Ogletree Deakins

ISSUE 26 | SPRING 2024

EMPLOYERS AND LAWYERS, WORKING TOGETHER

The Practical NLRB Advisor

The alarming evolution of the federal bureaucracy

In this Issue

5 NLRB changes recognition standard, revives 'ambush' election rules

8 Board reversals keep coming

11 New joint-employer rule casts wider net

13 Other NLRB developments

It is difficult to believe that when the U.S. Congress created the National Labor Relations Board (NLRB) it intended that the federal labor agency would devote substantial resources to searches for "chilling" phrases in employer handbooks, shelter employees who hurl racial epithets at their coworkers from discipline, and equate often petty personal complaints from employees with disputes that risk industrial strife or impede the free flow of interstate commerce. It is equally difficult to believe that Congress intended to create an entity that ignores the opinion of reviewing courts, constrains free speech, and works to diminish the free choice of employees in deciding whether they do, *or do not*, wish to be represented by a union.

Yet, after more than one hundred years, this is where we are. There is no shortage of causative factors, any or all of which could be to blame, including: the unfortunate confluence of politics and policy, the abdication of congressional and judicial responsibility, the unfortunate elasticity and flawed architecture of the National Labor Relations Act (NLRA), the myth of agency expertise, and the willingness of some to elevate results over fair process and the passivity of others to let them do it.

FEDERAL BURAUCRACY continued on page 3

BRIAN IN BRIEF

This issue of the *Advisor* is a compilation of good and bad news for employers. On the bad news side, we document a small part of the aggressive agenda of the current National Labor Relations Board (NLRB). From attempting to administratively impose "card check" to dramatically altering business-to-business relationships, and from finding "protected activity" in even the most attenuated circumstances to rendering the reversal of precedent an everyday occurrence, the current Board majority and its general counsel have been unequaled in their approach.

On the good news side, we discuss several current challenges to administrative agency authority in general, and the NLRB's authority in particular. The exponential growth and increasing power of the so-called "administrative state" has been well-documented. Equally well-documented has been its tendency to overreach and ceaselessly attempt to expand its regulatory mandate, as well as its willingness to jettison its own precedent often with seemingly little reason except achieving a desired result.

In a governmental system of checks and balances, these activities by the executive branch through its various agencies has created, to borrow a phrase, "a disturbance in the force." As a matter of constitutional physics, actions by one branch typically result in equal but opposite reactions by another. As we note in this issue, the judicial branch has clearly begun to recognize that the growing power and ubiquity of the administrative state poses a genuine threat to the viability of our constitutional republic. The judicial branch has not only recognized the problem but appears poised to push back against it.

As early as 2600 B.C., the ancient Minoans told the story of Icarus, a young man who could fly on wings made of wax and feathers. His father, Daedalus, warned him not to fly too high lest the sun melt the wax that held his wings together. However, Icarus ignored the warning, the wax melted, and he plunged to his death. It is an enduring and often repeated tale of hubris, overreach, and consequence. The story should be required reading these days for bureaucrats.

Sincerely,

Brian Hayes

Brian E. Hayes
Co-Chair, Traditional Labor Relations Practice Group
Ogletree Deakins
brian.hayes@ogletree.com
202.263.0261

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.

Ogletree Deakins editors

Brian E. Hayes, J.D., *Co-Chair,* Traditional Labor Relations Practice Group

C. Thomas Davis, J.D., *Co-Chair,* Traditional Labor Relations Practice Group

Hera S. Arsen, J.D., Ph.D., *Director of Content,* Client Services

***Employment Law Daily* contributors**

Linda O'Brien, J.D., *Editorial Manager*

Marjorie A. Johnson, J.D., *Co-Editor and Employment Law Analyst*

Mail regarding your subscription should be sent to editors@ogletree.com or Ogletree, Deakins, Nash, Smoak & Stewart, P.C., One Ninety One Peachtree Tower, 191 Peachtree Street NE, Suite 4800, Atlanta, GA 30303. Attn: Client Services. Please include the title of this publication. © 2024 Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

FEDERAL BURAUCRACY continued from page 1

The unofficial 'fourth branch'

In almost all these respects, the NLRB is not alone. It is, however, emblematic of the problem. Whatever the separate causes may be, the root of that problem is the same. Thus, whether by design, necessity, or inattention, the federal bureaucracy has grown to the point where our system of government, which is supposed to rest on the interplay between three separate and coequal branches, has now added an unofficial fourth branch. While nominally part of the executive, subject to control by the judiciary, and accountable to Congress, in actual practice this bureaucracy operates independently and is largely unfettered by these constitutional safeguards.

This administrative bureaucracy is omnipresent and ever-expanding and touches on virtually every aspect of U.S. life. The government first began itemizing its rules and regulations in the *Federal Register* in 1976. Between that point and the end of 2020, federal agencies and departments had issued 208,155 rules and regulations. In 1976, the *Federal Register* consisted of 133 bound volumes. By the end of 2020, that number had grown to 242 volumes—a nearly 82 percent increase.

The breadth of bureaucratic activity is so pervasive that it often seems to dwarf the everyday impact of the other branches of government. The argument in its favor has been that modern society has become so complex that it has outstripped the ability of a traditional tripartite government to regulate it. Leaving aside the question of how much governmental regulation a society should require, this argument has some merit. Courts, legislatures, and the more traditional arms of the executive are simply not able to competently oversee all that government has chosen to regulate. Accordingly, the exponential growth of the bureaucracy was not only predictable, it was, and likely remains, inevitable.

Inevitable too are the governance problems that the situation spawns. The bureaucracy by nature is nameless and faceless. Its occupants are largely unremovable and unaccountable to those whose lives they affect. While nominally an adjunct of the executive branch, and therefore theoretically subject to the checks and balances applied by the coequal judicial and legislative branches, the reality is that the bureaucracy often governs with little application of these safeguards. While not the only reason, this growth of an extra-constitutional fourth branch most certainly is a major contributing factor to the fact that less than 20 percent of Americans now trust their own government.

