Ogletree Deakins

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The Practical NLRB Advisor

New administration—Changing labor policies

In this Issue

The election of President Joe Biden, a longtime vocal supporter of organized labor, coupled with control of both chambers of Congress by the traditionally labor-friendly Democratic Party, is the prelude to changes on the labor law front, a number of which are potentially significant. The two major engines of this anticipated change will be the U.S. Congress, most especially the U.S. Senate, and the National Labor Relations Board (NLRB).

Since the Senate must confirm any nominees that President Biden will name to fill vacancies at the NLRB, and since it will also play a crucial role in enacting any labor-related statutory changes, the Democratic Party's victories in both of Georgia's runoff races are significant. However, while the 50-50 split in the Senate will help President Biden to install his pick for NLRB general counsel (GC) after Peter Robb's controversial ouster, as well as a labor-friendly Democratic Board by the fall of 2021, his party's slim margin of power will likely not be enough to push his legislative agenda through.

The more likely avenue for immediate change in labor law policy will be through Board decisions and rulemaking. That process will mostly begin in the fall of 2021 once President Biden's nominee to succeed Member William Emanuel is installed, though the naming of Acting GC Peter Ohr and his swift rescission of Trump-era directives has accelerated matters. While there are many administrative and potentially legislative changes to consider, we have highlighted 10 of these issues that we view as particularly important for employers to anticipate in the near future.

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BRIAN IN BRIEF

When one of a president's first official acts is the unprecedented firing of the National Labor Relations Board's general counsel 10 months before the end of his U.S. Senate-confirmed term, it is an exercise in understatement to note that employers are on the cusp of an abrupt and significant change in labor relations policy. Were the message not sufficiently obvious, the subsequent withdrawal of a host of Trump-era guidance memos by newly named Acting General Counsel Peter Sung Ohr certainly served to drive the point home. And bear in mind that this is all merely a preview of what is to come once the majority on the five-member Board "flips" later this year.

As this issue of the *Practical NLRB Advisor* details, employers can expect that once President Joe Biden has the ability to install a Democratic-majority Board—likely by the fall of 2021—this new Board will use both its case adjudication function as well as its rulemaking authority to make a number of labor-friendly changes. We expect this to include, among many things, seeking to reassert or affirm its jurisdiction in certain areas, expanding who qualifies as an "employee," upending the Trump Board's joint-employer rule, significantly reexpanding an employer's bargaining obligation, returning to its prior position regarding employer work rules and policies, and continuing to adopt and foster even more union-friendly election procedures.

The Biden administration clearly intends to put the issue of labor-management relations out front, completely erase the policies of the Trump Board, and create an exceedingly labor-friendly paradigm. Whether borne of political calculation, or genuine conviction, the new administration clearly subscribes to the theory that what is good for organized labor is good for the middle class. The motive aside, the result is self-evident. The policy deck is once again increasingly stacked in favor of unions, and employers are in for a difficult road ahead. The need to be alert, informed, and proactive could not be clearer.

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About Ogletree Deakins' *Practical NLRB Advisor*

At Ogletree Deakins, we believe that client service means keeping our clients constantly apprised of the latest developments in labor and employment law. With the whirlwind of activity taking place at the National Labor Relations Board (NLRB) in recent years—affecting both unionized and nonunion employers—a quarterly newsletter focused on the NLRB is an essential tool to that end.

Ogletree Deakins' *Practical NLRB Advisor* seeks to inform clients of the critical issues that arise under the National Labor Relations Act and to suggest practical strategies for working successfully with the Board. The firm's veteran traditional labor attorneys will update you on the critical issues in NLRB practice with practical, "how to" advice and an insider's perspective. Assisting us in this venture are the editors of Wolters Kluwer Legal and Regulatory Solutions' *Employment Law Daily.*

The *Practical NLRB Advisor* does not provide legal advice. However, it does seek to alert employers of the myriad issues and challenges that arise in this area of practice so that they can timely consult with their attorneys about specific legal concerns.

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U.S. Congress

The Senate will play two important roles in determining the fate of Biden's labor law policy goals. First, the Senate must confirm any nominees whom President Biden names to fill vacancies at the NLRB. Second, the upper chamber will be the legislative body with the most influence over any statutory changes in federal labor law before those changes can reach President Biden's desk and become law.

Slim Democratic majority. Following the recent Democratic victories in both of the Georgia runoff races, the Senate is technically split 50-50 between the Republicans and Democrats. However, the vice president is constitutionally empowered to cast any tie-breaking vote, which means that with Vice President Kamala Harris holding the tie-breaking vote, the Democratic Party has control of the upper chamber—albeit by a very slim margin.

Timing of Board nominations. In terms of the NLRB confirmation process, only the positions of Board member and general counsel (GC) require presidential appointment and Senate confirmation. The five-member NLRB currently has only four members—three Republicans and one Democrat, Lauren McFerran. The Republican with the shortest remaining time on the Board is William Emanuel, whose term expires on August 27, 2021.

Biden will soon likely submit a nominee to the Senate for the currently open Board seat. On February 17, 2021, the president nominated Jennifer Abruzzo, a former NLRB deputy general counsel and acting general counsel, to be the next NLRB general counsel following Biden's Inauguration Day firing of Peter Robb from that role. (See "GC abruptly fired before end of term" on page 9). Abruzzo is currently Special Counsel for Strategic Initiatives at the Communications Workers of America (CWA) and also served as a labor policy advisor to the Biden transition team.

Effect on Board agenda. Republicans will still hold a Board majority until Member Emanuel's term expires in August 2021, but for a variety of reasons it is unlikely that the Democratic Party will be able to push through much in the way of groundbreaking decisions before August 2021. Almost certainly nothing that is not already in the decisional pipeline is likely to see the light of day. Once Emanuel's term expires, the Board will temporarily be tied at two to two, so it is also a certainty that there will be no consequential decisions out of the Board at that point either.

Once Emanuel's term is up, the Biden administration will move quickly to replace him with a Democrat. Once again, with no real prospect for Republican delay in the Senate, this nomination is likely to move quickly. Thus, by the fall of 2021, the Board will have a solid Democratic majority—notably much sooner than would have been the case had the Republicans retained control of the Senate. Moreover, now that President Biden has cut Peter Robb's term as GC short, he will soon be replaced with Biden's labor-friendly nominee—again likely with little effective Republican resistance.

