

## EMPLOYERS AND LAWYERS, WORKING TOGETHER

# The Practical **NLRB** Advisor

## The woe of post-Pro Flo

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*Flo Jones owns and operates a successful fast-food franchise restaurant, Bill's Big Burger. Late on a Friday afternoon, she receives a petition filed with the National Labor Relations Board (NLRB) by the Food Workers Union seeking a union election in a unit composed only of the restaurant's line cooks. The next day, Saturday, she has a conversation in the kitchen with Sam, the day-shift lead line cook who essentially runs the daytime kitchen operation. Among other things, Flo comments to Sam, "What did I do to deserve a union? I'd like to make things right."*

*On Sunday, Flo visits the restaurant again, at which time she finds that several cases of burgers, hot dogs, rolls, and condiments are missing. She immediately asks Sam if he knows what happened to the supplies. Sam responds that he doesn't know what happened to them, but that he does know that Mike, a night-shift line cook, had a "huge" cookout at his house on Saturday night. Mike is the only night shift employee who has a key to the supply room and refrigerator. Mike is also the leading union adherent.*

*Flo confronts Mike over the missing supplies on Monday. Mike denies taking them and comments, "someone must have somehow gotten his key." As she has done in similar situations where workers are believed to have stolen items from the kitchen, Flo fires Mike on suspicion of theft. Fearing legal implications of her actions, Flo hires a lawyer the next day.*

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## BRIAN IN BRIEF



In the labor law arena, it is often difficult to separate policy from politics. In a presidential election year, and in the face of an evenly but sharply divided electorate, it becomes almost impossible. Even though the 2020 election is over, there is no sign that any of this is going to change.

In the current election cycle, as in 2016, one of the most politically critical socioeconomic groups has been the blue-collar worker or “working person.” From an electoral perspective, this group is of outsized importance in swing states like Michigan, Pennsylvania, and Wisconsin. This reality is here to stay even after the 2020 dust settles.

For decades, the Democratic party seemed to have a lock on the blue-collar vote. With the 2016 election, this dynamic began to change to the point where many pundits now describe the Republican party as home for the “working person.” Whatever the true reality, it is clear that over the next few years both parties will be battling for support from this key demographic. The strategies they employ to do so may, in large measure, dictate the course of labor policy.

Democrats have a narrower range of strategic options. Since a large percentage of their political funding comes from

organized labor, their strategy, of necessity, is predicated on the notion that whatever is good for unions is good for blue-collar workers in general. Thus, while perhaps not prepared to go as far as the Protecting the Right to Organize (PRO) Act, Democrats may see a dual advantage in supporting similar legislation: courting the blue-collar vote and advancing the legislative goals of their largest financial backers. Conversely, some Republicans see a growing divide between union leadership and the average blue-collar worker—a divide they can exploit by opposing legislation aimed at helping organized labor per se and supporting worker-friendly, nonlabor legislation. Other Republicans, however, may want to hedge their bets and lend at least some support to measures benefiting organized labor.

Whatever the strategy, the importance of the blue-collar worker demographic, the sharpness of the political divisions, and the narrowness of legislative minorities, all point to a future in which politics will play an even larger role in labor policy.

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 unionized and nonunion employers—a quarterly newsletter focused on the NLRB is an essential tool to that end.

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

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

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## The current prognosis for Flo

Flo's situation is not an uncommon one, particularly for small employers with no experience in union organizing efforts. Her reaction to the situation certainly could have been much better, and she now finds herself in a position that is far from being a good one. However, under current labor law, her initial missteps notwithstanding, her problems are manageable.

First, the union plainly wants an election in a "line cooks only" bargaining unit because it knows it can win among that group of employees. Flo, however, will have the opportunity to argue that a bargaining unit confined solely to line cooks is an inappropriate "micro unit," and that the appropriate unit in this case would consist of all of her rank-and-file employees. Given its initial unit request, it appears that the union lacks majority support in this broader unit. Accordingly, Flo has a good chance of prevailing in an eventual election assuming it is conducted in the broader unit.

Second, Flo's somewhat ham-fisted conversation with Sam is problematic. The conversation is very likely to form the basis of a union unfair labor practice (ULP) charge, and objections to the election in the event the union loses at the polls. The union will allege that Flo's remarks to Sam constitute both unlawful interrogation and the unlawful promise of benefits conditioned on the union's defeat. Once again, however, Flo is not without defenses to these claims.

Initially, she can argue that Sam is a statutory "supervisor" who is not covered by the National Labor Relations Act (NLRA). As such, her conversation with him cannot be the basis for either a ULP or election objection. Even if that fails, she may be able to successfully argue that, under current law, the surrounding circumstances render her open-ended question to Sam noncoercive, and therefore not violative of the Act. Additionally, and again under current law, she can further argue that her alleged promise of benefits was simply way too vague to be actionable. Finally, even if her defenses fail, the result would not be catastrophic as the remedy for these violations would likely be the issuance of a cease and desist order, the posting of a remedial notice, and the possibility of a rerun election. Since the violations here are close calls, and largely the result of an unsophisticated knee-jerk response, these remedies appear objectively appropriate and commensurate with the gravity of the employer's missteps.

Lastly, Flo's discharge of Mike will undoubtedly result in a ULP and objection alleging that he was discharged on account of his union activity. This is a typically "close call" case. On the one hand, Flo does have considerable circumstantial evidence that Mike stole the merchandise, as well as a consistent track record of discharging employees for similar misconduct. On the other hand, Mike's support of the union is well known, and the timing of the incident could not be worse from Flo's perspective. Close cases such as these are most often settled since the cost to litigate them typically exceeds the potential liability. Here, under current law, the liability would be limited to offering Mike reinstatement and providing him with backpay, minus any interim earnings.

In any election/ULP scenario there are inevitably unexpected turns and permutations. Consequently, the ultimate disposition of Flo's petition, ULP charges, and objections is far from clear. Yet what is clear is that under current law, Flo has an opportunity to mount a reasonable defense. That, however, could change.

