Ogletree Deakins

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The Practical NLRB Advisor

DEFCON 1: the nuclear memorandum

In this Issue

In late July, Jennifer A. Abruzzo was confirmed as the new general counsel (GC) of the National Labor Relations Board (NLRB). The vote was 51-50 and required Vice President Kamala Harris to cast the tie-breaking vote.

Like previous general counsels, one of Abruzzo's first priorities was the issuance of a memorandum (GC 21-04) to all the NLRB's regional offices entitled "Mandatory Submissions to Advice." As the name implies, the memo requires that whenever any issue identified in the memo arises in a region, the case must be sent for disposition to the Division of Advice, an adjunct of the GC's office located in the NLRB's Washington, D.C., headquarters. The Advice submission memo is a key document for any GC. It identifies the GC's priorities, and provides a roadmap for the policy initiatives and changes an incoming GC intends to effectuate by presenting to the five-member Board for eventual decision. Since that Board now enjoys a plainly pro-labor majority, the GC's submission wish list is very likely to eventually become law.

Unlike prior GCs, whose initial submission memos are typically targeted and limited to certain discrete issues, Abruzzo's memo decidedly is not. Prior GCs have typically utilized a limited "rifle shot" in targeting policy issues for change or reversal. Abruzzo, however, has deployed a blunderbuss. Running some 10 pages in length, it covers a plethora of issues, portends an effort to reverse more than 40 major cases decided by the Trump Board, and strongly suggests a proposed policy agenda even more aggressive and radical than that pursued by the Obama Board.

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BRIAN IN BRIEF

Joe Biden was elected while promising to be the "most pro-union president" in U.S. history. Whether his pledge is enough to halt the decline of organized labor remains to be seen. What is immediately clear, though, is that his administration is doing its best to live up to the promise.

From the unprecedented firing of National Labor Relations Board (NLRB) general counsel Peter Robb on Inauguration Day, to the filling of Board seats with labor-friendly nominees in record time, the White House support for organized labor has been palpable. In no instance has it been more evident than in the memoranda issued by the agency's new general counsel (GC), which is the focus of this issue of the *Practical NLRB Advisor.*

That the tilt of the agency would become decidedly more pro-union came as little surprise. The breadth and degree of the proposed reorientation reflected in the memoranda, however, stunned many observers. The memos do not foreshadow a mere recalibration of Board law. They plainly anticipate a tectonic shift.

While it seems clear that there is no viable legislative path forward for the Protecting the Right to Organize (PRO) Act, there remains the prospect that its massive monetary fine provisions will be included in the congressional budget reconciliation package. The aggressive changes contemplated by the new GC memos and the possibility of punitive monetary sanctions portend a tough road ahead.

Whether Congress will enact the penalty provisions, whether many of the GC proposals will pass judicial muster, and whether the agency's new aggressiveness will collapse under its own weight are all unclear contingencies at this point. Equally unclear is whether even the full enactment of these measures can resuscitate a moribund labor movement. What is very clear for employers, however, is that they do not want to be lined up in the sights of the current NLRB.

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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A labor policy storm is brewing

To most, the closeness of the election, and more importantly the necessity of a tie-breaking vote by Vice President Harris, would suggest the wisdom of the new GC pursuing a more modest and centrist policy agenda. However, as several pundits have observed, in today's Washington even a hairbreadth victory somehow becomes a mandate.

Whatever the thinking, it is clear that labor/management relations are headed for yet another violent swing of the policy pendulum. While some in the labor movement may applaud this, for most stakeholders such wholesale policy revision is likely to result in uncertainty, expense, and upheaval. Such swings also severely damage the public perception of the NLRB. When decision-making moves in lockstep with politics it is difficult to view the NLRB as a neutral arbiter or enforcer. Indeed, it runs the risk of being viewed as patently partisan. Given recent history, "Board law" has become much like New England weather—if you don't like it, just wait a few minutes. To extend the weather analogy, the GC's memo plainly means there's a storm on the horizon.

Revamping recent precedent

Despite the memo's own caveat that it is not intended to be "exhaustive" and that it "will be supplemented," it is both lengthy and comprehensive. What follows is a summary of the major issues it addresses. First off are 10 cases and subject matter areas where—according to the new GC—"in the last several years, the Board overruled legal precedent."

Work rules and confidentiality. First, and to the unquestionable chagrin of every human resources professional, the new GC wants to renew the Board's focus on work rules and personnel policies. Consequently, the memo calls for all cases involving the Trump Board's *Boeing* decision to be sent to the Division of Advice. The "grammatical police" are clearly back in town, and the endless parsing of employer policies will undoubtedly begin anew.

Second, and related to the employer handbook issue, the GC intends to again resuscitate the confidentiality issue. Thus, she has directed cases involving confidentiality and nondisparagement clauses in separation agreements, as well as confidentiality provisions regarding workplace investigations and arbitration agreements, to be forwarded to headquarters for review. This initiative will almost certainly make settlements more difficult and unlikely, and once again, potentially hamstring legitimate workplace investigations.