McFerran named NLRB chair

When President Biden took office on January 20, 2021, he promptly named Member McFerran as chair to replace Republican John Ring, who has now become Member Ring. In that role, McFerran will be able to exert some control over the cases that are decided by the Board and, more significantly, the pace with which those cases are decided by the majority while they maintain that control.

While Republicans could neither block nor delay naming McFerran as chair, had they maintained the Senate majority they could have substantially delayed the confirmation of President Biden's nominees to any vacant seats. However, having lost control of the Senate, Biden's nominees will move quickly to confirmation with little opportunity for Republicans to slow the process. Thus, within a relatively short period of time, a new Democratic Board member will also be installed and be able to partner with McFerran in opposition to the majority.

Pro-labor legislative agenda

The current political alignment represents a favorable opportunity for organized labor to advance its legislative

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agenda. Not only are both the Senate and the U.S. House of Representatives now in labor-friendly Democratic control, with Joe Biden as president, the White House also has organized labor's staunchest supporter in decades sitting in the Oval Office.

Last Congress, the House passed the Protecting the Right to Organize (PRO) Act—the most sweeping and radical revision of federal labor law in history. The legislation, which we highlighted in Issue 16 of the *NLRB Practical Advisor*, died in the Republican-held Senate and also would have been vetoed by former president Donald Trump even if it had passed. Despite a diminished Democratic majority following the November 2020 elections, the House again passed the bill on March 9, 2021. The vote of 224 to 194 was mostly along party lines, with five Republicans voting for the bill and one Democrat opposing it. The PRO Act will now be in the hands of the Democratic-controlled Senate, where in its current form it will likely face staunch opposition from the strong Republican minority.

Obstacles to passage of PRO Act. Despite Democrats having a one-vote margin in the Senate, passage of the PRO Act in its present form is unlikely for three reasons. First, the Senate legislative filibuster rule would require 60, not 51, votes to move the legislation to an up or down vote on the substance of the bill. While there is talk and a strong push among progressives for the Senate to eliminate the filibuster for legislative action, that prospect seems unlikely given that several Democratic senators have either publicly or privately indicated they would oppose it. As long as the filibuster remains in place there are not 60 votes in the current Senate that would support the PRO Act in its present form.

Second, the Senate has a narrow bandwidth for major legislation, and a slim majority narrows that bandwidth even further. A major overhaul of federal labor law would have to be a top priority of the Biden administration, and while the president is a supporter of the bill, it does not appear to be at or near the top of his legislative wish list. Like a number of other legislative initiatives, labor law revision will certainly take a backseat to such clear priorities as COVID-19 relief and economic stimulus, healthcare, immigration, infrastructure, and environmental legislation. Notably, the same situation occurred when former president Barack Obama, himself a strong supporter of both organized labor and the Employee Free Choice Act (EFCA), failed to get that legislation advanced despite having a Senate *supermajority*. In large measure, EFCA failed because of the political primacy and legislative preoccupation with the Affordable Care Act, which took all the oxygen out of the room. History is likely to repeat itself, and there will be multiple difficult policy initiatives of greater importance than any comprehensive labor law overhaul.

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Will modest legislation pass?

Countering all these obstacles to the passage of the PRO Act is the political lure of the "working class" vote. These are the blue-collar voters traditionally aligned with the Democratic Party who became alienated by its leftward direction and wound up in the Trump coalition. Democrats want them back *and* Republicans want to keep them in the fold.

Very often politicians on both sides of the aisle assume, incorrectly, that what appeals to organized labor necessarily appeals to blue-collar voters. While true in some instances, like a minimum wage hike or paid leave, this assumption is not true in others, like EFCA's proposed elimination of a secret ballot vote in union elections. Indeed, the latter provision proved to be extremely unpopular with most voters, including blue-collar workers. Passage of the "right" labor legislation, however, or even portions of the PRO Act, might be viewed by senators of both political parties as helpful in the scramble for the blue-collar vote. As a consequence, passage of a more modest form of labor law revision legislation remains a possibility. If the Democratic majority does not overreach, it may effectuate some legislative changes.

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Third, in its current form, the PRO Act contains more than a few "poison pills." For example, one provision in the bill would repeal right-to-work legislation now in place in some 26 states, including some that enacted the legislation by popular vote within the last decade. It would be difficult to imagine senators voting against the popular will of their own constituents.

NLRB policymaking

Although legislation remains a possibility, the more likely avenue for immediate change in labor law policy is through actions by the Board. That process will begin in the fall of 2021, once President Biden's nominee to succeed Member Emanuel is installed. The list of administrative and potentially legislative changes is long, and we have summarized the most prevalent issues below.

Two things are, however, important to bear in mind about the NLRB. First, when acting through its case adjudication function—historically its predominant means of policymaking—the Board is constrained to act only with regard to issues that are actually presented to it in a particular case. As much as it may wish to change a particular policy, it needs a case vehicle to do so through its decisional authority. At least one success of the Trump NLRB from the employer perspective was that it largely cleared the case decisional pipeline.

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The Board, however, also has the ability to change labor law policy through its rulemaking authority. In recent years, it has increased its usage of that authority to enact policies of broad application on its own and without using a case as a vehicle to accomplish policy objectives. However, the drawback to this strategy is that rulemaking is a very time-consuming process, and even as the Board becomes more familiar with its use, it is still realistically limited to only a handful of potential issues over what will be a minimum three-year run of Democratic control. Nevertheless, employers should expect a Biden NLRB to wield this weapon frequently in an effort to add greater permanence to its policy positions.

Top 10 labor issues

The following is a brief summary of the most prevalent issues in current labor law—in no particular order—and their likely disposition under the new Biden administration, the 50-50 Senate, and the eventual Democratic-majority Board. This list is by no means exhaustive, but it does give a sense of how numerous and broad the changes are likely to be.

1. Board jurisdiction. Once the NLRB has a Democratic majority, it will likely seek to reassert or affirm its jurisdiction in certain areas. First, the Board itself will act to solidify jurisdiction over student/employees at colleges and universities. While this is an issue that has changed several times, the Board's current decisional authority stems from its 2016 *Columbia University* decision, and finds these students to be employees with organizing rights. However, the Republican-led Trump Board had proposed a rule that would find the subject individuals to be primarily students without organizing rights. Assuming the current Board does not finalize that rule, the Biden Board could withdraw it and continue to follow the *Columbia University* decision or, for the sake of greater permanence, could also take up its own rulemaking on this issue.