## The PRO Act

Earlier this year, the U.S. House of Representatives passed the Protecting the Right to Organize (PRO) Act, which fortunately for employers, never saw the light of day in the U.S. Senate. The PRO Act represents the most radical and comprehensive effort to overhaul federal labor law since the enactment of the NLRA in 1935. However, the ultimate fate of the proposed legislation, in its current form, depends on the alignment of several political stars.

As issue 16 of the *Practical NLRB Advisor* goes to print, that alignment is unlikely. While the White House and the U.S. House of Representatives will be in Democratic hands, albeit with a much-reduced House majority, the U.S. Senate most likely will remain in Republican hands. Even if Democrats win both runoff seats in Georgia in January and, thus, gain control of the upper chamber as well, it appears there would not be enough votes to eliminate the legislative filibuster. That said, stranger things have happened in politics and as Yogi Berra observed: "it ain't over till it's over."

**Understanding the proposals.** Though the final disposition of the PRO Act is highly speculative, an understanding of it is crucial for employers. Obviously, if the legislation were ever

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enacted in anything like its present form, it would be a game-changer for employers. However, even if it did not pass intact in the next Congress, understanding the bill is important for other reasons.

First, legislative change is often a cumulative process with the same proposals being pursued in successive Congresses. For example, the Employee Free Choice Act, which came close to enactment, has been repeatedly introduced in congressional sessions. As a result, many management advocates believe the fundamental legislative fight encapsulated by the PRO Act is inevitable, with the only uncertainty being when that fight will begin and how many rounds it may entail. Accordingly, for those on the management side, the more familiar with and prepared to combat the legislation, the better the likely result.

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Second, the “stars aligned” analysis applies only to the binary result of whether the PRO Act, *in its current form*, becomes law. The legislative process, however, is rarely binary. More often than not, it is the product of political self-interest and negotiation. Thus, although the stars may not perfectly align, that does not mean that *some elements* of the PRO Act would not become reality. While the PRO Act itself will prove too heavy a legislative lift, some of its constituent parts may not.

Third, it is important to bear in mind that with a new administration, the NLRB majority will eventually change, and the political leadership of the entire executive branch will be in Democratic hands. It is equally important to note that many of the provisions of the PRO Act do not require legislative action at all. Indeed, the majority of its provisions could be achieved through NLRB adjudication or rule making, and administrative action through the executive branch and/or government agencies.

Thus, in a very real sense, the PRO Act is organized labor's playbook. A prudent management community may want to carefully study that playbook in order to understand

organized labor's aspirational goals and the legislative and regulatory chessboard on which labor/management policy will play out over the next span of time. Those goals, or more accurately the means by which organized labor hopes to attain them, are all catalogued for us in the PRO Act.

**Flo's dilemma**

To understand the practical impact of just a few of the PRO Act's more popular provisions one need only consider Flo's situation if the legislation were enacted.

**Representation case.** To begin, the law would have several immediate consequences on Flo's representation case. As an initial matter, she might not have even known that there was a hearing on the Food Workers Union's election petition since under the PRO Act an employer lacks representation case “standing.” Furthermore, even if she did have advance

notice of the hearing, her lack of standing would presumably preclude her from participating. In addition, even if she could participate in the hearing, her claim about the configuration of the bargaining unit would go

nowhere since the PRO Act would statutorily restore the NLRB's *Specialty Healthcare* decision and make micro-units appropriate. Consequently, the “line cook only” unit would be proper under the PRO Act.

Another headache for Flo would occur even if a majority of the line cooks ultimately ended up voting against the union, despite a majority of them having earlier signed authorization cards only because they were largely unaware of what the cards meant. Under current labor law, if the union subsequently filed charges, the potential remedy to successful election objections would be a rerun election. However, under the PRO Act, a bargaining order would be issued since the Food Workers Union had a “card majority” before the election. As a result, Flo would have to recognize and bargain with the union as to the unit of line cooks even though a majority of them did not vote for union representation.

Flo's problems under the PRO Act would not end here. If she decided to recognize the union and bargain in complete good faith, but failed to reach a collective bargaining

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agreement (CBA) with the union within a “reasonable” time, the contract terms could wind up being imposed on her through binding interest arbitration. In setting the substantive terms of the contract, the arbitrator would be permitted to consider the economic health of the “employer.”

The PRO Act would have a significant effect on that analysis as well, since it overturns current and decades-old law and codifies the aberrational and short-lived *BFI* joint-employer test. This would mean that Bob’s Big Burger, the *franchisor*, would likely be deemed a joint employer along with Flo, the *franchisee*. This would mean that the franchisor’s economic health could wind up dictating the CBA terms that Flo would have to live with.

**ULP charges.** The consequences of the PRO Act on the ULP charges would be equally far-reaching. To begin with, Flo would no longer be able to rely on a defense based on Sam’s “supervisory” status since the PRO Act radically narrows the definition of “supervisor.” Under the circumstances described, there would be simply no way Sam would qualify. Additionally, a contemporaneously changed majority on the NLRB itself would make it much less likely that Flo’s secondary claim that her comments were not coercive and were too vague to be a promise would be upheld.

In addition, a variety of the PRO Act’s provisions would significantly impact ULP charges relating to Flo’s interactions with Sam and discharge of Mike. First, each statutory violation could result in a punitive fine of between \$10,000 and \$100,000, which would apply to Mike’s discharge as well as Flo’s conversation with Sam. Moreover, if Mike’s discharge were deemed unlawful, he would be entitled to reinstatement plus up to two times of his backpay, with no interim earnings offset. He could also be awarded “consequential damages.”

It would not end there. The PRO Act would also require that the NLRB use its injunctive power to seek Mike’s immediate reinstatement. As a practical matter, this would result in the merits of Mike’s discharge being litigated in a full-blown federal court proceeding. Under the PRO Act, if this process did not move “fast enough,” Mike could file a civil suit in federal court on his own. If successful, he would be awarded

all of the above-referenced remedies plus his attorneys’ fees. Given this framework, the prospect of any reasonable restorative settlement of claims of this type would likely be a thing of the past in the wake of the PRO Act.