Federal courts spur paradigm shift

While the federal bureaucracy has deep historical roots, it blossomed in the Depression Era and has grown exponentially ever since thanks in no small part to court decisions that both permitted the conveyance of power to the administrative state and provided its constituencies with constitutional cover. There are signs, however, that a paradigm shift may be under way and that federal courts, increasingly aware of the omnipresence and growth of administrative governance, are increasingly alarmed by the constitutional implications of the phenomena.

One of the most notable examples is the U.S. Court of Appeals for the Fifth Circuit's monumental decision in *Jarkesy v. Securities and Exchange Commission*, in which the appeals court found the Securities and Exchange Commission's (SEC) adjudication of certain alleged violations to be unconstitutional. The Fifth Circuit first noted that the SEC's administrative law judges (ALJs), including the ALJ who heard the underlying action, are protected from removal from office by the president of the United States. Such protections, the Fifth Circuit observed, violate Article II of the U.S. Constitution, which vests all executive power in the president and holds the president to "take care" the laws are faithfully executed. Both the president's Article II power and his responsibility are illusory if his removal authority is limited. Second, the Fifth Circuit found the adjudication scheme at the SEC violated the Seventh Amendment right to a jury trial in "suits at common law." While the claims in the *Jarkesy* case involved violations of the Securities Exchange Act, they were akin to fraud claims that exist at common law. The Fifth Circuit reasoned that the right to a jury trial cannot be lost simply by retitling a common law cause of action as a statutory violation.

The Supreme Court of the United States granted certiorari in *Jarkesy* and heard oral arguments in late November 2023. A decision is expected before the Court term ends in June 2024. The pendency of the high court's review has not, however, precluded litigants from proceeding based on the Fifth Circuit decision. Of significant note, a company recently filed a lawsuit

FEDERAL BURAUCRACY continued on page 4

FEDERAL BURAUCRACY continued from page 3

in a Texas federal district court seeking injunctive relief and a declaratory judgment against an NLRB unfair labor practice proceeding. The complaint in that case relies on the Fifth Circuit precedent and alleges that like the SEC's ALJs, the NLRB's ALJs enjoy protection from removal in violation of Article II; the Board's claimed remedial powers trigger a respondent's right to a jury trial, not an administrative proceeding; and the very structure of the NLRB is unconstitutional since in the context of 10(j) injunctive matters, the Board exercises both prosecutorial and adjudicatory authority.

Jarkesy and its progeny are by no means the only high-level challenges to the administrative state. Readers may recall that in 2022 the Supreme Court issued its decision in *West Virginia v. Environmental Protection Agency* (EPA), in which the Court invoked the "major questions" doctrine to strike down an administrative regulation predicated on the agency's vague statutory authority. The Court held that administrative regulation of broad applicability and significant economic consequence required a clear congressional authorization in the agency's enabling statute, not a vague or inexplicit grant of authority. The Fifth Circuit recently vacated the Board's decision in a case involving a uniform policy and union insignia. In its decision, the Fifth Circuit observed that the Board had essentially outlawed all uniform policies and that the agency lacked statutory authority to do so, citing the Supreme Court's decision in *West Virginia v. EPA*.

The *Chevron* quagmire

Another potentially significant blow to the authority of the administrative state is currently awaiting decision by the Supreme Court. In two companion cases, *Loper Bright v. Raimondo* and *Relentless, Inc. v. Department of Commerce*, argued earlier this year, the high court appears poised to address the real elephant in the room—the doctrine of *Chevron* deference. The doctrine, which was coined after the high court's decision in a 1984 case, essentially holds that where a statute's language is vague, or its delegation of authority implicit, a reviewing court should defer to the relevant administrative agency's interpretation of its governing statute as long as that interpretation is "reasonable" and even if the court itself might take a different view. The unavoidable problem is that statutes are the product of legislative compromise, and in order to get legislation passed its drafters routinely make its language "strategically vague" to make it palatable to competing legislative interests.

The NLRA is no exception. For example, what did Congress really mean by the phrase "protected concerted activity," or why does the phrase "joint employer" not appear in the statute? Congress clearly cannot write every conceivable contingency into statutory text, and agency experience is often useful in "gap-filling." However, administrative agencies should not be able to use this as an opportunity to "legislate," nor should reviewing courts become rubber stamps merely because a statute is vague and some interpretation is "reasonable." For its critics, *Chevron* has allowed administrative agencies to go far beyond statutory "gap-filling" and allowed them to act as unaccountable legislatures that are immune from meaningful judicial review. Many observers believe that the eventual decisions in *Loper Bright* and *Relentless, Inc.* will, at a minimum, constrain the application of *Chevron*, if not simply overrule it entirely.

What's next?

Since *Loper Bright, Relentless, Inc.,* and *Jarkesy* are at the Supreme Court, they may be the most notable cases in the judiciary's current re-evaluation of the administrative state. However, they are by no means the only ones as the federal courts of appeal are also casting a skeptical eye. Having already told the Board it does not have authority to broadly ban employer uniform policies, the Fifth Circuit also appears poised to tell the agency both that it lacks the remedial power it has claimed and does not have authority to trench on an employer's constitutional rights. (See page 9 for more details.) As also noted in the "Other NLRB developments" section on page 13, the U.S. Court of Appeals for the Third Circuit has told the Board that it was plain wrong in determining that an employer had a post-expiration decisional bargaining obligation, and the U.S. Court of Appeals for the Eighth Circuit slammed the Board for not having evidence for its conclusion that seventeen employees were unlawfully discharged. Finally, as discussed on page 14, the Supreme Court has agreed to hear yet another case that may well diminish the NLRB's power.