A Biden Board is also likely to actively assert jurisdiction over charter schools. However, while it would also like to increase jurisdiction over religious institutions, the Board will likely leave that alone in light of a number of problematic court cases. Similarly, it will very likely avoid asserting jurisdiction over student athletes for political reasons, unless the winds of public opinion start blowing in a different direction. There is a desire to exert jurisdiction of certain workers in the home health care field and to apply the NLRA to agricultural workers. In some instances, the former would require legislation, and in all instances the latter would. Jurisdictional expansion would likely be viewed as "innocuous" legislation and could be part of a legislative "reform" package.

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2. "Employee" definition. This quasi-jurisdictional issue of who qualifies as an "employee" under the NLRA, as well as other employment-related laws, is one of great significance. In the labor law context, a Democratic-led Board will act to alter the "independent contractor" policy in a way designed to bring workers in the "gig economy" under the Board's jurisdiction. Given the significance of this economic sector, the new Board may proceed by rulemaking. Congress may not want to touch this issue given how similar legislation has apparently backfired in California.

In addition, for a host of policy reasons, there is a desire to either extend the NLRA to cover supervisors or to significantly narrow the definition of supervisor. The former would require legislation, the latter could be accomplished to some degree by Board decision. Such changes would prove very detrimental to employers both in organizing campaigns and day-to-day management.

3. "Employer" definition. Democrats have made clear that they want to undo the Republican-led Board's joint-employer rule. The final rule, enacted on February 26, 2020, was crafted to restore the joint-employer standard that had been applied for several decades prior to the Board's *Browning-Ferris* decision. Viewed as a win for employers, the rule has made it significantly less likely that business-to-business arrangements such as franchising, subcontracting, and contingent workforce utilization will result in both businesses being deemed the statutory "employer" of the involved employees. Such joint employment creates shared liability and, more problematically, imposes an identical bargaining obligation on both.

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For the Board to comprehensively upend the rule would likely require a new rulemaking—a very heavy lift. A Biden Board could, however, chip away at the rule. For example, appropriate cases could find joint and several liability. The policy could also be changed by legislation. However, given the strength of the management-side lobbying on this issue, Congress may want to steer clear of the joint-employer quagmire.

4. Penalties and remedies. There is a strong push in the labor movement to impose compensatory and even punitive penalties for labor law violations. The current statute is strictly a remedial one, so while the Board could nibble at the penalty issue around the edges, any substantive change would require new legislation. Current legislative proposals include the imposition of monetary penalties, double or triple backpay awards, tort-like damage claims, increased use of bargaining orders, federal contract debarment, attorneys' fee awards, individual liability for officers and executives, and criminal penalties. If there is a labor law reform package, look for it to contain—at a minimum—provisions for monetary penalties and contract debarment.

From a procedural perspective, the Board's GC already has broad discretionary authority to seek interim injunctive relief in unfair labor practice (ULP) cases and employers can expect the new Democratic GC to make significantly increased usage of this authority. Additionally, a provision in the PRO Act would make Board orders self-executing, meaning that employers would be required to comply with an order even when an appeal is pending in federal court. This precise change would require legislation, but a more aggressive use of already existing injunctive powers might have the same practical effect. The PRO Act would also create a private right to sue for NLRA violations that would operate somewhat like the Equal Employment Opportunity Commission's procedures. However, this specific change is likely a legislative bridge too far, particularly in light of the Board's efficiency and track record in handling ULP litigation.

Lastly, unions have also always favored binding interest arbitration (i.e., a "neutral" arbitrator decides on the terms for the collective bargaining agreement when the parties cannot reach voluntary agreement), particularly for first contracts or in the case of alleged bad faith bargaining. However, the

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Board currently does not have authority to compel interest arbitration in either situation. The prevailing view in Congress appears to remain that the parties should make their own contracts although this position has softened somewhat in the two noted circumstances. While legislation here is thus possible, it still remains unlikely.

5. Representation case substance. Most likely by decision, but perhaps by rulemaking, look for a Biden Board to restore the *Specialty Healthcare* "micro-unit" rubric. As noted above, and again by decision, look for a Biden Board to also narrow the definition of "supervisor." Additionally, it appears very likely that a new Board will, by decision, outlaw "captive audience meetings" by simply finding them to be inherently coercive. In the event of a union election loss expect the Objections bar to be significantly lower, and for employer speech to be subjected to greater scrutiny and control.

The new Board will also very likely seek to reinstate the right of employees to use company email systems for campaign purposes, despite the fact that the actual benefit of the policy for organizing purposes may not be worth the inevitable court fight over the issue. Additionally, while organized labor still wants mandatory card check recognition, the Board cannot do this on its own. A new Board can, and certainly will, make the *option* of card check easier and more attractive, but only Congress could make this process mandatory. This remains unlikely given the experience with EFCA that made the issue radioactive. Do not expect the demise of the secret ballot. Finally, the Biden administration will seek, once again, to modify the "persuader rule." Since recent attempts to do so administratively met with resistance in federal court, a legislative change to the Labor-Management Reporting and Disclosure Act of 1959 is certainly a possibility.

6. Representation case procedure. Both the Obama and Trump Boards have laboriously analyzed the issues involving the "ambush rules." In many instances they did not yield the electoral edge to unions that many believed would occur, and in other instances employers have merely adapted to the change. The new Board may not do much to replow old ground. It will, however, act to maintain expanded *Excelsior* requirements and a compressed election schedule. Given Chair McFerran's comment in a recent Board decision that it is time for the Board to reconsider its preference for in-person, on-site voting (she feels voting on the employer's property is inherently coercive), a new Board will also likely:

- liberalize mail balloting policy;
- consider telephonic and off-site voting; and
- move toward adopting electronic voting, assuming there is no longer any contrary budget rider.

7. Right-to-work laws. The current version of the PRO Act would eliminate the ability for states to have right-to-work laws, prohibiting unions from collecting dues or comparable payments from all workers who benefit from union representation that unions are legally obligated to provide. While Biden has also expressed his intention to ban these laws, the Board has no authority to do so on its own, and Congress is unlikely to touch this controversial issue. However, employers should expect organized labor to attempt to lobby state lawmakers to roll back such legislation in some states.