In short, the PRO Act would change Flo’s very common dilemma from defensible to disastrous. For no other reason, the legislation bears watching.

## Beyond Flo: Other ramifications of the legislation

The hypothetical involving Flo touches on the practical ramifications of only a few of the PRO Act’s provisions. Just a few more of its provisions amply illustrate how it would completely transform U.S. labor law. For example, other provisions in the statute would:

- eliminate and prohibit state right-to-work laws;
- overrule the U.S. Supreme Court’s decision in *Epic Systems Corp. v. Lewis* and bar the use of class action waivers in employment dispute resolution agreements;
- codify the NLRB’s overturned notice-posting rule, the “persuader rule,” and the federal contractor “blacklisting” rule;
- effectively eliminate the legal status of “independent contractors” and turn virtually everyone in the “gig economy” into a statutory employee;
- prohibit “captive audience” meetings;
- allow intermittent strikes and secondary economic pressure;
- prohibit the hiring of permanent replacements and ban the employer lockout; and
- direct the U.S. Governmental Accountability Office to provide Congress with a report on “sectoral bargaining.”

It is no understatement to suggest that the PRO Act represents the most fundamental restructuring of labor/management law in U.S. history. The legislation has already passed the House once, and odds are it will again. While it may or may not see immediate passage, it is a clear delineation of organized labor’s agenda—an agenda for which unions will fight and against which employers will argue in the next Congress and beyond. Because it is simply not going away, a prudent employer must be fully aware of what it means in order to readily combat it. ■

## NLRB decision places limits on Section 7 protection

For what many believe to have been far too long, the National Labor Relations Board (NLRB) afforded almost reflexive protection to employees who engaged in obscene, offensive, or even discriminatory speech or conduct, provided it occurred in the course of otherwise protected Section 7 activity. Perhaps the most egregious example of this knee-jerk analysis was the Board's 2016 decision in *Cooper Tire*, where it overturned disciplinary action against picketing employees who shouted racist comments at replacement workers. The decision was widely criticized for its failure to construe the National Labor Relations Act (NLRA) in the context of state and federal anti-discrimination laws, and its failure to recognize legitimate concerns for civility and order in the workplace.

The Board finally addressed these underlying issues in its highly anticipated decision in *General Motors LLC*. The decision, which was issued on July 21, 2020, recognized the importance of concerns that might be in tension with the unfettered exercise of Section 7 rights and the necessity of balancing those competing considerations. It did so by abandoning its prior "setting specific" standards and adopting the well-known *Wright Line* burden-shifting framework for determining whether an employer has lawfully disciplined or discharged an employee for engaging in abusive conduct in the context of union or other protected concerted activity, be it an outburst at the boss, social media comments, or heckling from the picket line.

As a result of this significant decision, an employer can now defend an unfair labor practice (ULP) charge related to abusive conduct committed in the course of Section 7 activity by showing that, even if the protected concerted activity was a motivating factor, it would have disciplined or discharged the employee regardless of that related activity. Because *General Motors* applies retroactively, this analysis now applies to all pending decisions before the Board and its administrative law judges.

### **Wright Line framework**

In order to establish that an employer unlawfully disciplined or discharged an employee for protected activity under the *Wright Line* framework, the Board's general counsel must initially show that the discipline or discharge was motivated by the protected activity. This requires demonstrating that: (1)

the employee engaged in protected activity, (2) the employer knew of the activity, and (3) the employer had animus against the protected activity. If this showing is made, the employer will be found to have violated the NLRA unless it can prove that it would have taken the same adverse action even in the absence of the Section 7 activity.

As with many other decisions issued by the Board in recent years, *General Motors* marks yet another reasonable and welcome rebalancing of the scales for employers. In a press statement announcing the decision, Chairman John F. Ring applauded the "long-overdue change in the NLRB's approach to profanity-laced tirades and other abusive conduct in the workplace," which "[f]or too long ... has protected employees who engage in obscene, racist, and sexually harassing speech not tolerated in almost any workplace today."

**The *Atlantic Steel* standard rejected.** Previously, the Board had held that an employer violated the NLRA by disciplining or discharging an employee for abusive or offensive workplace conduct in the context of protected activity unless that conduct was so severe that it lost the Act's protection. Whether an employee's conduct lost protection of the NLRA was evaluated by three "setting-specific" standards set forth in *Atlantic Steel*, which the Board selected depending on the employee's remarks and the context in which they were made.

As a result, the Board and administrative law judges issued a number of decisions granting protection to employees who suffered negative repercussions after having made extremely lewd and racially charged remarks in connection with some form of Section 7 activity. Indeed, in the *General Motors* case, the employer suspended the employee for cursing and making racially offensive comments towards management in union-related meetings. The administrative law judge ruled that because some of the employee's profane outbursts were protected by the NLRA, the employer committed an unfair labor practice when it disciplined him.

### **Employers no longer facing catch-22**

Rulings like this often left employers in a no-win situation. If they disciplined an employee for engaging in abusive

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behavior that occurred in the context of Section 7 activity, they were vulnerable to a legal challenge before the NLRB. Yet if they refrained from taking any disciplinary actions in response to such behavior, they could be viewed as implicitly condoning offensive and abusive conduct in the workplace. Placing employers on better legal footing, the *General Motors* decision now provides employers a way to avoid meritorious ULP charges by fairly enforcing their policies against harassment, abuse, or discrimination.

The Board's decisions in this line of cases will also no longer be at odds with local, state, and federal anti-discrimination laws, as it will be less likely to find that employers that have disciplined employees for racially or sexually offensive remarks have violated the NLRA. Indeed, NLRB Chairman Ring applauded this result, stating that *General Motors* "eliminates the conflict between the NLRA and antidiscrimination laws, and acknowledges that the expectations for employee conduct in the workplace have changed."

