjects before negotiating economic subjects." Here, by refusing to discuss economic subjects for the entire process of bargaining, the employer pursued a bargaining strategy that "'unreasonably fragmented the negotiations and drastically reduced the parties' bargaining flexibility.'" In a separate dissenting opinion, Member Ring emphasized that the employer and union had begun contract negotiations for a unit of hotel workers just as the COVID-19 pandemic began to hit the nation, "with New York City being particularly hard hit at the time." Under the particular circumstances, "[w]hile a continued insistence on addressing non-economic subjects might support a finding of bad-faith bargaining at some point in time, the point of 'indefinite insistence' had not been reached by the parties' last bargaining session" (*Troutbrook Co., LLC dba Brooklyn 181 Hospitality, LLC*, December 16, 2022).

Medical marijuana employee discharged for union activity. A medical marijuana provider violated Section 8(a)(3) and (1) of the NLRA when it fired a "budtender" two months after it learned of her union organizing activities at its dispensary. The employer argued that it fired the employee pursuant to its four-step discipline policy after she had a cash-drawer shortage of $20, and that her policy violations were "'egregious, particularly considering [the Respondent's] heavily-regulated environment.'" However, the Board concluded that the record supported the ALJ's finding the employer did not treat her as leniently as a comparator who accrued seven cash-handling violations before he was fired and whose conduct implicated the same state compliance issues. Dissenting, Member Ring would have found that the employee was lawfully fired and not treated disparately because some of her infractions violated state law rather than merely employer policies (*Absolute Healthcare*, December 8, 2022).

Union official's 'snitches' remark unlawful. The NLRB held that an ALJ properly found that under the particular circumstances of the case, "[a union official's] 'snitches' remark would reasonably be understood to threaten employees ... with bodily harm or other unspecified reprisals for engaging in protected concerted activity and thus constituted a violation of Section 8(b)(1)(A) [of the NLRA]." The official's statement came during a meeting in which an employee disagreed with certain seniority-based job assignments and commented about the work habits of more senior employees. The official's response "likened [the employee's] remarks to 'snitching' and conveyed that negative consequences could result from snitching on a coworker," concluded the Board (*International Brotherhood of Teamsters, Local 70 (United Parcel Service (UPS))*, December 6, 2022). ■

New Congress

The new members of the 118th U.S. Congress were sworn in on January 7, 2023, and the congressional committees reorganized. In the Democratic-majority U.S. Senate, the Committee on Health, Education, Labor and Pensions (HELP), which has jurisdiction over the NLRA and the NLRB, will be chaired by Senator Bernie Sanders (D-VT) and its ranking member will be Senator Bill Cassiday (R-LA).

The controversial Protecting the Right to Organize (PRO) Act legislation has once again been re-introduced in the Senate, and Chairman Sanders has convened a hearing on so-called union-busting for early March. In the Republican-majority U.S. House of Representatives, the Committee on Education and the Workforce will be chaired by Virginia Foxx (R-NC), and former chair Bobby Scott (D-VA) will serve as ranking member

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