Ogletree Deakins

ISSUE 24 | SPRING 2023

EMPLOYERS AND LAWYERS, WORKING TOGETHER

The Practical NLRB Advisor

General counsel chips away at employment agreements

In this Issue

5 Latest Biden Board activity

7 Corralling the administrative state

10 Other NLRB developments

On March 22, 2023, the general counsel (GC) of the National Labor Relations Board (NLRB) issued a memorandum clarifying the Board's February 2023 decision that nondisparagement and confidentiality provisions in severance agreements are unlawful. In Memorandum GC 23-05, entitled "Guidance in Response to Inquiries about the *McLaren Macomb* Decision," the GC states that she interprets the decision to apply to agreements already signed and that claims would not be time-barred as long as an employer maintains or enforces such terms.

In *McLaren Macomb*, discussed in Issue 23 of the *Practical NLRB Advisor*, the Board found that conditioning severance agreements on the acceptance of nondisparagement and confidentiality terms and the mere proffer of such terms are unlawful because they restrict workers' rights under the National Labor Relations Act (NLRA). Open questions following the Board's decision included what exactly it means for the use of separation agreements and whether the decision will be applied retroactively to agreements that already contain such terms.

The GC's new memorandum offered further guidance on her interpretation of the impact of the decision that employers may want to consider in drafting and enforcing separation agreements. Here are some key points of the memorandum.

EMPLOYMENT AGREEMENTS continued on page 3

BRIAN IN BRIEF

In the 1976 film classic "Network," fictional newscaster Howard Beale, a frustrated and world weary everyman played by Peter Finch, utters the now-famous line: "I'm as mad as hell, and I'm not going to take it anymore." The sentiment neatly captures a growing frustration being felt in the management community regarding the state of the Biden administration's National Labor Relations Board (NLRB).

As the Board's general counsel (GC) continues to pursue prosecutions aimed at protected free speech, imposing bargaining orders and "damages" for seeking judicial review, and appropriating the role of Congress in trying to rewrite the National Labor Relations Act, the mood among employers and practitioners regarding the federal labor agency has noticeably changed. Over the years, the management community has become somewhat accustomed to agency flip-flopping of precedent by, for example, issuing decisions that dutifully rewrite employee handbook rules to conform to the current Board majority's latest unfounded supposition about how an employee would interpret a rule. However, it appears that those days may soon be coming to an end.

As the NLRB becomes increasingly more partisan and intransigent, employers are becoming decidedly less willing to "go along, to get along" with its political maneuvering. This is an alarming trend for an agency that simply cannot function without a high degree of voluntary compliance as well as a very high settlement rate. The labor and management communities are already witnessing increasing delays and building backlog at the Board, and the trend is headed in the wrong direction.

In this edition of the *Advisor,* we take a deeper dive into the Board's far-reaching decision affecting an employer's use of nondisparagement and confidentiality clauses, and also chronicle some of the other boundary-breaking positions of the current Board majority. In addition, we examine the emerging trend in the federal courts that is supplying employers with a host of tools to push back.

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. © 2023 Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

EMPLOYMENT AGREEMENTS continued from page 1

Retroactive application. The memorandum clarified that the GC's interpretation is that the decision has "retroactive application." Further, the memorandum stated that the GC believes that despite a potential six-month statute of limitations period, "maintaining and/or enforcing a previously-entered severance agreement with unlawful provisions" will be considered to be a continual violation such that an unfair labor practice (ULP) charge "would not be time-barred."

The memorandum further explained that the decision applies to former employees and does "not depend on the existence of an employment relationship between the employee and the employer." Notably, the GC stated that while it will not cure violations of an unlawful proffer, employers "should consider remedying … violations … by contacting employees subject to severance agreements with overly broad provisions" to tell them "that the provisions are null and void" and that they will not be enforced.

Alarmingly, the Board held that the proffer of the agreement itself may constitute an unfair labor practice, and that an unfair labor practice may also occur whenever the agreement is expected to be enforced.

Are all severance agreements unlawful? According to the memorandum, severance agreements that waive the signing employee's right to pursue employment claims and "only as to claims arising as of the date of the agreement" are still lawful. Such "lawful severance agreements may continue to be proffered, maintained, and enforced" so long as they do not have "overly broad provisions that affect the rights of employees to engage with one another" in protected, concerted activities.

