

EMPLOYERS AND LAWYERS,
WORKING TOGETHER

The Practical **NLRB** Advisor

The NLRA in a pandemic

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Flintville Plastics Inc. is slowly resuming operations at the Michigan plant where it manufactures plastic components for automobiles. The coronavirus pandemic hit the region particularly hard, and the Flintville facility was mostly shuttered. However, the state's restrictive business closure and shelter-at-home orders were now being lifted, and Flintville was eager to meet its customers' inventory needs as they began to ramp up production.

During the shutdown, the United Auto Workers (UAW) successfully negotiated partial pay for bargaining unit members who were furloughed for six weeks. Flintville management was in close contact with the UAW local throughout the shutdown, touching base about the changing state of the public health crisis, the impact of federal legislation and state restrictions, and the wellbeing of its workforce.

As it prepared to reopen, management notified the local's safety committee chair about the modifications it was making to ensure social distancing and other protections—one of which was to stagger the shifts for the three assembly lines: 7 a.m. to 3 p.m.; 8 a.m. to 4 p.m.; and 9 a.m. to 5 p.m. This would ensure that employees could be temperature-tested at the entrance without creating a logjam; it would also allow for better social distancing in locker rooms pre- and post-shift. But the bargaining unit members were not happy with the schedule change

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BRIAN IN BRIEF



The coronavirus pandemic brought an abrupt halt to many aspects of daily life. Ironically, however, it has had quite the opposite effect on labor relations. While businesses shut down, slowed down, or modified their ways of doing things in response to the virus, each of these reactions spawned new, and oftentimes totally unanticipated, labor/

management issues. Novel bargaining obligations arose, and new bargaining mechanics became necessary. These unexpected issues, coupled with an increase in employee concerted activity in response to the pandemic, all have tested the capacity of the parties and the law to adapt to unprecedented circumstances.

Were these new issues and changes not disruptive enough, the National Labor Relations Board (NLRB), as an agency, chose to push forward despite the pandemic. In the case-handling context, this necessitated that agency stakeholders

adapt to such unprecedented procedures as virtual investigations and hearings, as well as the nearly universal use of mail-ballot elections. On the decisional front, perhaps fostered by the absence of any likely dissenter, the Board continued to turn out a large number of new cases.

The net result of all this activity has been a dynamic and fast-changing labor relations landscape. In this issue of the *Practical NLRB Advisor*, we take a look at both the multiple issues that the pandemic has raised, as well as the Board's activity in continuing to reshape the law.

Sincerely,

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About Ogletree Deakins' *Practical NLRB Advisor*

At Ogletree Deakins, we believe that client service means keeping our clients constantly apprised of the latest developments in labor and employment law. With the whirlwind of activity taking place at the National Labor Relations Board (NLRB) in recent years—affecting both union 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 provide updates 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 U.S.' *Labor & 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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and argued that the strategy wouldn't do anything to help maintain social distancing on the individual lines. The union wanted to negotiate. Management said it was willing to discuss additional safety measures on the lines but was adamant about the staggered shifts—prompting the union to threaten filing refusal-to-bargain charges.

Meanwhile, Flintville was contending with a mutiny by some of the financial services staff. Payroll, accounting, and purchasing employees worked full-time at home throughout the shutdown and now were being brought back to the office in stages. But news had spread that someone in accounts payable had fallen quite ill from the virus and was hospitalized for a number of weeks. Several employees insisted it was still unsafe to work in the facility's open office set-up, and one particularly vocal purchasing associate, speaking on behalf of her colleagues, told human resources (HR) they would refuse to work on-site until the department configuration was changed to provide private offices. There was talk of a walkout, she said. Additionally, all of the administrative employees were miffed that the plant workers "got six weeks off with pay" while they had to work. "Maybe we should go union too!," a number of them had suggested.

The coronavirus pandemic has shaken the U.S. workplace in innumerable ways, leaving companies dealing with difficult employee relations issues while simultaneously struggling with the challenges of reopening safely and efficiently in the midst of a sudden, crippling economic downturn. For unionized employers, collective bargaining obligations have added considerably to these complexities.

Brian E. Hayes, C. Thomas Davis, and Ruthie L. Goodboe, chairs of Ogletree Deakins' Traditional Labor Practice Group, discuss how the National Labor Relations Act (NLRA) affects the current state of affairs for both union and nonunion employers, and answer some of the most pressing questions regarding traditional labor law in the context of the unprecedented health crisis.

Employee rights in a pandemic

Fast-food employees, warehouse workers, "gig" employees, and others have walked off the job in recent months, engaging in work stoppages upon learning that coworkers have contracted COVID-19, and demanding paid sick leave,

more protective equipment, and other concessions in light of the coronavirus pandemic.

Most of the striking workers featured in mainstream media accounts are not union members. However, Section 7 of the National Labor Relations Act (NLRA) protects the right of all employees, unionized or not, to engage in "protected, concerted activity" for their mutual aid or protection without fear of discipline or discharge. These rights apply with equal force during a public health crisis, and extend to all employees, including to those deemed "essential workers."

What "concerted activities" might employees engage in during a pandemic?

Regardless of whether they are represented by a union, employees are entitled under the NLRA to engage in concerted actions in an attempt to improve their working conditions. "Concerted activities" typically involve group activity, i.e., two or more employees. However, a single employee seeking to initiate group action, or an individual employee "bringing truly group complaints to the attention of management," as with the purchasing department employee in our scenario above, are typically engaged in "concerted" activity as well.

To be "concerted" may require that employees have engaged in "prior or contemporaneous discussion" about the subject of the complaint. However, the National Labor Relations Board (NLRB) has held that an individual who speaks up at a group meeting with management may be inferred to have a concerted objective based on the circumstances. For example, when the individual protests the effect of a new policy or policy change "on the work force generally or some portion of the work force," and there has been no opportunity for employees to confer beforehand, the individually voiced complaint may, nonetheless, be concerted. This scenario is likely more common in the present circumstances, since social distancing or continued shutdowns have prevented employees from routinely interacting.

By contrast, actions that an individual undertakes without the actual or implied support of other employees, and actions that relate only to an individual's personal interests, are generally not concerted, and thus are not protected under the NLRA. For example, if the purchasing associate in our hypothetical went to HR to insist that she had to work from

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home because she didn't have childcare, that complaint would not be concerted, as her concerns were unique to her.

The fact that employees are engaged in collective action over safety concerns is likely sufficient to confer NLRA protection, even if the employer has complied with governmental and agency coronavirus safety directives, or otherwise believes it has taken the appropriate safety measures.

Is refusal to work due to COVID-19-related safety fears protected activity?

Among those activities entitled to protection under the NLRA is a refusal to work in conditions that the employees believe to be unsafe. Under Section 7, employees may refuse to work in conjunction with their coworkers, if their refusal is over a safety issue that affects all employees. Such a refusal is protected as long as the employees have a good-faith belief that working conditions pose a harm to health or safety—even if that belief is mistaken.

The right to refuse to work also applies even if employees work for an essential business, such as a hospital, grocery store, or other business deemed to be part of the essential infrastructure. This standard also applies to union-represented

A refusal is protected as long as the employees have a good-faith belief that working conditions pose a harm to health or safety—even if that belief is mistaken.

employees, if the union has not yet negotiated a first contract with the employer, or if they are working under an expired collective bargaining agreement (CBA).

No-strike clause. However, the analysis may differ when an employee is working under a current CBA with a no-strike clause. Even if bargaining-unit employees are precluded from striking by virtue of the union contract, they are nonetheless entitled to refuse to work due to concerns about unsafe working conditions.

Section 502 of the NLRA provides a safe harbor for employees engaged in a work stoppage predicated on unsafe working conditions. This provision excludes such work stoppages from the definition of a "strike," so that an employee does not breach the no-strike clause in a

CBA if the employee has a good-faith belief, supported by "objective" and "ascertainable" evidence, that the working conditions are "abnormally dangerous," i.e., beyond the usual level of danger for an employee's job, not merely because of the hazards that routinely exist at a particular worksite.

The burden of demonstrating that Section 502 applies, and that an abnormally dangerous working condition exists, rests with the party claiming the applicability of Section 502. Merely stating that the condition exists, or citing an unsubstantiated general fear, is insufficient to carry this burden. Ascertainable objective evidence must be presented before a union or employees may seek the safe harbor of Section 502.

Such evidence might include conditions that deviate from the norm or from a reasonable level of risk; safety equipment that is operating improperly or not at all; significant deviation from industry safety standards; the existence of Occupational Safety and Health Act (OSH Act) violations; or an employer's failure to provide sufficient safety instructions. In the current climate, "ascertainable" and "objective" evidence may include violations of, or a failure to conform to, federal or state directives relating to the COVID-19 pandemic.

Conversely, the argument can be made that an employer's compliance with COVID-19-related directives, federal guidelines, and/or

recommendations from the U.S. Centers for Disease Control and Prevention (CDC) and World Health Organization (WHO) may serve to undermine any claim that a given work environment is abnormally dangerous.

Section 7 vs. Section 502. While there is a substantial degree of overlap between the two, there are notable differences between the protected refusal to work under Section 7 of the NLRA and the safe harbor provision of Section 502 of the NLRA. First, a refusal to work protected under Section 7 requires the element of "concertedness," i.e., two or more people acting together or one person acting on the behalf of others. In contrast, Section 502 additionally, and expressly, covers work stoppages by a single employee without the requirement of "concerted" activity.

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Second, under Section 7, an employee must have a good-faith belief that the workplace poses a risk. However, Section 502 sets the bar higher. In the case of Section 502, that good-faith belief must be objectively reasonable. According to the NLRB in *TNS, Inc.*, “A purely subjective impression of danger will not suffice; nor will a speculative doubt about safety in general.” The employees or union must show, by a preponderance of the evidence, that “the employees believed in good-faith that their working conditions were abnormally dangerous; that their belief was a contributing cause of the work stoppage; that the employees’ belief is supported by ascertainable, objective evidence; and that the perceived danger posed an immediate threat of harm to employee health or safety.”

Lastly, and perhaps most significantly, the case law under Section 7 suggests that the source of the employees’ concern must relate to a condition over which the employer has control in order for the stoppage to be protected. Section 502 appears to be devoid of any such requirement. As long as the predicate condition exists, it appears immaterial as to whether or not it is within the employer’s control. Of course, this particular requirement may serve as an important defense for employers grappling with a pandemic over which they have little control.

Limits to statutory protections. A refusal to work, even if grounded in safety issues, could be considered unprotected when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action. A single, concerted refusal to work, such as a walkout, may constitute protected concerted activity, but may lose its protection if other intermittent refusals to work follow. However, to the extent that the subsequent work stoppages are attributed to different work-related complaints, the NLRB is generally reluctant to find that the work stoppages are part of a pattern or plan and thus unprotected.

Moreover, certain behaviors by employees who embark upon Section 7 activity can be so egregious or disloyal as to forfeit the protections of the NLRA. It remains to be seen whether the NLRB would display greater tolerance toward such conduct in light of the heightened emotional state brought on by the public health crisis and economic uncertainty.

Fixing the problem. Once an employer resolves the safety concern, unionized employees no longer can enjoy the safe

harbor provided by Section 502, and the no-strike provision in the operative CBA is once again enforceable.

How is it determined when the safety concern is resolved? The circumstances surrounding COVID-19 are unique, in that an employer may be unable to fully remediate the exposure risk. However, given that an abnormally dangerous condition must be proven by ascertainable and objective evidence, an employer’s adherence to governmental safety directives and other health guidelines would likely undermine the union or employees from claiming ongoing protection under Section 502.

What can an employer do when employees refuse to work?

While an employer may not discharge striking employees, it may temporarily or permanently replace them in order to continue its operations. One caveat: if employees have engaged in a work stoppage based on allegations that the employer violated the NLRA in some way—also referred to as an “unfair labor practice strike”—then the striking employees may only be temporarily replaced. Thus, for example, if a unionized employer refused to bargain with a union over how best to resolve concerns over proper social distancing on an assembly line, a subsequent walkout would likely be deemed to be an unfair labor practice strike, thus insulating the participants from permanent replacement.

Other considerations. An employer does not have to pay employees who refuse to work. However, it cannot withhold accrued benefits from employees based on their participation in the strike. In addition, under the Patient Protection and Affordable Care Act, it is generally recommended that benefits continue during a limited strike in order to avoid any potential penalties. To the extent employees are still working and benefits are still available, striking employees still may be entitled to receive healthcare coverage. However, employers can require that employees pay their portion of the premiums, but must provide them with information about how to make such payments. In most instances, an employer does not have to allow employees to use vacation or paid time off (PTO) for days spent on strike; however, employees may be able to utilize vacation or PTO if they are absent for other reasons. An employer may also choose to allow employees to use vacation or PTO to deplete their leave banks while on strike.

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Ending the work stoppage. If employees, or the union on behalf of represented employees, make an “unconditional” offer to return to work, the employer is required to let them return. In the context of a safety strike, that might be articulated by a simple statement that the employees are willing to return without any condition precedent or with acceptance of the employer’s COVID-19 response plan or safety precautions.

Bargaining during a pandemic

The country is facing an unprecedented public health crisis and the nation’s economy is in turmoil. Do these exigent circumstances excuse an employer from bargaining with an incumbent union or adhering to the terms of an extant CBA and instead permit an employer to take immediate, unilateral action to protect the company and its workforce? The short answer is no. CBAs remain in effect, pandemic notwithstanding, and must be honored for their duration. Moreover, an employer’s ongoing bargaining obligations continue intact.

During typical contract negotiations, the speed of the process may be largely immaterial. During a crisis situation, however, an employer may need to act quickly, before agreement or impasse is reached. It may need to immediately implement a new practice or policy in response to the

As a practical matter, employers may want to notify the union before implementing a unilateral change even when bargaining is not required.

pandemic, or revise a policy contained in the CBA. If that change is a mandatory subject of bargaining—such as paid leave, layoffs, or furloughs—an employer is not privileged to act unilaterally but must provide the union with notice and full opportunity to bargain.

There may, however, be circumstances where time is of the essence and protracted negotiations would be self-defeating. Under such circumstances, the employer still has a duty to bargain in good faith and can be faulted for unilateral action. Accordingly, in such an instance, the employer may want to notify the union of the term or condition at issue, the need for the change, and the need for exigency. An employer may also want to make it clear to the union that timing is of the essence, and why it is of the

essence. The employer also may want to be aware—and acknowledge—that it still may need to bargain with the union after an emergency change is implemented.

Look to the CBA. Review the CBA’s existing terms to identify those provisions that may have bearing on the current crisis. Leaves of absence, paid time off, recall rights, and health and safety clauses all are likely to be relevant to operations during the pandemic, and can guide employers and unions alike on how to proceed under these unique circumstances.

Management rights. Where there is no express CBA provision on the issue at hand, employers may have the ability to make changes without bargaining. The extent of this right depends in part on the presence and scope of a management-rights clause, which gives employers the right to make unilateral changes to employment policies and work conditions not otherwise set forth in the contract.

The NLRB has adopted a more favorable standard for determining when the employer has retained the right generally under the contract to make unilateral changes without negotiating with the union. Prior to its 2019 decision in *MV Transportation, Inc.*, an employer’s hands were tied, precluding unilateral action unless it

could show that the union had “clearly and unmistakably” waived its right to bargain over a particular subject. However, the Board’s newly adopted “contract coverage” standard

asks whether the proposed unilateral change involves a topic “within the compass or scope” of the contract. This framework gives employers greater leeway to act unilaterally where a CBA may be silent on a specific issue or application.

