Ogletree Deakins

ISSUE 22 | FALL 2022

The Practical NLRB Advisor

The ominous consequences of political rulemaking

In this Issue

In the last issue of the Ogletree Deakins Practical NLRB Advisor, *we utilized this space to remark that the current general counsel's (GC) multifaceted and radical agenda posed genuine institutional issues for the National Labor Relations Board (NLRB). The headlong pursuit of policy and precedent reversals sought by the GC were, and remain, a threat to the law's stability and the agency's credibility.*

We also noted, prematurely in retrospect, that the five-member Board had, thus far, been more constrained in its decisional capacity than had the GC in her prosecutorial role. Two recent actions by the Board, however, suggest it intends to eventually tread the same potentially self-destructive path as its top prosecutor. First, on September 6, 2022, the Board issued a notice of proposed rulemaking (NPRM) with regard to the definition of "joint employer." Next, on November 3, 2022, the agency issued a second NPRM aimed at certain Board representation case policies and practices. Both proposed rules seek to completely overturn rules only recently established by the Trump Board. This knee-jerk reaction to undo a predecessor Board's rulemaking predicated on little more than a change in the federal agency's political composition portends ominous consequences for both the law and the agency itself.

POLITICAL RULEMAKING continued on page 3

BRIAN IN BRIEF

In discussing statutory law, Supreme Court of the United States Justice Louis Brandeis once famously observed: "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right…"

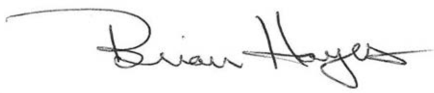
One can pretty much guarantee that these are words that will never be inscribed on the façade of the offices of the National Labor Relations Board (NLRB). Quite to the contrary, the NLRB has consistently demonstrated little regard for the principle of *stare decisis,* or precedent, or the stability and predictability for which it is designed to ensure. Every shift in the Board majority seems to usher in another fresh set of case and policy reversals. Labor "law" is fast becoming like New England weather—if you don't like it, just wait a minute.

As the current issue of the *Practical NLRB Advisor* spotlights, the new Biden Board has started down this same road having recently issued multiple case reversals. Even more alarming has been its willingness to revisit and presumably overrule its own recent rulemakings. One would have hoped that even if case precedent had no shelf life that at least rulemaking would. That, however, is apparently not the case.

The disservice to stakeholders resulting from this endless cycle of reversal and resuscitation is self-evident. One aspect of the phenomenon is, however, often overlooked and at least merits some thoughtful consideration. Every time the NLRB moves the goal posts it makes compliance less likely and the expenditure of litigation resources more likely.

As this issue of the *Advisor* goes to press, the NLRB is pleading with congressional appropriators to give the agency a substantial budgetary increase. Without dissecting the merits of the agency's budget requests, there is at least one obvious note of irony in that the Board's own practice of flip-flopping policy is a substantial contributor to the agency's operational costs. Some have likened it to a fire department setting blazes all over town and then asking the local government for a budget increase because of its unprecedented workload. That may or may not be fair, but in a political and budgetary environment where perception is reality, constantly changing policymaking surely is not helpful.

Sincerely,



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*,
Firm Publications

***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.

POLITICAL RULEMAKING continued from page 1

The proposed rule changes

The joint-employer NPRM is the more far-reaching and complex of the two and requires a brief recap of its significance and history. Under the joint-employer theory, the statutory employees of one employer (Employer B) may also be deemed the statutory employees of another employer (Employer A) where Employer A exercises the requisite degree of control over the wages, hours, and working conditions of Employer B's employees. This issue is potentially applicable to a myriad of business-to-business arrangements including, but not limited to, the franchisee/franchisor, contractor/subcontractor, and user/employee leasing or temporary company relationships. Indeed, if the criteria are "loose" enough, it could be applicable to any employers in functional privity to one another.

The question of whether two entities are joint employers turns on the type and degree of control held by one entity over the employees of another. Until recently, this was a matter of long-settled Board law. For decades, the Board had held that to be deemed joint employers the two entities had to codetermine the essential terms and conditions of employment for the employees in question. The Obama Board, however, overturned this precedent and spawned an enormous amount of policy uncertainty and disarray when it issued its 2015 decision in *Browning-Ferris Industries (BFI)*. (See the *Practical NLRB Advisor*, Issue 1). In *BFI*, the Board held that even evidence of indirect or merely potential or unexercised control over the wages, hours, and working conditions of the employees in question could be sufficient to demonstrate joint-employer status. This extraordinarily broad, frustratingly vague, and seemingly limitless test encompasses not only such standard business-to-business arrangements as franchises, subcontracting, and temporary and leased help, it arguably applies to any two employers that are operationally proximate to one another.

Given the political and policy turmoil that followed the *BFI* decision, the succeeding Trump Board sought to return the joint-employer analysis to its traditional framework and to do so on a more permanent basis. Thus, rather than merely issuing a decision in a new case that overruled *BFI*, the Trump Board decided to utilize the agency's rarely exercised rulemaking authority. (See the *Practical NLRB Advisor*, Issue 12). Despite being more time-consuming, the choice of rulemaking over adjudication was clearly aimed at bringing about greater stability and permanence with respect to this now controversial theory. Rulemaking, it was hoped, would result in a permanent solution as opposed to the partisan flip-flopping that seems to occur every time the Board's political majority changes.

That hope was, however, dashed with the issuance of the Biden Board's joint-employer NPRM, which in essence proposes to completely overturn the Trump Board's formulation and return to the analysis under *BFI*. It is now clear that the Biden Board, at any rate, views rulemaking no differently than adjudication in terms of the permanence or stability of its result. Either is susceptible to summary reversal by a subsequent Board of a different political persuasion.