However, the memorandum noted that the Board held that employers "have no legitimate interest in maintaining" unlawful provisions in severance agreements and that in finding whether there has been an NLRA violation, whether or not an employee actually signed a severance agreement is "irrelevant" as "the proffer itself inherently coerces employees by conditioning severance benefits on the waiver of statutory rights."

Lawful clauses. The memorandum states that confidentiality clauses that are "narrowly-tailored to restrict the dissemination of proprietary or trade secret information" for periods of time and with "legitimate business justifications" may still be considered lawful. Nondisparagement clauses may similarly be found lawful only where the clause is narrowly tailored and "justified" to prohibit statements that would rise to the level of "defamation" as being "maliciously untrue" and made with "knowledge of their falsity or with reckless disregard for their truth or falsity."

Other 'problematic' terms. Beyond confidentiality and nondisparagement clauses, the GC called attention to a number of other common contract clauses that she believes are "problematic" and may be unlawful in severance agreements, including: "non-compete clauses," "no solicitation clauses," "no poaching clauses," "broad liability releases," and "covenants not to sue" that go beyond the employer or employment claims. Additionally, the GC noted that agreements to require cooperation in future investigations or proceedings involving an employer (e.g., being asked to testify against a coworker who assisted with the filing of a ULP charge) may restrict employees' NLRA rights.

To whom does it apply? The principles set forth in *McLaren* and the GC memo apply only in the context of statutorily protected employees over whom the Board has jurisdiction. As such, the Board will not scrutinize employers' agreements with supervisory and managerial employees or with their independent contractors. However, the Biden Board and its top prosecutor aim to narrow these definitions so as to broaden who is covered under the Act.

What constitutes a ULP? Alarmingly, the Board held that the proffer of the agreement itself may constitute an unfair labor practice, and that an unfair labor practice may also occur whenever the agreement is expected to be enforced. This means that if the employer's expectation is for a former employee to continue honoring those restrictions after the proffer, such a restriction on the exercise of Section 7 rights will continue to reset the statute of limitations period under a continuing violation type of principle.

Are financial-term confidentiality clauses lawful? At least in terms of confidentiality, the single most important

EMPLOYMENT AGREEMENTS continued on page 4

EMPLOYMENT AGREEMENTS continued from page 3
element for most employers in a settlement or separation agreement is the financial terms embodied in the agreement. Employers typically do not want to disclose such financial terms since they either incentivize litigation or set separation expectations for other employees in the future.

GC 23-05 references a 2007 operations-management (OM) memorandum (OM 07-27) addressing the issue of acceptable terms in non-Board settlement agreements, writing that OM 07-27 is "still in full force and effect." Of particular note, GC 23-05 states in a footnote that "I believe that approving a withdrawal request when a non-Board settlement has a confidentiality clause only with regard to non-disclosure of the financial terms comports with the Board's decision, would not typically interfere with the exercise of Section 7 rights, and promotes quick resolution of labor disputes."

Therefore, from the current GC's perspective at least, regions will not refuse to grant a precomplaint withdrawal request aimed at effectuating a non-Board settlement as long as that financial term confidentiality clause is narrowly tailored to the agreement. However, what this means for the viability of financial-term confidentiality clauses outside of a non-Board settlement remains to be seen. ■

Key post-*McLaren* takeaways

The post-*McLaren* posture of the NLRB is clearly aggressive. Importantly, as noted, the decision will be applied retroactively and largely without regard to the NLRA's limitations period. Moreover, the GC has clearly signaled that employers that have such agreements with former employees that predate *McLaren* should notify those former employees that the problematic provisions are no longer in effect.

However, what is most concerning about *McLaren* and the GC's view of the case is the potentially broad application of its underlying principles. On its face, *McLaren* only applies to a voluntary separation agreement. The Board majority's reasoning, however, is equally applicable to any bilateral agreement between an employer and employee—separation or severance agreements, settlement agreements, employment or engagement contracts, etc. The principles announced in the *McLaren* decision may also be deemed applicable to *any* unilaterally created employment documents—most notably employee handbooks or employment rules and regulations. *McLaren* calls all of these into question and almost certainly presages that the Board will soon revisit its extant decision in *Stericycle* and return to the Obama-era flyspecking of employer rules and handbooks.