Protected activity. In her third class of cases targeted for review, the GC has identified the very broad issue of "[w]hat constitutes protected concerted activity" under the National Labor Relations Act (NLRA). She has asked for submission of all cases that bear on such topics as what constitutes "inherently concerted activity," what activity is for "mutual aid or protection," and what is the meaning of union "solicitation." She has even asked for the submission of cases involving employee use of employer email and other communication systems, likely signaling an intent to seek reversal of *Rio All Suites Hotel and Casino*, and a return to the problematic decision in *Purple Communications*. An expansion of the concept of protected activity even more aggressive than that pursued by the Obama Board appears in the offing.

Proof and settlement. In a technical, but nonetheless very significant, initiative the GC has asked for the submission of cases involving the government's burden of proof standard in unfair labor cases. The matters that the memo references are all designed to lower the government's burden or broaden the type of evidence that will satisfy its burden. The net result of the proposed changes is, quite simply, to make it easier for the government to prove guilt.

In an effort to reassert the GC's nearly total control over the settlement of unfair labor practice claims, the memo also directs the submission of all cases where an administrative law judge wants to accept a settlement proposal over the objection of the GC and proposed settlements in discharge cases that involve the payment of "excessive" backpay to a discharged worker in return for a waiver of reinstatement. The obvious tradeoff for putting the GC back in charge will be making successful unfair labor practice settlements more difficult and less likely.

Access and dues. The sixth category of cases identified by the GC are those involving union access to employer property. It seems clear the GC is intent on obtaining the reversal of two Trump-era cases. One of those cases stands for the proposition that the off-duty employees

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of a contractor may not return to an employer's property for union or organizing activity unless they *regularly* and *exclusively* work there *and* have no other reasonable means of communication. The other case stands for the proposition that an employer does not engage in *discrimination* by excluding union agents from its public spaces unless it allows access by other individuals engaged *in the same activity*. Current law strikes a balance between Section 7 rights and an employer's legitimate property rights. The GC has signaled a clear intent to upend this balance.

The GC's proposed initiative here is nothing less than a complete retooling of the law under Section 8(a)(5)—a retooling that reverses all the commonsense reforms enacted over the last four years and restores almost all of the radical initiatives of the Obama Board.

Unsurprisingly, the new GC also wants to revisit two significant issues regarding union dues. Under current law, an employer is privileged to unilaterally cease checking off and remitting union dues once the contract containing the checkoff clause expires. Also, under current law, a nonmember *Beck* objector may not be charged for a union's lobbying expenses and the union must provide independently audited financial information to such objectors upon request. A change in the right to suspend checkoff would significantly alter an employer's negotiating leverage for a successor contract, and changes to the *Beck* rules would seriously injure the rights of those employees who wish to refrain from union activity. These considerations notwithstanding, the GC appears primed to set up the reversal of extant law in both instances. These two issues have been the focus of continuing and vocal opposition by organized labor.

"Gig" workers. In an extremely important development for the "gig economy" the GC has directed the submission of all cases involving application of the *SuperShuttle* standard to determine if individuals are deemed statutory "employees." Under current law, this issue is determined based on the degree of entrepreneurial opportunity and individual exercises, and, consequently, many individuals that work in the gig economy are classified as "independent contractors," not "employees." The latter are covered by the NLRA, while the former are not. Given the large number of gig workers, a recalibration in this area has enormous organizing and coverage consequences.

Collective bargaining. In the tenth category of cases, the GC is apparently seeking to reverse a host of current precedents dealing with the collective-bargaining process. Thus, the GC wants to revisit the "contract coverage" versus "clear and unmistakable waiver" standard in determining if an employer may implement midterm changes without bargaining. Under current Board law, and the law in most judicial circuits, the contract coverage standard applies. Under that standard, if a contemplated change falls within the general language of an extant management rights clause, an employer is free to implement the change unilaterally. The waiver standard, however, requires a union's highly specific and unequivocal waiver of the right to engage in midterm bargaining over the particular issue.

While a reversion to the waiver standard would be of extreme practical significance, it is but the tip of the collective-bargaining iceberg in the GC memo. The GC also wants to review cases involving the employer's right to withdraw recognition on evidence of employee disaffection; a successor's forfeiture of the right to set initial terms and conditions of employment; the right of an employer to act in accordance with past practice after a contract has expired; the obligation of an employer to open its books based on a mere claim of competitive disadvantage; the remedies available for unilateral change violations; claims that the status quo requires continuing pay raises after contract expiration; the role of employee turnover, changed circumstances, and excessive delay in determining the propriety of a *Gissel* bargaining order; the obligation to provide the union with customer complaints; and reimposition of the duty to bargain over disciplinary actions before reaching an initial collective-bargaining agreement.

The GC's proposed initiative here is nothing less than a complete retooling of the law under Section 8(a)(5)—a retooling that reverses all the commonsense reforms enacted over the last four years and restores almost all of the radical

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initiatives of the Obama Board. It is bound to make the process of bargaining and contract administration less predictable, more complicated, and invariably problematic.

Apparently undaunted by nearly constant criticism from reviewing federal courts, the GC, in her memo's tenth case category, has also directed the submission of all cases involving the issue of potential Board jurisdiction over religious institutions. There could hardly be a clearer signal of the GC's aggressiveness and comprehensiveness than the willingness to again wade into this constitutional morass.