8. Class action waivers. Following the landmark decision by the Supreme Court of the United States in *Epic Systems Corp. v. Lewis*, it is clear the Board itself lacks the authority to outlaw the use of class action waivers in employment dispute resolution agreements. However, because this has been a priority for both organized labor and the plaintiffs' bar, employers should expect an effort to amend the unrelated Federal Arbitration Act in order to achieve the same result. This kind of "modest" change is the type of legislative action that could see passage even in a closely divided Senate.

9. Economic weaponry. By virtue of both decision-making and the general counsel's charging authority, the new Board will very likely extend legal protection to some forms of intermittent strike activity (i.e., repeated work stoppages often of a short duration). A Biden Board will also want to protect economic strikers from being permanently replaced, but will be unable to do so unilaterally due to contrary Supreme Court precedent. The chances of the current Congress making this a statutory change are, at best, less than 50/50. The Board could, however, achieve the same result by more readily categorizing any given strike as being an unfair labor

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practice strike, thereby prohibiting an employer from hiring permanent replacements.

In addition, the new Board is likely to use decision-making to loosen the prohibitions on secondary boycotts. For example, putative secondary employers already lack protection if they are deemed allies, and a Board led by Democrats could modify and broaden the ally doctrine and other secondary activity exceptions. The new Board may very likely use its decisional power to outlaw the "offensive" or "employer lockout" by finding it inherently destructive of employee rights.

10. Substantive ULP changes. The current *Boeing* standard for evaluating the legality of employer work rules remains sufficiently subjective that employers should expect a Biden Board to once again exercise heightened scrutiny of their rules and policies. In a similar vein, management should expect the new Board to be much more likely to find a significantly wider panoply of employee behavior to constitute "protected concerted activity." For example, where the Trump Board found that obscene or abusive behavior in the context of protected activity could result in the loss of protection, a Biden Board is likely to hold otherwise. Also, where the Trump Board found a wide range of *individual* behavior to not be "concerted" and therefore outside of the NLRA's purview, this, too, will be seen in an opposite light.

While unions and a new Biden Board would like to eliminate the Trump Board's adoption of the contract coverage theory (i.e., finding unilateral action by the employer lawful if covered by the contract), a change in this policy may prove difficult to enforce because the Trump Board's view reflects the predominant opinion of reviewing federal courts. That said, a Biden Board will certainly try given the importance of the issue. This doctrine is, of course, very significant for purposes of contract administration since it implicates the right of an employer to take unilateral action and the existence of any mid-term bargaining obligation. ■

Potential game changers

President Biden has committed to creating a cabinet-level working group with the sole focus of promoting union organizing and collective bargaining. They are to deliver "a plan to dramatically increase union density and address economic inequality." In that vein, the Biden administration has pledged to "study" two areas that could dramatically alter U.S. labor/management relations. Both areas would most likely require legislative action.

The first area of "study" would be the feasibility of some form of mandated "sectoral bargaining." In this model, bargaining would not be conducted on an employer-by-employer basis; instead, it would encompass an entire economic sector. Sectoral bargaining is a policy favorite of the most progressive wing of the Democratic Party.

Equally groundbreaking is the Biden administration's pledge to "study" the feasibility of waivers of preemption. By design, private-sector labor/management law in the United Sates is exclusively within the federal sphere and, as a result, is uniform across the country. However, there are some, once again in the left wing of the Democratic Party, who would like to cede this exclusive jurisdiction selectively to the states. In large measure, this idea is being driven by the reality that radical labor law "reform" is simply not possible through the U.S. Congress, but could instead be effectuated through some state legislatures. Balkanizing labor law in this fashion would be the most fundamental change ever in U.S. labor/management relations.

Given a closely divided Congress the volatility of these issues may ensure that they never progress beyond the "study" stage. However, all that may depend on how effectively the Democratic left can leverage the Congress, and where it wants to apply that leverage most. That is unclear at this early juncture, but it is worth bearing in mind that labor is an issue of fundamental concern among progressives.

GC abruptly fired before end of term

Twenty-three minutes after President Joe Biden was sworn in on January 20, 2021, the Trump-appointed general counsel of the National Labor Relations Board (NLRB), Peter Robb, received a letter from the White House Office of Presidential Personnel demanding his immediate resignation. The letter made clear that if he refused to leave his position voluntarily, he would be fired at 5:00 p.m. that afternoon. Robb respectfully declined the ultimatum and forwarded a letter explaining the reasons for his refusal to resign.

Apparently unpersuaded by Robb's letter, the president followed through and fired Robb late that afternoon. The following day, the White House demanded the resignation of Robb's deputy, Alice Stock. When she, too, respectfully declined, she was discharged that afternoon.

Acting GC named. Peter Ohr, a career NLRB employee and former regional director of the Board's Chicago office, has been named as acting general counsel by the Biden administration. Ohr is perhaps best known as having authored the regional decision finding college football players to be statutory employees, and determining that their request for a union election could therefore proceed. That regional decision was subsequently rendered moot when the full Board in Washington, D.C., unanimously declined to assert jurisdiction in the matter.

Lawfulness questioned. Predictably, organized labor applauded the termination of Robb's term, while the management community uniformly condemned it. Beyond such partisan reactions, however, many neutral observers and

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Myriad of Trump-era guidance memos rescinded

On February 1, 2021, less than 2 weeks after Peter Ohr was named NLRB acting general counsel following Peter Robb's premature ouster, Ohr issued Memorandum GC 21-02, in which he rescinded 10 GC memoranda that had been previously issued by Robb. According to Ohr, the Trump-era guidance memos were either "no longer necessary" or "inconsistent" with the policy of the National Labor Relations Act (NLRA), which Ohr explained "is to encourage the practice and procedure of collective bargaining and to protect the exercise by workers of their full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment." Among the guidance memos rescinded by Ohr were a number dealing with union culpability in duty of fair representation cases, a memo regarding the handling of one-party recorded evidence, and a memo directing the regions to issue complaints in neutrality agreement cases wherever the assistance provided by the employer under the agreement is "'more than ministerial.'"

