

## EMPLOYERS AND LAWYERS, WORKING TOGETHER

# The Practical **NLRB** Advisor

## Big changes at the NLRB

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*XYZ Logistics has certainly had its share of labor troubles lately. Its truck drivers have been represented by the Teamsters for decades, and it has been bargaining a new union contract for what seems like forever. The predecessor contract expired months ago; and, while the company has continued to check off union dues under the provisions of the expired contract, it is giving serious thought to suspending the checkoff in order to exert financial pressure on the union to settle. Also, before the contract expired, XYZ fired John Doe, the union's chief steward, for allegedly driving while impaired. The union timely grieved the discharge, but missed the contractual deadline to file for arbitration. The Teamsters have also just filed an unfair labor practice (ULP) charge over the termination.*

*Were the problems with the drivers not bad enough, John Smith—one of its warehouse forklift operators—has been openly attempting to unionize the company's warehouse employees for some time. Among Smith's many complaints is the fact that during peak work periods, XYZ uses temporary forklift operators from ABC Staffing Co. to pick up the slack. Smith believes XYZ should instead utilize its own employees and pay them overtime.*

*When the company first learned of Smith's activities, it sent its corporate vice president (VP) of human resources to the warehouse operation to assess the*

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## BRIAN IN BRIEF



As recently as the end of July, Republican National Labor Relations Board (NLRB) Member and Chairman Philip A. Miscimarra found himself, in yet another case, filing a dissent to the majority view of his two Obama-era colleagues. For nearly eight months, with two vacant seats on the five-member Board, a pro-business Republican in the White House,

a Republican majority in Congress, and the Senate filibuster on presidential nominees a thing of the past, the phenomenon of a Board Chairman finding himself still in a dissenting posture was emblematic of the currently glacial pace of change at the NLRB. The proponents of faster change were, of course, heartened on August 2, when the Senate confirmed President Trump's nominee, Marvin Kaplan, to fill one of the two Board vacancies. However, those sentiments were significantly constrained since the Senate also went into recess until September 5 without voting on Trump's second nominee, William J. Emanuel. The Board will now be almost certainly split 2–2 on any major policy shifts until Emanuel is seated.

Even more disheartening than the delay on Emanuel's confirmation vote was the subsequent announcement by Miscimarra that, for personal reasons, he would not accept reappointment to the Board when his current term ends this

December. His impending departure not only will result in the loss of a compelling and articulate voice for a more rational interpretation of the National Labor Relations Act (NLRA), it also raises, yet again, the prospect of a deadlocked Board, assuming Emanuel is confirmed before he departs.

The potential personnel problems do not end on the Board side. Richard F. Griffin, Jr.'s term as General Counsel will expire on November 4. Unlike a Board seat, if a new nominee is not in place when Griffin's term is up, the position will not remain empty. It would be filled on an "acting" basis, most likely by a career attorney at the Board. It is unlikely that anyone serving in a temporary, acting capacity will implement any change at all. Individuals in such positions are usually, at best, caretakers of the status quo.

As is evident from this issue of the *Practical NLRB Advisor*, the multiplicity and complexity of issues that a new Board majority and General Counsel should revisit are perhaps more extensive than at any similar transition period in the Board's more than 80 years of existence. Ironically, at a time when circumstances suggest the need for action, stasis seems to rule the day. Many observers have correctly counseled that it often takes time to make change at the Board. Indeed, here at the *Advisor* we have [previously noted](#) how long it took the Obama administration to seat its nominees. However, most of that delay came in the confirmation process, in the Senate, and through the use of the now-defunct filibuster. Here, much

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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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*situation, and he ran into Smith on the loading dock. Upon meeting Smith, the VP asked: "How are things going?" Smith replied: "Not great. Our warehouse manager is a terrible supervisor." The VP replied: "I'll look into that." Smith promptly filed ULP charges over the exchange, and the Board's regional office has issued a complaint alleging that the company unlawfully "solicited grievances" and "impliedly promised" to remedy them in an effort to discourage unionization.*

*In fact, the efforts of Smith and the Teamsters among the broader unit of warehouse employees had already fizzled, but Smith did find a good deal of support among his fellow forklift operators. Consequently, a few days ago the Teamsters filed a petition seeking an election in a unit of "all forklift drivers employed solely by XYZ Corporation, and by XYZ and ABC Staffing as joint employers."*