For an agency that has traditionally enjoyed an incredibly high winning percentage in the federal courts, the last few months could not have been pleasant for the NLRB. Going forward, the million-dollar question is: Has this been an aberration? A mere bump in the road? Or is it part and parcel of an even larger effort to rein in the administrative state? If, as many predict, it is the latter, that is both good news for employers and very good news for those who favor a more limited and accountable government. ■

NLRB changes recognition standard, revives 'ambush' election rules

On August 25, 2023, the National Labor Relations Board (NLRB) issued one of its most consequential and controversial decisions in decades. In the case, the Biden Board adopted a new standard for union representation that requires an employer to recognize and bargain with a union that has demonstrated majority status unless the employer challenges the union's support through an employer-initiated NLRB election and does so without committing any unfair labor practice. To many, the decision is tantamount to mandatory "card check" recognition—a legislative proposal that has been repeatedly rejected by the U.S. Congress. The ruling, combined with the resuscitation of the Board's 2014 "ambush" election rules, will make it much more difficult for employers to respond to demands for recognition from unions claiming to have majority support from their employees and to effectively communicate their position on unionization to their employees.

New recognition standard

Even though the Board fell short of reinstating the so-called *Joy Silk* doctrine, as requested by the NLRB's general counsel, its newly adopted standard requires employers to recognize and bargain with a union that has demonstrated majority support from their employees unless the employer elects to "promptly" file a petition for an election pursuant to Section 9(c)(1)(B) of the National Labor Relations Act (NLRA), known as an RM petition, normally within two weeks after the union's demand for recognition. However, if the employer invokes the NLRB's jurisdiction and files an RM petition, but later commits an unfair labor practice that is not so minimal or isolated that it could not have affected the election results, the Board will set aside the election, dismiss the petition, and issue a remedial bargaining order requiring the employer to recognize and bargain with the union. Given the Board's current proclivity for finding an ever-expanding range of employer conduct to violate the Act, it is little wonder that critics have labeled the decision "card check by other means." Moreover, the "card majority, plus employer unfair labor practice equals bargaining order" formula renders secret ballot employee voting virtually irrelevant and takes the "extraordinary" remedy of a *Gissel* bargaining order and makes it the standard remediation for even minor unfair labor practices. The decision is nothing short of stunning in scope.

Adding to the controversy, the decision came just one day after the Board revived its "ambush" election rules via rulemaking. The rules compress even further the time period between the filing of a representation petition and the holding of the election to just a few weeks. The shortened time frame makes it much more difficult for an employer to take legitimate and lawful steps to educate its employees about its perspective on the effects of unionization.

The shortened time frame makes it much more difficult for an employer to take legitimate and lawful steps to educate its employees about its perspective on the effects of unionization.

The divided decision. In the case, which involved employer misconduct sufficient to warrant setting aside and rerunning an election that the union had lost, the NLRB's general counsel (GC) urged the Board to revive the so-called *Joy Silk* doctrine. That doctrine provided that once confronted with evidence of majority status, typically via authorization cards, an employer was required to recognize and bargain with a union unless it could demonstrate a good faith doubt as to the union's claimed majority status. The doctrine stemmed from a 1949 decision and had been effectively abandoned by the Board nearly seventy-five years ago. While not acceding to the GC's request to resuscitate *Joy Silk,* the Biden Board largely accomplished the same goal by a slightly different route. Thus, while noting that an employer does not violate the NLRA solely by refusing to accept a union's claim that it enjoys majority support without an NLRB-conducted representation election, that does not end the employer's obligation. The Board held that an employer must then "test the union's majority support or the appropriateness of the

RECOGNITION STANDARD continued on page 6

RECOGNITION STANDARD continued from page 5

unit" through the RM petition process. Most significantly, however, the Board held that an employer that then commits an unfair labor practice that could affect the "laboratory conditions" during the pre-election period will face a bargaining order as the appropriate remedy—not a rerun election. The Board stated that such a ruling is necessary because the Board does not believe "conducting a *new* election—after the employer's unfair labor practices have been litigated and fully adjudicated—can ever be a truly adequate remedy."

Importantly, the GC memo explains that the "new standard will be retroactively applied to all pending cases in whatever stage as doing so would not work a manifest injustice."

Not surprisingly the decision prompted a pointed dissent from Member Kaplan and the holding of the case will, no doubt, require federal court resolution.

GC guidance. In the meantime, on November 2, 2023, the NLRB general counsel released a guidance memorandum regarding this new recognition standard. Importantly, the GC memo explains that the "new standard will be retroactively applied to all pending cases in whatever stage as doing so would not work a manifest injustice." The GC also noted that the new standard "does not address other situations where an employer may have forfeited or waived its avenue to seek a Board-conducted election, such as where it reneged on a previous agreement to recognize and bargain with a union based upon a showing of majority support or where an employer has independent knowledge of the union's majority support and, yet, disputes the union's majority support and refuses to recognize and bargain with the union." The memo advises that, in those situations, the cases should be submitted to the Division of Advice.

The return of 'ambush' election rules

On August 24, 2023, the NLRB announced a new final rule for union elections that revives the prior "ambush" election rules. The new rule compresses the time between the filing of a representation petition and the holding of an election. The impact of the rule is to likely make it more difficult for employers to educate employees about unions and unionization prior to a vote.

The new final "Representation-Case Procedures" rule, which was formally published on August 25, 2023, and became effective on December 26, 2023, rescinded the remaining aspects of the current 2019 rule and returned the Board to its prior 2014 rule, known as the notorious "quickie" or "ambush" election rules. The new rule sets an aggressive timeline for moving toward a union election, restricts regional directors' discretion in procedural matters, and limits the period for employers to consider important unit composition and election details.

The Board made these changes through direct rulemaking without the typical, public notice-and-comment process, claiming it was unnecessary since it was merely rescinding provisions from the 2019 rule and replacing them with the prior 2014 rule. On December 8, 2023, the NLRB GC released guidance regarding the new election rule that detailed its differences with the prior 2019 rule and described how representation cases would proceed moving forward.

Member Marvin Kaplan dissented from issuance of the new final rule, arguing that it was based on the majority's "fundamentally flawed premise" that "speed is more important than any other consideration" in whether the Board is protecting the rights provided by the NLRA. He argued that speeding up the process may have a "negative effect" on employees, as they may not have time to fully consider the election decision.