In the current environment, employers may want to consider the following ideas and potential ramifications:

- Employers that use "stock" or boilerplate language in any of their employment documents clearly risk running afoul of the NLRA. Employers may want to carefully review their documents and consider alternative language.
- Before putting pen to paper, employers may want to consider what provisions are genuinely necessary to achieve their legitimate business purposes. While restrictions aimed at protecting important business goals may be clearly worth fighting over, others may not be.
- When drafting any restrictive provision, employers may want to consider whether they would actually seek to enforce the provision in question. If an employer does not intend to do so, it may want to weigh the efficacy of the provision against its legal exposure.
- Employers may want to avoid overbroad restrictions and narrowly tailor any agreement to the specific circumstances, and most importantly to the specific and articulable business interest they are trying to protect.
- Employers may also want to take into account the specific individual for whom a restrictive provision is being drafted. For example, while there may be a host of legitimate post-employment restrictions that are justifiable in the instance of a high-ranking executive, the same may not hold true when presented to a rank-and-file employee.

Latest Biden Board activity

While the National Labor Relations Board (NLRB) decision on severance agreements and the general counsel's (GC) follow up memorandum captured recent labor relations headlines, both the Board and its top prosecutor took additional actions aimed at fulfilling the Biden administration's transparently pro-union agenda. While we expect much more blockbuster activity at the Board in the months to come, here are a few highlights of the latest activity at the Board since the last issue of the *Advisor* went to press.

GC provides updates on priorities

On March 20, 2023, the GC sent a memorandum (GC 23-04) to regional directors updating the status of her top priorities that she outlined in her August 2021, "Mandatory Submissions to Advice" memorandum (GC 21-04), discussed in detail in Issue 19 of the *Advisor*. Those priorities include, but are not limited to, cases involving successor employers, financial disclosures to union nonmembers, employer obligations after the expiration of a collective bargaining agreement, intermittent strikes, compensatory damages in refusal to bargain cases, and arbitration agreements.

In addition, as set forth in memorandum GC 23-02, "Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights," the GC added to the list of cases to be prioritized for submission to the Division of Advice those "involving electronic surveillance or algorithmic management that interferes with the exercise of Section 7 rights." GC 23-02 is discussed in more detail in Issue 22 of the *Advisor*.

Board rescinds four provisions of 2019 election rule, delays another

On March 10, 2023, the NLRB issued a final rule rescinding four provisions from the Board's 2019 changes to its regulations governing union elections. The Biden Board explained that its action complied with a recent decision of the U.S. Court of Appeals for the D.C. Circuit, which affirmed a district court's invalidation of the 2019 rule changes "giving employers up to 5 business days to furnish the voter list following the direction of election"; "limiting a party's selection of election observers to individuals who are current members of the voting unit whenever possible"; and "precluding Regional Directors from issuing certifications following elections if a request for review is pending or before the time has passed during which a request for review could be filed."

The D.C. Circuit also vacated a provision in the 2019 election rule "imposing an automatic impoundment of ballots under certain circumstances when a petition for review was pending with the Board." The Board's latest rule rescinds all four of the provisions struck down by the D.C. Circuit and reinstates previous regulations. Member Marvin E. Kaplan dissented, arguing that rather than just throwing out the rule changes, the Board should have opted to follow the alternative disposition suggested by the D.C. Circuit—i.e., repromulgating a notice of proposed rulemaking with regard to the voter list, election observers, and certification-timing rules and inviting public comment.

Also on March 10, 2023, the Biden Board stayed until September 10, 2023, the effective date of two other provisions of the 2019 rule, which had been enjoined by a federal district court and had never gone into effect. These provisions allow pre-election litigation over unit scope and voter eligibility and instruct regions "not to schedule elections before the 20th business day after the date of the direction of election." These two provisions are of obvious consequence to employers. The D.C. Circuit found the Board could lawfully issue these provisions without notice and comment, but remanded for the district court to consider other grounds on which the provisions had been challenged as unlawful.

Dissenting, Member Kaplan argued that a stay pending proceedings on remand was unwarranted. The fact that the Board majority decided to stay the effective date for the changes is a clear signal that it intends to engage in further rulemaking aimed at permanently rescinding those two rule modifications. Should that come to pass, these two provisions will never have been enacted, despite having been promulgated in 2019.