*While frantically compiling the voter eligibility lists and assessing its position on the petition, the company received two more ULP charges. The first claimed that Joe Jones, the lead forklift operator, whom the union claims to be a statutory supervisor, threatened the forklift drivers with a loss of pay and benefits if the union were to win the election. The second alleged that the "harmonious workplace and civility" provision in XYZ's handbook violates the National Labor Relations Act (NLRA) because it would "chill" a reasonable employee from exercising his or her rights under Section 7 of the Act.*

While the volume of XYZ's NLRA problems may be unique, their substance is not. Most of them stem from changes in, or expansions of the law by, the National Labor Relations Board (NLRB) under the Obama administration; and many, if not all, are likely to be modified or completely overruled by the incoming NLRB majority. For XYZ, however, the fact that change may be coming is only of academic interest—it needs to know what to do with the petition and charges right now. Like most employers, XYZ's decision to settle or contest a ULP case, or to oppose or stipulate in a representation case, is typically guided by three practical considerations: likelihood of success, consequence, and cost.

**Settle or contest?**

The prospect of a changing Board majority will almost certainly alter an employer's likelihood-of-success calculation in every instance. However, that may not always be the

critical factor. For example, the "solicitation of grievances" complaint certainly appears to be an example of Board overreach and disregard of an employer's statutory free speech rights. As such, it certainly seems a new Board majority would be unlikely to find a violation on these facts. However, standing alone, while this complaint may be aggravating, it is of little practical consequence. Not only is there no monetary remedy at play, but more significantly, the substantive act occurred *before* the petition was filed. Since it is outside the "critical period" in the lead-up to a representation election, the union cannot use the incident to secure a rerun election if it loses in the pending representation case.

Apart from principle then, the only reasons for not settling the matter would be either the possible negative impact on the election, or the likely insistence by the NLRB that XYZ's settlement must contain a "default" provision. As to the first reason, XYZ can simply wait until after the election to entertain settlement; and, as to the second, it can wait until November of this year to see if a new NLRB General Counsel opts to modify the current "default" policy.

**Post-petition conduct.** The two other ULPs in the warehouse unit present a different set of considerations. Both charges relate to post-petition conduct and, therefore, could form the basis for election objections. Thus, they could carry a much greater consequence than simply an eventual notice posting. Beyond this, other considerations attach to each. The ULP involving Jones is inextricably bound up with the pending election petition. The determination of Jones's supervisory status may have strategic importance in the context of the ongoing organizing campaign. Accordingly, immediate representation case considerations may well drive XYZ's position on this charge.

On the supervisory issue itself, XYZ will also need to keep in mind that the current Board majority has been so "situational" and inconsistent in its supervisory determinations that the entire extant analytical framework under NLRA Section 2(11) may be headed for reconsideration by the new Board, or even by the federal courts. Even more than the supervisory analysis, the current Board position on the legality of employer handbooks clearly appears headed for substantial revision. Since XYZ's disputed handbook policy appears particularly innocuous and unrelated to any actual employee discipline, XYZ may merely want to stipulate to the

salient facts, but refuse to settle any complaint based on the existence of the policy.

The ULPs and potential ULPs involving XYZ's already organized drivers also involve a number of practical considerations. A few years ago the current Board overruled decades of precedent holding that an employer was privileged to terminate dues checkoff once the collective bargaining agreement containing the requirement expired. Given the right case, a new Board will likely reverse that decision and revert to prior law. However, it is unclear if such a case is currently in the Board's decisional pipeline. So, even if XYZ is convinced that the law will be changing, it has to recognize that if it suspends checkoff, it will result in the issuance of a complaint and cause XYZ to incur litigation expenses until such time as the change in the law actually takes place. Moreover, the suspension of checkoff could color the Board's analysis of any other alleged bargaining misconduct and could alter the parties' respective rights should the union eventually go out on strike. Consequently, although the law will almost certainly change, XYZ must, in this instance, weigh the anticipated bargaining leverage it would gain from checkoff suspension against the costs of defending its position and the effect of having an outstanding ULP during bargaining.

The discharge of John Doe also raises some practical considerations for XYZ. Because the union missed the filing deadline, XYZ could take the position that the matter is not arbitrable. However, this would throw resolution of the discharge to the NLRB, which is traditionally sensitive to claims that an employee is being "singled out" because of his union activity. Consequently, XYZ might want to consider waiving the procedural defect and consenting to arbitration if the NLRB defers the charge.

There is, however, one final wrinkle: The current Board has changed its deferral standards and, as a consequence, Doe may be more likely to get a second bite of the apple on his discharge through the NLRB. This changed deferral standard may well be altered by the new Board, but this matter is likely to move much faster than the pace of change at the Board, so XYZ needs to either evaluate its options under current law or plan on protracted litigation over the discharge.