The rule. According to the NLRB, the new rule seeks to: (1) commence pre-election hearings sooner; (2) speed up the dissemination of election information to employees; (3) make pre- and post-election hearings more efficient; and (4) hold union representation elections more quickly. The Board provided a "List of Amendments," detailed below, as "a concise statement of the ways in which this final rule changes or codifies current practice and the general reasoning in support of those steps."

RECOGNITION STANDARD continued on page 7

RECOGNITION STANDARD continued from page 6

1. *Pre-election hearing scheduling* – Pre-election hearings will now generally be scheduled for eight calendar days from the service of the notice of hearing, which is ten days sooner than under the 2019 rule. This means that employers will now be required to present documents and witness testimony at the hearing with significantly less time to prepare.
2. *Pre-election hearing postponements* – Regional directors will have the discretion to postpone a pre-election hearing for up to only two business days "upon request of a party showing special circumstances" or for more than two days if a party shows "extraordinary circumstances." Under the 2019 rule, regional directors could postpone for an unlimited time upon a showing of good cause.
3. *Nonpetitioning party's statement of position* – A nonpetitioning party's written response (i.e., statement of position) to a representation petition will "generally" be due "by noon the business day before the opening of the pre-election hearing," meaning it will "normally" be due seven calendar days after service of the notice.
4. *Postponement of statement of position* – Regional directors will have limited discretion to postpone the due date for statements of position similar to pre-election hearing postponements.
5. *Responsive statement of position* – Petitioners will respond orally at the pre-election hearing as opposed to being required to submit a statement of position three business days prior. This change relieves unions of the requirement to file and serve their responsive statement, leaving employers in the dark on the relevant issues until the day of the hearing.
6. *Distributing notice of petition* – An employer will have two business days after the service of a notice of hearing to post and distribute a notice of petition for election to its employees, which is three days sooner than under the 2019 rule.
7. *Litigation of eligibility and inclusion issues* – The new rule clarifies that "[t]he purpose of the pre-election hearing is to determine whether a question of representation exists" and that disputes over the eligibility or inclusion of certain individuals "ordinarily do not need to be litigated or resolved prior to an election." Regional directors will "have authority to exclude evidence that is not relevant to determining whether there is a question of representation and thereby avoid unnecessary litigation on collateral issues that can result in [a] substantial waste of resources." This new rule eliminates the 2019 rule to the extent that the 2019 rule requires individual eligibility and inclusion issues to be resolved by the regional director prior to the election.
8. *Briefing* – Parties will be allowed to file post-hearing briefs only with special permission of the regional director following a pre-election hearing or a hearing officer following a post-election hearing. The 2019 rule had allowed parties to file briefs up to five days following a hearing.
9. *Election details* – Regional directions will specify the election details (e.g., "the type, date(s), time(s), and location(s) of the election and the eligibility period") in the decision and direction of election and will "ordinarily" send the notice of election with the decision.
10. *Scheduling elections* – Regional directors will have to schedule elections for "'the earliest date practicable'" after a decision and direction of election and will not observe the twenty-business-day waiting period under the 2019 rule.

Key takeaways

The Board's new recognition standard decision and the subsequent GC guidance has significantly changed the process for union representation matters going forward. The Board's new standard has placed greater responsibilities on employers faced with demands for recognition from unions attempting to represent their employees. The standard, when combined with the revived "ambush" election rules, also highlights the importance of union authorization cards (in both electronic and hard-copy forms) and the need for employers to proactively educate their workforces about unions and the potential legal implications of authorizing a labor organization to represent them for purposes of collective bargaining—namely, union representation without having the opportunity to vote on the issue in an NLRB-conducted election.

The revived "ambush" election rule also negatively impacts employer due process rights at every stage in the representation process and makes union elections occur much more quickly, in as few as fourteen to twenty-one days after a union requests a vote. Employers may want to take proactive steps and prepare once again for "ambush" elections in 2024. ■

Board reversals keep coming

As we have reported in prior issues of the *Advisor*, the pro-union majority on the National Labor Relations Board (NLRB) has continuously upended existing law to tip the legal scales in favor of organized labor and to increase its regulatory power over employers. That pattern has not abated. In two new decisions, the Board overruled existing law to increase union leverage at the bargaining table. In two other cases, the agency again jettisoned precedent to extend the scope of employee activity subject to the Board's regulation. We highlight those four decisions here.

Past practice defense in the past?

On August 30, 2023, the NLRB released two decisions that will make it much more difficult for employers to implement any changes based on past practice once a contract expires or the parties reach impasse. The decisions afford unions increased bargaining leverage by effectively holding employer decision-making hostage.

In *Wendt Corporation*, the Board overruled a 2017 decision, *Raytheon Network Centric Systems*, which had established a commonsense understanding of past practice that enabled employers to implement past terms and conditions of employment without bargaining following the expiration of a collective bargaining agreement (CBA) or during negotiations for a union's first contract, so long as the changes were similar in kind and degree to the changes made previously. The Board in *Raytheon* explained that a modification that is a "regular and consistent past pattern of change is not a change in working conditions at all."

In the second case, *Tecnocap LLC*, the Board overruled another part of *Raytheon* and held an employer's past practice developed under a collectively bargained management rights clause does not authorize an employer to continue that past practice following the expiration of the agreement.

***Wendt* decision.** In *Wendt*, the employer laid off ten employees temporarily during negotiations for a first CBA. To support its decision, the employer pointed to its "past practice" of layoffs during economic downturns. The NLRB analyzed Wendt's prior layoffs and determined this layoff was "different in kind and degree" than previous layoffs, and thus not a "past practice." In other words, the Board found the employer's layoff was unlawful under *Raytheon*. But rather than stop there, the Board overruled *Raytheon*, claiming it was inconsistent with the 1962 Supreme Court of the United States decision in *National Labor Relations Board v. Katz*. In that case, the Supreme Court held that an employer violated its duty to bargain when it unilaterally imposed policies on matters that are mandatory subjects of bargaining (i.e., wages, hours, and other terms and conditions of employment) without first consulting with the union.