Consequently, employers will be better equipped to keep the workplace free of profane, racially inappropriate, or sexually inappropriate comments because the Board will no longer assume that an employee's abusive conduct is tied to the protected activity. While they may still need to show that the negative consequence was not in retaliation for engaging in the protected activity, employers may defend against an unfair labor practice charge by demonstrating that the adverse employment action was motivated by entirely lawful reasons unrelated to any protected conduct, such as lewd or abusive comments, or by demonstrating that they would have disciplined or discharged the employee notwithstanding the protected activity.

**A win for workplace civility.** As a practical matter, the *General Motors* decision marks an important and timely win for civility in the workplace, particularly in light of recent national events that have demonstrated the need to ensure that workplaces are free of racial epithets and sexually inappropriate remarks, regardless of the context in which they are made. The new framework provides greater opportunity for employers to minimize potential conflict in the workplace caused by racist, sexist, or even offensive political speech—regardless of the particular setting. ■

## Briefing invited on the fate of "Scabby the Rat"

The National Labor Relations Board (NLRB) has invited parties and amici to submit briefs in *International Union of Operating Engineers, Local Union No. 150 (Lippert Components, Inc.)*, a case in which the administrative law judge found that the "[u]nion's stationary display of a 12-foot inflatable rat" (aka "Scabby the Rat") "and two large banners on public property" did not amount to "picketing or otherwise coercive nonpicketing conduct" in violation of Section 8(b)(4) of the National Labor Relations Act (NLRA). Chairman John F. Ring and Members Marvin E. Kaplan and William Emanuel joined in issuing the notice and invitation, while Member Lauren McFerran dissented.

According to the Board's general counsel (GC), "the display ... of the tall inflatable rat and two large banners was tantamount to picketing, or constituted otherwise coercive conduct, to unlawfully pressure neutral employers to cease doing business with the primary employer in the labor dispute." The GC is urging the Board to overrule both *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010), and *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 356 NLRB 1290 (2011), arguing that in those cases, "the Board narrowed the definitions of picketing and coercion, created standards that were 'vague and imprecise,' strayed from 'the dictates of Section 8(b)(4),' and departed from 'decades of Board law.'"

"Like the pied piper of Hamelin, the General Counsel now offers to rid the field of labor relations of a supposed rat problem—yet here, too, following the piper's lead may result in dire consequences," wrote Member McFerran in dissent. "The General Counsel asks the Board to overrule precedent, carefully reasoned and rooted firmly in court authority, concluding that the National Labor Relations Act does not prohibit the noncoercive, nondisruptive use of inflatable rats and stationary banners to publicize a labor dispute—and, indeed, that restricting such activity threatens First Amendment rights."

## GC urges consistent review of pre-recognition agreements

On September 4, 2020, National Labor Relations Board (NLRB) General Counsel (GC) Peter Robb issued Memorandum **GC-20-13**, in which he takes on the “confusing and contradictory” Board decisions related to the lawfulness of employer support for union organizing drives, and recommends that for consistency’s sake, the Board adopt the “more than ministerial aid” standard currently used to assess the lawfulness of employer support for employee decertification efforts. The GC memo also endorses the adoption of “a simple bright-line test” as to whether the National Labor Relations Act (NLRA) is violated when employers and unions enter into pre-recognition agreements, including so-called “neutrality agreements.”

**Different standards, same coercion.** Employers violate Sections 8(a)(1) and (2) of the NLRA by providing impermissible support to a union attempting to organize the employer’s unrepresented workforce, and also by providing impermissible support to employees who wish to decertify or withdraw from a union. According to Robb, the rationale behind both types of violations is the same, namely that “employees have been deprived of ‘that freedom of choice which is the essence of collective bargaining.’”

Yet, the Board has applied two different legal standards to these “two similarly coercive activities, creating different and incongruous outcomes.” When considering employer support for a union’s organizing efforts, the Board uses a “totality of the circumstances” standard. However, in examining employer support of a decertification petition, it uses “the more than ministerial aid” standard. As a result of the differing standards, inconsistent conclusions have been reached for what is essentially the same or similar conduct affecting the same aspect of employees’ Section 7 rights.

**“More than ministerial aid” standard for both.** In order to create greater certainty in its guidance as to what constitutes impermissible employer support, and to consistently treat all conduct that impacts Section 7 rights in similar ways, Robb has urged the Board to apply the “more than ministerial aid” standard to assess both an employer’s support for union organizing drives and its support for employee decertification efforts. This “would harmonize these two areas of Board law, and will clarify ambiguity and better protect employee free choice and majoritarian principles.”

The memo criticizes the “totality of the circumstances” standard since it is difficult to apply, lacks clear guidelines as to what is lawful and unlawful conduct, and thus yields inconsistent results. The GC favors the “more than ministerial aid” standard since it is “stricter and less ambiguous and provides a brighter line with respect to lawful and unlawful conduct.”

**When neutrality is really support.** The GC memo also takes on “neutrality agreements,” noting that while pure neutrality agreements are lawful, “we have increasingly seen in neutrality agreements provisions that go beyond neutrality into the area of impermissible support.” Such agreements “often contain provisions that sacrifice the statutory rights of employees for the commercial interests of unions and employers.”

Due to unclear standards for review of these agreements, existing Board precedent “has effectively permitted interference with employee free choice by not carefully examining the provisions of neutrality agreements to determine whether they are, in fact, neutral or provide support to the union,” and Robb wants these provisions to be examined “under the lens of whether they provide ‘more than ministerial support’ to the union’s efforts to organize.”

**“Bright-line test.”** As to pre-recognition agreements, the GC memo urges the Board to adopt “a simple bright-line test” that would find the NLRA is violated whenever an employer and union enter into a pre-recognition agreement in which the parties:

- (1) “negotiate terms and conditions of employment *prior* to the union attaining majority status”;
- (2) “agree to restrain employee access to Board processes and procedures”; or
- (3) “agree to any provision that is inconsistent with the purposes and policies of the [NLRA], such as by impacting Section 7 rights by providing support for the union’s organizing activities, rather than neutrality” (emphasis added).