Deferral. In yet another move to enhance the NLRB's primacy in workplace disputes, the GC memo also directs the submission of cases involving the deferral of unfair labor practice cases to the parties' grievance and arbitration machinery. The Trump Board had somewhat liberalized the deferral guidelines, ensuring that more employment disputes would be resolved through the parties' arbitration machinery than through the NLRB's adjudication processes. Despite the speed and efficiency of the arbitral process it appears the GC wants the agency to control more of these cases and dictate their outcomes.

Diving even deeper

Beyond all of these issues that involve jurisprudence either revived or developed over the last four years, the GC memo outlines a further laundry list of significant issues that must be submitted to the Division of Advice. Included in the list are additional cases regarding the "employee" status of certain disabled workers in rehabilitative settings, union salts, and another look at the question of whether employee "misclassification" can be an independent unfair labor practice. The memo also identifies several very significant strike-related issues for submission including whether an employer's motive vitiates an employer's right to hire permanent replacements during an economic strike, the legality of intermittent strikes, the ability to provide enhanced benefits to strike replacements, and limitations on finding unlawful certain strikes with a secondary object.

Also, of equally great significance are cases involving surface bargaining, the refusal to provide information in the context of a relocation or other *Dubuque Packing* situation, the right to midterm withdrawal of recognition, and, most importantly, the good faith doubt of an employer in declining to accept a union's claim of majority status. This last issue—the *Joy Silk* doctrine—is by far the most significant. Many have suggested that under the guise of assessing the validity of an employer's doubt regarding majority status that the Board at the GC's urging simply intends to implement mandatory card check recognition by other means.

The memo further presages a substantial broadening of *Weingarten* rights, the reversal of current law allowing an employer to "promulgat[e] a mandatory arbitration agreement in response to employees engaging in collective action," the establishment of the principle that any threat of plant closure is presumed to have been disseminated, and the determination that an employer violates the Act by informing employees that their "access to management will be limited if employees opt for union representation."

In addition, the memo also directs the submission of a substantial number of remedial issues, ranging from make-whole remedies for construction industry applicants and refusal to bargain, to the burden on an employer to show that an employee failed to adequately search for interim employment.

"Other casehandling matters." Were the GC's listing of novel issues requiring submission to Washington not nearly long enough, the GC goes on to remind regions of the host of other issues that are "traditionally submitted to Advice." Those issues, set forth in 16 bullet points, range from virtually all injunction-related matters to matters "involving the validity of partial lockouts."

Stunning and unprecedented

As noted at the outset, the breadth and numerosity of the GC's memo is stunning and unprecedented. Some witty commentators have suggested the GC could have saved a lot of ink by just saying "send everything" to Advice, or, at the very least, everything the Trump Board ever touched. Unfortunately, for those that look for even a modicum of enforcement consistency and stability, those commentators may have it absolutely right. ■

Remedies and settlements

While the new National Labor Relations Board (NLRB) general counsel's August 12, 2021, "Mandatory Submissions to Advice" memo (GC 21-04) was a blockbuster, it was by no means the end of the story. General Counsel (GC) Jennifer A. Abruzzo followed up with a one-two punch, issuing a "Seeking Full Remedies" memo (GC 21-06) on September 8, 2021, and a "Full Remedies in Settlement Agreements" memo (GC 21-07) on September 15, 2021. All three, taken together, represent the largest and most aggressive prosecutorial agenda of any GC in NLRB history.

The message: seek it all

Memorandum GC 21-06 directs regional offices to seek "full" remedies in all cases and to exercise the full extent of the Board's authority. In the instance of unlawful terminations, in addition to the traditional back pay and reinstatement remedy, the GC has directed regions to seek all "consequential" damages. Consequential damages are comprised of any losses that flow from the termination of employment. They include any medical or insurance costs that would have been covered by insurance but for the discharge, loan finance charges, costs associated with loan defaults or repossessions, job-search and training costs, and any other costs associated with the lost income or increased expenditures resulting from the termination.

[T]he memo calls on regions to routinely seek "broad orders," which require a respondent to not only cease and desist violating the [NLRA] by the conduct specifically alleged, but also "in any other manner."

In cases where reinstatement appears inappropriate, the memo requires regions to seek "front pay" and "instatement." Instatement would require an employer to fill the position of the discharged employee with a qualified individual *recommended or acceptable to a union* in some instances. In appropriate cases involving an employer's violation of its bargaining obligation, the GC memo directs the regions to seek reimbursement for bargaining costs and litigation costs. The memo further directs regions, in appropriate cases, to require the reading of Board notices by management officials, to require the publication of remedial notices in newspapers and social media sites, and to require union access to employer property and the use of employer bulletin boards. Lastly, the memo calls on regions to routinely seek "broad orders," which require a respondent to not only cease and desist violating the National Labor Relations Act (NLRA) by the conduct specifically alleged, but also "in any other manner."

GC 21-06 also references two additional highly controversial remedial matters. First, it suggests that in cases where an employer declines to recognize a union's claimed majority status on the basis of "good faith doubt"—the position taken by almost every employer confronted by a recognition demand—it is incumbent on the employer to prove the basis for its good-faith doubt. If the employer fails to do so, it would be subject to a Board bargaining order. This "remedy" is nothing less than mandatory card check by other means.