In addition to rolling back Robb's GC memos, Ohr also indicated that additional new policies would be released "in the near future." The very next day, February 2, 2021, Associate to the General Counsel Beth Tursell issued Memorandum OM 21-04, which rescinded two of the NLRB's operations-management memoranda that had similarly been issued under the Trump administration, citing Ohr's "approach to [the] effectuation and enforcement of the Act."

These policy-based moves, particularly when made by an *acting* general counsel, make clear that the Biden administration intends to swiftly reverse course at the Board. By rescinding GC memos, Ohr effectively changed how regional offices will handle certain cases and how agency staff will interpret the NLRA. In the next issue of the *Practical NLRB Advisor*, we will closely examine the specific Trump-era directives Ohr has struck down and other actions taken by the acting GC, how those changes will impact employers, and what to expect in the future.

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agency supporters viewed the new administration's action as ranging anywhere from harmful to outrageous, and some warned that it may be potentially unlawful. Here's why: the position of NLRB general counsel (GC) is *not* a terminable at-will political appointment. Rather, under the applicable statute, the GC must be nominated by the president and confirmed by the U.S. Senate "for a term of four years."

Robb was nominated by former president Donald Trump and confirmed by the Senate to a four-year term that was not set to expire until *November 2021.* Yet his firing, which was undisputedly not for cause, took place while his term still had 10 more months to run. Moreover, the NLRB's enabling legislation makes no provision allowing a new administration to terminate the term of an incumbent GC in this fashion.

A blow to tradition. Legalities aside, the Biden administration's action is a serious—if not fatal—blow to the independence of the NLRB as a federal agency. The move was completely unprecedented, as never in the more than 73 years that the Board has had an independent general counsel has a U.S. president *ever* terminated the term of an incumbent *before* the end of that person's 4-year term for *any* reason. A mere change in the political party is no cause for prematurely terminating a congressionally mandated and approved term in office.

A look at the actions of even the most recent presidential administrations illustrates the point. When Donald Trump, a Republican, became president, the NLRB general counsel was Richard Griffin, a Democrat appointed by Barack Obama. However, even though Griffin was widely disliked in the management community, he served the full remaining eight months of his term without interference from the Trump White House. The same scenario occurred when President Obama was elected to his first term and the sitting NLRB general counsel was Ronald Meisburg, a Republican appointed by President George W. Bush. As with the Trump administration, the Obama administration took no action to remove the GC and he remained in that role for more than 18 months during the Obama administration. However, the record for holdover longevity belongs to John Irving, a Republican GC who was appointed by President Gerald Ford, a Republican, but spent more than two years (and thus a majority) of his term under a president of the Democratic Party, Jimmy Carter.

A step too far? On the campaign trail, Biden promised that, if elected, his would be the most labor-friendly administration in decades. His swift termination of Robb was clearly meant to reenforce that pledge. Unfortunately, however, the unprecedented action has also further politicized the NLRB and seriously undermined its independence and integrity as a federal agency. Someday, even organized labor's biggest supporters may look back on this day with misgivings. ■

New framework for mail-balloting in the pandemic

On November 9, 2020, the National Labor Relations Board (NLRB) issued its decision in *Aspirus Keweenaw* in which it delineated the factors that its regional directors should consider in deciding whether to direct mail-ballot elections during the COVID-19 crisis. Immediately thereafter, the Board's general counsel at the time, Peter B. Robb, issued Memorandum GC 21-01, further elaborating on the new framework. The memo notes that "[t]he Board applied the *Aspirus Keweenaw* factors retroactively to the framework of that case, and presumably will do so in other matters, both pending and new."

Pandemic-specific safety considerations

According to the memo, the NLRB's guidance on the propriety of mail-ballot elections in view of the pandemic has "evolved" during the COVID-19 crisis. While the Board's prior guidance had so far been made on a case-by-case basis, its *Aspirus Keweenaw* decision "set forth a detailed framework for how Regional Directors should exercise their discretion when considering election type during the extraordinary circumstances presented by the pandemic." The memo states that "in addition to the established circumstances where a mail ballot election can be conducted," the Board set forth pandemic-specific situations that "will normally justify the propriety of a mail-ballot election" during these unprecedented times. The GC memo further explains each situation.

"Mandatory telework" status. First, if the regional "office tasked with conducting the election is operating under

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'mandatory telework' status," mail-in balloting would be justified. The memo notes that while the Board mandated telework at its offices earlier in the pandemic with the goal of "reduc[ing] interpersonal contact that might lead to the spread of the virus," regional offices "have all been on permissive … telework" status since mid-June 2020. However, "given the fast-moving nature of the pandemic it remains possible that a given office could again be placed on mandatory telework," which would "once again justify the propriety of a mail-ballot election."

An employer's failure or refusal to commit to following all the suggested protocols set forth in GC Memo 20-10 for conducting manual elections in the "unprecedented environment" caused by the pandemic may also support mail-in balloting.

Increased cases/testing positivity rate. A mail-ballot election would also normally be justified if "[e]ither the 14-day trend in the number of new confirmed cases of Covid-19 in the city/county where the facility is located is increasing, or the 14-day testing positivity rate in the city/county where the facility is located is 5 percent or higher." The memo states that "Regional Directors should generally focus their consideration on recent statistics that reflect the severity of the outbreak in the specific locality where the election will be conducted," and further explains that "[w]here a workforce generally lives in a geographically identifiable location that is distinct from the employer's facility, it may be appropriate to focus consideration on Covid-related data from that locality as well."

In addition, using "either broader regional data or narrower intra-county data" may be "more relevant to a particular case." The memo also states that "Regional Directors are not required to use any particular geographic level of data where better, more applicable, data exists," and they "should cite with explanation the best available geographic statistical measure in making their determinations." The memo explains that "[t]he question of whether geographically broader or narrower statistical measures provide a better basis for making a mail-ballot determination will necessarily be based on the specific facts of each case."

Regional directors are also instructed to "include in their decision the most recently available city- or county-level data regarding the 14-day trend," as well as "the most recent city- or county-level testing positivity rate, where available or, if not available, the most recent state-level testing positivity rate." The Board has indicated that a regional director's decision to utilize mail-balloting, if based on such measures, "will be sustained, unless a party contending that the Regional Director should have relied on a different geographic measure presented that sufficient data and argument to the Regional Director, …, to establish that the Regional Director's reliance on the geographic measures cited above was an abuse of discretion."