Were this not obvious enough, the current Board doubled down on this approach just weeks later by proposing to rescind the so-called "election protection rule" adopted by the Trump Board. Substantively, this rule made modest changes to the Board's "blocking charge" policy, provided employees who are subject to their employers' voluntary recognition of a union the brief opportunity to voice their own choices on the issue, and modified the criteria necessary to "convert" a construction industry pre-hire agreement into a full-fledged union relationship. The Trump Board made the last change in response to repeated criticisms of its then-extant policy in reviewing federal court' opinions. Undaunted by any of this, and again seemingly unconcerned with maintaining policy stability, the current Board has now proposed jettisoning the rule in its entirety and returning to the pre-rule practices.

Stakeholder revolt?

Much like the stock market, the one thing federal agency stakeholders hate most is uncertainty. Most are perfectly willing to play by the rules, but rightly complain when the rules are changed in the middle of the game. This is happening with alarming frequency at the NLRB, where legal principles apparently only have a shelf life that is commensurate with the ascendancy of one political party or the other. This has become especially disturbing now that it impacts both the rulemaking process *and* the decisional

POLITICAL RULEMAKING continued on page 4

POLITICAL RULEMAKING continued from page 3

process since the entire rationale behind rulemaking is the establishment of more durable policies.

The seemingly constant cycle of reversals and the purported "discovery" of new theories is remarkable given that the NLRA is a relatively simple statute that has been in existence for nearly ninety years. One would think that most of the essential issues under the statute should have been definitively resolved decades ago. That, however, is decidedly not the case. Each successive Board majority and general counsel now repeatedly revisits settled principles, attempts to resuscitate long dead theories, overrules their predecessors, and confounds their stakeholders.

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Those stakeholders are growing progressively more frustrated with this lack of stability. They no sooner adjust their practices or revamp their policies to bring themselves into compliance with the NLRA, only to find that the goalposts have been moved. This not only confuses stakeholders, it makes compliance more difficult and harms any perception of the NLRB as a neutral arbiter. Far too often the inevitable by-product of these perceptions is an increasing level of noncompliance.

The federal judiciary

The NLRB is but one cog in the massive "administrative state"—the alphabet soup of federal agencies, subagencies, departments, and bureaus that largely make and enforce the laws that most affect our daily lives. For nearly 100 years now, the administrative state has grown enormously and relentlessly to the point that while nominally part of the executive branch, it has in fact become its own "fourth branch" of government.

This development is alarming in many respects, but none more so than the fact that it is fundamentally antithetical to our most basic constitutional principles. Under the U.S. form of government, "law making" authority resides strictly with the U.S. Congress under Article II of the U.S. Constitution. Laws are only to be made by elected (and therefore accountable) officials and not by unelected (and therefore unaccountable and often anonymous) federal bureaucrats. Despite this basic constitutional tenet the quasi-legislative power of the administrative state continues to be exercised with ever-increasing frequency and breadth. The causes for this phenomenon are many, ranging from the complexities of the regulated space, the political reluctance of Congress to legislate, and to the old maxim that power itself begets more power. To whatever one may attribute the cause, no one denies the reality.

The growth of the administrative state has not escaped the notice of the federal judiciary where there appears to be increasing concern over its extra-constitutional nature. The concern was on full display in the Supreme Court of the United States' decision last term in *West Virginia v. Environmental Protection Agency,* when the Court invalidated a novel U.S. Environmental Protection Agency (EPA) rule based on vague statutory language where the rule would have had enormous economic consequence. The *EPA* case was framed in terms of the so-called "major questions doctrine," holding that vague and nonexplicit statutory power cannot support agency rulemaking that has significant economic consequence.

Judicial skepticism over the exercise of lawmaking authority by regulatory bodies has manifested itself in other legal theories in addition to the major questions doctrine, ranging from the "non-delegation doctrine," which holds that there are certain powers that Congress cannot constitutionally delegate to the executive branch, to the question of judicial "deference" to agency actions. These and other analytical frameworks, as well as a more stringent application of the Administrative Procedure Act and its requirements that administrative rules have a reasoned and supported basis and are not arbitrary or capricious, all evince a judicial concern over the administrative state's repeated forays into legislating by regulation.

Board rulemaking

The two referenced Biden Board rulemaking proposals may not prompt eventual court analysis under the "major questions"

POLITICAL RULEMAKING continued on page 5

POLITICAL RULEMAKING continued from page 4

or "non-delegation" doctrines, but they do run headlong into a judicial zeitgeist that has placed new emphasis on those doctrines out of concern for the legislative drift of the administrative state. Perhaps more significantly, the two proposals plainly raise questions regarding agency deference and arbitrariness. Both proposals share a similar set of problems in this regard as neither plows new ground. Rather, each one merely seeks to reverse rulemaking properly completed by a prior Board only a short while ago. Neither contains a cogently presented rationale for taking a 180-degree turn from the existing rules, nor does either cite persuasive evidence of problems under the current rules that would justify their wholesale reversal. As already noted, the only clear empirical evidence is that the Board's political majority has shifted.

It takes no imagination to realize that the joint-employer rule would have enormous economic consequence. Yet the Board has not assessed those consequences and cannot do so since it is statutorily barred from engaging in such economic forecasting.

Beyond the lack of a reasoned justification, both proposed rules, in part, share another questionable distinction: the courts have already expressed disapproval over a portion or portions of the proposed rules. On the proposed joint-employer rule, the U.S. Court of Appeals for the D.C. Circuit has admonished the Board that its *BFI* standard "painted with too broad a brush" and that the Board needed to erect definitional "scaffolding" around the joint-employer concept to ensure that it did not reach standard subcontracting or other business-to-business arrangements. This is precisely what the Trump Board rule did with its rule, yet the Biden Board is preparing to jettison the rule and tear down the very scaffolding the appeals court admonished the NLRB to erect.