BIDEN BOARD ACTIVITY continued on page 6

BIDEN BOARD ACTIVITY continued from page 5

NLRB and consumer financial protection agency join forces

On March 7, 2023, the NLRB and the Consumer Financial Protection Bureau (CFPB) announced an information sharing agreement and partnership between the two agencies. According to the CFPB's statement, the partnership will help the agencies "to better protect American families and to address practices that harm workers in the 'gig economy' and other labor markets." The CFPB also said the agency partnership will focus on "employer driven debt" that allegedly results from employee expenses related to "employer-mandated training or equipment," as well as potential Fair Credit Reporting Act violations related to worker productivity monitoring.

The NLRB also highlighted artificial intelligence tools as another hot-button issue on which it plans to focus. "Employers' practices and use of artificial intelligence tools can chill workers from exercising their labor rights," said the GC. "As our economy, industries, and workplaces continue to change, we are excited to work with CFPB to strengthen our whole-of-government approach and ensure that employers obey the law and workers are able to fully and freely exercise their rights without interference or adverse consequences."

Under the Biden administration, the NLRB GC has entered into similar partnerships with the U.S. Equal Employment Opportunity Commission, the U.S. Department of Labor, the Internal Revenue Service, the U.S. Department of Justice's Antitrust Division, and the Federal Trade Commission.

NLRB, Dems respond to House subpoena

In March 2023, Republican Chair of the U.S. House of Representatives Committee on Education and the Workforce, Virginia Foxx (R-NC), issued a subpoena to the NLRB seeking documents related to alleged "misconduct by NLRB employees in representation and unfair labor practice cases." The subpoena involves allegations—

BIDEN BOARD ACTIVITY continued on page 7

Board sees uptick in filing activity

On April 7, 2023, the National Labor Relations Board (NLRB) released its filing data through the first half of its fiscal year (FY) 2023 (October 1–March 31). Through the first six months of the fiscal year, filing activity continued to build on record increases that developed in FY 2022.

Compared with the first half of FY 2022, the number of unfair labor practice charge filings jumped from 8,275 to 9,592, a nearly 16-percent increase. The NLRB did not break down the number of charges associated with elections, established bargaining relationships, or other nonunion settings. Representation petitions were closer to the FY 2022 pace, though they still increased to 1,200 from 1,174. Overall, NLRB filings are up 14 percent in FY 2023 compared to the same period in 2022.

These filing increases through the first half of FY 2023 build on significant increases in filing activity that the NLRB observed in its full FY 2022 compared to the prior year. The most dramatic increase was in representation petitions, which increased from 1,638 petitions in FY 2021 to 2,510 petitions in FY 2022, or a jump of 53 percent. Additionally, unfair labor practice charges increased from 15,082 in FY 2021 to 17,988 in FY 2022, a bump of 19 percent.

There are reasons for employers to expect that filing activity will continue apace over the full FY 2023. At the end of calendar year 2022, the NLRB returned to its prior *Specialty Healthcare* bargaining unit determination standard that may lead to an increase in petition filing activity. The timing of that decision, released in December 2022, had limited time to affect petition filing decisions in the first half of the NLRB's fiscal year 2023. Additionally, the NLRB general counsel continues to pursue an aggressive agenda favoring organized labor that may lead to more NLRB precedent changes. These changes could incentivize more filings through the remainder of 2023.

BIDEN BOARD ACTIVITY continued from page 6

echoed recently by Senator Bill Cassidy (R-LA)—that in certain instances Board officials have provided improper aid to union officials and pro-union employees during union representation elections.

Specifically, Cassidy sent a letter to the NLRB chair and GC inquiring about actions they are taking to address "allegations of Board employee misconduct or interference in representation elections" that may have influenced election outcomes in favor of labor unions. Cassidy also expressed concern that "through a series of decisions and initiatives from the general counsel's office, the Board has weaponized its enforcement powers to target prominent employers."