Even if it appears that the employer has the right to act unilaterally, employers considering such changes may want to be prepared to explain the need for the change, how long it might be expected to last, and to share relevant information with the union supporting the need for the change. As a practical matter, employers may want to notify the union before implementing a unilateral change even when bargaining is not required. A union may be amenable to the

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change, particularly in light of the crisis situation, and might in turn help facilitate employee buy-in.

Effects bargaining. Keep in mind that even when a robust management-rights clause and a more favorable Board standard afford the right to implement certain changes without first bargaining with the union, an employer still may need to bargain over the effects of those changes. Will workers be entitled to partial pay if idled? Will they receive severance in the event of a permanent shutdown? A union must be provided the opportunity to negotiate over “effects” such as these.

Conflict with legal directives. If a CBA has a savings clause, then the employer may be excused from complying with contract terms that would conflict with an executive order, new law, or other official declaration. The employer first must consider if and how it could both follow the governmental directive and also comply with the CBA. If it can do so, it must. But when a legal obligation makes it impossible for an employer to comply with the terms of the CBA, a contract breach is excused.

For example, if the state government mandates that an employer’s facility be shut down immediately, that employer would be unable to comply with a CBA clause requiring advance notice of layoffs. However, the CBA may also include provisions that deal with other terms of layoff, such as the order of recall. Since compliance with that portion of the clause does not conflict with the government mandate it must continue to be honored.

As a practical matter, if the government issues a directive requiring immediate action, an employer would be hard-pressed not to comply. The employer in this scenario might contact the union, inform it of the need for imminent action, and request the union’s expedited response, setting a clear deadline. The employer’s next course of action would be to comply with the directive, and bargain after the fact over the directive’s impact on the workers.

New realities, new contract proposals. Employers that are currently negotiating a contract, or negotiating a successor agreement, may wish to adjust pre-coronavirus bargaining proposals as they confront the unexpected economic effects of the pandemic and shutdown, or to revisit

noneconomic proposals that are ill-suited to the current crisis. Given the present circumstances, employers that take this commonsense approach in the wake of such dramatically changed circumstances run little risk of being found to have engaged in impermissible “regressive bargaining” if they opt to revisit or revise relevant proposals.

Parties to a current CBA can always discuss and agree to mid-term modifications deemed necessary to maintain the continued viability of the business. For example, a union may be willing to relax contractual staffing levels, spread available work more evenly among bargaining unit employees, or agree to reductions in pay and benefits.

Negotiations are ongoing. If an employer has been in contract negotiations with the union for a first CBA or successor contract, those negotiations should continue, even though the practicalities of getting to the bargaining table are a challenge and the “dynamic status quo” is particularly volatile. Ongoing negotiations are required to satisfy bargaining obligations, regardless of whether the contract expires or the parties agree to extend it.

Although the general duty to negotiate a successor contract remains, employers may want to make it clear to unions that the current situation is not business as usual. If members of the management team are quarantined or dealing with COVID-19 emergency response measures, how does that impact the duty to bargain a successor contract? Such exigencies certainly provide employers with some leeway but do not entirely excuse bargaining where a union is insistent. Many unions, however, are agreeing to extend labor agreements for between 30 to 90 days to de-escalate tensions and allow employers to assess the impact of changing conditions on their business.

What are the most pressing subjects of bargaining right now?

As expected, the pandemic has placed increased emphasis on such contract provisions as those that bear on scheduling and shift changes; location changes; work from home; hazard pay or return-to-work bonuses; sick leave/PTO; layoffs, furloughs, and reduced hours; as well as health and safety. Employers are now seeing in clear terms the necessity for adequate management-rights provisions; the wisdom of savings provisions; and similar provisions.

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Common CBA provisions apply. Existing contract provisions that may be particularly applicable to the current crisis include clauses related to health and safety measures; layoff and recall; pay during furlough; quarantine or stay-at-home orders; leaves of absence; and paid time off.

Novel bargaining issues. Workplace issues surrounding COVID-19 center on employee health and safety in the context of a serious and readily communicable disease. These issues are not the typical fodder of labor/management

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bargaining. Thus, they include novel issues related to safety protocols, the sharing of health data, testing, and the like. The process is made even more challenging because so much about the virus, including its means of transmission, is not yet definitively understood.

Responding to union information requests

In the wake of the pandemic many employers have been inundated with union requests for information regarding the employer's response to the COVID-19 outbreak. These requests run the gamut from information and data as to how the employer intends to mitigate health and safety concerns to how absences from work will be handled. Almost all of these issues directly affect wages, hours, and working conditions and are thus mandatory subjects of bargaining. Accordingly, most related information requests will likely be deemed to be presumptively relevant to a union's representational duties, and an employer is therefore required to produce it.

That said, there are commonsense limitations. For example, an employer is only required to turn over information that already exists. Employers are not required to speculate or create information that they do not have. If the request involves specific questions, and a document or policy provides the answers, then providing the document or policy to the union satisfies the duty to respond. However, for information that remains in development, such as a policy relating to whether and/or how the employer plans to pay employees who cannot come to work due to an

exposure or quarantine, there may be no immediate ability to respond, but there would be a continuing duty to provide the policy to the union once it becomes available.

Some information requests include a very fast turnaround time. However, there often is a tension between a fast response and a complete response. There are no hard and fast rules on how quickly employers must respond. Consider the reasonableness of any requested timing based on the circumstances, the amount of information requested, and the additional, competing responsibilities

of those employees tasked with gathering the information. If a complete response is going to take time to provide, a prudent employer informs the union of this fact, delineates the reasons

that additional time is necessary, and sets a realistic date for production.

Health records requests pose significant privacy problems for employers. For example, a union request to provide a list of employees who have been exposed to COVID-19 and/or who have tested positive is particularly problematic in the current circumstances. Individual employee medical information is confidential and laws may prohibit disclosure by an employer even in response to a union demand. A prudent employer will decline the request but offer to discuss and bargain over alternative means to provide the union with necessary information without compromising confidential health information. One possible accommodation would be to provide such information if employees execute releases.

Unfair labor practice charges

One bright spot in the current situation has been a sharp drop in the number of unfair labor practice filings. This is largely attributable to the fact that so many businesses are closed. However, some of the drop-off is also due to an initial "we're all in this together" ethic that saw businesses and unions working more cooperatively and acting less confrontationally.

Like all good things, however, this reprieve is likely coming to an end as the pandemic becomes the "new normal" or begins to subside. The likelihood is that unfair labor practice charge filings will likely pick up soon, as unions focus on

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litigating some of the issues that came up during the crisis and chaos. For example, in two recent cases employers have been charged with COVID-19-related unfair labor practices. In one instance, employees were discharged after they refused to return to work and sought to bargain over safety issues. In another case, employees claimed they were packed into a crowded, mandatory anti-union meeting and had their wages garnished to pay for required personal protective equipment (PPE).

Best practices are essential: Be mindful of contractual deadlines and timelines in your grievance procedures. Be responsive to union requests for information. Comply with notice requirements if there are CBAs approaching expiration. Also, keep in mind: the statute of limitations for charge-filing is 180 days, and nonunion employers also may file charges with the Board.

COVID-19's impact on labor

There has been some level of cooperation between labor and management through the course of the coronavirus crisis. As labor unions contend with member job losses and safety risks, they are also aware of the challenges facing businesses, and understand their members' well-being is ultimately tied to the solvency of their employer.

Union safety committees have collaborated with management on coronavirus control measures and, in several instances, unions found common political cause with employers, forming a united front on policy matters. For example, the United Food and Commercial Workers (UFCW) union lobbied jointly with industry in hopes of securing "extended first responder" designation for unionized grocery workers so that these essential workers would be entitled to PPE and other protections.

Labor advocacy. On the other hand, the UFCW also turned its ire and economic pressure on grocery and retail chains as they began to end the temporary practice of giving additional hazard pay to these front-line employees. Unions also took aim at regulatory agencies, most notably the Occupational Safety and Health Administration (OSHA), for what they saw as a lackluster approach to regulating the hazards presented by the coronavirus outbreak. A coalition of labor organizations filed suit against the U.S. Department of Labor, hoping to compel the agency to adopt enforceable safety

regulations addressing the pandemic. OSHA's approach to date has been to offer industry-specific safety guidance in lieu of enforceable mandates, and to highlight existing OSHA standards that apply to the pandemic risks. Labor-affiliated groups such as Fight for \$15 have also turned to the courts, suing fast food and retail chains around the country for safety lapses after workers contracted COVID-19 and, in some cases, died.

Unions and "Alt Labor" groups have also staged work stoppages as part of the spate of employee walkouts that developed as the crisis unfolded. Indeed, one report indicated that by mid-May, more than 200 employee walkouts had occurred due to COVID-19-related safety concerns. Notably, the majority of these work stoppages involved nonunion workers. The public health crisis and ensuing economic fallout appear to have spawned a surge of organic protected activity, among both union and nonunion workers.

Impact on union organizing. All of this bodes well for labor organizers. Several national unions have reported a recent and sharp uptick in inquiries from nonunion workers seeking assistance and advice over health issues and job security. For a number of reasons, the coronavirus has created a favorable environment for union organizing and ushered in a challenging climate for employers seeking to remain union-free.

The pandemic has both highlighted and exacerbated the economic difficulties of vulnerable sectors of the workforce. Workers are in a heightened state of concern for their safety and their jobs, and organized labor is well-situated to capitalize on those fears. To the extent union members have secured better protective equipment, hazard pay, paid sick days for quarantined workers, and other benefits, unrepresented workers who feel unsafe, both economically and physically, may see unionization as an appealing proposition.

In addition, "essential workers" have elicited great admiration during the pandemic. Healthcare professionals, police and firefighters, and other first responders are heavily unionized, and goodwill from their efforts can effect a subtle shift in the public perception of the unions that represent them. Other essential workers, such as retail and service industry employees, food production workers, and delivery drivers

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have garnered newfound appreciation as well. Organized labor has long sought to deepen its foothold in these industries, and growing public awareness that these jobs are critical, but low-paid, has softened the target.

If there is a positive to take away from the unprecedented crisis, it is an opportunity for a fresh start in enacting positive employee relations as we embark on a “new normal.”

In addition, many essential workers, like health care and food supply employees, are rightly proud of their efforts during the pandemic. It is only a short step from pride to a sense of entitlement; and, where the entitlement is not met with a financial reward, employees become disgruntled and prime targets for union organizing.

Genuine job security and safety issues are front and center for most employees, and unions are quick to claim they are the solution to such concerns. Fear, employee protection or the perceived lack thereof, the inability to be heard, or the lack of a meaningful voice in the workplace, lack of control over employer economic or policy initiatives, and the failure of employers to be transparent or communicative, are all powerful messages that unions are using to help them organize.

Moreover, to the extent workers' demands are centered on ensuring safety on the job, they have broad public support. Indeed, one recent poll found, overwhelmingly, that “protecting employees” was job one for employers in the face of the pandemic. Management would be hard-pressed to argue that modest demands for PPE and health coverage while quarantined are unreasonable, particularly as troubling accounts of COVID-19 deaths, ostensibly contracted in the workplace, heighten sympathy for the cause.

Newfound momentum, new tactics. Government data reflect a steady increase in labor actions in 2019 and 2020, and the current circumstances appear to have heightened that labor activism. Beyond work stoppages, labor activism has, of necessity, morphed, and taken on new, digital forms. Unions are aggressively employing such digital resources as social media events, video conferencing union meetings, and e-authorization cards, among other efficient means of reaching and mobilizing potential members and public supporters, which can greatly facilitate union organizing.

Add to all of this the fact that unions are very active, that in large measure the “ambush” election rules continue to apply, that the NLRB is utilizing mail ballots that tend to favor unions, and that social distancing and less employee physical contact with the workplace make it very difficult for employers to campaign and present their side of the unionization argument.

Employer response. Businesses seeking to remain union-free must prepare for the fact that these new tools and sophisticated organizing tactics will be part of the union playbook long after the pandemic eases. Yet, more immediately, employers can also expect organized labor to strike while the proverbial iron is hot. While conditions are favorable presently, labor's moment could be fleeting if unions don't translate the current crisis into concrete membership gains and genuine bargaining power.

Labor is already seeking to take advantage of this current unrest and uncertainty. For employers, this means positive employee relations are essential as they work to reopen. If there is a positive to take away from the unprecedented crisis, it is an opportunity for a fresh start in enacting positive employee relations as we embark on a “new normal.” ■

Q and A: Practical labor relations in a pandemic

Brian Hayes, Co-Chair of Ogletree Deakins' Traditional Labor Relations Practice Group, answers questions about working with unions and the National Labor Relations Board (NLRB) regional offices during this unprecedented public health crisis:

Q What are the most frequent questions and concerns you hear from clients?

A Many clients have raised questions related to the scope and applicability of the National Labor Relations Act (NLRA) concept of “protected concerted activity” in the current environment.

- Are social media posts by employees about COVID-19 and/or criticisms of their employer's response to the pandemic protected?
- Can employees refuse to work because of health concerns?
- Is political and social commentary or activism protected by Section 7 of the NLRA? (More recently, employers have become equally enmeshed in questions arising out of the social justice movement. We'll visit that question in a forthcoming issue of the *Practical NLRB Advisor*.)

Unionized clients are frequently seeking guidance as to whether pandemic-driven changes require notice and bargaining, and, if so, what strategies are most productive. In a similar vein, many employers are now looking for bargaining guidance with respect to the rollback of emergency procedures and/or benefits that were installed at the outset of the pandemic.

Q What novel bargaining issues arise from COVID-19, both mid-term *and* when negotiating new or successor bargaining agreements?

A Determining the protocols for how employees will return to work; if and how they may be tested for the virus; and what safety, social distancing, hour or shift changes, or job modification measures will be enacted are just some of the more prominent mid-term bargaining topics. New or successor bargaining is informed by the current circumstances so not only will it likely involve these topics, but others such as hazardous duty pay,

leave policies, “force majeure” provisions, and the right to refuse work.

Q What must unionized employers do differently when implementing return-to-work?

A Under normal circumstances, some unionized employers subscribe to the “let sleeping dogs lie” rubric. In other words, employers may be willing to let the union be the entity that initiates dialogue on an issue. If the union does not initiate dialogue, the employer will simply proceed unilaterally unless the law requires that it engage with the union first. The pandemic has changed this dynamic for many employers. Thus, many see value in being more proactive and initiating the engagement with the union in the first instance.

Being proactive, rather than reactive, allows employers to not only “set the table” of issues, but accords the employer the “high ground.” Since union involvement is inevitable, many employers see value in engaging the union to proactively

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Q Must CARES Act loan recipients commit to union neutrality?

A “We have heard that taking advantage of programs under the Coronavirus Aid, Relief, and Economic Security (CARES) Act may require an employer to remain neutral during any union organizing effort. Is that true and, if yes, what does it mean?”

This question continues to arise, according to C. Thomas Davis, Co-Chair of Ogletree Deakins' Traditional Labor Practice Group, who addresses the matter in an Ogletree Deakins article, [*“CARES Act Loans for Mid-Sized Employers and the Commitment to Union Neutrality: How Concerned Should Employers Be?”*](#)

Fortunately, the answer provides some reassurance to employers.

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address problems rather than alienating the union and likely exacerbating problems.

Q How can unionized employers work effectively with unions to ensure workplace safety and resolve other COVID-19-related concerns?