The memo also references "a new make-whole remedy." Where an employer delays resolution by refusing to bargain or by bargaining in bad faith, the GC proposes attempting to seek damages based on speculation as to what employees might have gotten *but for* the employer's lack of good-faith bargaining. Astoundingly, it appears the GC would extend this remedy to so-called "technical refusals to bargain," which occur when an employer refuses to bargain for the sole purpose of obtaining federal court review of some matter related to an underlying representation case proceeding. Under the NLRA, this is the only way to obtain judicial review of such issues. If implemented, employers would have to put enormous potential assets at risk simply to exercise their right to appellate review.

Memorandum GC 21-07 extends these principles into the pre-litigation disposition arena as well, directing regions to insist on *full remediation* whenever settling a matter short

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of trial. For example, under current practice, discharge cases are often settled at a monetary component equal to 80 percent of the claimed amount of back pay. The memo appears to put an end to that practice by noting that such settlements should be for 100 percent of claimed back pay. The memo also suggests that the full panoply of remedies outlined in the GC's new "full remedies" memo should be insisted upon in the settlement of appropriate cases. Lastly, the settlements memo once again resuscitates the default language requirement. Thus, henceforth in most cases, a settlement agreement must provide that if the employer subsequently violates the agreement, it will be adjudged to have violated the NLRA in the manner alleged in the original complaint.

Legal challenges ahead

A number of the GC's recommended remedies have been looked upon unfavorably by reviewing federal appellate courts, and the remedies raise serious questions as to whether they are beyond the authority of the Board. In addition, as this issue of the *Practical NLRB Advisor* goes to press, Congress is considering an amendment to the NLRA that would provide for potential civil penalties of $50,000 to $100,000 for unfair labor practice violations. Couple the questionable nature of some of the GC's proposed remedies with their draconian reach, stir in the prospect of massive civil monetary penalties, and top it off with the GC's insistence on "full remediation" in settlements, and it becomes clear that employers will face higher stakes in unfair labor practice litigation going forward.

Lost, however, in the apparent zeal to up the ante and punish employers, are certain realities about the intended nature of the statute and the practicalities of its administration. First, it is worth noting that the NLRA was never intended to be a punitive statute. Its purpose has always been remedial. Thus, to many observers it is difficult to see how Congress can legitimately add punitive fines to the NLRA and change the core nature of the statute through a budget reconciliation bill without actual legislative action. It is equally unclear how the GC can properly pursue or obtain remedies that are essentially punitive. Such dramatic changes invite legal challenge.

Logistically untenable

Even assuming all the enumerated "remedies" pass legal muster, there will unquestionably be practical consequences to the new GC's enhanced remedial and settlement scheme. The NLRB is a small agency with limited resources. Consequently, its unfair labor practice enforcement responsibilities rely heavily on voluntary compliance and settlement.

Consider the following numbers: Last year, the NLRB settled over 5,000 of the complaints it issued. That constituted a settlement rate of 96 percent. The NLRB employs only 30 administrative law judges who conduct proceedings related to unfair labor practices, and they consistently decide a total of around 250 cases per year. The Board decides an even lesser number of these cases on appeal. It is certainly worth asking: What happens to the Board settlement rate if all of the GC's directives are put into practice and huge civil monetary penalties become effective?

There will unquestionably be an enormous employer resistance to settlement, and settlements will lose their financial and practical attractiveness. The effect is likely to prove seismic, as at the current complaint issuance rate, even a 5 or 10 percent reduction in settlements would double or triple the NLRB's annual litigation burden. From an output perspective, the Board is already at or near its maximum, and even doubling the adjudication load would cripple the agency and result in compounding backlogs and delays. Add to this the fact that the GC wishes to expand theories of liability and push the NLRA's substantive and remedial boundaries. This portends the double squeeze of a sharply increasing number of complaints and a plummeting settlement rate.

The NLRB simply does not have the resources to deal with such a contingency, and the notion that in 2023 it would receive massive budget increases from what could be a Republican-majority U.S. House of Representatives is implausible. The GC's new aggressiveness will no doubt create enormous short-term problems for any individual employer unfortunate enough to wind up in the Board's prosecutorial sights, but it is very likely an aggressiveness that is unsustainable over time. ■

Changes in key labor roles bolster pro-labor agenda

Several crucial labor appointments designed to further the Biden administration's pro-union policies have been finalized over the past few months. Over the summer, the U.S. Senate confirmed President Joe Biden's nominee for the top attorney at the National Labor Relations Board (NLRB), his picks for two Board vacancies, and two out of three of his nominees for top spots at the U.S. Department of Labor (DOL), with the future of the third nomination remaining unclear. In addition, the untimely death of the head of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) has led to an unexpected change in leadership at the largest federation of unions in the United States. Buckle up, because the administration's push for exceedingly labor-friendly policy changes is just getting underway.

Top NLRB prosecutor confirmed

On July 21, 2021, the Senate confirmed Jennifer A. Abruzzo to serve as the general counsel (GC) of the NLRB for a four-year term. Abruzzo was confirmed only when Vice President Kamala Harris broke a 50–50 tie vote in the Senate by voting in favor of confirmation. Abruzzo failed to receive any Republican support. One of the more controversial nominations of the Biden administration, Abruzzo did not receive a favorable vote out of the Senate Committee on Health, Education, Labor, and Pensions (HELP). The committee deadlocked 11–11 on Abruzzo's nomination and she required an unusual floor vote in the Senate to first

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Confirmed GC ratifies acting GC's questionable actions

In addition to releasing the consequential GC memoranda discussed in detail in this issue of the *Practical NLRB Advisor*, newly confirmed NLRB GC Jennifer Abruzzo has taken swift action in response to one of many legal challenges related to President Biden's installation of former acting GC Peter Sung Ohr following the president's controversial dismissal of Abruzzo's predecessor, Peter Robb. Following this unprecedented action, many employers with pending proceedings at the NLRB began challenging complaints issued by Ohr as unlawful, given the circumstances of his appointment.