Foxx's subpoena to the NLRB did not sit well with the Board or House Democrats. First, the Board's Office of Congressional and Public Affairs sent Foxx a letter characterizing the subpoena as an "unprecedented action [that] significantly threatens interference with ongoing investigations and litigation, infringement of parties' due process rights, and compromise of the integrity of the Agency's processes." Then, the House committee's ranking member, Representative Bobby Scott (D-VA), sent Foxx a letter accusing her of violating the committee's rules governing the issuance of subpoenas. Foxx responded by issuing a press release rejecting Scott's arguments, as well as a rumor that the NLRB Office of Inspector General was investigating Foxx as a result of the subpoena. It appears that this matter isn't going to end anytime soon. ■

Corralling the administrative state

The seemingly bottomless alphabet soup of federal departments, subdepartments, independent regulatory agencies, boards, commissions, and the like—all of which are housed in the federal government's executive branch—have come to be collectively known as "the administrative state." Its size, collective power, and influence are genuinely stunning. The executive branch is the largest employer in the United States and is home to more than 4 million federal workers, almost all of whom work in positions within the administrative state. In sheer size it dwarfs its "co-equal" branches, as the entire federal judiciary employs only about 30,000 individuals while the congressional branch is even smaller with a little less than 20,000 employees.

Unlike the congressional branch only a handful of members of the executive branch are elected or otherwise accountable to the citizenry. Owing to the civil service and other myriad job protections, these individuals enjoy virtually lifetime tenure and are not subject to the congressional vetting that attends lifetime judicial appointments. Perhaps most disturbing to its critics, the rank-and-file members of the administrative state tend to gravitate toward the same political viewpoint and almost uniformly view the world through the myopic lens of their own respective agencies.

The administrative state has long roots in U.S. political history, with many experts positing that it became enshrined as the unofficial "fourth branch" of government in the wake of President Franklin D. Roosevelt's New Deal. Whatever its origins, its exponential growth is not debatable. Every Republican and Democratic administration has at one time or another promised to curb the growth of the federal government, yet none have succeeded. As Congress seemingly finds itself unable to actually legislate, and the courts continue to accord considerable deference to agency decisions, the administrative state has grown not only in size but also in the degree and breadth of its regulatory power. As a result, it has become a permanent class of unelected and unaccountable bureaucrats that regulate and control a broad swath of U.S. life.

The NLRB poster child

There is a growing public awareness of the reach and power of the administrative state and an equally growing concern that it does not comport with the constitutional principle of a limited government that is directly accountable to its citizens. Those alarmed by the power and growth of the administrative state may want to turn their attention to the National Labor Relations Board (NLRB). With its flip-flopping, extraordinarily broad interpretations of its own statutory authority, and its partisanship, the NLRB has lately come to epitomize much of what is so wrong with the administrative state.

THE ADMINISTRATIVE STATE continued on page 8

THE ADMINISTRATIVE STATE continued from page 7

In the case of the NLRB, these problems are even more pronounced since its problematic statutory architecture houses the investigatory, prosecutorial, and adjudicatory functions within a single agency. While there is technically a "separation" of these functions, that has proven lately to be more of a fig leaf than a fact. For instance, we routinely see the NLRB's general counsel (GC) take legally questionable positions aimed at upsetting decades of precedent only to find the current Board cheerleading its top prosecutor's actions and eventually supplying the necessary rubber stamp. As a result, the adjudicatory outcomes at the Board have become alarmingly predictable.

To its critics, the NLRB evinces a kind of "Queen of Hearts" aura of "verdict first, and trial after." Moreover, while its opinions and orders are technically subject to judicial review, the Board has an incredibly high rate of enforcement success in the U.S. federal courts of appeal. Frankly, no litigant at the appellate level could enjoy such a level of success in the absence of the decided "edge" that has been supplied by a host of judicial doctrines that collectively afford exceedingly generous deference to agency determinations.

Agency expertise or bias?

The National Labor Relations Act (NLRA) was first enacted nearly 90 years ago. As it is a relatively short statute, one would assume that over the course of nearly a century, most issues concerning its interpretation would have been definitively resolved by now. That is clearly not the case as those interpretations change. While for decades those changes were limited in number, nuanced, and somewhat at the statutory margins, that is decidedly not the case at present.