A Employers with current bargaining relationships typically know the incumbent union's bargaining posture. Is the union's stance usually cooperative or obstructionist? To a large extent this determination may guide the employer's approach. Whether cooperative or obstructionist, employers may want to give the union as much advance notice and information as possible when contemplating a change. If the union is typically cooperative in the former instance, an employer may actually receive constructive input; if the latter, proactive engagement may mollify the union somewhat and at least lessen the likelihood of a subsequent grievance or Board charge.

While there will undoubtedly be exceptions, most unions recognize the need to work cooperatively with employers on

COVID-19-related issues. They recognize that temporarily or permanently shuttered businesses do nothing but hurt their members, and consequently are willing to work with employers to ensure a safe return to work. Employers, however, may need to be sensitive to the fact that unions often must play to members who have sincere health and safety concerns. In these circumstances, employers may wish to be proactive and seek to involve the union at the earliest possible stage. Doing so may lessen or prevent union pushback and can make employee buy-in more likely.

It is also worthwhile to bear in mind that the pace of bargaining is often tied to the circumstances and the subject matter. Thus, true emergencies may dictate a far more circumscribed bargaining schedule, while matters of a nonemergency nature are typically susceptible to a more routine, mid-term bargaining pace.

Collaboration with the employees' union, and its safety committee if there is one, on current issues of workplace safety can go a long way in ensuring a smoother return to work. ■

NLRB is operational in the pandemic

Like most organizations, the National Labor Relations Board (NLRB) has had to alter its operations in response to the coronavirus pandemic and resulting shutdown orders. However, with the exception of some temporary closures, the Board's regional offices have been functioning throughout the public health crisis. Representation elections and hearings were briefly on hiatus, and the effective date of certain rule changes were delayed. Like most organizations, though, the Board has shifted to a "new normal," moving to teleconference and video hearings, exclusive use of E-Service, and increased use of mail ballot elections as a concession to the extraordinary circumstances presented by the pandemic.

Up and running

The NLRB mandated telework for employees at its Washington, D.C., headquarters on March 12, 2020, after news that an employee came into contact with a person who tested positive for COVID-19. Several days later, as other agency employees had brushes with the virus, the Board temporarily closed its Manhattan, Detroit, and Chicago

offices, implemented mandatory telework, and postponed scheduled hearings. Shortly thereafter, its New Orleans and Cleveland offices were shuttered and small resident offices in Little Rock, Arkansas; San Antonio, Texas; San Diego, California; and Tulsa, Oklahoma, were also closed.

The Board eventually implemented telework on an agencywide basis. Field offices are operating with minimal onsite staffing and public access is limited or by appointment only. Initially, teleworking was to run through "at least April 1," with the agency continuing to monitor the evolving situation to determine when a full reopening was feasible. The Board has not indicated when it will resume normal office operations but continues to update the status of individual field offices on its [website](#).

Meanwhile, NLRB field staff continue to operate through email, teleconference, and limited videoconferencing to process representation petitions, field unfair labor practice charges, and issue complaints, as warranted. The priority of investigations or

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THE NLRB IS OPERATIONAL IN THE PANDEMIC continued from page 12 time targets has not changed, the agency reports, with affidavits being taken by phone in most cases. The Board continues to process cases, including exceptions to administrative law judge (ALJ) decisions, and requests for Board review of regional actions, motions, briefs, and other filings.

E-Service exclusively. As always, parties are required to E-File documents with the Board. The NLRB's E-Service program, in effect since 2008, previously had been limited to parties who have registered for the service. However, during this mandatory telework period, the agency is serving all Board and ALJ decisions exclusively through E-Service. (Parties can request E-Service by [sending an email to e-Service@nlrb.gov](mailto:e-Service@nlrb.gov).)

Board hearings

As the pandemic unfolded, the Board's Division of Judges cancelled in-person unfair labor practice hearings, though some hearings were conducted via teleconference at the discretion of the presiding judge, and judges continued to make conference calls in order to aid in settlement and handle case-related stipulations and agreements. Some hearings resumed on June 1, 2020, and have been conducted remotely through videoconferencing. However, the agency noted it needs to shore up its videoconferencing capabilities before it can roll out unfair labor practice hearings more fully.

Regional directors, at their discretion, have held hearings on disputed representation election issues by teleconference or videoconference. The NLRB held that the COVID-19 pandemic amounts to "compelling circumstances" sufficient to warrant holding a pre-election hearing remotely. For example, in one case, the Service Employees International Union (SEIU) filed a petition seeking to represent a group of hospital workers employed by Morrison Healthcare. In mid-March, the regional director (RD) postponed a hearing on the petition indefinitely, citing COVID-19 concerns. However, on April 22, 2020, the NLRB RD scheduled an April 30, 2020, pre-election hearing to be conducted by phone. The hospital issued a request for review and the Board stayed the hearing.

In its **May 11, 2020, decision**, the Board lifted the stay but said it would permit telephone conferences only when "compelling circumstances exist and no witness testimony

is involved." If witness testimony is required, the regional director must conduct a hearing by videoconference; if no testimony is to be taken, a hearing can proceed by phone.

Representation elections

On March 19, 2020, the NLRB suspended all Board-conducted representation elections through April 3, 2020, including mail ballot elections. At the time, several of the regional offices had been closed and other locations were operating with limited staffing. Under such conditions the agency determined it could not effectively conduct elections. Elections resumed April 6, 2020, with regional directors exercising their traditional discretion to determine on a case-by-case basis *if* a representation election should be conducted and, if so, the time, place, and manner of the election.

The NLRB has rejected calls from employers to postpone elections due to the coronavirus, even at a hard-hit hospital bracing for a rush of COVID-19 patients. Moreover, a regional director ordered an election of hotel workers who had been furloughed due to the pandemic.

Board won't postpone election at hospital. Rejecting an acute-care hospital's contention that the pandemic constitutes an extraordinary circumstance justifying a **stay** of a union election, the NLRB denied the hospital's request for review of an acting regional director's decision allowing an election to continue as scheduled. The hospital argued that it anticipated a huge influx of patients in the coming weeks, and that its operations and HR personnel should not be focused on a union campaign in the midst of a public health emergency. However, the Board, in an unpublished decision, deferred to the acting regional director, who had carefully considered the circumstances presented, adding that neither the parties nor the record had raised an issue that warranted postponement of the election (*Crozer-Chester Medical Center*, April 23, 2020).

In the hospital's view, it "simply would be inappropriate" to have to contend with a union election during a state of emergency. Moreover, it argued, in the event of a union win, the hospital would be faced with the prospect of risking a violation of Section 8(a)(5) of the National Labor Relations Act (NLRA) by doing what is necessary to operate effectively amidst the public health crisis, "or effectively abandon its

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Request for Review and bargain with the Petitioner out of an abundance of caution.”

The Board acknowledged the significant challenges raised, but cited its obligation to maintain operations to the extent that it is safe and feasible to do so, and denied the motion for a stay.

Rejecting bids to postpone union representation elections due to COVID-19, the NLRB and the agency's regional officials are increasingly inclined to direct mail-in balloting as a safety concession to the pandemic.

Furloughed workers get election. Employees furloughed by a Waikiki, Hawaii, hotel will be able to proceed with a representation election, an NLRB regional director ruled, finding the layoffs are temporary, not permanent. The hotel where they work suspended most of its operations due to the pandemic and Hawaii's quarantine order, but it remains minimally open, mostly to service airline flight crews, and has a skeleton crew in place. However, the hotel has continued the employees' health coverage and holds videoconference meetings with the furloughed staff, and both the hotel and the employees “understand that the layoffs are temporary, that the [e]mployer has intended all along to reemploy them, and that there is a date certain for reopening the hotel in full,” the regional director observed. Consequently, the employees “have a reasonable expectation of reemployment in the near future and are thus eligible to vote in the election.” The regional director rejected the employer's bid to delay the election (*Hawaii Prince Hotel Waikiki LLC and UNITE HERE Local 5*, June 30, 2020).

Moreover, the regional director ordered a mail ballot election, rather than an in-person election, given that the furloughed employees “could be located anywhere” and should not have to come to the hotel to vote in person. “This scattering of employees, standing alone, is enough to justify a mail-ballot election,” according to the regional director. “Under normal circumstances, and absent employee scatter, I would almost certainly direct a manual election. However, the current pandemic does not present normal circumstances.” She noted continued federal, state, and local guidelines in place that recommend “avoiding unnecessary travel, social contact, and conducting business remotely when possible.”

Mail-ballot elections gain favor. Rejecting bids to postpone union representation elections due to COVID-19, the NLRB and the agency's regional officials are increasingly inclined to direct mail-in balloting as a safety concession to the pandemic, including in a high-profile organizing effort among Instacart in-store shoppers. Employers have argued that the public health crisis requires the suspension of representation elections but, if an election *must* be held, it

should be conducted in person.

As one regional director points out in a footnote in *Maplebear Inc. dba Instacart*, the “manner of election is an administrative matter and not a litigable issue.”

The regional directors have entertained the employers' contention nonetheless, but their argument has not prevailed.

In one of several regional director decisions issued on May 7, 2020, the NLRB's regional director in Chicago ordered mail-in balloting in an election filed by the United Food and Commercial Workers International Union to represent Instacart in-store shoppers at a Chicago grocery store. In *Maplebear Inc.*, the employer asked the Board to hold the election petition “in abeyance until response measures associated with the ongoing COVID-19 pandemic are no longer in effect.” It urged that a union election would distract Instacart shoppers—deemed essential workers during the pandemic—from their critical duties. But the company cited no cases in which an election had been put off “due to the potential for employee distraction.” Employees' NLRA-protected rights “are not diminished during times of emergency,” the regional director added, noting that even during World War II, workers performing essential functions for the war effort voted in NLRB-conducted elections.

The acting director of the NLRB's Boston field office directed a mail-ballot election among employees of a cannabis dispensary. The employer in *Curaleaf Massachusetts, Inc.*, wanted an in-person vote and offered to provide voters with personal protective equipment (PPE) and to hold the vote offsite at a vacant office allowing plenty of room for social distancing. However, the regional director pointed to Massachusetts's stay-at-home advisory, and reasoned that workers waiting in line to vote, election

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observers milling about, and NLRB officials assembled to tally the vote would likely breach the state's temporary prohibition on gatherings of more than 10 people. He also reasoned that voter safety could not be assured in an in-person election, even with the proposed safety measures in place. A mail ballot election, on the other hand, "has no apparent significant drawbacks," despite the employer's contentions to the contrary. The Board has allowed for mail-ballot elections when eligible voters are "scattered."

As applied to worksites shut down from COVID-19, notice must be posted within 14 days after the facility involved reopens and a substantial complement of employees have returned to work.

Granted, the employees in this case "are not 'scattered' in the traditional sense," the regional director said. "They are, however, 'scattered' by COVID-19, which has rendered an immediate manual election, like so many other previously-ordinary gatherings, unsafe."

The regional directors' approach in these cases has found favor with the Board. In *Atlas Pacific Engineering Co.*, the NLRB affirmed a regional director's decision directing a mail-in ballot at a company designated an essential business. The Board noted the controlling precedent in such circumstances is *San Diego Gas & Electric*, a 1998 Board opinion which stands for the proposition that while manual, in-person elections are best, in "extraordinary circumstances" an RD may always exercise discretion to direct an election by mail. Here, the regional director appeared to be concerned mostly with the safety of NLRB employees. In upholding her decision, the Board relied on "the extraordinary federal, state, and local government directives that have limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting this election should remain on mandatory telework."

In-person elections still preferable. However, the Board *has* administered several elections during the public health crisis, and one of those elections serves as the blueprint for recent **guidance** by NLRB General Counsel Peter B. Robb on the safe conduct of in-person elections

during the pandemic. The general counsel's manual election guidelines, issued July 6, 2020, suggest safety protocols for conducting in-person representation elections, including those pertaining to the mechanics of the election; employer, party, party representative, and observer certifications related to COVID-19 exposure and infection; written agreements requiring post-election notification of COVID-19 exposure and infection; COVID-19 safety-related arrangements to be included in election agreements; and elections requiring Board agents to travel.

As Robb noted, "the COVID-19 pandemic is still evolving and ... circumstances can change," adding that, "[i]n the end, the decisions on election procedures and the safety of all

participating in an election remain in the sound discretion of the Regional Director," (although subject, of course, to the Board's review.)

Temporary notice-posting change

In *Danbury Ambulance Service, Inc.* (May 6, 2020), the NLRB adopted a temporary change to its standard notice-posting remedy: As applied to employers whose worksites are currently shut down as a result of COVID-19, notice must be posted within 14 days after the facility involved in the proceedings reopens and a substantial complement of employees have returned to work. Notice may *not* be posted until a substantial complement of employees have returned. The temporary change also applies to electronic distribution of notice, if employers customarily communicate with employees by electronic means. However, the temporary change does *not* apply to employers whose worksites have stayed open during the pandemic and continue to be staffed by a substantial complement of employees.

On the heels of the Board's ruling, NLRB General Counsel Peter B. Robb on May 20, 2020, issued **Memorandum GC 20-06**, which instructs the regions that this temporary change to the notice-posting remedy is to be applied to informal settlement agreement cases, effective immediately. "Accordingly, if a place of business/office is currently closed and a substantial number of employees are not reporting to the facility due to the

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Coronavirus pandemic or is open and operating with less than a substantial complement of employees, the 60 consecutive day period for posting will begin when the place of business/office reopens and a substantial complement of employees have returned to work,” Robb wrote. For purposes of timing, “a substantial complement of employees is at least 50% of the total number of employees employed by the charged party prior to closing its business due to the Coronavirus pandemic.” However, Robb added, because a charged party will be able to email the required remedial notice to employees as soon as it reopens its worksite, in cases involving informal settlement agreements, the emailing of the notice, if appropriate, must be done on reopening. Proceeding in this manner ensures that “the notice will be placed in employees’ email in-boxes awaiting their return to work.”

Division of Advice fields COVID-19 queries

The general counsel's Division of Advice has released several memos addressing COVID-19 related questions received by the agency. Advice memos released on July 15, 2020, address issues such as layoffs and temporary assignment offers; union jobsite access; discharge after requesting to work remotely; and unilateral policy changes made in response to the pandemic.

- **Unilateral policy changes.** At the onset of the pandemic emergency, a union representing a hospital's nurses and other patient-care staff proposed that employees should not be subject to discipline or other adverse consequences for absences due to “the potential risk of exposure to COVID-19.” The hospital agreed, and issued a modified attendance policy to “temporarily pause all attendance and tardy-related penalties, including attendance and tardy-related corrective action.” However, the hospital did not first notify the union that it agreed to the proposal. While it's unusual that the employer's first response was to issue a policy essentially adopting the union's proposed change, the hospital's “actions are understandable in these circumstances where, as an acute-care hospital, time was of the essence in dealing with the emergency pandemic situation,” the Division wrote.

Nor did the hospital violate Section 8(a)(5) by unilaterally expanding its work-from-home policy,

General Counsel offers pandemic guidance

In response to the “unprecedented” public health and economic crisis, Robb on March 27, 2020, issued [Memorandum GC 20-04](#), summarizing Board case law addressing employers' bargaining duty during “emergency situations,” including “public emergencies as well as emergencies unique to a particular employer.” Robb cites cases involving layoffs and other unilateral changes during hurricane-related evacuations and power outages, a retailer's 60 percent drop-off in anticipated business in the wake of 9/11, and circumstances affecting individual employers, including lumber shortages, bankruptcy, and a discontinued credit line.