The NLRB subsequently punted the issue to the courts, declining to rule on the lawfulness of Ohr's designation because "reviewing the actions of the President is ultimately a task for the federal courts" (*National Association of Broadcast Employees and Technicians*, 370 NLRB No. 114 (April 30, 2021)). The only federal district court to weigh in on the issue to date declined to make a decisive ruling on the thorny issue. Only briefly addressing the employer's argument, the court stated in dicta that presidents have the power to remove NLRB general counsels without cause, but held overall that the validity of the acting GC did not impact whether the Board could petition the court for an injunction—the dispositive issue in the case (*Goonan v. Amerinox Processing, Inc.*, No. 1:21-cv-11773 (July 14, 2021)).

Other cases are pending in which employers have similarly challenged the validity of Ohr's designation, some of which may have stronger underlying bases for their arguments. Shortly after her confirmation, Abruzzo took legal steps aimed at overcoming these objections and protecting Ohr's interim actions from attack. Thus, on July 25, 2021, Abruzzo signed a "Notice of Ratification" in *Exela Enterprise Solutions, Inc.*, a case in which the respondent employer alleged that the complaint was an unauthorized ultra vires act by Ohr in his invalid role as acting GC.

In an attempt to moot the argument, Abruzzo stated in the ratification notice that after having reviewed the case and consulting with her staff, she had decided that "the issuance of the complaint and its continued prosecution in [the] case were and are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act." As a result, she announced, "I hereby ratify the issuance and prosecution of the complaint and all actions taken in this case by former Acting General Counsel Ohr and his subordinates." The employer has filed a petition for review in the Fifth Circuit.

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discharge her nomination and then to confirm the nomination with the vice president's tie-breaking vote.

During the hearing, Republican senators raised significant concerns about Abruzzo's potential recusal and ethics issues since immediately prior to her nomination she had served as special counsel to the Communications Workers of America. She also faced tough questions about her role on the Biden transition team and her suspected participation in the president's unprecedented and legally questionable decision to fire former NLRB GC Peter Robb before the expiration of his statutory four-year term.

Board turns blue

On July 28, 2021, on the heels of Abruzzo's confirmation as the Board's new GC, the Senate confirmed President Biden's two nominees to serve on the NLRB. By a vote of 52–47, Gwynne Wilcox was confirmed to serve a five-year term expiring on August 27, 2023. Wilcox fills the seat vacated by former NLRB member Mark Gaston Pearce. She is the first African American woman to serve on the Board. With a 53–46 ballot, David Prouty was confirmed for a five-year term expiring on August 27, 2026. Prouty has filled William J. Emanuel's recently expired seat on the Board.

Both nominees are clearly union-friendly and have strong ties to organized labor, having advised large locals affiliated with the Service Employees International Union (SEIU). The installation of Wilcox and Prouty tips the NLRB from a Republican to a Democratic majority.

"There has been an empty Democratic seat on the NLRB for nearly three years and there wasn't a single Democrat on the board from late 2019 until mid-2020," noted Democratic Senator Patty Murray.

Along with the confirmation of Abruzzo as the Board's general counsel, the new Board majority has already begun to show signs of its plan to flex its adjudicatory and rulemaking authority to make many more labor-friendly changes.

Recusal controversy. One issue already being spun up for review by the new Board is the Trump-era Board's final rule on "joint-employer" status under the National Labor Relations Act (NLRA). Within weeks of the Wilcox and Prouty confirmations, the SEIU filed a complaint challenging the controversial final rule and seeking a return to the former and more union-friendly rule. However, Republican lawmakers

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Unexpected changes at the AFL-CIO

Labor leaders and politicians alike mourned the unexpected and untimely passing of labor activist and AFL-CIO president Richard Trumka on August 5, 2021, at the age of 72. Since 2009, Trumka had served as the president of the federation of 56 unions and 12.5 million members, capping a more than 50-year career of dedication to America's unions and working people. "The labor movement, the AFL-CIO and the nation lost a legend today," the federation of national and international unions observed in a statement. It also praised him for being a "relentless champion of workers' rights, workplace safety, worker-centered trade, democracy and so much more."

In the weeks following Trumka's death there was much speculation as to who would fill in as his replacement. On August 20, 2021, the AFL-CIO Executive Council elected the federation's secretary-treasurer and longtime trade unionist Liz Shuler to take on this massive task. The first woman elected to hold that office, Shuler will serve out the remainder of Trumka's term, which runs through June 2022. She is viewed by many as a "second act" of Trumka who will likely focus on lobbying and politics as a means of furthering President Biden's pro-union agenda.

To succeed Shuler as secretary-treasurer, the Executive Council elected United Steelworkers (USW) International Vice President Fred Redmond, the first African American person to hold the number-two office. Tefere Gebre will continue as the federation's executive vice president, rounding out the most diverse team of officers ever to lead the AFL-CIO. The terms of the three executive officers will run through June 2022, when delegates to the AFL-CIO convention in Philadelphia will elect leaders for new four-year terms.