"[A]n employer may not defend a unilateral change in terms and condition of employment that would otherwise violate Section 8(a)(5) by citing a past practice of such changes *before* its employees were represented by a union and thus before the employer had a statutory duty to bargain with the union," the Board stated. The Board majority also claimed prior precedent had not taken into account how unilateral action could harm the bargaining process.

The Board declared, "Permitting such expanded discretionary unilateral conduct encourages piecemeal, fragmented bargaining, which is disfavored under the NLRA, because it reduces flexibility in negotiations and narrows the range of possible compromises that characterize the give-and-take of meaningful overall bargaining for an agreement."

***Tecnocap* decision.** The *Tecnocap* case involved an employer that unilaterally implemented twelve-hour and eleven-hour work shifts (eight-hour shifts were normal) while bargaining for a new CBA. The union opposed the change and the employer refused to bargain over it, claiming a past practice of similar shift adjustments. The employer did not provide evidence as to when production requirements necessitated a twelve-hour or eleven-hour work shift. The newly expired contract contained a management rights clause that provided the employer with discretion to run its business, but the clause did not say it survived contract expiration. The employer argued the schedule change was unavoidable and necessary to accommodate the workload and relied on the management rights clause as an explanation for its actions post-expiration.

BOARD REVERSALS continued on page 9

BOARD REVERSALS continued from page 8

The Board stated *Raytheon* contradicted *Katz* to the extent a past practice allowed unilateral conduct "involv[ing] substantial employer discretion." Citing the *Wendt* case, the Board stated the "willingness to treat discretionary past practices as privileging unilateral action to be flawed policy that … warranted reversal of *Raytheon*."

Key takeaways. The NLRB has greatly restricted employers in their business operations while a contract is pending. These cases highlight the importance of offering the union the opportunity to bargain over business decisions unless the employer can provide detailed evidence of consistent—nearly annual or more—changes of the same nature. These decisions continue the Board's recent trend of decisions favoring unions and limiting employer actions. In sum, these decisions make clear that:

- Management rights clauses that do not explicitly state they survive contract expiration will not survive contract expiration and cannot be relied upon by an employer to establish a past practice.
- A past practice must be "regular and consistent," meaning the past practice defense is limited to situations where the employer's unilateral change is fixed by an established formula based on nondiscretionary standards and guidelines.
- Employers desiring to take lawful unilateral action during contract negotiations must meet a heavy burden to show through detailed and data-driven history that they made the same changes consistently in the past.

Protected concerted activity expanded

The Biden Board also issued two significant decisions that reversed Trump-era precedent that had provided guidance for determining what constitutes protected concerted activity under Section 7 of the NLRA. In doing so, it substantially increased the zone of employee activity the Board protects and the zone of employer conduct the agency is empowered to regulate and sanction.

In *Miller Plastic Products, Inc.*, issued on August 25, 2023, the Board overruled its 2019 decision in *Alstate Maintenance,* and revived its totality-of-the-record-evidence test for determining what constitutes employee concerted

BOARD REVERSALS continued on page 10

Fifth Circuit considers controversial Board rulings

In the next few months, two key decisions are expected from the U.S. Court of Appeals for the Fifth Circuit that could deal a major blow to controversial opinions issued by the Biden-era National Labor Relations Board (NLRB).

Expanded remedies on the chopping block. On February 6, 2024, a three-member panel of the Fifth Circuit heard oral argument in a divided NLRB decision that expanded—arguably beyond statutory limits—the remedies recoverable by successful charging parties in unfair labor practice cases. In the decision below, the Biden Board announced that its make-whole remedy includes compensation for employees "for any other direct or foreseeable pecuniary harms suffered" as a consequence of labor violations. On appeal, the employer urged the Fifth Circuit to conclude that the Board simply lacks statutory authority to award such damages. An adverse decision would deal a blow to the current NLRB's majority view of its own remedial powers. While oral argument is often an inaccurate predictor of a case's final outcome, observers noted that the panel judges appeared to regard the Board's claimed remedial authority with skepticism.

Employer speech and the First Amendment collide. On January 25, 2024, an *en banc* session of the Fifth Circuit heard re-argument of a significant free speech challenge to the NLRB's unfair labor practice finding. In the underlying case, a company owner, in response to a social media question from a nonemployee, stated that the company's employees were free to join a union at any time, but asked why they would do so just to pay union dues and lose stock options. Although not directed at any employee, couched as an opinion, and perhaps even technically correct, the Biden Board nonetheless found the remark regarding stock options to constitute an unlawful threat. At oral argument, the *en banc* panel repeatedly pressed Board counsel about how and where the Board would draw the line between constitutionally protected employer speech and unlawful coercive speech.

BOARD REVERSALS continued from page 9

activity. A day later, the Board issued its decision in *American Federation for Children, Inc. (AFCI)*, in which it took the opportunity to overrule its 2019 decision in *Amnesty International of the USA, Inc.,* and announce that concerted advocacy by statutory employees on behalf of nonemployees is protected by the NLRA when it can benefit the statutory employees.

[T]he Board then took the further step of overturning Alstate *because it "invited unwarranted restrictions on what constitutes concerted activity," and stated it was returning to the totality-of-the-circumstances standard articulated in its* Meyers II *decision.*

Return to the 'totality of circumstances.' In *Miller Plastic*, the employer discharged an employee after he raised concerns about the employer's COVID-19 protocols and decision to remain open for business in the early months of the pandemic. After the governor issued a stay-at-home-order and the closure of nonlife sustaining businesses, the employer held an all-hands meeting and announced the company would be classified as an essential business and outlined the health and safety measures. The employee raised concerns and urged that "we shouldn't be working." In the weeks that followed, he continued to voice concerns and was ultimately discharged for "[too] much talking to coworkers, lack of profits and poor attitude."