In part, the proposed election protection rule would make precisely the same error as the D.C. Circuit, and other courts have repeatedly held that in the construction industry a "pre-hire" agreement cannot ripen into a full-blown 9(a) relationship simply on the basis of contract language. Yet the new NPRM takes the polar opposite view. Further still, and while vastly more important in the case of the joint-employer rule, the Board has undertaken no analysis of the economic or social impact of its proposed rule. It takes no imagination to realize that the joint-employer rule would have enormous economic consequence. Yet the Board has not assessed those consequences and cannot do so since it is statutorily barred from engaging in such economic forecasting. That statutory prohibition alone seems to have been a clear congressional signal that it did not want the Board involved in rulemaking of major consequence. And yet the proposed joint-employer rule would be of major consequence.

The problems with the proposed rules do not end here. The proposed election protection rule would be, at least, largely procedural and within the supposed expertise of the Board. The same is decidedly not true of the proposed joint-employer rule. It would be substantive, not procedural, and turn on a construction of the common law, not the NLRA text. However, the Board has seemingly no "expertise," theoretical or otherwise, in divining the common law.

Lastly, and in many respects, both proposed rules run contrary to the plain text of the NLRA. The election protection rule would limit the right of employees to free choice in their selection of representatives despite the statute's express directives to the opposite effect. In the case of the joint-employer rule, not only does the phrase "joint employer" appear nowhere in the NLRA text, the actual statutory text runs counter to the notion. The term "employer" is consistently referenced in the singular in all relevant sections of the statute, and the law directs the Board to *facilitate* collective bargaining, not render it hopelessly complex and counterproductive.

Conclusion

It is unfortunate that the current Board has chosen to follow this path with its rulemaking authority. Its actions may once again sow confusion regarding the NLRA, and in the process of doing so may also further damage the NLRB's institutional credibility. From a legal perspective, while courts may rectify the Board's errors, from an institutional perspective, the damage may already be done. ■

Latest GC memos again favor labor

National Labor Relations Board (NLRB) General Counsel (GC) Jennifer Abruzzo issued two additional memoranda in recent months that align with her aggressive prosecutorial agenda. The first of the memos directs regional officers to pursue interim injunctive relief while cases are pending. Abruzzo has claimed that this framework is likely to increase settlements, decrease court litigation, and conserve resources. However, for employers that are not ready to admit fault, the new policy is likely to place them between the proverbial rock and a hard place. In the second memo, the GC joins the U.S. Equal Employment Opportunity Commission (EEOC) in targeting employers' use of new technologies to monitor, manage, and hire employees.

Push for interim injunctive relief

The NLRB's top prosecutor continues her push for the use of injunctions under Section 10(j) of the National Labor Relations Act (NLRA), this time urging for the use of such relief while litigation is pending before the agency. On October 20, 2022, Abruzzo issued memorandum GC 23-01, entitled "Settling the Section 10(j) Aspect of Cases Warranting Interim Relief." The memo piggybacks the GC's memo earlier this year, GC 22-02, which urged the robust usage of the agency's injunctive authority, particularly in the context of organizing campaigns. (See the *Practical NLRB Advisor*, Issue 20).

Abruzzo has claimed that this framework is likely to increase settlements, decrease court litigation, and conserve resources. However, for employers that are not ready to admit fault, the new policy is likely to place them between the proverbial rock and a hard place.

In GC 23-01, Abruzzo encourages NLRB regional directors to attempt to obtain interim relief while a 10(j) case continues to unfold. According to the memo, "if efforts to settle the entire administrative case are unsuccessful, charged parties will be given the opportunity to voluntarily agree to an interim settlement that includes remedies, such as reinstating alleged discriminatees or agreeing to bargain, pending final resolution of the administrative case by the Board."

As noted, the GC asserts that the policy is geared to increase settlements, decrease court litigation, and conserve resources for the Board and all parties. However, this assumes that the underlying charges are appropriate for injunctive relief and that the charged party is willing to accept interim relief in lieu of litigation. As to the latter, Abruzzo acknowledged that there may be cases in which regions determine that the time and resources necessary to seek an interim settlement is futile, including when it appears a charged party would not agree or adhere to the terms of an interim settlement. In such cases, the region may proceed directly with sending a streamlined recommendation to the agency's Injunction Litigation Branch to seek Section 10(j) relief. And if a charged party breaches the terms of the interim settlement, regions retain the right to recommend initiation of Section 10(j) proceedings in court.

Abruzzo instructed that interim settlements of the Section 10(j) portion be sought in all cases in which Section 10(j) relief is appropriate, including, "discharges during an organizing campaign, violations during an organizing campaign that necessitate a *Gissel* bargaining order, violations during initial contract bargaining, unlawful withdrawals of recognition, unlawful successor refusals to bargain, threats and other unlawful statements as referenced in GC 22-02, and any other case in which the viability of the Board's final order is threatened by a charged party's unlawful conduct."

What does this mean for employers? The GC clearly and correctly views the threat of 10(j) litigation as powerful leverage in obtaining either interim or permanent resolution of certain unfair labor practice (ULP) charges. Unlike a typical ULP trial before an administrative law judge, followed by appeals to the Board and possibly a circuit court, Section 10(j) holds out the prospect of immediate relief. From a charged party's perspective, 10(j) litigation can be expensive and the likelihood of a charged party prevailing in a 10(j) proceeding as compared to a full blown ULP trial is diminished since the level of proof and persuasion is lower.

These factors have led Abruzzo to conclude that the threat of 10(j) litigation may prove to be a significant

LATEST GC MEMOS continued on page 7

LATEST GC MEMOS continued from page 6

tool in extracting either interim or permanent "voluntary" settlements. However, it remains to be seen if all this will actually result in a large uptick in 10(j) filings. For all the aggressiveness that the GC's office has displayed over the last sixteen months, its actual track record in seeking 10(j) relief has, thus far, been extremely modest. Indeed, Abruzzo has sought 10(j) relief far less than her recent Democratic predecessor GCs. It also remains to be seen whether employers will opt for an interim settlement instead of proceeding with the 10(j) litigation. In cases in which employers are of the view that they lawfully discharged an employee for cause, the prospect of interim reinstatement of the discharged employee is often a bridge too far.