**Representation case issues.** XYZ's representation case issues are no less complicated. The "forklift only" unit demand and the "joint-employer" claim regarding ABC Staffing are both clearly problematic and consequential. While a new Board is very likely to revisit and, perhaps, reverse the Obama Board on both the "micro-unit" and joint-employer issues, XYZ simply cannot sit back and wait for the law to change. If it proceeds to election in the requested forklift unit without opposition and loses the election, it will very likely be stuck with that unit since even if a new Board reverses *Specialty Healthcare*, it is not going to simultaneously invalidate all the micro-units that have previously been certified under the case. Doing so would almost certainly be deemed too destabilizing. Given this consequence, XYZ clearly has to fight the unit issue now.

*We all know that a host of Obama Board decisions are likely to be revisited by the new Board. That said, no one knows when that will happen, and no one knows exactly what the new Board might do in a given instance.*

That same logic applies equally to the joint-employer issue. The new Board will very likely revisit the current Board's expansion of the joint-employer doctrine. Indeed, it is an issue of such great interest to all stakeholders, with so many ramifications, that it is likely destined for years of litigation before the Board and courts. Moreover, XYZ's situation also involves a corollary to the joint-employer issue—the so-called *Miller & Anderson* multi-employer unit issue. The new Board majority is very likely to overrule *Miller & Anderson* and return to a doctrine that finds such multi-employer units are not appropriate absent the consent of both employers. However, whether it is the joint-employer claim or the *Miller & Anderson* unit configuration, XYZ needs to fight them now or run the risk that it loses the election and is stuck with the requested unit if subsequent changes by a new Board do not apply retroactively.

**Uncertainty ahead.** As noted, XYZ's issues are not atypical and will be faced by many employers in the coming months. So what is the larger lesson that can be gleaned from the XYZ scenario? Yogi Berra probably provided the best answer to that question when he observed: "It ain't over till it's over." We all know that a host of Obama Board decisions are likely to be revisited by the new Board. That said, no one knows

when that will happen, and no one knows exactly what the new Board might do in a given instance.

With respect to the latter point, a new Board may completely overrule, or merely refine or modify, existing Obama Board doctrines. In either event, the practical impact of such future decision-making has way too many variables to be dispositive right now for the particular circumstances of a particular employer. To put it another way, we know that dozens of Obama-era cases will be

reconsidered, but we do not know, with certainty, what their exact outcomes will be.

The good news for employers is that they now have the prospect of obtaining a different result at the Board level on a host of representation and ULP case issues. The bad news is that until a new Board issues controlling decisions that apply to an employer's specific issues, the employer is still going to have to litigate the claim in order to preserve and, hopefully, prevail on the given issue. ■



## Meet your new NLRB members

### Will the newcomers bring much-needed change to the agency?

President Trump has named two nominees to fill open seats on the National Labor Relations Board (NLRB). In June, Trump nominated Marvin E. Kaplan to the NLRB; one week later, he nominated labor attorney William J. Emanuel to fill the other vacancy.

Kaplan was sworn in as a Board member on August 10, joining Democrats Mark Gaston Pearce and Lauren M. McFerran, as well as Philip A. Miscimarra, the sole Republican member and newly appointed chair. Emanuel's nomination has been passed out of the U.S. Senate Committee on Health, Education, Labor and Pensions (HELP), and he awaits confirmation by the full Senate. Once he is confirmed, there will be a 3–2 Republican majority on the five-member Board. It is widely anticipated that this new majority will reverse many of the Obama Board precedents that have proven problematic for employers.

**Marvin Kaplan** was most recently chief counsel of the Occupational Safety and Health Review Commission (OSHRC). Previously, he was Republican counsel to the House Education and the Workforce Committee, where he was responsible for congressional oversight and policy development in private-sector labor and employment law under the National Labor Relations Act (NLRA), Labor-

Management Reporting and Disclosure Act (LMRDA), and Labor Management Relations Act (LMRA). He previously served for nearly seven years as counsel to the U.S. House Committee on Oversight and Government Reform. Kaplan also worked in the Bush administration at the Department of Labor's Office of Labor-Management Standards (OLMS).