In the proceedings below, the administrative law judge (ALJ) applied *Wright Line* and concluded that the employer discharged the employee for his protected concerted activity in violation of Section 8(a)(1) and not for poor performance policy violations. The employer urged the Board to find that his conduct was not concerted under the five-factor framework set forth in *Alstate Maintenance*. The Board, however, found that the employer violated Section 8(a)(1) under extant law, including *Alstate*.

However, the Board then took the further step of overturning *Alstate* because it "invited unwarranted restrictions on what constitutes concerted activity," and stated it was returning to the totality-of-the-circumstances standard articulated in its *Meyers II* decision. Member Kaplan filed a concurring opinion in which he agreed with the majority that the employee's COVID-19-related complaints constituted concerted activity under the *Meyers* cases, and that, even applying *Alstate*, the conduct at issue would still be found to be concerted and protected. Kaplan thus blasted the decision to overrule *Alstate* as "completely unnecessary to the *holding* in this case." (Emphasis in the original.)

Advocating for nonemployees protected. In *AFCI*, the issue was whether a nonprofit employee's actions in advocating among her coworkers for their support in ensuring the rehire of a former colleague, who was awaiting renewal of her work authorization status, constituted protected Section 7 activity. For its part, the employer argued that it discharged the employee because she violated company policy by calling a director with whom she had met to discuss the former coworker a "racist."

The ALJ concluded that the employee had not engaged in protected concerted activity by her efforts to rally opposition to the director's policies, including his perceived lack of support for rehiring the former colleague. Specifically, the ALJ concluded that the employee did not act concertedly. Then, applying the Board's decision in *Amnesty International of the USA, Inc.*, which found that employees' efforts on behalf of a nonemployee are not for "mutual aid or protection," he reasoned that the employee's actions were not protected by Section 7 because they were for the benefit of the former colleague, whom he found to be a nonemployee.

Contrary to the ALJ, the Biden Board found that the employee did engage in protected concerted activity by seeking to induce group support among her coworkers to ensure that the former colleague was rehired. Overruling *Amnesty International*, the majority concluded that the Act protects the efforts of employees who take action to support nonemployees when those actions can benefit the employees who undertake them, and here, the employee acted for the purpose of mutual aid or protection in advocating for the former colleague and her employment with the employer. Alternatively, the Board found that because the Board found that the former colleague was indeed a statutory employee under the Act, *Amnesty International* did not apply.

BOARD REVERSALS continued on page 11

BOARD REVERSALS continued from page 10

In a dissenting opinion, Member Kaplan disagreed with the majority that the employee was advocating for a statutory employee when advocating for the former colleague. Moreover, the record was clear that the employer investigated, warned, and put the employee in the position of resigning because she repeatedly accused her supervisor of being a "racist," which was not for "other mutual aid or protection" within the meaning of Section 7, and therefore not protected activity.

Stricter scrutiny

As the Board broadens its definition of concerted activity, it simultaneously increases its control over employer reaction to a widening range of employee conduct. The nexus between the conduct and the statutory employee's workplace has become increasingly attenuated, e.g., advocacy on behalf of a nonemployee. The current Board's expansive reading of Section 7 appears unaccompanied by any sound limiting principles. When is the subject of an employee's advocacy so attenuated to the workplace that it is unprotected? The Board currently seems content to let that question remain unanswered. ■

New joint-employer rule casts wider net

On October 26, 2023, the National Labor Relations Board (NLRB) issued its final joint-employer rule that will make it far more likely for one business to be deemed the joint employer of another business's employees under the National Labor Relations Act (NLRA). The new rule eliminates the standards and predictable consequences that the current rule provides and deprives employers of the ability to reasonably forecast the risks and costs of their contracts with providers, vendors, subcontractors, and franchisees.

On hold, for now. The new rule was set to take effect on December 26, 2023, but on November 16, 2023, the NLRB announced that it was extending the effective date to February 26, 2024.

However, just days before the rule was scheduled to go into effect, a judge of the U.S. District Court for the Eastern District of Texas vacated the rule due to "the unlawfulness of the rule's sweep beyond common-law limits." Judge J. Campbell Barker wrote that the Board had "failed to reasonably address the disruptive impact of the new rule on various industries, … resolve ambiguities in a way making the rule more predictable than common-law adjudication, or explain how the rule does anything other than mandate piece-meal bargaining that will likely promote labor strife rather than peace."

The details. Under the joint-employer rule that the Board adopted in 2020, which the new rule rescinds and replaces, an entity may be considered a joint employer only if it exercises *actual* and *direct* control over a specified and clearly defined list of "essential terms and conditions of employment." The new rule significantly expands the definition of "essential terms and conditions of employment" by including additional terms that are inherently vague.

The new rule, titled "Standard for Determining Joint-Employer Status," eliminates the requirement that control be actually exercised, providing that an entity may be a joint employer if it "possesses the authority to control (whether directly, indirectly, or both) or to exercise the power to control … one or more of the employee's essential terms and conditions of employment." In the final rule notice, the NLRB explained that an entity has such direct or indirect control "regardless of whether the [entity] exercises such control."

The new rule defines the "essential terms and conditions of employment" as: "(1) wages, benefits, and other compensation; (2) hours of work and scheduling; (3) the assignment of duties to be performed; (4) the supervision of the performance of duties; (5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline; (6) the tenure of employment, including hiring and discharge; and (7) working conditions related to the safety and health of employees." Importantly, these seven terms represent what the Board considers the "core subjects of collective bargaining" contemplated by the NLRA.

Further, the NLRB's final rule expands on its proposed rule released in September 2022 by requiring that a joint

JOINT-EMPLOYER RULE continued on page 12

JOINT-EMPLOYER RULE continued from page 11

employer of a group of employees "must bargain collectively with the representative of those employees." While a joint employer will be required to bargain over only those terms and conditions that it "possesses the authority to control or exercises the power to control," it must bargain about all terms and conditions over which it has such authority or exercises power to control, even those the rule does not define as "essential."

No exceptions. Despite comments to the proposed rule from employers in particular sectors and industries that anticipate substantially negative impacts, such as the building and construction industry, franchisors, staffing agencies, and healthcare, the NLRB declined to carve out any exceptions or otherwise make clear how and to what extent the rule applies to particular industries or common business arrangements.