Increased oversight of employer 'abusive' technology use

On October 31, 2022, Abruzzo *announced* the issuance of memorandum *GC 23-02*, entitled "Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights," which she described as her "plan to urge the Board to apply the Act to protect employees, to the greatest extent possible, from intrusive or abusive electronic monitoring and automated management practices that would have a tendency to interfere with Section 7 rights." This comes in response to employers' increased reliance on new technologies to monitor, manage, and hire employees. Some of these technologies include tracking devices, keyloggers, audio-recording software, and automated decision-making tools.

While recognizing that employers may have legitimate business reasons for using electronic monitoring and automated management, Abruzzo identified employer actions connected to the use of such technology that she perceives to be violations of NLRA precedent, and in particular, the rights provided to employees under Section 7 of the Act (e.g., "the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"). Notably, and despite the increasing use of technology by labor unions, the GC identified no activities engaged in by unions that could be violations of the NLRA. Among other potential violations of the NLRA, Abruzzo flagged the following:

- The use of technology to obtain information concerning union activity
- Instituting new technologies in response to Section 7 activity
- Discipline for employee protests of surveillance technology or algorithmic management technology
- The use of artificial intelligence to screen job applicants if an algorithm makes or recommends decisions based on employees' protected activity or propensity to engage in protected activity. (This derivative liability is consistent with the U.S. Department of Justice's and EEOC's recent joint guidance in which the agencies made clear that employers could be held liable for Americans with Disabilities Act violations tied to third-party technology.)
- Discriminatory application of "production quotas or efficiency standards to rid [employers] of union supporters"
- Failing to supply information or bargain with existing unions about "the implementation of tracking technologies and [the employers'] use of the data they accumulate"

In addition to announcing activities that are regarded by the general counsel's office as violations of existing law, the GC also announced that she would "urge the Board to adopt a new framework" relating to employer use of technology. Specifically, Abruzzo announced the following new proposed standard:

> An employer has presumptively violated Section 8(a)(1) where the employer's surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act.

If an employer establishes that the practices at issue are narrowly tailored to address a legitimate business need—i.e., that its need cannot be met through means less damaging to employee rights—Abruzzo "will urge the Board to balance the respective interests of the employer and the employees to determine whether the Act permits the employer's practices." Further, if the employer's business need outweighs employees' Section 7 rights, unless the employer demonstrates that special circumstances require covert use of the technologies, Abruzzo "will urge the Board to require the employer to disclose to employees the technologies it uses to monitor and manage them, its reasons for doing so, and how it is using the information it obtains. Only with that information can employees intelligently exercise their Section 7 rights and take

LATEST GC MEMOS continued on page 8

LATEST GC MEMOS continued from page 7

appropriate measures to protect the confidentiality of their protected activity if they so choose."

Employers beware. This proposed framework is structurally consistent with the approach suggested by Abruzzo to govern facially neutral work rules that may impact employee Section 7 rights. Further, the framework is consistent with the growing trend of federal and state regulation and guidance in this space to suggest or require employer notification related to employee monitoring, surveillance, and the use of automated technology.

Absent rulemaking, the proposed standard urged by Abruzzo does not have the force of law unless the NLRB adopts it in a published opinion. Nevertheless, it seems likely that the agency's top prosecutor will seek out cases involving employer use of surveillance, monitoring, and automated management technology. Indeed, Abruzzo announced a mandatory submission to the NLRB's Division of Advice for "any cases involving intrusive or abusive electronic surveillance and algorithmic management that interferes with the exercise of Section 7 rights."

Given the rapidly evolving compliance risks in this area, employers that presently use electronic monitoring or automated decision-making tools may want to assess their labor law compliance risks and consider guardrails to mitigate against potential violations. ■

Recent NLRB cases highlight precedent-shifting agenda

In three recently issued decisions, the Democratic majority on the five-member National Labor Relations Board (NLRB) followed through on its anticipated intention to tilt the labor-management playing field in favor of organized labor through the reversal of extant Board law. In addition to its recent proposed rulemaking discussed in this issue's lead article, the agency is also now beginning to use its decisional authority to reject and overrule established law. The move appears destined to cast doubt on the law's stability and predictability.

New restrictions on neutral workplace dress codes

On August 29, 2022, the Biden Board issued a divided 3–2 decision that further restricts employers' ability to enforce workplace dress codes, overruling a 2019 decision issued by the Trump Board. The case involved a car manufacturing facility in which employees were required to wear black company-branded shirts, as well as black cotton pants with no buttons, rivets, or exposed zippers. The purpose of the uniform was to prevent damage to the cars during production and to help distinguish among different groups of employees.

In the summer of 2017, a production employee wearing a black union shirt was told by a supervisor that he would be sent home if he wore the union shirt again. On the same day, a second production employee was told by his supervisor that he would be sent home if he did not change out of a union shirt because the shirt did not comply with the employer's team-wear policy. From that point forward, the employer prohibited production employees in that area of the facility from wearing the black union shirts in place of team-wear shirts but continued to allow them to wear union stickers on the required team wear. NLRB prosecutors brought the union's challenge of the policy to an administrative law judge (ALJ), who ultimately declared the policy unlawful under the National Labor Relations Act (NLRA).

Majority adopts "special circumstances" test. Agreeing with the ALJ, the Democratic Board majority ruled that the employer's practice was unlawful, holding that "when an employer interferes *in any way* with its employees' right to display union insignia, the employer must prove special circumstances that justify its interference." (Emphasis in original.) In so ruling, the Board overruled the Trump Board decision applying the more flexible *Boeing Co.* standard to employer policies limiting the size and appearance of union buttons and insignia. That decision distinguished between a complete ban on union insignia and facially neutral dress code and uniform policies. In the instant action, the Biden Board instead adopted the so-called "special circumstances" test to "workplace rules or policies that restrict the display of union insignia by requiring employees to wear uniforms or other designated clothing, implicitly prohibiting employees from substituting union attire

RECENT NLRB CASES continued on page 9

RECENT NLRB CASES continued from page 8

for the required uniform or clothing," and also stated that this test would be applied retroactively.