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and pro-employer groups hope to remove two of the three Democratic board members from any decision-making on this issue, and potentially other issues.

Citing conflicts of interest arising out of the two newly confirmed Democrats' strong ties to the SEIU and its long record of public opposition to the joint-employer rule, as well as Member Prouty's particular relationship to the union's counsel trying the case, several Republican lawmakers signed a letter to NLRB chair Lauren M. McFerran urging Prouty's and Wilcox's recusals from the pending SEIU case or related litigation, as well as their withdrawal from serving in any advisory capacity concerning the controversial joint-employer rule. The National Right to Work Legal Defense Foundation sent a similar letter to NLRB ethics officials.

New leadership at the DOL

On July 13, 2021, the Senate confirmed Julie Su as deputy secretary of labor, installing her in the number-two spot at the powerful agency. The 50–47 vote was along strict party lines with Democrats and Independents voting for the nominee and Republicans opposing her nomination. Although senators Susan Collins (R-Maine) and Lisa Murkowski (R-Alaska) voted to advance Su's nomination after a Senate HELP Committee hearing, they voted against her confirmation during the full Senate vote. During the nomination process, Republicans criticized Su's tenure as secretary of the California Labor and Workforce Development Agency, blasting her handling of the state's unemployment insurance program.

On July 14, 2021, the Senate confirmed Seema Nanda to serve as solicitor of labor. The 53–46 vote was the result of three Republicans crossing party lines to support the nomination. Nanda previously served in the Obama administration as chief of staff, deputy chief of staff, and deputy solicitor at the U.S. Department of Labor (DOL). Before that, she served more than 15 years in various roles as a labor and employment attorney, mostly in government service.

On August 3, 2021, the Senate HELP Committee failed to favorably report out the nomination of David Weil to head the DOL's Wage and Hour Division. The committee deadlocked 11–11. Fourteen different business groups had filed a letter with the committee opposing Weil's nomination and expressing deep concern about the nominee's policy track record on issues such as overtime regulations, independent contractors, and joint employment. As of publication, Weil's future remains on hold as his nomination awaits a motion to discharge and a vote by the full Senate. ■

Other NLRB developments

Circuit court decisions

1st Cir.: Non-union hospital worker unlawfully fired for letter to editor. The U.S. Court of Appeals for the First Circuit has enforced a decision by the National Labor Relations Board (NLRB) affirming its view of both the "concertedness" and "protection" elements of "protected concerted activity." The NLRB found that a hospital nurse was unlawfully fired for writing a letter to the editor of the local newspaper in which she expressed support for unionized nurses and their dispute with the hospital over perceived staffing shortages. The employee, an activities coordinator, was not a member of the bargaining unit, was only indirectly affected by the staffing shortage, and did not discuss her plans with other employees. She also sharply criticized hospital management and its handling of patient safety, but "[her] criticisms were not so disloyal or disparaging as to shed their Section 7 armor." The record also demonstrated that she "acted in support of what had already been established as a group concern," the First Circuit explained. "Importantly, hospital employees had utilized the newspaper to amplify their message. So, by contributing her voice to the newspaper platform, [the employee] was acting with her coworkers in a meaningful, albeit indirect, way" (emphasis in original) (*National Labor Relations Board v. Maine Coast Regional Health Facilities dba Maine Coast Memorial Hospital*, May 26, 2021).

9th Cir.: Unilateral changes after CBA expired violated NLRA. The U.S. Court of Appeals for the Ninth Circuit enforced a Board decision holding that a television station violated the National Labor Relations Act (NLRA) by unilaterally implementing two employment policy changes after the expiration of the parties' collective bargaining agreement (CBA).

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The union challenged the employer's new requirement that employees complete an annual motor vehicle/driving history background check and its new practice of posting work schedules just two weeks (rather than four months) in advance. "When contractual obligations cease, the NLRA replaces 'agreed-upon terms' with 'terms imposed by law'; the statute requires the employer to preserve the 'status quo' terms and conditions of employment during negotiations." Therefore, even if the employer had the right to make unilateral changes during the term of the contract, it cannot do so after the CBA's expiration unless "the CBA provides that the employer has a *contractual* right to alter the status quo as to terms or conditions of employment that survives the expiration of the CBA." (Emphasis in original.) Rejecting the employer's contention that it was entitled to make changes under the "'contract coverage' theory," the Ninth Circuit concluded that "[t]he NLRB's continued insistence on express language extending management's right to make unilateral changes during that period is 'rational and consistent' with the NLRA" (*National Labor Relations Board v. Nexstar Broadcasting, Inc. dba KOIN-TV*, July 12, 2021).