Instead, the NLRB has left businesses to guess and rely upon the agency's assertion that it will be "mindful that applying the final rule will require sensitivity to industry-specific norms and practices," and has noted it "will take any relevant industry-specific context into consideration when considering whether an entity is a joint employer."

Purported common law principles. The new rule largely mirrors the short-lived and much-criticized rule the Board adopted in its 2015 decision in *Browning-Ferris Industries of California, Inc. (BFI)*, which had rejected the "direct and immediate" control framework. The new rule makes clear that joint-employer status only exists where an entity has authority or control over essential terms or conditions of employment, and the rule sets forth a limited list of what specifically is considered essential terms and conditions.

The Board majority stated that the rule "more faithfully grounds the joint-employer standard in established common-law agency principles." However, the new rule actually expands on *BFI*'s broad approach, deeming joint-employer status can exist based on any level of authority or control the putative joint employer reserves or has over one essential employment term. *BFI*, at least, allowed for consideration of the extent to which that potential control existed and whether it was material to bargaining.

Dissenting from the new rule, Board Member Marvin Kaplan called it "an unprecedented and unwarranted expansion of the Board's joint-employer doctrine" and argued that it could "frustrate national labor policy" by placing multiple employers at the bargaining table, particularly some who may never have exercised control over the employees. Member Kaplan built his dissent on the framework under which federal agency regulations can be challenged, laying out a detailed and well-articulated argument for parties challenging the rule.

Swift backlash

Member Kaplan foresaw that there would be legal challenges to the rule, writing, "A betting person might hesitate to put money on [the rule's] chances because, as demonstrated below, the final rule is wrong as a matter of law and unadvisable as a matter of policy." The Republican Board member was correct. Hours after the Board's announcement of the final rule, Senators Joe Manchin (D-WV) and Bill Cassidy (R-LA) announced their introduction of a Congressional Review Act resolution to rescind the rule.

On January 12, 2024, the U.S. House of Representatives passed H.J. Res. 98 to rescind the new joint-employer rule. The vote was 206–177, with eight Democrats voting in favor of the resolution. Though the White House has stated that President Biden will veto the measure if it passes in the Senate and eventually arrives on his desk, this effort on Capitol Hill represents just one front in the business community's battle against the new rule. As noted above, a group of trade groups has filed suit against the Board contending that the rule both violates the NLRA and is arbitrary and capricious. That lawsuit remains pending.

Broad impacts

All companies and business entities may now want to consider reviewing their current and pending contracts with third parties to evaluate whether those agreements could be interpreted as reserving the right to potentially control any essential term or condition of employment of a third party's employees. Given that the actual exercise of direct control over another entity's employees creates an even greater risk of being deemed a joint employer under most federal labor and employment laws, an employer that allows the employees of third parties to perform work on its premises may also want to consider reviewing the actual practices of their supervisors and managers and, to the extent possible under any particular business situation, training them to avoid actions that might be used to argue it has control over another entity's employees. ■

Other NLRB developments

Federal court decisions

3rd Cir.: Five-shift guarantee terminated when CBA expired. The U.S. Court of Appeals for the Third Circuit held that the National Labor Relations Board (NLRB) erred in finding that an employer violated Sections 8(a)(5) and (1) of the National Labor Relations Act (NLRA) by unilaterally eliminating the parties' five-shift guarantee and laying off two employees prior to reaching an impasse in negotiations for a new collective bargaining agreement (CBA). The court found that "the five-shift guarantee did not become part of the post-expiration status quo, as that provision makes plain the guarantee was to end when the CBA expired." However, the court remanded the case for the Board to determine whether the employer "engaged in adequate effects bargaining," since if it did not, even under the employer's own theory of the case, it would still have been precluded from implementing the layoffs (*PG Publishing Co., Inc., dba Pittsburgh Post-Gazette v. National Labor Relations Board*, September 26, 2023).

8th Cir.: Board erred in ruling that union activity spurred seventeen firings. The U.S. Court of Appeals for the Eighth Circuit vacated an NLRB order that erroneously found a government contractor violated Sections 8(a)(3) and (1) of the NLRA by firing seventeen employees in response to a corrective action report it received from the U.S. Air Force program manager, who did not visit the facility before the terminations. Regarding the first three terminations, the Board relied on "suspicion and unreasonable inferences" to find anti-union animus and a causal nexus, and the record lacked substantial evidence to infer pretext. In finding no evidence of anti-union bias as to the firing of the other fourteen employees, the court noted that the employer did not previously "make any union-based threats or outbursts, question employees on union involvement, or ever comment on unionization" (*Strategic Technology Institute, Inc. v. National Labor Relations Board*, December 6, 2023).

E.D. Tex.: GC's captive audience memo survives another legal challenge. The U.S. District Court for the Eastern District of Texas found that it lacked jurisdiction to hear First Amendment of the U.S. Constitution claims brought by a group of staffing companies alleging that a memorandum issued by the NLRB's general counsel concerning "captive audience" meetings chilled their right to freedom of speech and was an ongoing violation of federal law that the court could remedy through equitable relief. Granting the motion to dismiss, the court held that the memo and the general counsel's prosecutorial decisions were unreviewable, that the NLRA's scheme of reviewing unfair labor practices precluded jurisdiction, and the staffing companies lacked standing (*Burnett Specialists v. Abruzzo*, August 31, 2023).

NLRB rulings

NLRB regional office finds college basketball players are employees. In early February, the regional director (RD) for Region One of the NLRB issued a decision finding the members of the Dartmouth College basketball team were statutory employees of the college and entitled to a vote on unionization. (The Service Employees International Union (SEIU) had petitioned to represent the players in September 2023, and approximately one month after the RD's ruling the team voted to unionize.) In her decision and direction of election, the RD found the college exercised pervasive control over the "work" of the college players. The decision syncs with a memorandum issued by the NLRB's general counsel in 2021 in which she expressed the opinion that college athletes were the statutory employees of the schools they represented. The college has the right to appeal the decision to the five-member Board in Washington, D.C., and to eventually seek federal court resolution of the claim. The decision marks an important chapter in the current high-stakes battle over college athletics.