When will "special circumstances" justify a dress code's restrictions on union insignia? To answer this question, the Board majority pointed to Board precedent finding the requirement may be met "'when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees.'" In this instance, however, the Board found that the employer failed to meet its burden since it "has not shown that cotton shirts with non-Respondent logos, such as union logos, pose a mutilation risk to the unfinished vehicles" in the area where the rule was enforced.

The [dues-checkoff] decision reverses a rule first established by the NLRB sixty years ago that allowed employers to unilaterally cease dues checkoffs following the expiration of a contract even before bargaining reaches an impasse.

Impact on facially neutral policies. Dissenting members John F. Ring and Marvin E. Kaplan agreed that "displaying union insignia in the workplace is an important way employees exercise their rights under Section 7 of the National Labor Relations Act," but argued that the majority decision "effectively nullifies the legitimate interests served by employer dress codes by requiring that employees be permitted to disregard the dress code whenever they wish to substitute an item of union apparel, unless special circumstances are shown." The dissent continued, "In other words, an employer's right to maintain a dress code and insist on compliance with it is now the exception, not the rule—and even the exception may prove illusory."

Members Ring and Kaplan also urged that "[t]he balancing of rights and interests mandated by the Supreme Court requires the Board to distinguish between employer policies that broadly prohibit union insignia and facially neutral, nondiscriminatory dress codes that require employees to wear specific apparel but do not prohibit the display of union insignia." While the "special circumstances" standard should apply to the first category, the facially neutral policies "should be lawful as long as the dress code affords employees a meaningful opportunity to display union insignia." Applying this analysis to the case at hand, the dissenting members would thus have found that the employer "lawfully maintained its team-wear policy and lawfully enforced it against employees wearing shirts bearing union insignia in place of the required team wear," since the policy allowed them to affix union stickers to the required team wear and thus they were not denied "meaningful opportunities to display union insignia."

Dues-checkoff provision continues after CBA expires

In another major reversal of precedent, the NLRB released a 3-2 decision on September 30, 2022, declaring that an employer was required to continue a contractual union dues-checkoff clause even *after* the parties' collective bargaining agreement (CBA) had expired. The Board majority reasoned that "a dues-checkoff provision properly and reasonably belongs in the broad category of mandatory bargaining subjects that Section 8(a)(5) of the Act bars employers from changing unilaterally after the expiration of a contract, rather than in the small handful of exceptions to the rule."

Fifty-year-old precedent overturned. The decision reverses a rule first established by the NLRB sixty years ago that allowed employers to unilaterally cease dues checkoffs following the expiration of a contract even before bargaining reaches an impasse. In a controversial 2015 Obama Board decision that long-standing rule was overturned. The Trump Board restored the traditional rule in 2019 in an earlier iteration of the present case, ruling that so-called dues-checkoff provisions do *not* survive the expiration of a CBA. On appeal, the U.S. Court of Appeals for the Ninth Circuit remanded for the Board to consider the issue of why dues-checkoff provisions are included in the types of provisions that do not survive the expiration of a CBA.

The current Board took that remand as an opportunity to reinstate the controversial Obama Board's rule, stating that it "has never persuasively explained why dues checkoff should be an exception" and that dues checkoff "reasonably belongs in the broad category of mandatory bargaining subjects that

RECENT NLRB CASES continued on page 10

RECENT NLRB CASES continued from page 9

Section 8(a)(5) of the Act bars employers from changing unilaterally after the expiration of a contract."

Once again, NLRB members John Ring and Marvin Kaplan dissented from this reversal of precedent, arguing that dues checkoff is a "contractual duty" that cannot survive the expiration of the contract. They noted that the Labor Management Relations Act allows employees to revoke their individual dues authorizations and thereby change the nature of the dues checkoff without bargaining with

RECENT NLRB CASES continued on page 11

NLRB revises mail-ballot standard

In a decision released on September 29, 2022, the National Labor Relations Board (NLRB) revised its six-factor analysis that regional directors should use for determining when a representation election should be conducted by mail balloting, as opposed to in-person voting, due to COVID-19. In the decision, the Board amended the existing second factor to allow for mail-ballot elections when the risk of COVID-19 transmission in a particular community level is "high," based on the latest U.S. Centers for Disease Control and Prevention (CDC) metric. (The previous second factor examined the fourteen-day trend of positive cases in the surrounding county.)

Dissenting members John F. Ring and Marvin E. Kaplan criticized the majority's failure to seek stakeholder input or expert opinion on the matter, as well as its failure to acknowledge the problems with mail-ballot voting. The dissent claimed that rather than "comprehensively explore both when it is or is not appropriate for Regional Directors to direct mail-ballot elections at this stage of the Covid pandemic," the majority "simply substitut[ed] one imperfect basis for calculating voter risk with a different imperfect basis."

Meanwhile, in an October 20, 2022, letter to NLRB Chair Lauren M. McFerran, U.S. House of Representatives Virginia Foxx (R-N.C.) and Rick Allen (R-Ga.) said that the NLRB should abandon its 2020 decision in *Aspirus Keweenaw*, the ruling which had established new considerations for how its regional directors determine whether an election should be conducted manually or by mail ballot due to the COVID-19 pandemic. (See the *Practical NLRB Advisor*, Issue 17). To understand the effects of the increased use of mail-ballot elections on workers, Foxx and Allen requested specific information from the Board by no later than November 3, 2022.