11th Cir.: NLRB ruling that employer engaged in anti-recognition scheme reversed. The U.S. Court of Appeals for the Eleventh Circuit rejected the NLRB's decision that a nursing home operator that took over running a unionized home violated the NLRA by: "(1) coercively interrogating employees about union membership during job interviews, (2) notifying employees that they were not represented by a predecessor union, (3) threatening to fire an employee if she engaged in union activity, (4) using a discriminatory hiring scheme to avoid hiring a majority of the predecessor company's employees to evade bargaining obligations with the union, (5) refusing to recognize and bargain with the union, and (6) refusing the union's requests for information for purposes of bargaining." Ruling that the employer did not coercively interrogate the applicants, the Eleventh Circuit found that the Board "plainly failed to state the relevant standard or analyze the circumstances to determine whether the interview questions were coercive." Instead, the Board "simply declared as a matter of law that [the employer] violated § 158(a)(1) by interrogating [predecessor] applicants about their union membership." Since substantial evidence did not support the Board's conclusion that the employer refused to hire four predecessor-employees because of their union membership, the finding of successorship status was also reversed (*Ridgewood Health Care Center, Inc. v. National Labor Relations Board*, August 13, 2021).

D.C. Cir.: Disparate use of email policy to restrict union organizing unlawful. The U.S. Court of Appeals for the D.C. Circuit reversed an NLRB decision finding that a nationwide telecommunications company did not violate the NLRA when it reprimanded a call center's customer service representative for sending out a facility-wide email inviting her coworkers to join ongoing efforts to organize a union. Concluding that "the Board's decision to reverse the [administrative law judge's] finding that [the employer] discriminatorily enforced company policies related to email use is not supported by substantial evidence," the appeals court faulted the Board for failing to rely on any of the three company policies allegedly violated by the employee in reaching its decision. Moreover, the company's "contemporaneous rationales for reprimanding [the employee] for her email also fail[ed] to support its actions" since the evidence showed that the "'mass'" email policy upon which it attempted to rely was "disparately enforced against [her union-organizing] email (*Communications Workers of America, AFL-CIO v. National Labor Relations Board*, July 23, 2021).

D.C. Cir.: Statements blaming union for leave plan "mix-up" didn't violate NLRA. The NLRB erred in finding that an employer unlawfully blamed a union for a "mix-up" regarding a union employee's entitlement to paid leave under the union's unique plan. A supervisor made statements to the employee blaming the problem on the union, including "'You need to fix that with the Union'" and "'[T]hat's the problem with the Union.'" Granting the employer's petition for review and denying the Board's cross-application for enforcement, the D.C. Circuit concluded that the supervisor's remarks constituted protected "'opinion[s]'" that did not contain any threats or promises. Though the Board urged the D.C. Circuit to "recognize an exception under § 8(c) for misstatements involving no threat or promise," the appeals court declined to do so, explaining that "'Section 8(c) does not require fairness or accuracy,' … and it says nothing about materiality or knowledge." Rather, "[a]bsent threats or promises, § 8(c) unambiguously protects '*any* views, argument, or opinion'—even those that the agency finds misguided, flimsy, or daft. 29 U.S.C. § 158(c) (emphasis added)" (*Trinity Services Group, Inc. v. National Labor Relations Board*, June 1, 2021).

NLRB rulings

Six-week delay did not violate negotiation duty. An employer did not unlawfully refuse to meet at reasonable times to negotiate a successor agreement at one of its radio stations, the NLRB ruled. After the employer prematurely declared an impasse in negotiations, its representative was

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under the mistaken belief that his duty to meet with the union had been suspended and therefore delayed meeting with his union counterpart for six weeks. Though such a delay may violate Section 8(a)(5), "'[t]he Board considers the totality of the circumstances when determining whether a party has satisfied its duty to meet at reasonable times.'" Here, the employer's actions were not lawful since its representative's six-week delay in meeting with his union counterpart was due to his "mistaken but sincere belief that negotiations had reached impasse over the critical issue of layoffs" (*Stephens Media Group–Watertown, LLC*, July 22, 2021).

Display of Scabby near neutral employer's entrance lawful. A divided four-member NLRB affirmed the finding of an administrative law judge (ALJ) that a union's display of a 12-foot inflatable rat (a.k.a. "Scabby") and two large banners near a neutral employer's entrance to a trade show, without more, did not "'threaten, coerce, or restrain' the neutral in violation of Section 8(b)(4)(ii)(B)." The concurring Board members agreed that "under the constitutional avoidance doctrine, the potential infringement of a union's First Amendment rights precludes the Board from finding that the banners and inflatable rat in these circumstances [was unlawful]." In a separate concurrence, Chair Lauren McFerran held that the outcome of the case was required by Board precedent, an opinion concurring members Marvin E. Kaplan and John F. Ring did not share to the extent this interpretation of Section (b)(4) "is improperly narrow, and may be Constitutionally broadened." Member William J. Emanuel would have found the banner and rat display unlawful and in a separate dissenting opinion urged his fellow members to overrule the aforementioned cases (*International Union of Operating Engineers, Local Union No. 150 (Lippert Components, Inc.)*, July 21, 2021).

Union cannot get file on employee until after pre-disciplinary interview. A divided three-member panel of the NLRB has held that an employer was not required to provide a union with certain requested information, including potential questions, in advance of an employee's investigatory interview for alleged misconduct. The Board majority held: "Where an employer announces that it will conduct an investigatory interview of an employee alleged to have committed misconduct and a union, prior to that interview, requests relevant information concerning the interview, the employer may refuse to disclose such information while the investigation is ongoing, but must provide it at the conclusion of the investigation." While the initial refusal in the case was lawful, the employer subsequently violated the Act by failing to produce the information requested for four weeks *after conducting the interview.* Chair McFerran dissented with respect to the central holding and would have found the refusal to provide the requested information before the investigatory interview unlawful. She blasted the majority's "blanket rule," stating "this position is not only contrary to *Weingarten*—which recognized that informed union representatives play an integral role in the disciplinary process—but is also an unwarranted departure from core Section 8(a)(5) principles" (*United States Postal Service*, July 21, 2021).