Moreover, if "a Regional Director directs a mail-ballot election based on a different geographic measure than" those set forth in the GC memo, "the decision should articulate the basis for relying on that measure."

Mandatory orders on maximum gathering. A regional director's choice of a mail-ballot election would also not be deemed an abuse of discretion where "[t]he proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size." However, while "[c]onducting a manual election that cannot reasonably be conducted without violating mandatory restrictions on gathering size would be at cross-purposes with these restrictions," the memo states that "[n]onmandatory guidance will not, by itself, be a sufficient reason to direct a mail-ballot election."

Noncommitment to "suggested manual election protocols." An employer's failure or refusal to commit to following all the suggested protocols set forth in GC Memo 20-10 for conducting manual elections in the "unprecedented environment" caused by the pandemic may also support mail-in balloting. "These protocols are designed to ensure manual elections can be conducted safely and efficiently, and [GC Memo 20-10] indicates that these protocols must generally be included in an election agreement or decision and direction of election providing for a manual election." Because an employer that seeks a "manual election[] must unequivocally commit to abide by GC Memo 20-10's suggested protocols," its "failure or refusal to commit to abide by the suggested protocols therefore may support the direction of a mail-ballot election."

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Facility outbreak or refusal to disclose/certify. Another circumstance warranting mail-in balloting is where "[t]here is a current Covid-19 outbreak at the facility or the employer refuses to disclose and certify its current status," since conducting a manual election under such circumstances "would … pose[] potential health and safety issues for everyone who participates." Therefore, the memo announces that, "for the duration of the pandemic, in all cases where a party requests a manual election, the employer shall certify, by affidavit, as part of its submission regarding election arrangements, how many individuals present in the facility within the preceding 14 days have tested positive for Covid-19 (or are awaiting test results, are exhibiting characteristic symptoms, or have had contact with anyone who has tested positive in the previous 14 days)." Furthermore, "[t]he Employer must promptly notify the Region of any changes to the number of employees at the facility who have tested positive (or who are awaiting test results, are exhibiting characteristic symptoms, or have had contact with anyone who has tested positive in the previous 14 days), up to the day of the election itself."

Other "similarly compelling considerations." Finally, the memo explains that the five enumerated situations "normally suggesting the propriety of a mail-ballot election are not exclusive or exhaustive," and a regional director may direct mail-in balloting based on other pandemic-related circumstances which "the Board will consider at that time whether those circumstances similarly warrant an exception to its preference for manual elections." Indeed, "[d]uring the pandemic, Regional Directors have been confronted with many novel and difficult decisions requiring the exercise of discretion." While the *Aspirus Keweenaw* decision "provides further [NLRB] guidance, Regional Directors must continue to exercise their sound discretion where new situations arise."

Looking ahead

For a variety of reasons, employers strongly favor in-person, manual voting. On the other hand, unions often prefer mail balloting, and some have even lobbied for remote electronic voting. Employers are concerned that pandemic-related mail balloting may become the new normal and that the practice will continue beyond the end of the current health crisis. This would be a very unfortunate consequence of the pandemic since, without regard to any partisan concerns, manual balloting is a demonstrably better way of determining employee free choice. Benefits of manual balloting include:

- Unlike mail balloting, manual voting ensures that ballots are cast in a controlled and supervised environment.
- Manual ballot elections have a far lower incidence rate of void, late, mismarked, or lost ballots than mail-ballot elections.
- Voter identification is both immediate and simple in a manual election.
- Perhaps most importantly, manual elections have a significantly higher rate of employee participation than mail-ballot elections.

Board-supervised in-person voting remains the gold standard. Hopefully, a temporary health crisis will not do permanent damage to the process. ■

SCOTUS to review union access case

In a clash between private property rights and union organizing rights, the Supreme Court of the United States has agreed to hear arguments in *Cedar Point Nursery v. Hassid*, a case in which the justices will examine a California regulation that allows union organizers to access agricultural employees on their employers' properties. Proponents contend the regulation protects the labor rights of farm workers, while agriculture employers argue that the regulation violates their property rights. Although the case arises under a state, not a federal, labor statute, it may provide an indication as to how the Court will balance these competing interests. The necessity of balancing employers' property rights and their employees' organizing rights is a recurring theme under the National Labor Relations Act (NLRA).

Union organizers allowed on property. The regulation at issue was not promulgated under the NLRA, but pursuant to the California Agricultural Labor Relations Act (ALRA). It was implemented shortly after the ALRA became effective in 1975 and allows union organizers access to employees at agricultural workplaces under limited circumstances. Thus, with proper

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written notice, union organizers are allowed access to the workers at agricultural worksites for an hour before and after work and during lunch, for no more than 120 days each year.

Case background. After its implementation, California growers sought to have the regulation enjoined through the California state court system. Those efforts were ultimately unsuccessful. Turning to the federal court system, the growers filed the present case seeking declaratory and injunctive relief under 42 U.S.C. Section 1983 against members of the California Agricultural Labor Relations Board (ALRB). The growers allege that the regulation amounted to a "per se taking" in violation of the Fifth Amendment to the U.S. Constitution because it was a permanent physical invasion of their property without just compensation, and that the regulation also effected an unlawful seizure of their property in violation of the Fourth Amendment to the U.S. Constitution.

[A]lthough it does not involve the NLRA itself, the Court's decision in Cedar Point may well contain analysis that impacts a broad range of matters arising under that statute.

Case reaches Supreme Court. A federal district court in California rejected both claims and dismissed the lawsuit. A divided three-member panel of the U.S. Court of Appeals for the Ninth Circuit subsequently affirmed, holding that because the easement was not accessible to union organizers "24 hours a day, 365 days a year," and because the only right taken was the right to exclude, there was no violation of the takings clause. In yet another divided opinion, the Ninth Circuit denied the growers' petition for a rehearing en banc, with eight judges dissenting.

The growers then filed their petition to the Supreme Court, arguing that the high court's review was necessary due to a "clear circuit split" on the question "of whether a continual, but time-limited easement qualifies as a 'permanent' physical invasion." They also urged that the rule adopted by the Ninth Circuit "would permit governments to seize all sorts of easements without compensation, so long as the easements include any time restriction" and that if the Court did not intervene, the growers "and many others will be left with no practical remedy when governments require them to grant unwanted members of the public access to their property." In their opposition brief the respondents countered, amongst other things, that the regulation at issue "modeled the regulation on a right of access that this Court has recognized under the National Labor Relations Act" and that "[t]here is no indication that the access regulation poses a significant problem for California farms."