Perhaps most relevant to the current pandemic: *Virginia Mason Hospital*, a 2011 case which found that an acute care hospital in Seattle violated Section 8(a)(5) by unilaterally implementing a flu-prevention policy without giving the union representing the facility's 600 nurses an opportunity to bargain. During the term of the parties' bargaining agreement, the hospital instituted a requirement that all nurses who had not received influenza vaccinations must either take antiviral medication or wear a protective mask. While an administrative law judge found that the hospital was excused from its bargaining duty, a divided NLRB panel disagreed.

according to the memo. The policy did not apply to bargaining unit employees, who could not work remotely anyhow given their direct patient-care role; rather, it applied only to non-unit employees who were able to carry out their duties from home. As such, there was no unilateral change to unit members' work conditions.

Even assuming that the revised policies amounted to unilateral changes, “it is the General Counsel's view that an employer should be permitted to, at least initially, act unilaterally during emergencies such as COVID-19 so long as its actions are reasonably related to the

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emergency situation,” the memo states. “However, in addition, the employer must negotiate over the decision (to the extent there is a decisional bargaining obligation) and its effects within a reasonable time thereafter.” Here, the hospital likely had no bargaining obligation in this situation, “where the unilateral changes appear to have been reasonably related to the pandemic emergency.” Notably, the parties have continued to negotiate the effects of various pandemic-related proposals as they arise (*Mercy Health General Campus*, June 10, 2020).

The Board revised its blocking charge policy, its voluntary recognition bar, and the “conversion” of NLRA Section 8(f) to NLRA Section 9(a) relationships in the construction industry.

- **Discharge after remote work request.** The Division found meritless a charge that an employer fired an employee for asking to work at home due to COVID-19. The employee discussed his COVID-19-related health and safety concerns in a text exchange with the company’s controller on their personal cell phones. Regardless of whether the controller was an “employee” under the Act or a statutory supervisor or manager, the discharged employee’s work-at-home request was individual, not concerted activity. Moreover, the employer was unaware of the texts, and thus its knowledge of his activity cannot be established. Also, there was insufficient evidence of animus here, and the employer would likely be able to establish that the discharge decision was made before the employee made his work-from-home request (*Larry Peel Co.*, June 15, 2020).
- **Union jobsite access.** Citing the Board’s policy of declining to choose between two “equally plausible” interpretations of a CBA, the Division recommended dismissing a charge that an employer violated the union’s contractual right to access the job site “at any reasonable time.” As the memo notes, “it’s not at all clear that the Union’s demand for immediate unrestricted access was reasonable in light of the COVID-19 pandemic.” Also, the union didn’t try to bargain over the employer’s position that it would require “one hour advance notice to prepare for safe access.” At any rate, the CBA’s “any reasonable time” language gave the employer the right, under the “contract coverage”

standard adopted in *MV Transportation, Inc.*, to require such notice (*RS Electric Corp.*, June 19, 2020)

In a very brief response to a similar query, the Division recommended dismissal of a Section 8(a) (5) charge in which the denial of access on a single occasion during the pandemic was due to an apparent misunderstanding between the parties that was quickly resolved the same day (*United States Postal Services*, June 3, 2020).

- **Layoffs and temporary assignments.** A government contractor that supplies nursing services within the District of Columbia public schools lawfully laid off some employees in response to the citywide closure of schools due to COVID-19, and lawfully offered temporary reassignments to others (in partnership with the D.C. government) to perform COVID testing and/or contact tracing in lieu of layoffs. The CBA contained an entire provision regarding layoffs, and while it was unclear whether the provision covered “temporary” layoffs, the CBA’s management rights clause also references “a general right to lay off,” the memo notes. Thus, under the contract coverage test, the employer had the right to conduct the layoffs under the operative CBAs. In addition, the contract’s “broad” zipper clauses “likely foreclosed any obligation to engage in effects bargaining as to the layoffs or alternative work assignments in lieu of layoff,” the Division found.

Finally, even if the employer *did* have a bargaining duty, it had engaged in pre-implementation bargaining over both issues, and the bargaining was sufficient to satisfy its obligations under the exigent circumstances present here (*Children School Services*, June 30, 2020).

Rule implementation postponed

On April 1, 2020, the NLRB published a final rule amending its policies regarding how labor organizations attain or keep their representational status under the federal labor law. Specifically, the Board revised its blocking charge policy, its voluntary recognition bar, and the “conversion” of NLRA Section 8(f) to NLRA Section 9(a) relationships in the construction industry. None of these matters had been previously addressed by formal regulations. On April 8,

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THE NLRB IS OPERATIONAL IN THE PANDEMIC continued from page 17 2020, however, the NLRB announced it was delaying by 60 days the effective date of this **Election Protection Final Rule**, from June 1, 2020, to July 31, 2020, “[d]ue to the ongoing national emergency caused by the coronavirus.”

Previously, the Board delayed the implementation of its more sweeping Representation Case Rules, which revokes certain Obama-era changes to the timing and conduct of

The recent resurgence of the coronavirus suggests the pandemic and the Board’s procedural responses will both be with us for a good deal longer.

Board-run representation elections. The new procedures, published in December 2019, were initially slated to take effect April 16, 2020, but were delayed to May 31, 2020, not due to COVID-19, but “to facilitate the resolution of legal challenges.” Certain provisions of the revised rule were subsequently invalidated by a federal court. The Board has appealed that decision. Those provisions that were *not* invalidated are now in effect.

The “new normal”?

Working with NLRB regional offices during the pandemic can be difficult. Effective and timely communication with regional personnel is often more challenging right now. Regional office personnel want to reduce all personal contact as much as possible, and the agency is fully on board with their desires. The agency has greatly expanded the opportunities for its employees to telework. Consequently, investigations and representation case hearings are being handled virtually, rather than in-person. The net result is that investigations and hearings are considerably more complex, more time-consuming, and more likely to result in voting under challenge.

Remedial orders and settlements will look the same, but they will likely be implemented differently. For example, reinstatement may not be immediate if the employee or employees involved would otherwise not presently be working. A remedial order only requires that they be placed in the same position that they would have been in had their employment not been terminated. In a similar vein, backpay should be “tolled” for periods during which the employee(s) would not have been working for COVID-related reasons. And, as noted above, some remedies like notice-posting or reading may be delayed.

Campaigns and elections are exceedingly more difficult from the employer’s perspective. Board-ordered elections are largely being accomplished by mail ballot, which typically favors unions. Even election counts are being held virtually. Moreover, in the representation context, the hope for some reprieve from the Obama Board’s “ambush election” rules was recently lost, at least temporarily, when a federal judge enjoined in part the Trump Board revisions to those rules. While the changes that remain provide some relief, the representation case campaign period remains truncated.

It is likely that procedures implemented by the NLRB during the COVID-19 crisis will continue at the very least for the short term. However, the recent resurgence of the coronavirus suggests the pandemic and the Board’s procedural responses will both be with us for a good deal longer. Moreover, there is a risk that this “new normal”—affidavits by teleconference, bargaining by videoconference, and balloting by mail—becomes permanent. Going forward, employers and their counsel may want to adjust to these new means of interacting with the NLRB and labor organizations, while at the same time marshalling evidence and argument for the agency to return to its traditional practices when the public health crisis abates. ■

Other NLRB developments

Circuit court decisions

5th Cir.: Blaming lack of raises on union unlawful. The U.S. Court of Appeals for the Fifth Circuit determined that substantial evidence supported a National Labor Relations Board (NLRB) decision that an employer violated the National Labor Relations Act (NLRA) by withholding raises from its employees during the pendency of a decertification petition and blaming the union for its action. The Fifth Circuit also sustained the Board finding that this, and other unfair labor practices, tainted a second decertification petition filed by employees. However, the appeals court additionally found that the NLRB failed to justify an affirmative bargaining order under circuit case law. Therefore, the appeals court vacated the Board's bargaining order issued after an employer

The employees narrowly failed to oust the union the first time, and almost unanimously voted to oust the union the second time.

unlawfully withdrew recognition from the union. The court also determined that the Board's issuance of a public-notice-reading order could not be justified under the facts of this case, and vacated that portion of the Board's order as well (*Denton County Electric Cooperative, Inc. dba CoServ Electric v. NLRB*, March 18, 2020).

The employer's unfair labor practices, which had created disaffection toward the union and resulted in its ouster, included failing to give raises and blaming the union for the lack of raises. Each time employees received a paycheck without the customary annual raise, they were reminded of the union's ineffectiveness. The withholding of those raises, and blaming the union for that withholding, influenced employee morale and support for the union.

To remedy the employer's unfair labor practices, the NLRB issued a cease-and-desist order, an affirmative bargaining order, and a public-notice-reading order. However, although the Board alleged that the order was proper under both its own standard and the standard established by the U.S. Court of Appeals for the District of Columbia Circuit, it failed to analyze the propriety of the order under Fifth Circuit precedent. Nor could it justify the public-notice-reading order

under the facts of this case. The employer was not a repeat violator, and it was unlikely that there was a "chill atmosphere of fear." The employees narrowly failed to oust the union the first time, and almost unanimously voted to oust the union the second time. The employer's conduct, both in type and frequency, was not as egregious as in cases where the Fifth Circuit has upheld a public-notice-reading order.

5th Cir.: Impasse declaration was not premature. The NLRB lacked substantial evidence to find that DISH Network Corp. prematurely declared an impasse in its negotiations with a union, the Fifth Circuit held. The Board's conclusion was based on an erroneous finding by the administrative law judge (ALJ) regarding a key factor in the union's counterproposal. The appeals court granted DISH Network's petition for review and denied, in part, the NLRB's cross-petition for enforcement (*DISH Network Corp. v. NLRB*, March 20, 2020).

DISH Network experimented with a new compensation system that lowered base wages but provided performance-based incentives. Employees disliked it so much that they unionized. However, when the new incentives proved to result in higher compensation, the employees favored the plan, while the company sought to abolish it. The parties conducted more than two dozen face-to-face bargaining sessions, with more scheduled to come, when DISH Network made a final proposal to eliminate the incentive program. The union responded with a counterproposal: current employees would keep the incentive program, but new hires would not be eligible. The employer rejected the counterproposal and stated that its proposal was its last, best, and final offer. The union continued to request a new meeting and refused to take the company's offer to its members for ratification. For various reasons, further attempts to negotiate floundered.

An ALJ determined that the employer unlawfully declared an impasse and that the union's counterproposal—which would have exempted new hires from the incentive plan—was a "white flag" of surrender. A Board majority affirmed. On review, the Fifth Circuit found the "white flag" conclusion

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was based on erroneous findings about the attrition rate of employees covered by the incentive program. The employer presented evidence regarding the declining attrition rates and gave the Board plenty of notice that the ALJ used the wrong data in reaching his conclusion. The employer's arguments to the Board, however, apparently "fell on deaf ears." The Fifth Circuit noted that the Board had an independent obligation to consider contradictory evidence in the record. Because it failed to do so, the Board lacked substantial evidence to support its finding.

6th Cir.: Union's inadvertent error no breach. The U.S. Court of Appeals for the Sixth Circuit found a Board ruling that inadvertent error can constitute an unfair labor practice under Section 8(b)(1)(A) of the NLRA exceeded the reach of the statute and had no reasonable basis in law. Relying on a 2018 decision, the Board concluded that "intent is not a required element of an 8(b)(1)(A) violation." However, the Sixth Circuit agreed with the union that the Board's 2018 ruling did not eliminate an intent requirement and does not support the proposition that inadvertence or negligent conduct violates Section 8(b)(1)(A). The appeals court refused to enforce that aspect of a Board order finding that a union restrained an employee in the exercise of his Section 7 rights by failing to promptly process his resignation and revocation of dues authorization. On the other hand, the union's conduct in delaying his refund for three months, together with a reproachful response after receiving an unfair labor practice charge, supported the Board's determination that the union acted in bad faith, in violation of its duty of fair representation, by intentionally ignoring the employee's resignation and revocation requests (*United Auto Workers Local 600 v. NLRB*, April 13, 2020).

9th Cir.: Casino slot technicians were not guards. Slot technicians employed by a casino were not guards within the meaning of Section 9(b)(3) of the NLRA, held the U.S. Court of Appeals for the Ninth Circuit, granting the NLRB's petition for enforcement of its order requiring the casino to bargain. The slot technicians enforced rules and policies against underage gaming and drinking and enforced anti-money laundering rules, but these responsibilities were common to all casino employees who worked on the gaming floor. Moreover, the technicians generally were not involved in investigating other employees and had no more obligation

than other employees to report coworker misconduct. In the court's view, the purpose of Section 9(b)(3), to minimize divided loyalty between guards and non-guard employees, simply was not an issue here (*International Union of Operating Engineers Local 501 v. NLRB*, February 7, 2020).

9th Cir.: Employer retracted inability to pay claim. An event technology services company effectively retracted its claim of inability to pay a union's wage and benefit proposals during negotiations for an initial collective bargaining agreement (CBA) for riggers and technicians; rather, substantial evidence supported the Board's findings that the union did not sufficiently test the employer's willingness to bargain prior to filing bad-faith bargaining charges, ruled the Ninth Circuit. Retraction questions aside, an important takeaway is the appeals court's reminder that an employer is entitled to maintain a hard bargaining position while bargaining in good faith (*International Alliance of Theatrical Stage Employees, Local 15 v. NLRB*, April 29, 2020).

In its first contract proposal, the union sought wages of \$33 to \$45 per hour—a 73- to 120-percent increase, depending on job classification. The union also sought provisions on overtime pay, benefits contributions, and other terms and conditions. The employer made a counterproposal of \$15 to \$30 per hour, and proposed that employees "maintain their current rate of pay and not be subject to a reduction in pay as a result of this Agreement," to pay overtime as required by law, and provide the same benefits as those provided to unrepresented employees.

At the next bargaining session, the employer's attorney said that agreeing to the union's proposed wage increase would put the company "underwater." The union reduced its requested wage rates by \$2 per hour and adjusted its overtime and discipline proposals. It also requested financial information from the employer that would support its dire predictions regarding the impact of the union's wage proposal. But the employer's attorney rebuffed the requests, stating that "no employer in this business would pay such a wage to its hourly workforce that was so grossly outside of its business model and if it did so, it would be suicide for the company. This is not an inability to pay for lack of revenue. It's a refusal to pay an hourly rate that would be detrimental to the business."

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When an employer justifies its bargaining position by claiming an inability to pay the union's demands, the union may "request financial documents sufficient to substantiate the employer's position," the court noted. However, an employer asserting only an *unwillingness* to pay does not have a duty to produce information about its financial viability, and an employer may retract an inability-to-pay claim and avoid having to produce financial information. A retraction is effective if the employer makes it "unmistakably clear to a union that it has abandoned its plea of poverty."

The "contract coverage" standard examines the "plain language" of the agreement to determine whether the employer's act was "within the compass or scope of contractual language granting the employer the right to act unilaterally."

At issue on appeal was whether the employer effectively retracted its claim of inability to pay the union's wage and benefit proposals, thereby limiting its obligation to produce financial documents to the union. Here, the court concluded that the employer's attorney clarified the employer's position that it was not *unable* to pay the union's proposed rates due to lack of revenue; rather, it expressly communicated a *refusal* to pay, based on its judgment as to business strategy. Therefore, the employer clearly disavowed its claim of poverty. The court rejected the union's assertion that the retraction was not effective because the employer had maintained the same bargaining posture after its purported retraction.