What does this mean for employers? Regional directors still have discretion to order mail-ballot elections under the *Aspirus* standard. However, at the time of publication, only approximately 3 percent of the country has "high" community spread, independently sufficient to warrant a mail-ballot election. Accordingly, nearly 97 percent of the country has "low" or "medium" community spread levels, which according to this latest Board decision on the issue, is not independently sufficient to warrant a mail-ballot election. Because regional directors have relied heavily (and in some cases exclusively) on the second *Aspirus* factor when ordering mail-ballot elections over the past two years, the new ruling may result in more in-person elections taking place. Employers with pending union election petitions may want to review the CDC's COVID Data Tracker website for the latest community spread data in the counties at issue and direct the NLRB's regional offices to the relevant information to have the best possible chance of having an in-person election.

NLRB inspector general audit. In other mail-ballot news, a recent memorandum from the NLRB's Office of Inspector General initiates an audit of the Board's mail-ballot election procedures. According to the memo, the audit will "[d]etermine if any external factors are impeding the Agency's mail ballot elections" and "[d]etermine if the Agency's internal controls for mail ballot elections and representation decision writing are effective." The audit is perhaps a response to employer complaints made over the summer that NLRB officials were improperly coordinating with union officials during a mail-ballot election. According to the memo, a draft report will be issued in March 2023.

RECENT NLRB CASES continued from page 10

the union. Ring and Kaplan further stated that the retroactive application of the new rule is "punitive" in that it will require employers to fund unions after employers have already paid employees the money that would have been deducted as dues.

Employers lose bargaining tool. As a result of this ruling, even employers in right-to-work states may not unilaterally stop collecting dues and remitting them to unions following the expiration of a CBA unless the CBA includes an express provision stating that dues collections do not continue after expiration. Ceasing checkoff was a useful piece of leverage in an employer's arsenal during contract negotiations since it served to largely end a union's revenue stream while the contract remained unresolved. That tool is now gone unless an employer is party to a CBA with express language allowing the post-expiration cutoff. In addition, because of the retroactive effect of the decision, employers that did unilaterally end dues checkoff following the expiration of a contract after the Trump Board decision could now face monetary, and arguably "punitive," claims from unions to be made whole for lost dues.

Revival of Obama Board's "dynamic" status quo

In another divided decision, the Biden NLRB made a dramatic change to the way it analyzes an employer's duty to maintain the "status quo" following the expiration of a CBA. In the case at hand, the Board majority concluded that a five-shift guarantee was part of the status quo, even though the parties had agreed that the guarantee would end when the contract expired. Concluding that the unilateral change violated the law, the Board ordered the reinstatement of two employees who were laid off even though there was no work for them to do. In doing so, the Board majority not only refused to follow a Trump Board decision on this issue, but also ignored a decision by the U.S. Court of Appeals for the Eighth Circuit that had denied enforcement of a controversial Obama Board decision, which had applied the reasoning the Biden Board now resurrected.

Controversial Obama-era decision resurrected. Here is a brief primer: An employer's contractual obligations generally end when a CBA expires, but an employer still has a statutory duty to maintain the status quo on mandatory subjects of bargaining until the parties reach a new agreement or a valid impasse. As a result, an employer's contractual and statutory obligations are not necessarily coextensive. In the controversial Obama Board decision, the NLRB held an employer had a statutory duty to maintain the "dynamic status quo" after the parties' CBA expired by continuing to grant 3-percent annual pay increases, even though the CBA lasted only one year and stated its obligations were "for the duration of the contract," and there was no historical practice of granting the 3-percent annual pay raises. The Eighth Circuit denied enforcement on appeal, ruling that the wage increase did not survive the contract as a matter of statutory law since it had not been practiced for so many years that employees could reasonably expect it.

In an unrelated 2019 decision, the Trump Board rejected the Obama Board decision without expressly reversing it. In the divided 3-1 decision, with then-member, now-chair Lauren McFerran dissenting, the Board majority applied a "contract coverage standard" to decide whether a provision in the CBA regarding health and welfare fund contributions continued after its expiration. The majority concluded that the employer did not breach any contractual duty to increase fund contributions, nor did it abrogate its statutory duty to maintain the status quo of health insurance contributions for the unit employees, noting it was well established that '"the status quo is … defined by reference to the substantive terms of the expired contract,'" and the ALJ's finding that the expired agreements created a status quo of the employer paying annual contribution increases did not reflect the terms of the agreements. Rather, because the agreements explicitly limited increases to 2016 and 2017 and said nothing about future increases, the Board found the status quo to be the employer contribution rate for 2017.

Management's disadvantage. The Trump Board's ruling provided employers more breathing room during collective bargaining negotiations and more flexibility to hold their ground or act during a contract hiatus, while limiting unions' ability to hold employers hostage on unilateral actions through dilatory bargaining. The Biden Board's refusal to follow that ruling means that employers may want to be extra vigilant to ensure that language in the CBA makes it clear and unmistakable that the union waived both its contract and statutory rights to bargain over changes after the expiration of the agreement. ■

Other NLRB developments

Circuit court decisions

D.C. Cir.: Worker's use of vulgar phrase to protest overtime policy protected. The U.S. Court of Appeals for the D.C. Circuit upheld a National Labor Relations Board (NLRB) decision finding that an operator of a rolled aluminum manufacturing facility unlawfully suspended and fired an employee who wrote "whore board" at the top of two overtime sign-up sheets. The NLRB issued the underlying decision on remand from a prior opinion issued by the D.C. Circuit finding that the Board failed to address the potential conflict between its interpretation of the National Labor Relations Act (NLRA) and the employer's obligations under state and federal equal employment opportunity (EEO) laws. In this latest decision, the Board affirmed its earlier decision under a different analytic framework, and the employer appealed once more.

Granting the Board's cross-application for enforcement of its order, the D.C. Circuit held that the Board sufficiently addressed the conflict between the NLRA and the employer's EEO obligations and reasonably found that the employer's discharging of the employee violated Sections 8(a)(1) and (3) of the NLRA. The appeals court noted that the employer's "failure to enforce its code of conduct or anti-harassment policy dooms its assertion that it would have fired [the employee] for use of the phrase or for an offensive writing." The dissenting judge argued that both the panel majority and the NLRB improperly disregarded the importance of a $1 million verdict that had been issued against the employer in a sexual harassment case less than one year before the employee's firing, opining that the employer "had every reason to respond strongly to [the employee's] writing 'whore board' on the overtime signup sheets by punishing him for using sexually offensive language in an effort to intimidate and harass other employees" (*Constellium Rolled Products Ravenswood, LLC v. National Labor Relations Board*, August 9, 2022).