### Types of impacted agreements

The GC memo addresses two types of employer/union agreements that have become progressively more common.

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The first is the basic “neutrality agreement,” in which an employer agrees not to openly oppose a union’s organizing efforts while the union seeks to obtain authorization cards from a majority of the employer’s employees. A simple neutrality agreement also provides that the employer will voluntarily recognize the union in the event the union can demonstrate its majority status. More often than not, an employer is coerced into agreeing to a neutrality provision in order to avoid picketing, a corporate campaign, or other union measures that could economically injure the employer.

**Problematic provisions.** Neutrality agreements that stop at merely a pledge of “no opposition” by the employer would continue to remain viable under the GC’s analysis. However, it has now become common for such neutrality agreements to go far beyond “no opposition.” Thus, such agreements often provide for union access to the employer’s property for purposes of solicitation, the provision of employee contact information, or even expressions of employer endorsement. Under the GC’s analysis, such additional provisions would certainly be “more than ministerial aid,” would violate the Act, and would subject any subsequent recognition achieved pursuant to such an agreement to attack.

The other type of agreement addressed by the GC memo is somewhat less common, yet equally problematic from a statutory perspective. These are so-called pre-recognition agreements in which an employer and union agree to certain provisions that would typically be reserved for post-recognition negotiations, but would do so *before the union has demonstrated majority status*.

The controversy in this area stems largely from the Obama-era Board’s decision in *Dana Corp.*, which allowed the pre-recognition agreement as to certain terms on the questionable ground that it did not constitute a full agreement or that it was simply a “framework” for eventual bargaining. The GC’s memo makes clear his view that *Dana Corp.* was wrongly decided and that any pre-recognition agreement as to substantive terms is problematic.

Pointing to several examples, the GC memo notes that while an agreement providing for post-majority wages or benefits is clearly unlawful, so too is one which sets out wage or benefit “ranges” or references to other union contracts as a “guide.” Also objectionable in the GC’s view are pre-recognition agreements that provide for eventual interest arbitration, impose no-strike/no-lockout restrictions, and/or resolve unit scope issues.

## DOL proposes greater disclosure of union funds

On October 13, 2020, the U.S. Department of Labor (DOL) posted a notice of proposed rulemaking (NPRM) that, if enacted, would require unions to broaden disclosure of their funds. The proposed rule would revise Form LM-2, the annual financial disclosure report required for labor organizations with \$250,000 or more in total annual receipts, and would also establish a Form LM-2 Long Form (LF) for larger unions with annual receipts of \$8,000,000 or more. Public comments on the proposed rule are due by December 14, 2020.

The DOL cited concerns for both union democracy and fiscal security as the impetus for the proposed rule and explained that, “[b]y reviewing the reports, a member may ascertain the labor organization’s priorities and whether they are in accord with the union’s constitution and purposes, the member’s own priorities, and those of fellow members.” According to the DOL, “[t]imely and complete reporting also helps deter labor organization officers or employees from embezzling or otherwise making improper use of such funds.”

Among the many changes proposed to the reporting forms is a requirement that the union report whether it has a separate strike fund. Where the union reports that it does, it must provide “the amount of funds in the strike fund as of the close of the reporting period.” The agency acknowledged that “employers may benefit from knowing the extent of their employees’ union strike fund during negotiations or a labor impasse” and that there is a “potential cost to individual members associated with public disclosure.” However, because “strike funds may hold substantial sums that otherwise would not be available for public inspection—and thus more opportunity for the detection of financial improprieties, as has happened in the past—and that public disclosure would make it easier for union members to review this information, the Department believes the benefits of disclosure outweigh competing considerations.”

**Balancing of interests.** In sum, the GC advocates for the position that both the “neutrality plus” type agreement and the substantive pre-recognition agreement violate the Act. In doing so, he has clearly and correctly placed the statutory imperative of employee free choice above the economic interests of employers and unions. ■

## New NLRB investigation protocols issued

This summer, National Labor Relations Board (NLRB) General Counsel (GC) Peter B. Robb issued Memorandum [GC 20-08](#), detailing changes to the agency's investigative procedures for interviewing former supervisors and union agents, as well as the handling of audio recordings obtained in the course of Board investigations. According to the memo, the new protocols were "created to ensure consistency, promote transparency and apply fairness." The memo additionally noted that the "dissemination of information during the investigation will facilitate the prompt and efficient resolution of labor disputes and afford more timely protection of employee rights set forth in the Act."

### Testimony of former supervisors and agents

Under the guidance, the investigatory interview of former supervisors and agents should be treated differently depending on whether they are "actor[s]" or "fact witnesses." Actors are those individuals who have allegedly made unlawful statements or committed unlawful acts. In contrast, fact witnesses are not accused of having themselves engaged in any unlawful conduct, but their testimony may

*[B]efore interviewing a former supervisor about his or her recommendation to discharge an employee where the discharge was allegedly the result of union activity, the region should notify the employer and allow it to be present for any interviews.*

be relevant to whether someone else did. Because this distinction can sometimes be "a tricky one," according to the memo, "[w]here appropriate, Regions should contact the Ethics Office."

**When parties can be observers.** One substantial change the GC memo makes is that where there is a claim that an actor's statements or conduct is binding on the employer or union, the region should apprise that party or its representative before communicating with the witness about the substance of the matter and provide the party or its representative an opportunity to be present as an observer for "substantive communications" with the former supervisor or business agent. This rule applies even if the supervisory

and/or agency relationship has ended, and even if the investigation occurs in a jurisdiction where "skip counsel rules" might not prohibit ex parte contact.

The GC memo provides two examples. One is where a region seeks to interview a former business agent about the agent's "administration of a hiring hall list during a time when the relevant charge alleges the union bypassed a hiring hall registrant for unlawful reasons." In this scenario, "[t]he Region should communicate with the union *before* having substantive conversations with the former business agent and permit the union, or designee, to be present at the taking of any affidavit" (emphasis added). Similarly, before interviewing a former supervisor about his or her recommendation to discharge an employee where the discharge was allegedly the result of union activity, the region should notify the employer and allow it to be present for any interviews.