NLRB rulings**"Contract coverage" cases**

In *MV Transportation, Inc.*, the Board abandoned the "clear and unmistakable waiver" standard for determining whether a union had waived its right to bargain over particular terms or conditions of employment. The Board, instead, adopted the "contract coverage" standard pursuant to which it would examine "the plain language of the collective-bargaining agreement to determine whether [the] action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally." The Board held it would apply the contract coverage standard retroactively. In several recent cases, the Board applied the contract coverage standard to hold that employers had the right to act unilaterally.

No duty to bargain over changes to attendance

policy. An employer did not violate Section 8(a)(5) of the NLRA when it unilaterally changed its attendance policy. Under the CBA's management rights clause, the employer, after providing required notice and time to respond to the union, could unilaterally "adopt reasonable rules and policies." Pursuant to the CBA, the employer changed the policy despite the union's demand to bargain over specific terms of the new policy. The Board, applying the contract coverage standard, held that the employer's change to the attendance policy was covered by the management rights

clause. It was not necessary for the management rights provision to specifically reference attendance in order to waive the union's right to bargain over the new policy. Under the new standard, the attendance policy

fell within the definition of "reasonable rules and policies" in the management rights provision; thus, the employer could unilaterally change the policy (*Huber Specialty Hydrates, LLC*, February 25, 2020).

Applying the prior standard, an ALJ held that because the management-rights provision did not explicitly mention attendance, "it was insufficiently specific to clearly and unmistakably waive the Union's right to bargain over changes to the attendance policy." In reversing, the Board observed that the clear and unmistakable standard typically results in decisions that abrogate "a lawful agreement merely because one of the bargaining parties is unhappy with a term of the contract and would prefer to negotiate a better arrangement."

Unilateral change to six-day workweek lawful.

An employer did not violate the NLRA by unilaterally implementing a six-day workweek for service and installation technicians, ruled the NLRB. However, the employer did violate Section 8(a)(5) by circumventing the union and dealing directly with an employee when it granted him an exemption from the mandatory six-day workweek (*ADT, LLC dba ADT Security Services*, February 27, 2020).

The general counsel had alleged that the employer unlawfully refused to bargain over the six-day workweek. However, the Board found that the employer's implementation of a six-day workweek was within the "compass or scope of language" in

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the CBA granting the employer “the right to take that action unilaterally.” The CBA vested in the employer the exclusive right “to determine the reasonable *amount* . . . of work needed.” [Emphasis and ellipsis in original.] Both of these provisions, when considered together, authorized the employer “to determine the amount of work it needed the technicians to perform and to require its technicians to work in excess of 40 hours a week or on scheduled days off to accomplish that work.” Accordingly, the Board found that the language “covered” the employer’s decision to implement a six-day workweek, and that the employer did not violate the NLRA by doing so.

Contract coverage standard didn’t apply. In another recent case addressing an issue of first impression, the NLRB ruled that its contract coverage standard does not apply to unilateral changes made after a collective bargaining agreement has expired, where the expired CBA does not provide that an employer retains the right of unilateral action post-expiration. Accordingly, an expired CBA without such a provision was not a defense to an employer’s unilateral changes to its schedule-posting practices and background check requirements (*Nexstar Broadcasting, Inc. dba KOIN-TV*, April 21, 2020).

The union in this case represented employees at a television station in Portland, Oregon. After the parties’ CBA expired, the employer implemented a new requirement that employees complete an annual driving history check, and it also changed its practice of posting employee work schedules four months in advance by reducing the notice to only two weeks. The employer did not provide the union with notice or an opportunity to bargain over either change.

Since the right to act unilaterally arose from the management rights clause, and such clauses do not survive a contract’s expiration, the employer was not privileged to make post-expiration unilateral changes. Unless a CBA contains language expressly providing that the relevant provision survives expiration an employer must maintain the status quo and cannot act unilaterally.

Work rules pass Boeing test

The new standard adopted by the NLRB in *Boeing Co.* has proven to offer a more commonsense approach to evaluating whether employer policies and work rules unduly interfere with employees’ rights under Section 7 of the NLRA. In

recent decisions, the Board has found that employers’ interest in promulgating work rules tends to outweigh the comparatively minimal intrusion upon protected rights.

Cell phone, email policies upheld. An employer did not violate the NLRA by maintaining a policy that prohibited the possession of a cell phone inside its trucks. Citing the safety hazards of using a cell phone while driving, the employer prohibited the possession and use of cell phones in the employer’s commercial vehicles. Employees were required to sign a form acknowledging the employer’s “zero tolerance” policy for cell phones in its vehicles. The Board found the policy passed muster under *Boeing*. The policy did not restrict employees’ right to communicate with each other during nonwork time, and nothing in the cell phone policy or acknowledgement form would indicate to employees that they were prohibited from discussing, taking photos, or recording conditions of employment while away from the facility (*Argos USA LLC*, February 5, 2020).

The Board also found that an employer’s electronic communications policy was lawful. The Board noted that in *Caesars Entertainment dba Rio All-Suites Hotel and Casino*, it had reinstated the principle that employees have no statutory right to use employer email systems for Section 7 purposes in a typical workplace. The Board further noted that the employees covered by the rule were able to exercise traditional methods of communication, including oral solicitation and literature distribution, that they had access to personal email and social media, and there was no allegation that the employer applied the policy in a discriminatory manner. Accordingly, the policy was a permissible restriction on the employees’ use of the employer’s email system for nonwork purposes.

Lastly, the Board also upheld a policy prohibiting the disclosure of confidential information about the company, including company earnings and employee information. The provision did not refer to employees’ wages, contact information, or other terms and conditions of employment, but merely business information. Therefore, an objectively reasonable employee would not interpret the agreement as interfering with his or her Section 7 rights.

Confidentiality rule was lawful. A confidentiality policy that prohibited employees from talking about an investigation while

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pending and also prohibited post-investigation discussions that were a “distraction” from work did not violate the NLRA. The policy fell into *Boeing* Category 1(b) since it was limited to open investigations. The confidentiality instruction was expressly limited to “the time of the investigation,” and thus passed muster (*Securitas Security Services USA*, April 14, 2020).

The pertinent question is not whether the employer could have drafted a narrower rule, but whether the potential overbreadth is outweighed by the employer's business justification for the rule.

The complainant was interviewed pursuant to an internal race discrimination complaint against a supervisor. She was told not to discuss the investigation or the incident with anyone. The employee asked the HR manager to clarify the scope of the instruction, and the HR manager explained that all employees “are barred from talking during the time of the investigation in any circumstance. After the investigation is concluded—if anyone starts conversing about it and those conversations become a distraction to the workplace anyone involved in conversing could face disciplinary action in accordance with the handbook.”

In *Apogee Retail LLC dba Unique Thrift Store*, the Board held that “investigative confidentiality rules,” which by their terms apply only for the duration of any investigation, are categorically lawful under *Boeing*. Applying *Apogee*, the Board found the employer's investigative confidentiality instruction did not violate the Act. It held that investigative confidentiality rules limited to open investigations fall into *Boeing* Category 1(b).

Restricting cell phones was lawful. Companywide and local work rules that restrict employees from having cell phones in a beverage manufacturing facility's work areas were lawful. The prohibitions were limited to the manufacturing floor and warehouse and did not apply to nonworking areas. Further, the broad prohibition of personal items in work areas was a “reasonable, lawful effort to ensure the integrity” of the production process to satisfy U.S. Food and Drug Administration (FDA) requirements for food-production facilities, and to reduce the risks of product contamination, slowed response times, and on-the-job injuries, the NLRB held (*Cott Beverages Inc.*, May 20, 2020).

The policy restricted employees' ability to use their phones not only to make audio or video recordings, but also to communicate with each other about workplace issues or take photographs of working conditions. As such, it potentially infringed on employees' Section 7 rights. The ALJ concluded that the rule was unlawful because it could have been drafted more narrowly. However, the Board explained, the pertinent question is not whether the employer could have drafted a narrower rule, but whether the potential overbreadth is outweighed by the employer's business justification for the rule. In this case, the rule did not bar employees from “retrieving their phones from their lockers and using them on their own time when away from their workstations.” Therefore, the employer's legitimate business interests outweighed the “relatively slight” risk that the rule would interfere with employees' right to engage in protected activity.

Code of conduct provisions were lawful. An employer's legitimate business justifications for the government investigations and information protection policy in its business code of conduct outweighed “the slight risk that employees would misread the rule as restricting their ability to provide information to the Board or other law enforcement agencies on behalf of themselves or their coworkers,” the NLRB concluded. The employer, a third-party hotel management company that operates approximately 400 hotels throughout the country, “established a compelling interest in safeguarding the information of its guests, associates, and other third parties and in protecting itself from liability” with respect to confidential information collected by it and stored in its databases (*Interstate Management Co., LLC*, May 20, 2020).

The government investigations policy stated that employees may not respond to requests from the police, Internal Revenue Service, and other regulatory authorities without getting clearance from the company's legal department. Nothing in the policy would be interpreted to mean that employees must refer NLRB investigative inquiries to the company legal department, the Board said. Moreover, the policy is intended to safeguard the information of its guests, associates, and other third parties and to protect itself from liability were the information to be improperly released to

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such authorities without vetting. This compelling interest “outweigh[ed] the slight risk that employees would misread the rule as restricting their ability to provide information to the Board or other law enforcement agencies on behalf of themselves or their coworkers.”

The employer’s information protection policy prohibited disclosure of confidential information including, but not limited to, “personal information ... that can be associated or traced to any individual, such as an individual’s name, address, telephone number, e-mail address, bank and credit card information, social security number, etc.,” including customer and associate information, collected and stored in the employer’s databases. “Objectively reasonable employees would understand” the policy as covering only information stored in the employer’s records, “and that the policy does not restrict their ability to share generally known contact information with each other or with a third party, such as a union.” Even assuming there is risk employees may construe the policy to apply more broadly, any such potential interference with Section 7 rights was slight, and was outweighed by the employer’s legitimate business justifications for the policy.

Cap policy didn’t prohibit union insignia. A policy that bans baseball caps except for those with the company logo did not unlawfully prohibit employees from wearing caps bearing union insignia, ruled the NLRB in a case on remand from the U.S. Court of Appeals for the District of Columbia Circuit. Although not expressly stated in the policy, “unrebutted employee testimony established ... that buttons and pins [were] prohibited on the production floor as a safety hazard.” Aside from this safety restriction, the rule itself did not prohibit employees from wearing company caps bearing union insignia (*World Color (USA) Corp.*, June 12, 2020).

Employee monitoring, property searches OK. An employer work rule providing that the employer may search employees’ personal property, including employee vehicles, is lawful under the Act, the NLRB held. The Board applied the test set forth in its *Boeing Co.* decision—which was issued shortly after an ALJ invalidated the work rules in question under the previous standard, but which applies retroactively—to find that any “minimal impact” on employees’ protected rights was outweighed by the employer’s interest in protecting company assets from theft,

among other purposes. The Board also upheld a code of conduct provision that reserves the company’s right to monitor employees’ activity on company-owned computers, networks, and other devices, with or without notice. The Board had already held in *Purple Communications* that an employer “lawfully may monitor its employees’ company-issued computers and devices for legitimate management reasons,” the Board reasoned, so “it does not violate the Act to maintain a policy informing employees that their company computers and devices are subject to employer monitoring” (*Verizon Wireless*, June 24, 2020).

Board lacks jurisdiction over religious schools

The religious mission of Duquesne University of the Holy Spirit, a Catholic school, placed it beyond the jurisdiction of the NLRB, ruled a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit. The appeals court held that the Board’s 2014 ruling in *Pacific Lutheran University*, which the Board followed in the *Duquesne University* case, ran afoul of the D.C. Circuit’s earlier decisions in *University of Great Falls v. NLRB* and *Carroll College v. NLRB*. Under the bright-line test announced by the appeals court in *Great Falls*, the Board cannot undertake an examination of the role played by particular adjunct faculty in the university’s religious education to determine its jurisdiction. Consequently, the appeals court refused to enforce a Board order compelling the university to bargain with a union representing adjunct faculty (*Duquesne University of the Holy Spirit v. NLRB*, January 28, 2020, Griffith, T.).

In *Pacific Lutheran University*, the Obama Board fashioned a new test to determine its jurisdiction over a religious school. Under this test, a religious educational institution would be subject to the Board’s jurisdiction absent an initial showing that the school “holds itself out as providing a religious educational environment.” Beyond that, however, the facts needed to demonstrate that the school held out *the specific faculty members* a union sought to represent as performing a specific role in creating or maintaining the institution’s religious educational environment. Applying *Pacific Lutheran University* in this case, a divided NLRB concluded that adjunct faculty, outside of those in the theology department, were not held out “as performing a specific role in creating or maintaining” Duquesne University’s religious environment.

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Accordingly, it held the Board had jurisdiction. The university sought review, arguing that the Board lacked jurisdiction and that its order violated the Religious Freedom Restoration Act.

The appeals court agreed. Under the court's bright-line *Great Falls University* test, in determining whether an institution is covered under the NLRA, "the Board should consider whether the institution: (a) holds itself out to the public as a religious institution; (b) is non-profit; and (c) is religiously affiliated." This three-prong test was designed to allow the Board to determine whether it has jurisdiction without delving into religious doctrine or motive. The Board may not "question[] the sincerity of the school's public representations about the significance of its religious affiliation' or conduct a 'skeptical inquiry' into whether an affiliated church exerts influence over the school," the appeals court said. The "substantial religious character" test involved the same "intrusive inquiry" and same "exact kind of questioning into religious matters" that the Supreme Court of the United States sought to avoid in its decision in *NLRB v. Catholic Bishop of Chicago*. [Emphasis in original.]

The NLRB will strike down arbitration agreements that, "when reasonably interpreted," would be construed as interfering with an employee's right to access the Board and its processes.

The Board in *Pacific Lutheran University* ran afoul of court precedent by exercising jurisdiction in cases beyond the agency's reach. If the *Great Falls University* bright-line test is satisfied, the school is "altogether exempt from the NLRA," the appeals court said. "The Board may not 'dig deeper' by examining whether faculty members play religious or non-religious roles, for '[d]oing so would only risk infringing upon the guarantees of the First Amendment's Religion Clauses.'"

Board won't exercise jurisdiction. In a June 10, 2020, decision, the NLRB dismissed an unfair labor practice complaint against a church-affiliated university after determining that it lacked jurisdiction over a self-identified religious institution of higher learning. In so ruling, the Board overruled *Pacific Lutheran University* and adopted the *Great Falls University* test. In *NLRB v. Catholic Bishop of Chicago*, the U.S. Supreme Court held that the exercise of

Board jurisdiction over religious schools in matters involving faculty members will inevitably involve inquiry into the tenets of these institutions. The D.C. Circuit's *Great Falls* test avoids that risk; *Pacific Lutheran* does not, the Board concluded. Applying *Great Falls* will remove any subjective judgments about the nature of the institution's activities or those of its faculty members, and limit the Board to making jurisdictional determinations based on objective evidence (*Bethany College*, June 10, 2020).

Applying the *Great Falls* test to the case before it, the Board found it could not exercise jurisdiction over the college, and dismissed the faculty members' unfair labor practice allegations.

Board continues to scrutinize arbitration provisions

The NLRB continues to scrutinize employer arbitration agreements on a case-by-case basis under its *Boeing Co.* framework, striking down those which, "when reasonably interpreted," would be construed as interfering with an employee's right to access the Board and its processes.