Conflicting DOJ positions. On January 7, 2021, the Trump-led Department of Justice (DOJ) filed an amicus brief in the case arguing for reversal of the Ninth Circuit's ruling, contending that the regulation does effect a per se taking of petitioners' property because "[t]he indefinite legal authorization to invade private property, even intermittently, is a per se taking, absent circumstances not present here." However, in a letter dated February 12, 2021, the Biden-led DOJ changed course. Acting Solicitor General Elizabeth B. Prelogar wrote that "[f]ollowing the change in Administration, the Department of Justice has reconsidered the government's position in this case, and the United States is now of the view that the California regulation does not effect a per se taking under this Court's precedents." Prelogar opined that the Supreme Court "has previously recognized that such 'temporary limitations on the right to exclude' differ from '[t]he permanence and absolute exclusivity of a physical occupation' and accordingly 'are subject to' the 'balancing process'" previously adopted by the Court.

Future challenges ahead?

As already noted, this case does not directly involve the NLRA. However, it does involve a balancing test that arises often in the federal labor law context. In terms of Supreme Court jurisprudence, the issue dates all the way to the Court's 1956 decision in *NLRB v. Babcock & Wilcox, Inc.*, 351 U.S. 105 (1956). Yet, it remains important today. Indeed, the Trump Board revisited the issue in no fewer than three major decisions, including *Bexar County Performing Arts Center Foundation dba Tobin Center for the Performing Arts* (August 23, 2019). Beyond merely questions of access, the balance between property and organizing rights serves as the backdrop for such issues as employees' right to use employer email systems for union purposes. Thus, although it does not involve the NLRA itself, the Court's decision in *Cedar Point* may well contain analysis that impacts a broad range of matters arising under that statute. ■

Other NLRB developments

Circuit court decisions

1st. Cir.: Musician unit with no employees improperly certified. The National Labor Relations Board (NLRB) made errors of law and fact when it certified a bargaining unit of musicians that did not have any employees, the U.S. Court of Appeals for the First Circuit ruled in denying the Board's petition for enforcement. The union filed a petition to become the union representative for musicians "sourced" by a theatre to assist independent producers in getting the musicians for their productions. Despite the theater's assertion that it had not employed any musicians for two years since the producers had been hiring their own musicians, an NLRB regional director certified a bargaining unit, finding that "'special circumstances'" in the entertainment industry warranted application of the more expansive *Julliard School* standard for bargaining unit membership. The First Circuit held that the Board's typical *Davison-Paxon* standard should have instead been applied, and under that test, "there were no voting-eligible employees in the proposed unit" since it was undisputed that none of the musicians met the requirement of having "regularly average[d] 4 hours [of work] or more per week for the last quarter prior to the eligibility date" (*National Labor Relations Board v. Wang Theatre, Inc.*, November 30, 2020).

[T]he First Circuit joined the Second, Third, Sixth, Seventh, and Ninth Circuits in rejecting the contention that there is a cognizable "backward-looking" Section 1983 claim for fees collected at a time when the law permitted their collection.

1st Cir.: Nonmember employees' pre-*Janus* claim rejected. In a lawsuit brought by state employees who were not union members, seeking reimbursement of the agency fees collected from the union prior to the Supreme Court of the United States' ruling in *Janus v. AFSCME, Council 31*, the First Circuit joined the Second, Third, Sixth, Seventh, and Ninth Circuits in rejecting the contention that there is a cognizable "backward-looking" Section 1983 claim for fees collected at a time when the law permitted their collection. Because prior to *Janus*, unions for government employees were permitted to collect "agency fees" from nonmembers for whom they collectively bargained, dismissal of the employees' claim for reimbursement of agency fees was proper since the union collected the fees when doing so was legal (*Doughty v. State Employees' Association of New Hampshire, SEIU Local 1984, CTW, CLC*, November 30, 2020).

2d Cir.: NLRB must redo faulty analysis of coercive questioning. In determining that an employer unlawfully interrogated known participants in an unprotected work stoppage about their protected union activities incidental to the stoppage, the NLRB erred in its application of a standard requiring that the employer "'… minimize intrusion into Section 7 activity,'" the U.S. Court of Appeals for the Second Circuit ruled in vacating the Board's order and remanding for reconsideration. At issue were three questions that the employer asked employees while investigating their employees' involvement in the unprotected demonstration: "'Who told you about this gathering?'; 'When did you receive notification of the gathering?'; and 'How was the event communicated to you?'" In finding that the questioning was unlawful, the Board stated that the employer "'was required to focus closely on the unprotected misconduct and to minimize intrusion into Section activity.'" The appeals court held that Board precedent provided support for at least the "focus closely" portion of its analysis. However, its restrictive interpretation of the phrase "'minimize intrusion'" to mean "'avoid virtually all intrusion'" had the "problematic" effect of barring the employer "from seeking information of very high pertinence to its investigation of the unprotected demonstration." Moreover, "[b]y allowing no inquiry into any conduct preceding the demonstration except to identify 'actual participants,' the Board disallowed highly relevant inquiry into identification of those deserving of discipline and into making appropriate distinctions among them" (*Time Warner Cable of New York City LLC v. National Labor Relations Board*, December 10, 2020).

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11th Cir.: Arbitration award favoring employee fired over drug test reinstated. An "arbitrator 'arguably' interpreted" a collective bargaining agreement (CBA) in finding that an employer did not have "just cause to fire" an employee "who tested positive on a random drug test," the U.S. Court of Appeals for the Eleventh Circuit ruled in an unpublished decision, reinstating the arbitrator's award in favor of the employee. Although the arbitrator construed the portion of the CBA "concerning discharge for positive results differently than the district court did," it was clear that he grappled with the text of the contract and "didn't ignore or modify [its] language." The Eleventh Circuit concluded that it was irrelevant whether the arbitrator was right or wrong; "all that matter[ed] [was] that the arbitrator's answer flowed from his interpretation of the contract." Given that "the district court recognized … the arbitrator interpreted the contract as a whole and attempted to synthesize the provisions that were (perhaps) in tension," the arbitrator's decision should have been affirmed (*Georgia-Pacific Consumer Operations, LLC v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union, Local 9-0952*, November 20, 2020).