On the other hand, where "the former agent or former supervisor is a fact witness only, who would testify as to what some other official ... allegedly said, the Region need not involve the union or employer in its communications if the ethics rules do not compel it."

### Communication to witnesses.

The memo also instructs regions to advise "former agents and supervisors about this policy so that they are aware that the party representative may be involved

in or present at the substantive communication." In addition, "[w]here the former agent or supervisor has independent representation and/or does not want the charged party's representative to be present, or where the charged party's attorney seeks to participate as more than an observer, the Region should contact the Ethics Office."

### Audio recordings

The memo allows regions to continue to seek relevant audio recordings during investigations, but lays out specific guidelines for doing so. According to the memo, while the same approach should be used for video recordings, Robb notes that statutes may have different consent requirements

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for video recordings than for audio recordings.

**What recordings should *not* be received.** To avoid violations of the Federal Wiretap Act, the memo instructs regions not to receive recordings “know[n] to have been made without the consent of any participant in the conversation and with an expectation of privacy.” On the other hand, regions are not necessarily prohibited from receiving a recording that may have violated a state wiretap statute or an employer policy.

However, according to the memo, the region should advise anyone proffering such recordings of the potential repercussions in order to allow the individual to make an informed choice. When in doubt about these rules, the memo advises regions to seek guidance from the Ethics Office.

**Offer to play recordings.** When a region “determines that an audio recording is relevant to the decision of whether an employer or labor organization committed an unfair labor practice, [it] should apprise the charged party as to the existence of the recording during the investigation, offer to play the relevant portion[,] ... and solicit the charged party’s position before making a determination on the merits.”

**Advice before receiving recordings.** Before receiving a proffered recording, the region should advise its provider of the following: (1) that the region may play the recording “for the charged party before the conclusion of investigation;” (2)

“that if the recording was made contrary to law, the one who made the recording may be subject to prosecution or to a civil claim;” and (3) “that if the recording was made contrary to a lawful employer work rule or policy, the employer may take action based on a violation of its rules.”

Once a party or person proceeds with proffering a recording, according to the memo, “the Region may utilize the recording to the full extent of its probative value during the investigation” and should deny any request by the charged party for a copy. The memo further states that if the region has any ethics concerns about using the recording during a hearing, it should contact the Ethics Office for guidance.

### Growing significance

The memo should provide much needed clarity and consistency, both with respect to the investigatory interview of former supervisors and the use of recorded materials. The latter has become increasingly prevalent with the almost universal availability and use of cell phones and other devices capable of recording audio. These devices have made it easier for employees to secretly record “captive audience” meetings or other organizing campaign interactions, disciplinary interviews, or other personnel-related discussions. Employers may want to check their policies regarding workplace recordings to ensure that they are facially lawful and consistently administered. Employers may also want to be fully aware of the relevant state law regarding audio recording and consent that applies to their operations. ■

## Board still mulls changes to contract-bar doctrine

On September 16, 2020, the National Labor Relations Board (NLRB) extended the time from September 23, 2020, to October 7, 2020, for interested amici to [file briefs](#) with respect to the contract bar doctrine at play in *Mountaire Farms Inc.* The Board’s original [notice and invitation](#) was issued on July 7, 2020. Briefs submitted by the parties in response to the notice and invitation to file briefs were due no later than August 21, 2020.

**Underlying case.** The question presented in the underlying case was whether a poultry employee’s petition to decertify an incumbent union should be dismissed on the basis of

the Board’s contract-bar doctrine. The regional director concluded the petition was not barred because the operative labor contract contained an unlawful union-security clause.

**Board orders.** The union, the United Food and Commercial Workers Union (UFCW), sought review of the regional director’s decision to reject the extant contract as a bar and to allow the decertification election to go forward. The petitioning employee argued that the contract should not bar the election and that the Board should take this opportunity to reassess the contract-bar doctrine.

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On June 23, 2020, the Board *granted* the request for review of the regional director's decision and indicated its intent to seek amicus briefing on a range of issues involving the contract-bar doctrine. The Board permitted the decertification election to go forward and has impounded the ballots. On July 7, 2020, the Board issued its invitation for briefing with regard to the underlying contract bar doctrine.

**Contract-bar doctrine modification.** Pursuant to the July 7, 2020, invitation, amici were invited to address the questions of whether the Board should rescind the contract-bar doctrine, retain it as it currently exists, or retain the doctrine with modifications.

*Some employers subscribe to the “devil you know” school of thought, and would rather deal with a union with which they have some bargaining history rather than newcomers that could be more radical or be out to “prove themselves.”*

As to the option of retaining the contract-bar doctrine with modifications, the Board invited the parties to specifically address the following, in addition to any other issues raised:

- “the formal requirements for according bar quality to a contract”;
- “the circumstances in which an allegedly unlawful contract clause will prevent a contract from barring an election”;
- “the duration of the bar period during which no question of representation can be raised (including the operation of the current “window” and “insulated” periods)”; and
- “how changed circumstances during the term of a contract (including changes in the employer's operation, organizational changes within the labor organization, and conduct by and between the parties) may affect its bar quality.”

**Policy issues at play.** The contract bar doctrine—like the election, certification, and recognition bars—is the product of tension between the goal of “industrial stability”

and “employee free choice.” Obviously, any bar to the electoral process that prevents employees from ousting or replacing an incumbent union limits the “free choice” of such employees.

However, the various bars have been erected to ensure some degree of stability in the labor/management relationship. In the absence of some bar, existing union relationships would be subject to continuous potential electoral challenge, and thus unstable. On the other side of the coin, it has frequently been argued that the complexity and multiplicity of the Board's election bar regime affords employees few realistic opportunities to oust or change their union representative.