Savings clause. A recent application of the Board's 2019 decision in *Briad Wenco, LLC dba Wendy's Restaurant*, again

underscored the role of a "savings" clause in those instances where the arbitration agreement might otherwise be construed as limiting Board access.

In *Anderson Enterprises, Inc. dba Royal Motor Sales* (May 8, 2020), the Board addressed the lawfulness of such a policy when it included "savings" language informing employees that they were "free to file charges with the Board." It held that because the prominent savings clause specifically and affirmatively stated that employees may bring claims and charges before the Board, the policy could not be "reasonably understood to potentially interfere with employees' access to the Board and its processes." The Board acknowledged that its holding was inconsistent with *Ralph's Grocery Co.* However, it noted that the decision in *Ralph's Grocery* was predicated on the test in *Lutheran Heritage Village-Livonia*—a case invalidated by *Boeing Co.*

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The Board overruled *Ralph's Grocery* and its “false premise” that because the arbitration clause was written broadly, it would cause employees to construe the savings clause as being meaningless.

The Board also has found the arbitration agreements were lawful in these cases:

- Bloomingdale’s dispute resolution policy requiring all employment disputes to be settled exclusively by final and binding individual arbitration. The policy, however, also included “an unconditional and explicit exclusion for NLRA claims” that the NLRB viewed as “even more prominent than the savings clause in *Briad Wenco*” (*Bloomingdale’s, Inc.*, January 21, 2020).
- A nursing care facility dispute resolution program that broadly required binding arbitration of employment-related disputes, but contained a savings clause specifically providing that employees did not waive their rights under the NLRA and that employees retained the right to pursue disputes before federal administrative agencies (*Alexandria Care Center, LLC*, June 2, 2020).
- An arbitration agreement Uber software engineers were required to sign, which, like the agreement found lawful in *Briad Wenco*, included savings language that “specifically and affirmatively” provided that employees were free to bring charges before the NLRB, and that an employee will not be disciplined or face retaliation “as a result of his or her exercising his or her rights under Section 7 of the National Labor Relations Act.” The agreement, however, contained additional language which provided that “claims may be brought before and remedies awarded by an administrative agency if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate.” The general counsel thought this language muddled the matter and made the provision ambiguous, and, thus, unlawful. The Board, however, concluded that any ambiguity was resolved by the very next sentence, which explicitly identified NLRB claims as the type of administrative charges that employees were free to pursue (*Uber Technologies, Inc.*, June 11, 2020).
- Similarly, a skilled nursing facility’s arbitration agreement was lawful because it contained a savings clause providing that nothing in the policy was intended to preclude an employee from filing a charge with the NLRB

or any federal or state agency seeking administrative resolution. The savings clause appeared at the very end of the policy, but the entire policy was only three pages long. Also, the clause was set apart from other provisions in a separate paragraph, and so it would not be easily overlooked (*San Rafael Healthcare and Wellness, LLC*, June 12, 2020).

- **Invalid provisions.** In its 2019 decision in *Prime Healthcare Paradise Valley, LLC*, the Board held that “an arbitration agreement that explicitly prohibits the filing of claims with the Board, or more generally, with administrative agencies must be found unlawful,” since it falls within “Category 3” under the *Boeing* test. However, when an arbitration agreement does not explicitly prohibit the filing of claims with the Board, but rather is facially neutral, the *Boeing* “reasonably interpreted” analysis applies.

Applying *Boeing* in these cases, the NLRB invalidated the following arbitration agreements:

- An arbitration agreement that made arbitration the exclusive forum for covered claims arising out of, relating to, or associated with the employment relationship was unlawful. The provision was invalid even though it did not explicitly prohibit charge filing and stated that “nothing in this Agreement shall be construed to require arbitration of any claim if an agreement to arbitrate such claim is prohibited by law.” The Board, however, found this exclusion clause was too vague to salvage the provision. In its previous ruling in *Everglades College, Inc. dba Keiser University*, the Board had held that while an objectively reasonable employee would understand that the arbitration agreement does not apply where “prohibited by law,” that language leaves the reasonable employee in the dark as to *what* is “prohibited by law” because “the language remains impermissibly vague and ambiguous as to whether it applies to claims that the NLRA has been violated.” Member Emanuel, who dissented in *Everglades College*, did so here as well; he would find the exclusion clause sufficient for the same reasons in each case (*Countrywide Financial Corp.*, January 24, 2020).
- An agreement that required employees to arbitrate civil claims related in any way to their employment, including but not limited to discrimination or harassment, was unlawful. Claims for workers’ compensation or

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unemployment compensation benefits were not covered; nor were Employee Retirement Income Security Act (ERISA) claims or disputes governed by a collective bargaining agreement. The agreement did not contain “savings clause” language. However, the employer sent notices to employees of a “Change” to the agreement to include: “This Agreement does not restrict employee rights to file charges with the NLRB.” However, the Board held that the notices did not change the agreement, since the agreement expressly provided that it “may be modified or amended only by a writing signed by [the employee] and an officer of [the company],” and the notices were not such a writing (*VW Credit, Inc.*, March 12, 2020).

- An employer’s mandatory arbitration agreement stating that “arbitration is the exclusive remedy for all claims and disputes; and with respect to such claims and disputes, no other action may be brought in court or any other forum (except actions to compel arbitration hereunder or any claim within the jurisdiction of the small claims)” was unlawful. The agreement “significantly impairs employees’ right to access the Board and its processes ... and cannot be legitimately justified,” the Board said (*Dynamic Nursing Services, Inc.*, March 27, 2020).
- An expansive arbitration agreement that covered wrongful termination, breach of contract, breach of any duty owed by the company, wages or other compensation, benefits, reimbursement of expenses, discrimination or harassment, including claims under Title VII of the Civil Rights Act of 1964, the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), ERISA, the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), the Fair Employment and Housing Act (FEHA), California Labor Code, or State of California Department of Industrial Relations Industrial Welfare Commission Wage Orders, among other claims, was unlawful. Here, as in *Prime Healthcare*, it did not expressly mention the Board or the filing of charges pursuant to the NLRA. However, given its expansive coverage, reasonably read, the Board found it would be perceived by employees as making arbitration the exclusive forum for the resolution of statutory claims, including those arising under the NLRA. Its exclusions clause, which states that under the policy “[c]laims does not mean any dispute if arbitration of the dispute is prohibited by law,” was insufficient to apprise employees that they may access the Board (*Aryzta LLC*, April 13, 2020).

- Applying *Prime Healthcare*, the Board held an arbitration agreement that required binding arbitration of “any dispute or controversy ... arising from or in any way related to my employment with the Company,” but specifically excluded disputes over workers’ compensation and unemployment benefits disputes, made arbitration the “exclusive forum” [emphasis in original] for resolving all disputes—including those brought under the NLRA—and was therefore unlawful (*IIG Wireless, Inc.*, April 30, 2020).
- An arbitration agreement required employees to arbitrate any legal “claim” related to their employment, and defined covered claims as those arising under federal, state, or local law. The agreement also contained language excluding from the definition of covered claims “any dispute that cannot be arbitrated as a matter of law.” The Board concluded that this exclusion clause was “too vague to salvage the arbitration agreement,” and “would leave a reasonable employee in the dark as to *what* exactly can and cannot be arbitrated ‘as a matter of law’” [Emphasis in original] (*Hoot Winc, LLC*, May 6, 2020).

Confidentiality provision is lawful. An arbitration agreement that requires proceedings be conducted on a confidential basis and precludes the disclosure of evidence, the final award, and/or the decision, does not violate the NLRA, the Board held in a decision on remand. When reasonably interpreted, the provision does not forbid employee discussions of their terms and conditions of employment but “merely prohibits disclosure of ‘evidence or awards obtained in the arbitration proceeding itself,’” which the employer “asserts would include confidential business records or other information protected by the right of privacy.” The disclosure provision does not bar the disclosure of information a party possesses independent of the arbitral proceeding; nor does it “restrict employees from discussing their terms and conditions of employment or workplace issues generally.” The Board held that “when reasonably read, the provision does not prohibit employees from disclosing the existence of the arbitration, their claims against the employer, the legal issues involved, or the events, facts, and circumstances that gave rise to the arbitration proceeding” (*California Commerce Club, Inc.*, June 19, 2020).

The confidentiality provision prevents an employee from disclosing to coworkers that he prevailed on his claim, even if the claim involved a workplace issue common to

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other employees. However, “the fact that a work rule may restrict some activity that Section 7 protects does not end the analysis of whether it violates the Act,” the Board said, noting that pursuant to *Boeing*, the Board must balance the impact of the challenged rule on Section 7 rights against any legitimate employer interests served by the rule.

The employer argued that “protecting parties’ agreement to arbitrate disputes on a confidential basis saves resources, protects all parties from reputational injury, and facilitates the cooperative exchange of discovery.” However, the Board assumed without deciding that these interests did “not outweigh the impact of the [employer’s] confidentiality provision on the exercise of Section 7 rights,” and if

The fact that a work rule may restrict some activity that Section 7 protects does not end the analysis of whether it violates the Act.

maintained as an employer-promulgated work rule, it would not pass muster on the Act. However, because it was not an employer-promulgated work rule but rather was part of an arbitration agreement, the Board balanced the respective interests by looking to whether the provision was shielded by the Federal Arbitration Act (FAA).

The Board drew “a line between confidentiality provisions that set forth ‘rules under which ... arbitration will be conducted,’ and confidentiality provisions that interfere with what employees ‘just do for themselves in the course of exercising their right to free association in the workplace’—i.e., discuss workplace matters of mutual concern, whether or not they are also the subject of an arbitral proceeding. On one side of the line, the FAA prevails; on the other, the NLRA. We find that the confidentiality provision at issue here falls on the side of the line governed by the FAA.” The Board overruled prior NLRB decisions to the extent they are inconsistent.

However, while an employer is entitled to maintain an arbitration agreement that includes a confidentiality provision, “it would not be entitled to discharge or discipline an employee for a Section 7-protected disclosure of information even if the disclosure violated that provision,” the Board said.

Additional NLRB rulings

Airport operations covered by Railway Labor Act. In agreement with the National Mediation Board (NMB), the NLRB held that since air carriers controlled the operations of a company that operated and maintained the baggage conveyor systems and passenger boarding bridges at Chicago’s O’Hare International Airport, the company was covered by the Railway Labor Act and subject to NMB, not NLRA, jurisdiction. In finding the NMB’s advisory opinion was supported by the record evidence, the NLRB agreed that three factors in the NMB’s traditional six-factor jurisdictional test supported a finding of carrier control (*Oxford Electronics, Inc. dba Oxford Airport Technical Services*, January 6, 2020).

Based in part on recent NMB decisions declining jurisdiction, the NLRB had initially asserted control over the underlying claims. However, during the

pendency of the case, the D.C. Circuit issued a decision in an unrelated matter that criticized the NMB for departing from its traditional jurisdictional analysis and criticized the NLRB for simply following the NMB’s lead. As a result, the NLRB sought an advisory opinion from the NMB on the jurisdictional issue. The NMB took the occasion to overrule the cases criticized by the D.C. Circuit, and to reinstate its traditional jurisdictional analysis. Having done so, the NMB concluded it had proper jurisdiction in light of the air carrier’s degree of control. The NLRB subsequently declined jurisdiction, holding that the NMB decision was supported by the record evidence and therefore entitled to deference.

No duty to furnish service contract. A successor employer lawfully refused to furnish a union representing its security guards with a copy of its contract to provide security services to a waste treatment company, finding that the union failed to provide “objective evidence” of the contract’s relevance. The union’s speculation that the contract might include provisions that affected unit members’ terms and conditions of employment was insufficient to support “a reasonable belief that the contract actually included such provisions” (*G4S Secure Solutions (USA), Inc.*, January 9, 2020).

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Employer unlawfully merged bargaining units. As a *Burns* successor to a steel company with a unionized workforce of operating engineers, laborers, and drivers, an employer that was awarded a contract for work at the steel mill had a duty to recognize and bargain with all of its predecessor's preexisting unions. The predecessor employer had recognized three different unions, each of which represented a separate unit of employees. After being awarded the contract, the successor employer sought to merge the three units and bargain solely with the union that represented operating engineers. The Board, however, determined that the employer violated Section 8(a)(2) by recognizing the union representing operating engineers at the expense of its rivals and violated Section 8(a)(3) by "maintaining and enforcing the union security and dues-checkoff provisions" in the recognized union's CBA. The

Board also held that the operating engineers union violated Section 8(b)(1)(A) and Section 8(b)(2) by accepting the successor company's recognition as the exclusive bargaining representative of the laborers unit. However, the Board rejected an ALJ's finding that the employer forfeited its right to set the initial terms and conditions of employment contracts negotiated by the predecessor with the laborers unit (*Stein, Inc. (Laborers)* and *Stein, Inc. (Truck Drivers)*, January 28, 2020).

Dues checkoff ends when CBA expires. A health care system comprising two employers did not violate the Act by ceasing to deduct union dues following contract expiration. The Board noted that in its recent decision in *Valley Hospital Medical Center, Inc.*, it had returned to the longstanding rule that an employer's statutory obligation to check off union

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Union lacks input in employee discipline pre-contract

In a significant reversal of Obama-era decisional law, the NLRB found that an employer lawfully disciplined four employees without first providing a union with notice and an opportunity to bargain before imposing discipline. In so ruling, the Board overruled its 2016 decision in *Total Security Management Illinois 1, LLC*. *Total Security* applied to employers that had been unionized but had not finalized an initial collective bargaining agreement. In those circumstances, it required that the employer provide the union with notice and opportunity to bargain about the discretionary elements of an existing disciplinary policy before it imposed serious discipline on any union-represented employees. The Board, however, has now held that *Total Security Management* cannot be reconciled with precedent finding that there is no statutory pre-discipline bargaining obligation (*800 River Road Operating Company, LLC dba Care One at New Milford*, June 23, 2020).

The majority in *Total Security* was "fundamentally mistaken" in its interpretation of the Supreme Court of the United States' *NLRB v. Katz* "unilateral-change doctrine regarding when a material change has occurred in employees' terms and conditions of employment," the NLRB said. "[T]he *Total*

Security majority looked only at whether the application of an employer's preexisting disciplinary policy or practice to discipline an individual employee included the use of *any* discretion and holding that the exercise of that discretion always means a 'change' occurred within the meaning of *Katz* requiring advance notice and bargaining," the NLRB determined [emphasis in original]. However, the "correct analysis under *Katz* must focus on whether an employer's individual disciplinary action is similar in kind and degree to what the employer did in the past within the structure of established policy or practice." Thus, the Board overruled *Total Security* and "return[ed] to long-standing law establishing that, upon commencement of a collective-bargaining relationship employers do not have an obligation under Section 8(d) and 8(a)(5) of the Act to bargain prior to disciplining unit employees in accordance with an established disciplinary policy or practice."

"*800 River Road Operating Co.* is perhaps the most significant of recent NLRB cases," notes Brian E. Hayes, Co-Leader of the Ogletree Deakins Traditional Labor Relations Practice Group. "The decision is particularly important in that it eliminates a serious problem for newly organized employers."

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dues ends when the CBA containing the provision expires. Accordingly, the employers had no obligation to continue dues checkoff after the CBAs with a union that had three bargaining units expired (*Valley Health System, LLC dba Desert Springs Hospital and Medical Center*, January 30, 2020).