By her own count, the NLRB's current GC has targeted more than 50 long-standing precedents for reversal and has signaled there are many more on the way. The current Board has thus far been in lockstep, almost invariably supporting the GC's position. These decisions are neither limited nor nuanced, rather they go to the very core of the statute. These are not "policy gyrations," they collectively constitute an effort to rewrite the statute. It is no surprise that agency and regulatory critics have come to ask why an entity incapable of adhering to its own precedent (indeed one that is intent on turning that precedent 180 degrees), should be entitled to any deference or credibility by anyone, and to question whether agency "expertise" is merely bias in disguise.

SCOTUS weighing in

Perhaps not as patent as the NLRB, other instrumentalities of the administrative state have also vastly expanded their regulatory reach of late. For the reasons already noted, this phenomenon has alarmed many observers since it is so antithetical to the core principles of our form of government. While most observers may be largely powerless to rein in these agencies and departments, those in the federal judiciary are not. Within this group there are signs of growing concern over the expanding regulatory power of the administrative state. The federal judiciary's effort to restrain this power has been recently evidenced by four cases at various stages of disposition pending before the Supreme Court of the United States.

The last case issued by the Supreme Court in its 2022 term was *West Virginia v. Environmental Protection Agency*. In Issue 22 of the *Practical NLRB Advisor,* we noted that the case reflected concern by the current Court majority over the extent of agency regulatory power. The decision revived the somewhat moribund "major questions doctrine" and cautioned agencies against relying on ambiguous or general statutory language as the basis for claiming extensive, legislative-type agency authority. As former Justice Antonin Scalia once remarked, "Congress … does not, one might say, hide [legislative] elephants in [statutory] mouseholes." It now appears that the *West Virginia* case may well have been only the high court's first step in placing some restraints on the authority of federal regulatory agencies.

In mid-April of this year, the Supreme Court issued a unanimous decision in *Axon Enterprise, Inc. v. Federal Trade Commission,* where the Court clarified the procedures in place for certain challenges to federal regulatory agency proceedings. Federal courts have plenary jurisdiction to entertain all suits based on a "federal question." However, under a statute such as the NLRA,

THE ADMINISTRATIVE STATE continued on page 9

THE ADMINISTRATIVE STATE continued from page 8

which provides for agency adjudication (in the case of the NLRB before an administrative law judge, and then by appeal to the Board itself), followed by review in a federal court of appeal, that internal adjudication typically "substitutes" for initial jurisdiction in the federal courts. In *Axon,* however, the Supreme Court announced that such is not always the case, and that "agency first" jurisdiction is not absolute.

THE ADMINISTRATIVE STATE continued on page 10

Dilution of the NLRB's pre-emption role

As we go to press, the Supreme Court of the United States issued its opinion in *Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174*, a case discussed in Issue 23 of the *Practical NLRB Advisor*. Glacier Northwest supplies mixed cement to construction sites and was in contract negotiations with the Teamsters union that represents its drivers. On a workday, after the concrete was mixed and loaded onto 16 of the employer's cement trucks, the union commenced a strike in support of its bargaining position. Since the cement hardened during the strike, the union's action imperiled the employer's equipment and destroyed its product.

The employer filed the underlying tort claim in state court alleging the union intentionally timed the strike to cause damage to the employer's product and equipment. The state court dismissed the tort claim, finding it was pre-empted by federal law, and the state supreme court affirmed the dismissal. The Supreme Court of the United States agreed to hear the case.

Pre-emption is the judicial doctrine that holds that where the federal government has clearly indicated its intention to regulate certain conduct, any dispute that arises in the context of that conduct must be resolved through the federally prescribed processes. In the instance of labor/management relations, a special form of pre-emption, so-called *Garmon* pre-emption (named after the case in which the doctrine was first applied) applies. Under *Garmon,* a state court is ousted of jurisdiction if the conduct at issue is *arguably protected or prohibited by the NLRA.*

In essence, the union in *Glacier Northwest* argued that the right to strike is clearly protected under the NLRA and that virtually all strikes result in some economic damage to the struck employer. Thus, the union argued, the tort claim was correctly found to be pre-empted under *Garmon* since the strike activity was "arguably protected." In an 8-1 opinion, the Supreme Court rejected this argument and held that the state court tort claim was **not** pre-empted. The majority opinion, authored by Justice Amy Coney Barrett, noted that the intentional destruction of property, even in the course of an otherwise protected strike, has never been found to be protected. In other words, economic harm that is *incidental* to strike activity is protected, but where the timing or conduct of the strike activity reveals the *purpose* of the strike is to cause heightened economic damage, it is unprotected. The Court noted that the NLRB has long held that in calling a strike, a union must take "reasonable precautions" to ensure that the work stoppage does not cause harm that is foreseeable and more than incidental.