Complicating the situation even more is the fact that the prospect of liberalizing the Board's bar doctrine, and permitting greater opportunities for employees to change or remove their union

representative, is not a position universally endorsed by the employer community. Some employers subscribe to the “devil you know” school of thought, and would rather deal with a union with which they have some bargaining history rather than newcomers that could be more radical or be out to “prove themselves.”

Perhaps more importantly, the prospect of decertification is a serious consideration for employers that are participants in an underfunded multiemployer pension plan. For those employers, decertification would result in their ouster from the pension plan and the imposition of pension-based withdrawal liability. For underfunded plans, an employer's withdrawal liability can be staggeringly expensive.

A decision in this case is not expected to issue until next year. Meanwhile, the solicitation of amicus views will hopefully provide the Board with guidance as it considers refashioning the contract bar doctrine in a way to maximize free choice without causing substantial collateral damage. ■

## Other NLRB developments

### Circuit court decisions

#### 5th Cir.: Utilities dispatchers were statutory

**supervisors.** The National Labor Relations Board (NLRB) did not err in concluding that dispatchers for a utility company were “supervisors,” and thus excluded from the protection of the National Labor Relations Act (NLRA), the U.S. Court of Appeals for the Fifth Circuit ruled. On remand from a prior appeal, the Board had held that the evidence showed that dispatchers used independent judgment in assigning field employees and therefore met the statutory definition of “supervisor.” The appeals court agreed, ruling that the Board reasonably concluded that the dispatchers’ prioritization of outages required the use of independent judgment, and that the discretionary function necessarily resulted in the assignment of field employees. The record also demonstrated that their work was far from mechanical, requiring them to juggle a number of complex factors when making assignments (*International Brotherhood of Electrical Workers, AFL-CIO, CLC, Local Unions 605 and 985 v. National Labor Relations Board*, September 2, 2020).

#### 5th Cir.: Plant supervisors improperly included in

**BU.** In another supervisory case, the same circuit court found that the NLRB had erred in concluding that unit supervisors and maintenance supervisors at a nuclear power plant were not statutory supervisors. Reversing and denying enforcement of a bargaining order, the Fifth Circuit explained that the employer was only required to prove “that each group exercise one of the statutory criteria necessary to qualify as a ‘supervisor.’” Here, the court’s independent review of the record revealed that the substantial evidence did not support the Board’s finding that “unit supervisors [did] not ‘responsibly direct’ work and maintenance supervisors [did] not ‘assign’ work.” In particular, the NLRB erred in concluding that the unit supervisors were not held accountable for the actions of their subordinates, and also observed that “the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” Additionally, the Board “ignored significant portions of the record showing that maintenance supervisors indeed assign work using independent judgment” (*STP Nuclear Operating Company v. National Labor Relations Board*, September 16, 2020).

#### 6th Cir.: NLRB’s use of “special remedies” curbed.

Certain special remedies that the NLRB imposed on an employer it found had unlawfully interfered with unionization efforts were improper, the U.S. Court of Appeals for the Sixth Circuit ruled. Thus, the appeals court denied enforcement of the Board’s special remedies, including public notice reading. While affirming the order for a rerun election, the circuit court also refused to enforce special remedies providing for union access, “equal time,” and an expanded entitlement to employee information. The appeals court held that since these “remedies” were not tailored to address any specific violation, they constituted an “impermissible punishment . . . [which was] not an appropriate exercise of remedial power.” The notice-reading requirement was similarly deemed punitive, and not remedial, and the court generally cast doubt on the constitutionality of any public reading remedy. The case is significant inasmuch as the Board, of late, has been imposing “special remedies,” especially notice-reading, with greater frequency (*Sysco Grand Rapids LLC v. National Labor Relations Board*, September 4, 2020).

#### 6th Cir.: Union supporter’s firing unlawfully motivated.

The NLRB did not err in applying the *Wright Line* analysis to find that that an employer was motivated by general union animus when it discharged a known union supporter who, among other things, produced and distributed “No Open Shop” bumper stickers to his coworkers in the midst of a significant dispute over the inclusion of an open-shop provision in the anticipated collective bargaining agreement. In an unpublished opinion granting enforcement of the Board’s order, the Sixth Circuit found that ample evidence of the employer’s conduct both before and after the termination supported a finding that anti-union animus motivated the employee’s discharge. This included the timing of the termination in relation to his protected activity, the employer’s “shifting explanation” for his termination, its “inconsistent application” of its progressive-discipline policy, and its tolerance of similar job-related misconduct committed by the employee in the past. The appeals court also found that the Board did not err in rejecting as pretextual the employer’s assertion that it discharged the employee because of his “quality-of-work violation” (*National Labor Relations Board v. Roemer Industries, Inc.*, August 27, 2020).

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## NLRB rulings

### Exotic dancer an employee, not independent contractor.

An administrative law judge (ALJ) properly applied the common-law agency test in finding that a strip club failed to prove that a dancer was an independent contractor rather than an employee entitled to the protections of the NLRA. The NLRB determined that the ALJ correctly applied the entrepreneurial opportunity principle to find that the dancer lacked sufficient opportunity for economic gain to render her an independent contractor. It further noted that the employer exercised “significant control over the dancers’ day-to-day work (through extensive rules, expectations, supervision, fines, and penalties), their work environment, and the customer base,” and that the “dancers [made] minimal investment and [had] minimal economic risk.” Many of the other common-law factors also supported a finding of employee status, including “in-person supervision of the dancers’ work, which [was] subject to [the employer’s] detailed rules . . . and enforced through a system of fines that [were] imposed on a near-daily basis, as well as through verbal warnings and suspensions.” Additionally, the ALJ properly applied the *Wright Line* analysis in concluding that the club violated the NLRA by discharging the dancer “for filing unfair labor practice charges against past employers and for threatening to file a charge against” the employer (*Nolan Enterprises, Inc. dba Centerfold Club*, July 31, 2020).