However, the Board also held that the employers later violated Section 8(a)(5) by withdrawing recognition from the union in reliance in part on unauthenticated email submissions. Such submissions were not sufficiently reliable evidence on which to predicate withdrawal. The employers also violated Section 8(a)(5) by granting wage increases to employees in all three bargaining units immediately after withdrawing recognition.

New “community of interest” standard applies retroactively. In a technical refusal-to-bargain case aimed at testing the validity of a union’s certification, the NLRB remanded the matter to a regional director in light of an intervening change in the “community of interest” standard applicable to the bargaining unit determination (*Green Jobworks, LLC*, February 4, 2020).

In *PCC Structurals, Inc.*, the Board overruled *Specialty Healthcare & Rehabilitation Center of Mobile* and reinstated the traditional community-of-interest standard for determining an appropriate bargaining unit in union representation cases. In *Green Jobworks*, the Board stated that its “usual practice is to apply new policies and standards retroactively ‘to all pending cases in whatever stage,’” and therefore found “that retroactive application of *PCC Structurals* would not work a manifest injustice” in the present case. The union argued “that it relied on *Specialty Healthcare* in selecting the scope of the petitioned-for bargaining unit; however, the Board implicitly rejected the view that any such reliance would preclude retroactivity in *PCC Structurals*, where the Board remanded the case to the [r]egional [d]irector for further proceedings applying the standard” it had reestablished. It did so even though, as here, the union also presumably relied on *Specialty Healthcare*.

Unlawful cutback in merit wage increases. An employer violated the NLRA by unilaterally reducing employees’ annual merit wage increases because they selected a union, the NLRB found. The wage increase program was an

established term of employment at the time of the union’s certification; therefore, the employer could not change it once the employees voted for the union. The threshold issue was whether the receipt of annual merit wage increases was an established term and condition of employment. The Board wrote that it “has long held that ‘a merit wage program will be found to be a term and condition of employment when it is an ‘established practice ... regularly expected by the employees.’” (*Atlanticare Management LLC dba Putnam Ridge Nursing Home*, February 11, 2020).

In determining whether a practice is “established,” the Board considers such factors as “the number of years that the program has been in place, the regularity with which raises are granted, and whether the employer used fixed criteria to determine whether an employee will receive a raise, and the amount thereof.” The employer argued that it did not have an established practice of providing annual merit wage increases pursuant to an established formula, citing two years in which it provided general wage adjustments instead of merit increases. The Board found this argument unpersuasive since in a memorandum announcing the reason for general wage adjustments, the employer acknowledged that it had instituted a policy to review all of its employees on an annual basis and to provide merit increases. The Board determined that “nothing in the ... memo suggested that those employees would not receive merit wage increases in the future. ... Instead, the memo affirmed that the [employer] had adopted an annual merit wage increase program.” Accordingly, the employer “was not privileged to unilaterally change its merit wage program once the unit employees selected the [u]nion as their representative.”

Worker wrongly suspended from hiring hall. A union unlawfully suspended a nonmember from its hiring hall and prevented him from returning to work until he paid disciplinary fines that it levied against him after he assaulted a coworker outside the union office, the NLRB held. The complainant did not pay, and he was suspended from the referral list, at which point he filed an unfair labor practice charge. The Board found the union’s actions were “patently arbitrary” and in violation of its obligation to operate its exclusive hiring hall “in a fair and impartial manner” to union members and nonmembers alike (*International Association of Theatrical Stage Employees, Local 720*, February 28, 2020).

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When a union operates an exclusive hiring hall, it owes a duty of fair representation to all applicants using the hall, whether members or nonmembers. In this case, in assessing the fines, the union did not conform to its own written rules and procedures. Rather, it increased the fine from \$2,000 to \$4,000 without explanation and without regard to its written disciplinary policy. Next, it offered to rescind the fine in exchange for withdrawing the Board charges, then claimed, post hoc, that it had never planned on enforcing the fine anyway. The union interfered with the complainant's

A health care employer unlawfully discharged an employee who wrote to a local newspaper expressing support for a union's efforts to improve the staffing levels for hospital nurses and discussing the impact of staffing shortages on her and her coworkers.

employment status by its application of the rule. The NLRB determined that the union's conduct was arbitrary and discriminatory since the complainant was a nonmember, and therefore found that the general counsel established a rebuttable presumption of discrimination. To rebut this presumption, the union had to show that its conduct did not violate its duty of fair representation and was necessary for the effective performance of its representational function. The union failed to make this showing.

Drivers are statutory employees. Drivers who leased trucks from a container shipping company were employees under the NLRA Section 2(3), not independent contractors, under the traditional common-law test as restated in *SuperShuttle DFW, Inc.* The drivers had little entrepreneurial opportunity; although they could choose which days to work and what time to start, the company assigned them to either the day or night shift based on the availability of trucks for lease, and they had no discretion to decide to work beyond the end of their shift. The company effectively set the drivers' rate of pay since they were compensated at a per-load rate, negotiated between the company and its customers. Thus, the only way a driver could increase his income was to work more hours. The drivers paid a daily lease rate, fuel surcharge, and clean truck assistance payments set by the company. They also could not use the trucks to perform other work. Because the drivers paid to use the trucks on the days they drove, they did not have a significant investment in the company; the company also

provided them with almost all of their instrumentalities and tools (*Intermodal Bridge Transport*, March 3, 2020).

The drivers hauled containers for customers as assigned, with no discretion to decide what loads to haul; they worked assigned routes in which they did not have a proprietary interest. The company controlled the details of their work through a variety of policies and procedures enforced through a progressive discipline policy. The drivers were not engaged in a distinct occupation but were a regular part of the company's business. Although driving a commercial truck

requires specialized skill, that skill was inherent to the performance of driving duties in furtherance of the company's business. More than 80 percent of the drivers had been with the company for at least 6 years, suggesting that they functioned as a permanent

workforce. Finally, the fact that the drivers signed documents stating that they were independent contractors did not undermine a finding of employee status.

However, the misclassification of the drivers as independent contractors was not a "per se" violation of the NLRA under the Board's recent decision in *Velox Express, Inc.*, the Board determined.

Employee fired for pro-union letter to editor. A health care employer unlawfully discharged an employee who wrote a letter to the editor of a local newspaper expressing support for a union's efforts to improve the staffing levels for nurses at the hospital and discussing the impact of staffing shortages on her and her coworkers. The Board held that the employee was engaged in protected concerted activity. Additionally, the Board struck down, as "unlawfully overbroad," the employer's media policy that prohibited employees from contacting or releasing information to the news media information that related to the employer, its member organizations, or its subsidiaries, without the direct involvement of the community relations department or the chief operating officer. However, the Board noted that the employer's amended media policy, which included an express carveout for concerted communications for the purpose of mutual aid or protection protected by the NLRA, was lawful under *Boeing (Maine Coast Regional Health Facilities dba Maine Coast Memorial Hospital)*, March 30, 2020).

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Production employees fired for union activity. An employer was motivated by anti-union animus when it suspended and then discharged three pro-union employees for falsifying time records, ruled the NLRB. The Board largely relied on the fact that the pro-union activists were the only employees discharged, despite other workers having far more egregious timesheet infractions. Applying *Tschiggfrie Properties, Ltd*, decided after the ALJ issued his ruling in this case, the Board found the general counsel put forth evidence “sufficient to establish that a causal relationship exists between the employee’s protected activity and the employer’s adverse action against the employee.” The Board, however, dismissed the allegation that the employer violated Section 8(a)(5) by unilaterally changing its layoff-by-seniority policy when it laid off 44 employees for 1 week while retaining 8 newly-hired employees who were in the second week of their orientation and were observing but not yet working on the shop floor, as there was evidence the union had previously allowed the employer to retain employees in their first week of orientation during a layoff (*Mondelez Global, LLC*, March 31, 2020).

Employer repudiated unlawful statement. An employer effectively repudiated a statement by its security guard who unlawfully told an employee that she could not distribute union flyers outside the building entrance while she was off-duty. The Board noted that an employer effectively repudiates unlawful conduct if the repudiation is timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct. Here, the employer’s chief of human resources emailed the employee within an hour of the guard’s statement to inform her that the “security guard was ‘in error’” and to advise her that there was no prohibition against distributing union literature in a nonworking area during nonworking time. The ALJ had found that “the repudiation was ineffective because it did not occur in a context free of other unlawful conduct.” However, the Board noted that the employer’s other unfair labor practices “were relatively remote in time and did not involve unlawful restrictions on distribution of union literature.” Accordingly, the Board dismissed this allegation (*T-Mobile USA, Inc.*, April 2, 2020).

Talk with union steward not interrogation. An employer did not engage in unlawful interrogation when a nursing home administrator questioned a union steward about her union-related conversation with a coworker. The administrator asked if the coworker had been told she would lose her job if she

did not join the union. The steward, who denied the allegation, was an open and active union supporter. The administrator asked only the single question noted and assured the steward that he believed her denial. The employer did not have a history of discriminatory behavior. Thus, under its totality of the circumstances standard, the Board found “the evidence insufficient to support an unlawful interrogation violation.” Nor did the employer violate the Act when management officials asked an employee whether she still wanted to be in the union; when a manager repeatedly told an employee that employees needed to vote “no” in the election; and when the manager, on the morning of the election, told two employees that voting for union representation is incompatible with having a “good relationship” with their supervisor (*First American Enterprise dba Heritage Lakeside*, April 9, 2020).

On the other hand, the administrator’s request that the steward keep their conversation confidential was unlawful because, under Board law, the steward had the “right to discuss the interaction with other employees, especially because she was neither the subject nor witness in a disciplinary investigation,” and the conversation she was asked about was union-related.

Petition sought to cease membership, not representation. An employer unlawfully withdrew recognition from a union based on an employee petition that reflected only the signatories’ desire to cease membership in the union, “not their desire to cease having union representation.” The petition itself contained contradictory statements expressing both a desire to withdraw membership and to participate as a union member. In addition, a questionnaire circulated by the employer on company letterhead, indicated it was from the company president, was presented at an employee meeting, and was not accompanied by assurances of confidentiality. As such, the questionnaire “did not separately constitute reliable evidence of employee disaffection with the Union.” The Board held that there was no evidence the employer “initiated this polling effort based on prior evidence creating uncertainty about employees’ continuing majority support for the Union. As such, the memorandum constituted improper employer solicitation of employee disaffection, and the employees’ responses [did] not represent a valid showing that there was an actual loss of majority support for the Union” (*Kauai Veterans Express Co.*, April 16, 2020).

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Private release didn't limit Board authority. A release agreement between an employee and a predecessor employer did not prevent the NLRB from ordering make-whole relief based on the successor employer's unlawful refusal to rehire the employee because of her protected activity, ruled the NLRB. When the predecessor sold the facility, the successor employer hired 40 employees, 36 of whom had worked for the predecessor. It did not hire

The clear language of the Act and well-settled precedent preclude private limitation of the Board's authority to remedy violations of the Act in the public interest.

the complainant, however. An ALJ recommended an order requiring the successor to make the complainant whole for its unlawful refusal to hire her because of her protected union activity. The successor, however, argued that a release agreement between the employee and the predecessor "prevent[ed] the Board from ordering its standard make-whole remedies" (*County Agency Inc.*, April 29, 2020).

The NLRB explained that Board-ordered remedies serve a public purpose, and the Board does not give effect to private agreements that would limit the exercise of its remedial powers in the public interest. "[A]n agreement that purports to prohibit an employee from obtaining Board-ordered remedies implies 'a reciprocal limitation of the Board's exercise of its power to award those remedies,' ... and such a limitation must be denied effect." The Board also pointed out that "the clear language of the Act and well-settled precedent preclude private limitation of the Board's authority to remedy violations of the Act in the public interest." Moreover, the predecessor's release agreement did not even purport to cover a successor's liability for its own independent violations of the NLRA. Although the release shielded a successor from liability for unfair labor practices committed by the predecessor, there was "no basis, either in the language of the agreement or in law, for construing the release to shield the successor[s] from liability for *their own* unlawful conduct," the Board held.

"Dual-marked" ballots are void. Establishing a new bright-line rule, the NLRB overturned precedent on dual-marked ballots in representation elections and ruled, in this case, that a ballot with a diagonal line in the "No" square and

an "X" in the "Yes" square was void. The Board said it will apply its new standard retroactively, noting that extant Board law on this issue "has been inconsistent, speculative, and subjective," to note just a few terms among many the Board used to describe the precedent it is overturning. Finally, the Board determined that modification of its "official election ballot language will help to reduce or eliminate instances of dual-marked ballots" (*Providence Health & Services-Oregon dba Providence Portland Medical Center*, May 13, 2020).

Employer bad-faith

bargaining. An employer did not make a sincere effort to reach agreement on a successor CBA, the NLRB found. The employer

proposed a "sweeping management-rights clause" under which it would retain broad rights regarding job assignments and exclude certain decisions from the grievance process, including claims arising from alleged violations of the employee handbook. It also proposed a "zipper" clause under which the union would waive all mid-term bargaining rights; work-jurisdiction provisions that placed no restrictions on the employer's use of non-bargaining unit employees to perform bargaining unit work; and a "broad no-strike clause that included prohibitions on 'handbilling' and 'protest[s]' regardless of the reason." The proposal also included a narrow arbitration provision; eliminated seniority as a consideration in layoffs; eliminated any guarantees regarding hours of work per shift, per day, or per week; provided the employer with discretion to eliminate health coverage "at will"; and transferred company-provided benefits to an employee handbook outside of the CBA and entirely within the employer's unilateral control. Further, the proposal would grant the employer the ability to change and establish all policies on 10 days' notice and would establish a two-tier wage proposal that gave the employer "complete discretion to set rates of pay above specified minimums," as well as discretion to raise or reduce wages (*Altura Communication Solutions, LLC*, May 21, 2020).

The Supreme Court of the United States long ago held that bargaining for a contract that grants an employer unilateral control over certain terms and conditions of employment is not, per se, an unfair labor practice. However, the Board has consistently found that an employer's contract proposals may evidence bad-faith bargaining when they would confer on

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the employer “unilateral control over virtually all significant terms and conditions of employment.” The Board explained that while it will not decide whether an employer’s proposals are acceptable, it “will continue to examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract.” In *Phillips 66*, the Board reiterated that the content of proposals “may become relevant in determining whether a party was making a sincere effort to reach an agreement.” Here, because the employer’s proposals would have left the union and employees “with no avenue to challenge any of the [employer’s] decisions with regard to the nearly exhaustive rights reserved to the [employer] under the management-rights clause,” the Board concluded that the employer had “crossed the line that separates lawful hard bargaining and unlawful bad-faith bargaining.”

Board expands definition of “solicitation.” A Las Vegas hotel-casino lawfully disciplined an employee for engaging in a brief conversation with an on-duty security guard about an upcoming union election, in violation of a rule prohibiting solicitation by employees in work areas during work time. In *Wal-Mart Stores, Inc.* (2003) and *Conagra Foods, Inc.* (2014), the Board held that such discussions are permissible when there is only a “brief” interruption of work and that, “in order to constitute solicitation, the solicitor’s conduct must include the contemporaneous tender of a union authorization card.” Relying on these precedents, the general counsel contended that the employee’s discharge was unlawful; the conversation lasted about three minutes, and it did not involve asking to sign a union authorization card. The Board rejected the rationale that solicitation requires an actual disruption of work. It also concluded that these prior cases had “defined the term ‘solicitation’ too narrowly.” Therefore, it overruled *Wal-Mart* and *Conagra* and adopted a new standard, under which “‘solicitation’ also encompasses the act of encouraging employees to vote for or against union representation” (*Wynn Las Vegas, LLC*, May 29, 2020).