Glacier Northwest was decided under the *Garmon* rubric, while simultaneously making clear that there are limitations to that form of pre-emption. Justices Clarence Thomas and Neil Gorsuch filed a concurring opinion in which they opined that while no party asked that the Court revisit and possibly overturn *Garmon* and doing so was not necessary to resolve the case, the Court should revisit *Garmon* in an appropriate case.

The *Glacier Northwest* opinion serves to narrow the breadth of *Garmon* pre-emption, and as a result a state court complaint plausibly asserting that the complained-of conduct is not protected will likely survive a motion to dismiss on pre-emption grounds. Moreover, the Thomas concurrence reflects what may be an emerging view—that broad *Garmon* pre-emption should be abandoned so that normal pre-emption will instead apply in labor cases. In either case, *Glacier Northwest* represents a dilution of the NLRB's role in pre-emption disputes and a return of that power to the courts.

THE ADMINISTRATIVE STATE continued from page 9

In *Axon,* and its companion case, *Securities and Exchange Commission v. Cochran*, the plaintiffs filed suits in the federal district court prior to the commencement of actions against them before the FTC and SEC, respectively, claiming that there were constitutional infirmities with respect to the agency proceedings. Both cases were dismissed by the district courts on the ground that both agencies had an internal adjudicatory mechanism that culminated in review by a federal appeals court, which meant the plaintiffs could eventually raise their claims in that judicial forum. The Supreme Court, however, held that there is an exception to the "agency first" litigation procedure whenever a plaintiff files a claim in district court that: (a) will escape "meaningful judicial review" if not decided by the district court; (b) is "collateral to" any eventual appeal; and (c) is "outside the agency's expertise." While the "collateralism" requirement, in particular, may prove difficult to satisfy, do not be surprised if the case spurs an uptick in employers going on offense and seeking district court orders against NLRB proceedings.

Finally, on May 1, 2023, the Supreme Court granted *certiorari* and agreed to hear the appeal in a case entitled *Loper Bright Enterprises v. Raimondo*. *Loper* will address the question of so-called "*Chevron* deference" (named after the case in which it was first announced), which is a critical cog in the legal machinery that has ceded so much power to federal agencies. According to the *Chevron* deference doctrine, when Congress delegates authority to an administrative agency on a particular issue or question that is not explicit but rather implicit, a court may not substitute its own interpretation of the statute for a reasonable interpretation made by the administrative agency. A decision that abandons or even places limits on application of the doctrine would serve to significantly broaden the scope of judicial review of federal agency decisions. *Loper* will be argued in the Court's next term.

Key takeaway…

The timing of the federal judiciary's actions aimed at limiting regulatory power could hardly come at a better time for employers facing litigation before the NLRB. Faced with the actions of an aggressive general counsel—one who, for example, believes the agency can prohibit employee meetings and suppress employer speech despite the statutory and constitutional impediments to doing so—any judicially imposed constraints would be welcome.

The unfortunate truth is that the agency's decision-making has wildly fluctuated—often due to partisanship—over the years. As employers continue to view the agency's process as an unfair playing field, it is safe to assume that they will make increasing use of the tools provided by the federal judiciary to seek fairer outcomes through access to the state and federal courts. ■

Other NLRB developments

Federal court decisions

Employer held in contempt for ongoing refusal to bargain. The U.S. Court of Appeals for the Seventh Circuit held a construction company in contempt for its continued refusal to bargain with a carpenter's union from the time the federal appeals court first ordered it to do so in 2018. Imposing most of the sanctions proposed by the National Labor Relations Board (NLRB), including a $192,400 fine and a six-month decertification bar, the Seventh Circuit found that the employer "significantly violated [the court's] unambiguous command to bargain in good faith with the Union by retracting, without good cause, the aspects of the collective bargaining agreement to which it tentatively had agreed." However, the appeals court declined the NLRB's request for an enhanced prospective fine schedule against the company and a prospective fine schedule against bargaining representatives who assisted in the violation of the court orders, as well as the agency's bid for various other remedies which would have required continuing judicial involvement (*National Labor Relations Board v. Neises Construction Corp.*, March 10, 2023).