Employer's unilateral termination of shift differentials without notice to union unlawful. The NLRB held that an employer violated Sections 8(a)(5) and (1) of the NLRA by unilaterally terminating shift differential payments to employees of a nursing facility without affording a union notice and an opportunity to bargain. Rejecting the employer's defense to the unilateral change allegation, the Board found that the collective bargaining agreement adopted by the parties did not authorize the employer to unilaterally eliminate shift differential payments, nor did the employer establish that the union waived its right to bargain over the termination of shift differential payments. Member Marvin Kaplan filed a separate concurring opinion in which he agreed that the employer had violated Sections 8(a)(5) and (1) (*Twinbrook OpCo, LLC*, December 28, 2023).

OTHER NLRB DEVELOPMENTS continued on page 14

OTHER NLRB DEVELOPMENTS continued from page 13

Union was qualified to represent unit of guards. The NLRB held that a regional director erred in finding that a union was unqualified to represent a bargaining unit composed of guards at a university because it also represented employees who were not guards. The employer asserted that the union already represented its traffic control aides who were classified differently than its guards. Section 9(b)(3) prohibits the certification of any unit that admits both guards and non-guards to membership. However, the Board found that the record in the case established that the traffic control aids "have an ongoing responsibility to observe and report security concerns while performing their traffic duties—obligations that the Board has found to be indicative of guard status." Thus, the union would still arguably be representing two groups of "guards," not guards and non-guards. Accordingly, the Board found that it had not been established that the union was barred from certification under Section 9(b)(3) of the NLRA, hence, it reinstated the petition and reversed and remanded the case to the regional director (*Universal Protection Service, LLC dba Allied Universal Security Services*, December 13, 2023).

No-camera rule unlawfully applied to workers frustrated by parking. The NLRB held that an administrative law judge (ALJ) did not err in finding that an employer violated Section 8(a)(1) of the NLRA when it applied its no-camera policy to the conduct of two employees who took pictures of contractors' vehicles parked in an employee-designated parking lot. Here, the Board agreed with the ALJ that enforcement of the rules against protected activity engaged in by the employees was unlawful since photographs taken by the employees did not implicate "legitimate business justifications" that the employer had for maintaining work rules prohibiting unauthorized photography or video recording. On the other hand, the matter was remanded to the ALJ for a determination of whether the employer violated Section 8(a)(1) by maintaining overly broad camera rules in light of the Board's recent ruling in *Stericycle, Inc.* (*Phillips 66 Company*, December 6, 2023).

Prepared statement about union campaign read individually was lawful. A coffeehouse chain did not violate Section 8(a)(1) of the NLRA when a store manager spoke to employees about a union organizing campaign during employee performance reviews, ruled the NLRB. The ALJ questioned the credibility of employee testimony and rejected the general counsel's allegation that the employer unlawfully engaged in "captive audience" meetings by requiring employees to listen to its unsolicited views on union activity during a mandatory meeting and by prohibiting employees from talking about the union during working time. The Board found no basis for reversing the judge's credibility determinations and adopted the ALJ's dismissal of the complaint (*Starbucks Corp.*, November 28, 2023). ■

SCOTUS to review NLRA injunction standard

On January 12, 2024, the Supreme Court of the United States granted *certiorari* to decide what standard should be applied by federal district courts when the National Labor Relations Board (NLRB) seeks injunctive relief during the pendency of an unfair labor practice (ULP) proceeding. Section 10(j) of the National Labor Relations Act (NLRA) authorizes the agency to seek injunctive relief. In most instances, the power has been used to preserve or restore the status quo during the resolution of ULP cases. For example, the Board may seek an order to reinstate discharged employees where it claims the discharges violated the NLRA. It is a powerful authority, and one which the Board's current general counsel has indicated a desire to use more frequently. The U.S. federal courts of appeal, however, have been divided over what standard a district court must apply in determining whether it should grant the injunctive request.

Circuit split. The federal courts of appeal are currently split roughly in half with regard to the standard their district courts should apply. About half of the circuits require only a "just and proper" standard, while the other half require the more exacting "four factor" standard routinely used by district courts in other types of injunctive cases. Advocates for the stricter standard have argued that there is no reason to make 10(j) injunctions easier to obtain than any other form of injunctive relief. The current NLRB obviously takes a different view. The Supreme Court agreed to take the case and resolve the circuit split next term. It seems clear that whatever standard the Court approves, it will be applicable to all circuits, and the early betting suggests the Court will adopt the more stringent test.

Ogletree Deakins

Employers & Lawyers, Working Together

Ogletree Deakins

Ogletree Deakins is one of the largest labor and employment law firms representing management in all types of employment-related legal matters. *U.S. News – Best Lawyers®* "Best Law Firms" has named Ogletree Deakins a "Law Firm of the Year" for 12 consecutive years. In 2023, the publication named Ogletree Deakins its "Law Firm of the Year" in the Litigation – Labor & Employment category.

Ogletree Deakins has more than 950 lawyers located in 54 offices across the United States and in Europe, Canada, and Mexico.

Atlanta
Austin
Berlin
Birmingham
Boston
Charleston
Charlotte
Chicago
Cleveland
Columbia
Columbus
Dallas
Denver
Detroit (Metro)
Greenville
Houston
Indianapolis
Kansas City
Las Vegas
London
Los Angeles
Memphis
Mexico City
Miami
Milwaukee
Minneapolis
Montréal
Morristown
Nashville
New Orleans
New York City
Oklahoma City
Orange County
Paris
Philadelphia
Phoenix
Pittsburgh
Portland (ME)
Portland (OR)
Raleigh
Richmond
Sacramento
Salt Lake City
San Antonio
San Diego
San Francisco
Seattle
St. Louis
St. Thomas
Stamford
Tampa
Toronto
Torrance
Washington, D.C.