**Pandemic-spurred layoffs precluded union election.** A regional director erred in scheduling an election during a time in which an employer had indefinitely suspended its operations and laid off all of its employees due to the COVID-19 pandemic, the NLRB ruled. The employer closed all of its Las Vegas properties after the governor of Nevada issued an emergency directive requiring all of the state’s casinos to cease operations, and initially advised the employees that they would likely be recalled. However, after the governor extended the emergency order, the company sent the employees in the petitioned-for unit a termination letter explaining that the uncertainties prevented it from predicting whether or when it would resume normal operations. Dismissing the regional director’s election petition subject to reinstatement when the employer resumed its operations, the Board concluded that the laid-off employees had no reasonable expectation of recall and thus were ineligible to vote, noting that “where an employee is given no estimate as to the duration of the layoff or any specific indication as to when, if at all, the employee

will be recalled, the Board has found that no reasonable expectancy of recall exists” (*NP Texas LLC dba Texas Station Gambling Hall and Hotel*, August 31, 2020).

**No bad faith bargaining.** The NLRB rejected an administrative law judge’s finding that ExxonMobil Research & Engineering had implemented unilateral changes in its evaluation procedures during the term of a collective bargaining agreement. It also rejected the ALJ’s finding that during subsequent contract negotiations, ExxonMobil had “unlawfully conditioned agreement” on acceptance of an alleged permissive bargaining subject; “refused to bargain over personal time in retaliation for” the union’s grievance activity; promised a “benefit in exchange” for employees’ rejection of the union; “engaged in unlawful direct dealing” with unit employees; and “unlawfully disparaged the [u]nion.” Accordingly, the Board overturned the ALJ’s finding that the employer had bargained in bad faith. The Board observed that while the company “engaged in hard bargaining, it was clearly willing to give ground and make trade-offs on some issues to secure its desired outcome” (*ExxonMobil Research & Engineering Co., Inc.*, September 28, 2020).

**Email policy did not violate NLRA.** An employer’s restriction on nonbusiness email usage was not unlawful, the NLRB ruled in applying its recent decision in *Caesars Entertainment*, where it overturned Obama-era precedent holding that a prohibition on personal use of email during nonworking time was unlawful. The employer’s policy prohibited staff at its four unionized call centers from using the company’s email systems for the purpose of “[e]ngaging in activities on behalf of organizations or persons with no professional or business affiliation” and “[d]istributing or storing . . . solicitations . . . or other non-business material or activities.” This policy did not violate the NLRA since under *Caesars Entertainment*, “an employer does not violate the Act by restricting the nonbusiness use of its IT resources absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other, or proof of discrimination” (*Purple Communications, Inc.*, September 28, 2020).

**Threats about unionization unlawful.** The NLRB held that statements made by a tire manufacturing company’s president that implied to two employees that “all employees’ jobs were in jeopardy” if they were to select the union as their bargaining representative, including his comment to one of them that

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“this company will not survive if the union comes in,” violated the NLRA. The president’s statements drew a straight line from the employees’ selection of the union as their bargaining representative to the company’s demise, and “he presented no objective basis for such a prediction.” The fact that the president mentioned the company’s financial troubles with its creditors, and the “need to show the creditors” its strength

and ability to “stand on [its] own,” was “not sufficient under *Gissel* to render his statements lawful.” Certain predictions made by team leaders were also unlawful, including those predicting that the company would lose two major automobile manufacturers as customers if it were unionized, that jobs would be lost because of a strike, that operations would be transferred, and that the union would cause the loss of employment (*Kumho Tires Georgia*, October 8, 2020). ■

## NLRB proposal changes voter list requirements

On July 29, 2020, the National Labor Relations Board (NLRB) published a notice of proposed rulemaking (NPRM) that would repeal the Obama-era 2014 amendment to the voter list rule requiring employers in representation cases to provide unions with the personal email addresses and available home and personal cell phone numbers of all eligible voters. While public comments on the proposed rule changes were initially due by October 13, 2020, that date was extended by two weeks to October 27, 2020.

**2014 modifications to *Excelsior* rule.** Before the amendment in 2014, employers were only required to produce the names and addresses of eligible voters pursuant to the Board’s 1966 *Excelsior Underwear* decision. However, in 2014, among many other amendments to Board election procedures, the Obama-era Board changed the voter list requirement by mandating that employers additionally provide the personal email addresses and available home and personal cell phone numbers for all eligible employees.

Proponents of the change argued that it was justified by advancements in telecommunication technology and would enhance union/voter communication. Advocates also claimed that the modifications would facilitate faster union investigation of names included on the list, thus reducing the risk that unions would challenge voters based solely on lack of knowledge as to their identity.

**RFI responses highlight privacy concerns.** The voter list amendments, however, drew much criticism largely centered around privacy concerns. These concerns were amplified after the Board issued a [Request for Information](#) on December 12, 2017, in which the agency solicited information about whether the 2014 amendments should

be retained without change, retained with modifications, or rescinded.

According to the Board, virtually every responder addressed the expanded voter list disclosures. Supporters of the 2014 amendment praised the expanded requirement as a desirable modernization of the *Excelsior* requirement that fostered union campaign communications and offset employers’ greater access to employees. However, critical responses complained that the amendments had not adequately considered employee privacy interests, and also reported that the expanded disclosures had prompted employee complaints, including excessive and harassing communications from union advocates.

As reflected in the NPRM, the current Board has suggested that eliminating the requirement that employers provide eligible voters’ personal email addresses, as well as home and personal cellular telephone numbers, “will better balance employee privacy interests against those supporting disclosure of this information.” Those interests include not only a desire to be left alone, but also to protect oneself against data and identify theft.

**Change to rule on absentee ballots.** The same NPRM also proposes an amendment that would modify the Board’s currently informal policy of not providing absentee ballots by allowing eligible employees on military leave to use absentee mail ballots. The Board believes that it should seek to accommodate these voters in light of congressional policies facilitating their participation in federal elections and protecting their employment rights. The Board further noted that this policy can be effectively implemented without inordinately delaying election outcomes.



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