9th Cir.: Board authorized to order payment of union's negotiation expenses. The U.S. Court of Appeals for the Ninth Circuit held that the NLRB did not abuse its discretion in ordering an employer that engaged in bad-faith bargaining to reimburse a union $42,000 in legal fees it incurred as part of the negotiation process. In the proceedings, an administrative law judge (ALJ) held that the employer engaged in a number of unfair labor practices, including the halting of its merit pay raise program, its transfer of bargaining unit work to nonunion temporary employees without notice, its discharge of two employees because of their union activity, and its bad-faith bargaining with the union. Concluding that the employer had engaged in "unusually aggravated misconduct sufficient to warrant more than a traditional remedy," the Board ordered it "to reimburse the union for the costs and expenses the union incurred during collective bargaining sessions." On appeal, the Ninth Circuit squarely rejected the employer's contention that its precedent established that the NLRB lacks the power to order the reimbursement of legal fees, declaring that "[t]he Board may take any 'affirmative action' that 'will effectuate the policies'" of the NLRA. In this case, the award of legal fees was "exactly the sort of remedy that courts have upheld as within the Board's statutory remedial authority" (*National Labor Relations Board v. Ampersand Publishing, LLC dba Santa Barbara News-Press*, August 11, 2022).

NLRB rulings

Employer unlawfully solicited employees to reject union. A divided three-member panel of the NLRB held that an employer violated Section 8(a)(1) by distributing memoranda in which it solicited employees to withdraw their union membership and authorization for dues deduction and polled employees by asking them to return an attached union authorization card if they wanted to join the union and start paying union dues. Reversing the ALJ's conclusions, the Board majority explained that while an employer may provide "'ministerial or passive aid' to employees about resigning their union membership and withdrawing their dues-checkoff authorization," that was not the case here. Member John F. Ring filed a separate dissenting opinion emphasizing that the record demonstrated the employees were fed up with the union and averring that the majority's decision "obstruct[s] the exercise of the right freely to choose whether to be represented by a labor organization" (*New Concepts for Living, Inc.*, September 30, 2022).

OTHER NLRB DEVELOPMENTS continued on page 13

OTHER NLRB DEVELOPMENTS continued from page 12

Workers laid off in retaliation for union's grievance. A divided three-member panel of the NLRB held that an asphalt paving company violated Sections 8(a)(3) and (1) when it laid off thirty-five bargaining unit employees in retaliation for a union's successful filing of a contractual grievance regarding the employer's failure to maintain minimum crew sizes as required by the parties' collective bargaining agreement. In the layoff notice to the employees, the employer blamed the union's crew-size grievance for the shutdown of its asphalt operations. Amongst other things, the notice accused the union of "forc[ing] [the employer] to make *major changes* to our asphalt paving operations, even though our operations have been the same for decades and are accepted industry standards," and "simultaneously expressed regret for the layoffs, while also blaming '[the union's] *deliberate effo*rts to interfere with our industry-standard asphalt paving operations.'" (Emphasis in original.) Adopting the ALJ's finding below, the Board majority found that the language in the layoff notice was direct evidence of the employer's unlawful motivation as well as "ample circumstantial evidence of animus." Member Ring dissented in part, and would have found that the layoff notice contained expressions of opinions that were protected under Section 8(c) (*New York Paving, Inc.*, September 26, 2022).

Union steward unlawfully fired for 'outburst' in owner's office. On remand from the D.C. Circuit, the NLRB once again found that an automobile dealership violated Sections 8(a)(3) and (1) by discharging a union steward after he called the owner of the dealership a "'stupid jack off'" in Greek during a confrontation. The Board found that the employer's assertion that it would have discharged the steward even if he had not engaged in protected activity was undermined by the fact that his allegedly "'offensive and insubordinate behavior'" was "a single derogatory term" that was made in a workplace where such language was common and in response to the owner's own profane threat of physical force (*Cadillac of Naperville, Inc.*, September 22, 2022).

Strike replacements entitled to *Weingarten* rights. The NLRB ruled that an employer violated Section 8(a)(1) by denying a strike replacement employee's request for a union representative prior to an investigatory interview. In so ruling, the Board rejected the employer's contention that strike replacement employees were analogous to workers in a nonunion setting who do not possess such rights. While the Board confirmed that an employer has the right to unilaterally implement the terms and conditions of employment for strike replacements, it explained that whether a strike replacement employee maintained *Weingarten* protections was a "different question." The Board reasoned that an employee's *Weingarten* right is held by the individual and

OTHER NLRB DEVELOPMENTS continued on page 14

SCOTUS to weigh in on NLRA preemption of state tort claim

On the first day of its new term the Supreme Court of the United States granted *certiorari* in a case entitled *Glacier Northwest, Inc. v. International Brotherhood of Teamsters,* (No. 21-1449, cert. granted October 3, 2022) on appeal from the Washington Supreme Court. During the course of a bargaining dispute in 2017, Teamsters Local 174 in Seattle directed the employees of Glacier Northwest, Inc., to abandon their cement trucks and walk off the job to protest the employer's bargaining position. The strike caused damage to the employer's property and product since the cement that was on board the trucks hardened and set when the trucks were shut down and abandoned by their drivers.

Glacier Northwest filed a state court tort claim against the Teamsters for the strike-related damages. The trial court dismissed the suit on the grounds that the damages occurred in connection with an otherwise lawful strike and that the claims were therefore federally preempted by the National Labor Relations Act. The Washington State supreme court agreed.