D.C. Cir.: Employer required to bargain over subcontracting of unit work. An employer committed an unfair labor practice when it failed to give notice and an opportunity to bargain to an incumbent union before retaining a staffing company to perform work that could have been done by bargaining unit employees, the U.S. Court of Appeals for the District of Columbia Circuit ruled. Affirming an NLRB order finding that a tire company violated Sections 8(a)(5) and 8(a)(1) by unilaterally subcontracting the work, the appeals court rejected the employer's assertion that the subcontracting had no economic impact on its existing unit members because it did not result in the loss of any jobs or hours of work. In addition to questioning the factual basis for the employer's claim that employees were not harmed, the D.C. Circuit explained that "'[a] bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees regardless of whether the work would have been done by employees already in the unit or by employees who would have been hired into the unit.'" The appeals court also rejected as "specious" the employer's contention that the staffing agency was a joint employer, and as such the agency's "workers should have been considered part of the bargaining unit" (*Bob's Tire Co., Inc. v. National Labor Relations Board*, November 20, 2020).

NLRB rulings

Nondisparagement provision in separation agreement lawful. An administrative law judge (ALJ) erred in concluding that an employer unlawfully "maintain[ed] an 'overly-broad' nondisparagement provision" in a separation agreement it offered to employees whose employment was terminated as a result of the elimination of their jobs. The provision stated, "You will not disparage or discredit [the company] or any of its affiliates, officers, directors and employees. You will forfeit any right to receive the [agreed upon severance] if you engage in deliberate conduct or make any public statements detrimental to the business or reputation of [the company]." A divided NLRB ruled that "because the Agreement is entirely voluntary, does not affect pay or benefits that were established as terms of employment, and has not been proffered coercively, we find that the nondisparagement provision would not tend to interfere with, restrain, or coerce employees in the exercise of their rights under the Act." In so ruling, the Board determined that the analysis set forth in *Boeing Co.* did not apply to "a separation agreement offered to departing employees, as opposed to a work rule or policy that establishes conditions of employment" (*IGT dba International Game Technology*, November 24, 2020).

Tweet threatened attempted unionization. A public social media post that the publisher of The Federalist posted to his private account, stating that "first one of you tries to unionize I swear I'll send you back to the salt mine," violated Section 8(a)(1) of the NLRA since the employer "[t]hreaten[ed] employees with unspecified reprisals if they engage[d] in union activity." The Board found no merit to the employer's contention that the publisher's post to his account conveyed his personal view that was protected under Section 8(c) of the Act. Rather, agreeing with the ALJ, the Board found that "employees would reasonably view the message as expressing an intent to take swift action against any employee who tried to unionize" and that "the reference to sending that employee 'back to the salt mine' reasonably implied that the response would be adverse" (*FDRLST Media, LLC*, November 24, 2020).

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Deferral to arbitral award. The NLRB set aside an ALJ's finding that an employer unlawfully issued a written warning to an employee for violating a work rule against wasting time, suspended him after he damaged windshields, and discharged him after he "cursed" a manager following a disciplinary hearing. The evidence showed that the employer first suspended, then "disciplined [the employee] for undisputed misconduct, and the General Counsel did not show that the discipline was inconsistent with the [employer's] treatment of similar misconduct." Additionally, the Board found that the ALJ applied the wrong standard in initially determining "that deferral to the parties' grievance settlement regarding the suspension and the arbitral decision regarding the discharge was not warranted." The ALJ utilized the test delineated in *Babcock & Wilcox Construction Co., Inc.* in reaching this determination. However, in a 2019 case, the Board abandoned this test and "returned to pre-*Babcock* deferral standards, and decided to apply those standards retroactively in all pending cases" (*Volvo Group North America, LLC*, December 3, 2020).

Civility rule didn't adversely impact Section 7 rights. A divided NLRB reversed an ALJ's finding that an employer unlawfully maintained standards of conduct that "require[d] employees to '[d]emonstrate respect for the Company' and '[n]ot engage in behavior that reflects negatively on the Company.'" The Board held that the employer's justifications for the rules "outweighed any potential adverse impact" on employees' "exercise of Section 7 rights," and that these and several other handbook provisions were lawful under the *Boeing* test. However, the Board unanimously upheld the judge's determination that the employer violated the NLRA "by discriminatorily prohibiting conversation about the [u]nion during worktime while permitting conversation about other nonwork subjects, by creating the impression that employees' union activities were under surveillance, and by maintaining an overbroad no solicitation/distribution rule" (*BMW Manufacturing Co.*, December 10, 2020).

Ban on wearing union buttons unlawfully overbroad. An ambulance service violated Section 8(a)(1) of the NLRA by prohibiting employees from wearing union buttons in the workplace and directing them to remove the buttons even when they were in nonpublic areas and not interacting with patients or the public. Affirming the ALJ's decision, the Board explained that "[i]t is the employer's burden to prove the existence of special circumstances justifying a prohibition on employees' Section 7 right to wear union insignia in the workplace" and "an employer's ban or prohibition on union insignia must be narrowly tailored and not extend beyond the special circumstances justifying the ban or prohibition." Here, the union insignia ban was unlawfully overbroad since it banned the wearing of buttons even when the employees did not have contact with patients or the public, and thus the ambulance company's "patient safety and public image concerns would not be present" (*American Medical Response of Southern California* and *American Medical Response West*, December 10, 2020).

[T]he union insignia ban was unlawfully overbroad since it banned the wearing of buttons even when the employees did not have contact with patients or the public, and thus the ambulance company's "patient safety and public image concerns would not be present."

Social media policy didn't infringe on employee rights. Provisions in an employer's "social media policy prohibiting inappropriate communications, disclosure of confidential information, use of the [c]ompany's name to denigrate or disparage causes or people, and the posting of photos of coworkers" did not violate Section 8(a)(1) of the NLRA, ruled a divided NLRB. Reversing the ALJ's finding that the policy was unlawful, the Board determined that an "objectively reasonable employee would not read" the provisions as interfering with the exercise of Section 7 rights. The Board also rejected the ALJ's conclusion "that the [employer] unlawfully maintained rules prohibiting the sharing of employee compensation information and the use of social media to disparage the [c]ompany or others" (*Medic Ambulance Service, Inc.*, January 4, 2021). ■

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