Unwillingness of a participant does not negate "concertedness." Further defining the scope of "protected concerted activity," the Board found that the operator of a group home for boys violated NLRA Section 8(a)(1) by interrogating two employees regarding their conversation over potential overtime claims and an office manager's potential discrimination claim. The NLRB held that the office manager engaged in "protected concerted activity" when she asked a coworker to keep copies of her own timesheets and to make copies of other employees' timesheets because she was researching filing a third-party wage complaint. Reversing the ALJ's finding that this conversation was not protected NLRA activity, the Board found the fact that the coworker "declined the [office manager's] request and reported it to the [employer] did not negate the concerted nature of [the office manager's] conduct" (*Healthy Minds, Inc.*, July 15, 2021).

Licensed deck officers were supervisors under NLRA. Finding that a bargaining unit of licensed deck officers (LDOs) aboard maritime vessels was comprised entirely of supervisors within the meaning of Section 2(11) of the NLRA, a divided NLRB panel concluded that it lacked jurisdiction in a refusal to bargain case. Observing that the ALJ "failed to address the threshold question of what type of unit the Respondent voluntarily recognized," the Board found that the employer "voluntarily recognized a unit that was understood—by the Union and the Respondent alike—to consist solely of supervisors." Under such circumstances, the LDOs were excluded from coverage under the Act. Chair McFerran filed a separate dissenting opinion in which she argued that the ALJ "correctly found that the bargaining unit was at most mixed—the second mates and third mates are statutory employees—and so rejected [the employer's] defense that it had no duty to bargain because the unit consisted entirely of supervisors" (*Sunrise Operations, LLC*, July 12, 2021).

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State court decisions

Mo. Sup. Ct.: State law favoring "public-safety labor organizations" unconstitutional. In a 5-2 decision, the Supreme Court of Missouri affirmed a trial court's judgment finding that House Bill (HB) 1413—which enacted new legislation governing public sector unions—violated the Missouri Constitution's equal protection clause by giving favored treatment to unions designated as "public-safety labor organizations." In particular, the state's high court found that "there is no rational basis for protecting public safety employees from most—if not all—of the new provisions in HB 1413." Moreover, because the exemption "permeates throughout HB 1413 and reaches all provisions," the court declared the statute "void in its entirety." The dissenting justices would not have struck the law down since "the distinctions between the public employees the separate labor groups wholly or primarily serve provides plausible explanations and justifications for the dissimilar regulatory framework for public safety and nonpublic safety labor groups and is not unconstitutional" (*Missouri National Education Association v. Missouri Department of Labor and Industrial Relations*, June 1, 2021, Russell, M.). ■

Reconciliation

House and Senate Democrats in the U.S. Congress have been negotiating for months to cobble together a massive budget reconciliation package—the Build Back Better Act (H.R. 5376)—that will contain as many of the Democrats' policy initiatives as possible. They have chosen this omnibus reconciliation bill because, unlike a legislative bill, a budget reconciliation package is not subject to the Senate's legislative filibuster, which requires 60 votes to overcome. Thus, a reconciliation package can be approved by both houses of Congress on a straight majority vote.

The reconciliation bill, however, has faced two problems. First, it has been beset by intraparty fighting among Democrats over its contents and price tag. That fight continues. Second, and of more significance in the present context, any reconciliation package will have to satisfy the "Byrd Rule" in the Senate. The Byrd Rule is designed to prohibit lawmakers from legislating on a budget bill. Accordingly, provisions added to a reconciliation bill that look more like legislative matters than budget matters can be stripped out of a final reconciliation package in the Senate. The Senate parliamentarian determines which portions of a budget reconciliation bill may be "legislative" and therefore impermissible under the Byrd Rule. The parliamentarian's ruling is not legally binding, but it is typically respected.

Democrats have tried without success to shoehorn several legislative matters, including comprehensive immigration legislation, into the reconciliation package. Many members of the House have also wanted to include the entire Protecting the Right to Organize (PRO) Act of 2021. However, as this issue of the *Practical NLRB Advisor* goes to press, the only National Labor Relations Act (NLRA)–related provision in the reconciliation bill concerns the establishment of monetary civil fines for violations of the NLRA. This provision is no small matter, as it sets forth a range of fines from $50,000 to $100,000 per violation. The provision is contained in the current version of the reconciliation legislation posted by the House Democrats.

The future of the provision is not clear at present. Given the continued intraparty wrangling, there is no guarantee that the reconciliation bill that will eventually be voted on by the Senate will look like the bill currently posted in the House. The penalties provision could come out in the ongoing negotiations, or the Senate parliamentarian could find that it violates the Byrd Rule. There is certainly a persuasive argument for the latter result. Since its inception, the NLRA has been a *remedial* statute. By adding monetary penalties, the statute would become *punitive.* Many have argued that such a fundamental change in the nature of the act is *legislative* and should not be allowed in the context of a budget resolution. At this juncture, no one knows the fate of the penalties provision, but its legislative status bears very close watching since its enactment would be a game-changing development.

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