In granting *certiorari,* many observers believe the Supreme Court of the United States may be poised to cut back on the preemption doctrine, particularly in those instances where intentionally tortious conduct takes place within the context of otherwise protected activity. The case could have great significance for property damage claims and other strike or picket line misconduct damage claims. Oral argument of the case will take place later this term and a decision from the Court should issue by next summer.

OTHER NLRB DEVELOPMENTS continued from page 13

based on Section 7 of the NLRA, rather than a right held as a term or condition of employment. The Board also held, amongst other things, that the employer violated Section 8(a)(5) and (1) by implementing a new punch-in policy without affording the union notice or an opportunity to bargain (*Troy Grove a Div. of Riverstone Group Inc.*, September 14, 2022).

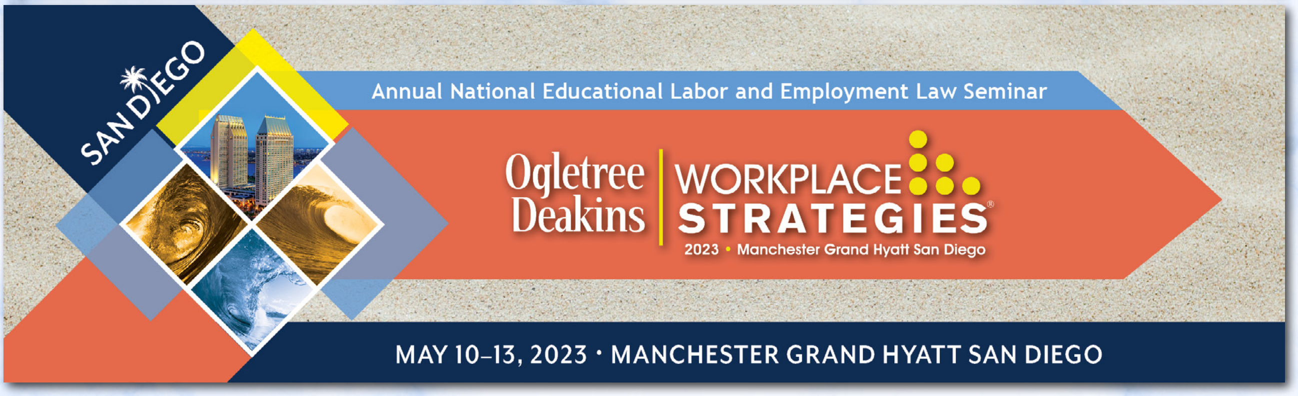
Security guard unlawfully fired for questioning weapons-qualification practices. A divided three-member panel of the NLRB held that a military contractor violated Section 8(a)(1) by discharging a security officer in retaliation for raising safety concerns about the employer's refusal to follow weapons-qualification practices. The Board majority agreed with an ALJ that the employee engaged in protected concerted activity and retained the protection of the Act at all relevant times, and his protected concerted activity was a motivating factor in his discharge. Member Ring dissented and would have found that the discharged employee's actions were unprotected because he "failed to adequately apprise the military of the existence of an ongoing labor dispute related to employees' terms and conditions of employment" (*Xcel Protective Services, Inc.*, September 8, 2022).

NLRB decision vacated due to member's financial conflict. A divided three-member panel of the NLRB vacated a prior decision, which had favored the employer, following a determination by an ethics officer that former member William J. Emanuel's participation in the decision violated a criminal statute because of his ownership of a conflicting financial interest in an energy sector mutual fund that owned the employer's common stock. The full Board previously accepted the ethics officer's determination that Emanuel should have been disqualified, and the panel majority now found that, "[v]acatur eliminates any possibility that a decision tainted by bias based on a financial conflict of interest will have legal effect." Member Ring dissented and would have found that absent a showing of "actual bias," Emanuel's participation was "harmless error" that did not require vacating the case, citing a case in which the U.S. Court of Appeals for the Eleventh Circuit cautioned "that an unjustified vacatur might cause the public to lose confidence in the process by which decisions are made" (*ExxonMobil Research & Engineering Company, Inc.*, August 19, 2022).

Divided panel reaffirms *Staunton Fuel.* A divided three-member NLRB panel affirmed an ALJ's finding that an employer's bargaining relationship with a construction union was governed by Section 9(a) (and not Section 8(f)) of the NLRA, and that it unlawfully failed and refused to provide the union with requested information to which it was entitled. The Board squarely declined the employer's urging to overrule its 2001 decision in *Staunton Fuel & Material*, explaining that it was reaffirming the decision "inasmuch as it followed prior precedent in holding that the existence of a Section 9(a) bargaining relationship may in some circumstances be evidenced with contract language alone." Though "prehire agreements" in the construction industry do not require a showing of majority support under Section 8(f), under *Staunton Fuel* they can be governed by Section 9(a) solely based on contractual language demonstrating such support. Member Ring issued a scathing dissent, averring that *Staunton Fuel* was contrary to Supreme Court of the United States precedent, amongst other things, and should be reversed (*Enright Seeding, Inc.*, August 19, 2022).

State court decisions

State law directed at labor-related picketing of public officials declared unconstitutional. The Supreme Court of Ohio unanimously ruled that an Ohio statute prohibiting public employee unions and public employees from inducing or encouraging "'any individual in connection with a labor relations dispute to picket the residence or any place of private employment of any public official or representative of the public employer,'" violates the First Amendment of the U.S. Constitution. A union challenged the statute's constitutionality after the State Employment Relations Board ordered it to stop picketing a public agency's board members. Resolving a state appellate court split as to the statute's constitutionality, the Ohio supreme court held that the statute was "a content-based regulation of speech" which was not "narrowly tailored" to the alleged "compelling state interest of protecting the privacy rights of public officials, thereby encouraging citizens to run for or serve in public office and preserving labor peace in Ohio" (*Portage County Educators Association for Developmental Disabilities v. State Employment Relations Board*, September 13, 2022). ■



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