“Going forward, the Board will not require that an authorization card be contemporaneously presented for signature or that a conversation last a certain amount of time in order for an act to be considered union solicitation,” the NLRB wrote. “Accordingly, where an employee makes statements to a coworker during working time that are intended and understood as an effort to persuade the

employee to vote a particular way in a union election, that employee has engaged in solicitation subject to discipline under an employer’s validly enacted and applied no-solicitation policy.” This broader construction of “solicitation” is more consistent “with long-standing Board law establishing that the act of requesting an employee to sign an authorization card constitutes solicitation, even if a card is not presented at the time of the conversation,” the Board said.

Union unlawfully threatened reprisals. A union unlawfully threatened an employee with reprisals for reporting the verbal harassment of a coworker by the union president. The employer suspended the union president and launched an investigation, during which the complainant provided a witness statement. Thereafter, the union secretary-treasurer angrily accosted the complainant and promised to “get to the bottom of it,” which the NLRB held would reasonably be interpreted as a threat to hold the complainant accountable for his role in the union president’s discipline (*Graphic Communications Conference/International Brotherhood of Teamsters Local Union No 735-S*, June 5, 2020).

In addition, the union separately violated the Act when it retaliated against the complainant by reporting his safety infractions in an attempt to cause the employer to discipline him. The union secretary-treasurer reported the employee for not wearing required noise protective gear; later that day, the secretary-treasurer reported the employee for other purported safety violations. Displeased that he was not disciplined, the union secretary-treasurer reported the incident on the company compliance hotline and, the next day, called human resources insisting that she “wanted something done” and accusing the employer of giving the complainant “preferential treatment.” While the union secretary-treasurer had raised safety concerns to the employer in the past, this was the first time she reported an employee for a safety violation. The longstanding practice was for the employer and union “to address safety lapses through informal counseling.” Here, though, the union secretary-treasurer’s “entire course of conduct” was intended to have the employer take formal disciplinary action against the complainant.

The union also violated the Act “by posting a memo on the union bulletin board threatening to blacklist members from employment opportunities if they ‘turned in’ fellow union members,” the Board held.

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Unilateral removal of unit members unlawful. A hospital violated the NLRA when it unilaterally removed pharmacy technicians from an existing bargaining unit after a new state law required pharmacy technicians to obtain licenses. Under the terms of the CBA's recognition clause, "licensed associates" were excluded from the bargaining unit. The employer "purported to create a new nonunit pharmacy technician position with different job duties," but the NLRB found that the employer "merely renamed and removed from the unit an existing unit position under the guise of creating a new nonunit

The Board announced it will conduct a general review of its contract bar doctrine, intended to "balance often competing aims of employee free choice and industrial stability."

position." The employer argued that the change was necessary because the CBA's recognition clause excluded licensed associates. However, it failed to obtain the union's consent, the Board found. A transfer of work out of the bargaining unit is a mandatory subject of bargaining; however, the composition of a bargaining unit is a permissive subject of bargaining, the Board said. Here, the removal of the pharmacy technicians was a permissive subject of bargaining, and the employer violated the Act by removing the pharmacy technicians without the union's consent, the Board held (*Trinity Health-Michigan dba St. Joseph Mercy Oakland Hospital*, June 18, 2020).

Duty to bargain over video cameras. An employer unlawfully refused to bargain when it unilaterally installed video cameras in employee break/locker rooms, referred to as "shacks," where employees regularly change clothes. The ALJ concluded that installation of the video cameras in the shacks was permissible as a past practice because the employer had installed cameras in work areas, such as docks. But the Board concluded that installing cameras in the shacks was "materially different." Moreover, the employer had previously installed cameras in the shacks but removed them in response to employee and union objections. It tried again a few years later, arguing that it did not have to notify or bargain with the union because its action was permissible under the union contract. The Board disagreed (*ABF Freight System, Inc.*, June 19, 2020).

The union contract does not include a management-rights clause; however, it contains a provision which states: "The

Employer shall not install or use video cameras in areas of the Employer's premises that violate the employee's right to privacy such as in bathrooms or places where employees change clothing or provide drug or alcohol testing specimens." Thus, the only mention of camera installation in the contract prohibits the employer from doing so. And while there was a dispute whether this clause applied to the shacks, the Board said it did not need to address this issue; the only issue raised by the general counsel was whether the contract granted the employer the right to install cameras unilaterally in the shacks, and there was no contract language allowing the employer to do so without notifying the union.

Board to reexamine contract bar doctrine. The NLRB

granted a union's request for review of a regional director's decision that the union's bargaining agreement with a Delaware processing plant did not act as a bar to an employee's petition to decertify the union. More importantly, the Board also announced it will conduct a general review of its contract bar doctrine, created by Board common law "to balance often competing aims of employee free choice and industrial stability." The longstanding Board rule provides that once a contract is executed, no representation elections are permitted in the unit covered by the agreement for three years, or until the contract expires, whichever occurs first (*Mountaire Farms, Inc. and Oscar Cruz Sosa and United Food and Commercial Workers Union*, June 23, 2020).

In the underlying case, an employee filed a petition with the NLRB to decertify the union as exclusive bargaining representative of about 800 employees at the plant. The union argued that its CBA with the employer barred the petition. In an April 8, 2020, **decision**, the regional director concluded that the operative CBA included a union-security clause that was unlawful because it did not afford nonmember employees the required 30-day grace period to become union members. Since the contract clause was unlawful, the contract itself could not serve as a bar to the petition, and the regional director directed an election. The Board stayed the election on June 23, 2020, but the next day, the Board **indicated** that because the mail-in ballots were already issued, the stay would be rescinded;

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however, the ballots would be impounded while the request for review is pending.

In its June 23, 2020, stay, the Board said that it would issue a notice establishing a schedule for the parties to file briefs on review and inviting amicus briefs. The formal invitation to file briefs was issued July 7, 2020. The Board's announcement and accompanying invitation to file amicus briefs may signal a change in Board policy that places greater emphasis on employee free choice.

Surface bargaining. The NLRB held that an employer engaged in unlawful surface bargaining for a successor contract, prematurely declared an impasse in negotiations over wages, and unlawfully implemented several provisions of its final proposal. During negotiations, the employer held to its "unlawful unilateral discontinuation of longevity wage increases for certain unit employees and continued

CNN America, Inc. signed on to a settlement under which the cable news giant will pay \$76 million in back pay—the largest monetary remedy in Board history.

to withhold relevant requested information" central to the union's health and welfare proposal. When confronted with the information request, the company's lead negotiator did not immediately respond and said he would need to confer with other company officials. A few days later, the lead negotiator emailed the union to state the employer's position that the parties were at impasse, and that the employer was going to implement portions of its last, best, and final offer. It subsequently revoked the impasse declaration and announced instead that the parties were at a "single-issue impasse," inasmuch as the union continued to reject the company's wage proposal. The employer said it would implement its final wage proposal, but that it would continue to bargain over nonwage issues. However, the Board found that the employer did not establish that the parties were at a single-issue impasse that would lead "to a breakdown in overall negotiations." Additionally, the employer's own "serious, unremedied" unfair labor practices had adversely affected negotiations (*Richfield Hospitality, Inc.*, June 26, 2020).

The Board did, however, reverse the ALJ's finding that the employer had unlawfully threatened employees that unionization was futile. The alleged threat, which came from a high-level manager in comments to bargaining unit employees, was a lawful expression of personal opinion under Section 8(c) of the Act.

Other labor developments

\$76 million successor employer settlement. CNN America, Inc. (CNN) signed on to a settlement under which the cable news giant will pay \$76 million in back pay—the largest monetary remedy in Board history. The deal resolves a dispute that began in 2003, when CNN terminated its contract with Team Video Services (TVS), a company that had been providing CNN video services in Washington, D.C., and New York City. The back pay, more monetary relief than the federal agency collects on average in a typical year, is expected to benefit more than 300 workers. "After terminating the contract, CNN hired

new employees to perform the same work without recognizing or bargaining with the two unions that had represented the TVS employees," according to the NLRB. The union argued that

CNN wanted to operate as a nonunion workplace, and that it had conveyed to the workers that their prior employment with TVS and their union affiliation disqualified them from employment (despite that CNN had hired several former TVS employees).

The Board found that CNN's actions violated the NLRA and that CNN was a successor to, and joint employer with, TVS. In 2014, the Board ordered CNN to bargain with the unions and provide back pay. In 2017, the D.C. Circuit adopted the Board's findings and enforced the earlier order that CNN cease and desist from refusing to recognize and bargain with the unions. However, the appeals court remanded the Board's joint-employer finding for further clarification, along with the issue of back pay for further consideration by the Board. After remand, the parties agreed to resolve their dispute through the Board's Alternative Dispute Resolution program. Since then, Board staff "worked diligently" with the parties to reach the \$76 million settlement, the NLRB said. ■

In other news...

While our focus in this issue of the *Practical NLRB Advisor* is the coronavirus pandemic, there have been a number of non-COVID-19-related labor and National Labor Relations Board (NLRB) developments:

Joint employer rule. A final *NLRB rule* governing joint-employer status under the National Labor Relations Act (NLRA) took effect on April 27, 2020. The rule, published February 26, 2020, formalizes the joint-employer standard that the Board had used for decades prior to its controversial, 2015 divided decision in *Browning-Ferris Industries of California, Inc.* Under the new rule, an entity may be considered a joint employer of another entity's

As a formal rule, the rule governing joint employer status has a much greater degree of permanence than a single adjudicatory decision.

workers only if the two “share or codetermine” the workers’ “essential terms and conditions of employment.” The rule also defines the applicable terms and conditions as limited to wages; benefits; hours of work; hiring; discharge; discipline; supervision; and direction. The final rule:

- specifies that to be a joint employer, a business must possess and exercise “substantial direct and immediate control over one or more essential terms or conditions” of employment of another employer’s employees;
- defines key terms, including what are considered “essential terms and conditions of employment,” and what does, and what does not, constitute “direct and immediate control” as to each of these essential employment terms;
- defines what constitutes “substantial” direct and immediate control and makes clear that control exercised on a sporadic, isolated, or de minimis basis is not “substantial”;
- specifies that “evidence of indirect control and contractually reserved but unexercised authority” over essential employment terms may be a consideration for finding joint-employer status under the final rule, but it cannot give rise to such status without substantial direct and immediate control;

- makes clear that the routine elements of an arm’s-length contract cannot turn a contractor into a joint employer.

Rather than restore the NLRB’s pre-*Browning-Ferris* standard through case adjudication, the Board did so via rulemaking, with the “greater clarity” and detail that a formal regulation allows, the Board noted. Additionally, a formal rule has a much greater degree of permanence than a single adjudicatory decision.

Representation election procedure changes.

In December 2019, the Board, without formal notice and comment, issued a *direct final rule* modifying its

representation election procedures. No doubt anticipating that the changes would be challenged due to the absence of formal rulemaking, the Board specifically cited its “clear

regulatory authority to change its own representation case procedures” and its “longstanding practice of evaluating and improving its representation case procedures.” The rule was scheduled to take effect April 16, 2020, but the effective date was delayed to May 31, 2020, due to the pandemic emergency.

As the Board had anticipated, on the eve of full implementation, a federal court invalidated portions of the new rule, holding that those specific provisions could only be implemented through formal rulemaking. The Board promptly implemented those provisions unaffected by the federal court ruling and appealed the decision with respect to the remaining provisions. Those remaining provisions will stay “on hold” pending the appeal. Moreover, those amended rules have been only partially implemented, as several provisions have been subject to legal challenge.

The Board made other changes to its representation case procedures in another completely separate rulemaking. This initiative, entitled the *Election Protection Rule*, was established through formal rulemaking and focused on three specific matters. It changed the Board’s “blocking charge”

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policy; reestablished the “recognition bar” rules first set out in the *Dana Corp.* decision; and changed its “conversion doctrine” in the construction industry under which a construction contract under Section 8(f) of the NLRA can “convert” into a Section 9(a) relationship. The Election Protection Rule took full effect on July 31, 2020.

Finally, in keeping with the Board’s stated intent to modify, in piecemeal fashion, the most problematic elements of the “ambush election” rule, the Board on July 28, 2020, published a notice of proposed rulemaking (*NPRM*) to eliminate the requirement that employers in representation cases provide the personal email addresses as well as the home and personal cell phone numbers of all employees who are eligible voters.

Prior to 2014, employers were required to produce only eligible voters’ names and home addresses. However, among many other amendments to Board election procedures, the Obama Board codified a revised “*Excelsior* list” requirement and mandated that employers disclose eligible voters’ “available” personal email addresses, and home and personal cell phone numbers. Eliminating this expanded requirement “will advance important employee privacy interests that the current rules do not sufficiently protect,” the Board said in announcing the latest proposed rule change.

In the same proposed rule, the Board introduced an amendment that would provide for absentee ballots to accommodate eligible voters who are on military leave. The Board has invited public comments on the proposed rule changes to be received on or before October 13, 2020.

Additional developments. Further NLRB and labor news:

- In addition to the initiatives noted above, the Board continued its policy efforts in the representation case arena by soliciting public comment with regard to the longstanding “contract bar” doctrine. (See “Board to reexamine contract bar doctrine” in *Other NLRB Developments*, pg. 35.)
- The Board utilized individual adjudication to overturn the Obama Board requirement that a newly unionized employer give a union notice and an opportunity to bargain before imposing “discretionary” discipline on a unit

employee. (See “Union lacks input in employee discipline pre-contract” in *Other NLRB Developments*, pg. 29).

- In a major decision, *General Motors, LLC*, the Board significantly changed its analytical framework for determining if an employee’s offensive language or behavior in the course of otherwise protected activity renders the employee unprotected and subject to discipline. The case overturns a substantial line of Board cases excusing an employee’s use of obscene and offensive language in the context of protected activity. (The decision and implications of the new framework will be discussed more extensively in a future issue of *The Practical NLRB Advisor*.)
- President Donald Trump’s renominations of former NLRB Democratic Board Member Lauren McFerran to another term and current Republican Member Marvin Kaplan to a second term were approved by the U.S. Senate. The five-member Board now has four seats filled.
- The NLRB’s general counsel has implemented *changes* to the agency’s investigation procedures for interviewing former company officials and the handling of audio recordings during investigations, and the Board has issued guidance making it easier for union members to obtain make-whole relief from unions that violate their duty of fair representation.
- The U.S. House of Representatives advanced the Protecting the Right to Organize (PRO) Act of 2019 (H.R. 2474), which, among other controversial provisions, would add a private right of action for labor law violations; codify the controversial “ABC test” for determining employee status; and ban “captive audience” meetings, strike replacements, and mandatory class action waivers. The Republican-majority Senate, however, has expressed no interest in taking up the bill. However, if the Democratic-majority House remains unchanged, and the White House and Senate were to “flip” in November, the PRO Act will likely be reintroduced with a very different result.

Finally, as if a global pandemic were not worrisome enough, a tidal wave of social unrest has erupted in recent months. What does it mean for employers? Can employers lawfully regulate the protest conduct of their employees? These questions, and a more detailed look at the recent NLRB rulemaking, changes to agency investigatory procedures, and adjudicatory changes, will be the primary topics of the next issue of the *Practical NLRB Advisor*. ■

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