NLRB GC sued over "captive audience" memo. A state trade group has sued the NLRB general counsel (GC)

OTHER NLRB DEVELOPMENTS continued on page 11

OTHER NLRB DEVELOPMENTS **continued from page 10**

over her April 2022 memorandum, GC 22-04, about which the Board's press release stated that she would "ask the Board to find mandatory meetings in which employees are forced to listen to employer speech concerning the exercise of their statutory labor rights, including captive audience meetings, a violation of the National Labor Relations Act (NLRA)." (The memo is discussed in detail in Issue 21 of the *Practical NLRB Advisor*.) The lawsuit alleges that GC 22-04 chills employers' statutory speech rights and violates the First Amendment of the U.S. Constitution. The plaintiffs asked the court to order the GC to rescind the memorandum and refrain from threatening to prosecute employers that speak to employees in certain situations (*Associated Builders and Contractors of Michigan v. Abruzzo*, Case No. 1:2023cv0227, March 16, 2023).

[T]he Board noted that it "has consistently found that employers have created the impression of surveillance when they have departed from prior practice by physically following or otherwise changing how they observe prounion employees."

NLRB rulings

Extraordinary remedies imposed on employer with history of bad faith bargaining. A divided NLRB panel affirmed the decision of an administrative law judge (ALJ) finding that an employer bargained in bad faith and unlawfully implemented a final offer absent a valid impasse. The employer was a repeat offender, having ignored the fact it had been sanctioned by a district court after the issuance of a §10(j) injunction, to continue to bargain in bad faith. Consequently, in light of the employer's "open hostility toward its responsibilities under the Act," the Board issued "extraordinary remedies" it regarded as "necessary and appropriate to remedy the Respondent's misconduct and to ensure that its employees understand their rights under the Act and feel free to exercise them going forward, despite what has come before." Significantly, the Board took this opportunity to discuss in detail extraordinary remedies. Member Marvin Kaplan issued a partial dissent in which he criticized some of the ordered remedies, as well as the Board's use of this case "to engage in an extended discussion of extraordinary remedies in general." Kaplan emphasized that "the majority's treatise on extraordinary remedies does not change Board law" (*Noah's Ark Processors, LLC dba WR Reserve*, April 20, 2023).

Baristas laid off during pandemic could vote in decertification election. The NLRB ruled that nine baristas who were laid off by an operator of cafes in Ithaca, New York, were eligible to vote in a union representation election conducted by mail following a decertification petition filed by the employer in January 2021. Of the thirty-one eligible voters, four voted for and seven voted against union representation, with ten ballots challenged by the employer. Reversing an acting regional director's decision that had sustained the employer's challenges as to nine of the ballots and rescinding certification of the election results in favor of decertification, the Board found that the challenged employees had a "'reasonable expectancy of recall in the near future, which establishes the temporary nature of the layoff'" and eligibility to vote (*Gimme Coffee, Inc.*, April 13, 2023).

Employer created unlawful impression of surveillance of pro-union employee. The NLRB ruled that a produce retailer violated Section 8(a)(1) of the NLRA "by creating the impression of surveillance by accessing the inside-facing camera in the cab of [a union supporter's] truck and requesting that he uncover it" during his lunch break. The employer had recently reinstated the driver pursuant to a settlement agreement following charges that it unlawfully failed to recall him from layoff. Affirming the ALJ's decision, the Board noted that it "has consistently found that employers have created the impression of surveillance when they have departed from prior practice by physically following or otherwise changing how they observe prounion employees." Additionally, the Board found that the employer violated Sections 8(a)(1), (3), and (4) by issuing a warning letter against a second known pro-union employee for his first infraction of using inappropriate language in the workplace (*Stern Produce Company*, April 5, 2023, reissued April 11, 2023). ■

Ogletree Deakins

Employers & Lawyers, Working Together

Ogletree Deakins

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

Ogletree Deakins has more than 950 lawyers located in 55 offices across the United States and in Europe, Canada, and Mexico.

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