Kaplan's legislative and agency experience was likely a key factor in his selection. Indeed, his experience may foreshadow the policy direction of the agency. For example, Kaplan was instrumental in drafting the Workforce Democracy and Fairness Act, a bill that is currently pending in Congress and that would, if enacted, reverse the Obama Board's "ambush" election rule. As Education and the Workforce Committee counsel, he was similarly involved in a number of other bills aimed at reversing several other Obama Board decisions. (See "Other NLRB developments," pg. 12, for a discussion of these proposed measures.) Kaplan will serve the remainder of a five-year term expiring August 27, 2020.

**William Emanuel** is a shareholder in the Los Angeles office of a national labor and employment firm, where he advises employers on traditional labor law matters. Emanuel has considerable experience advising employers in NLRB litigation, collective bargaining, labor arbitrations, union election campaigns, strikes and picketing, and litigation concerning union access to employers' private property. He has been involved in a number of amicus briefs on behalf of

employers and trade association groups addressing some of the more significant labor law issues currently affecting employers. Emanuel, once confirmed, will serve through the remainder of a five-year term expiring on August 27, 2021.

**Senate confirmation near.** NLRB nominations can sometimes be contentious simply because of the significant role the Board plays in setting national labor policy. Indeed, on July 19, the HELP Committee approved both nominees, but only moved them forward to the full Senate on a straight 12-11, party-line vote. Kaplan was subsequently confirmed by the full Senate. Emanuel's nomination should move to the Senate floor for a confirmation vote soon after the Senate reconvenes following its annual August recess. Since the filibuster is no longer available to block the confirmation of presidential nominees, and since the Republicans hold a 52-48 edge in the Senate, there is little reason to doubt that Emanuel will also be confirmed. However, even without the filibuster, Senate Democrats have been adept at using Senate procedures to delay the vote on a host of Trump nominees.

**Impending departures.** On April 24, the president formally designated Member Miscimarra, who had served as acting chair since January, as chair. Until recently, he was the minority voice on the Obama Board and the prolific author of numerous dissents. Once Emanuel is seated, Miscimarra is

poised to steer the agency in a more centrist, common-sense direction. However, Miscimarra has recently announced he will not accept reappointment for a second term, but will depart the agency once his current term expires on December 16 of this year. His departure will leave President Trump with another Board vacancy to fill and another chair to name. Until a replacement is actually seated, the Board is very likely to be deadlocked at 2-2 on most major issues.

Also of note: The term of NLRB General Counsel Richard F. Griffin, Jr., expires on November 4. President Trump will therefore also need to nominate a replacement for this critical position. Griffin, a former union attorney, has played an especially activist role at the agency. We will take a closer look at the General Counsel's role, and the likely impact of the turnover in that position, in the next issue of the *Advisor*.



## Top 10 targets for reversal

Most observers believe, and almost every employer hopes, that once a new majority is seated at the National Labor Relations Board (NLRB), and once a new General Counsel is confirmed, the agency will turn away from its decidedly pro-labor tilt of the last eight years. Indeed, the hope and belief goes beyond merely a more evenhanded administration of the National Labor Relations Act (NLRA) in the future. Most observers believe that the new Board majority, in particular, will actively undo much of the decisional law and policy of the Obama Board. As the Obama Board's controversial decisions and policies resurface in new cases, the new Board will accomplish this

end by substantially modifying, or flat-out reversing, that recent precedent. And, they may even get a legislative assist from a Republican House and Senate that have repeatedly expressed concern over a host of NLRB decisions over the last five years.

With or without help from Capitol Hill, the newly-constituted NLRB will certainly take aim at a number of Obama-era decisions. The list of candidates for the decisional chopping block is a very long one, and no short list will capture them all. However, with that caveat in mind, here is the *Advisor's* "Top 10":

**1. “Ambush” election rule.** As we discussed at length in the [inaugural issue](#) of the *Advisor*, the NLRB’s revised representation election rule drastically reshaped the procedures for Board-conducted representation elections, sharply curtailing the time between petition filing and election and, in the process, restricting the ability of employers to educate their employees and to effectively express their views on unionization as well as restricting their right to litigate legal disputes prior to the election. Thus far, however, the “ambush,” or “quickie,” election rule has withstood judicial scrutiny. In 2016, the U.S. Court of Appeals for the Fifth Circuit, in *Associated Builders and Contractors of Texas, Inc. v. NLRB*, upheld numerous provisions of the revised rule in a challenge brought by a number of trade associations, finding that the new rules and procedures did not exceed the scope of the Board’s authority under the NLRA and did not violate the “arbitrary and capricious” standard of the Administrative Procedure Act.

The ambush rules, however, may not survive a new Board, which will now have the ability to engage in its own rulemaking aimed at eliminating the rules’ more problematic provisions. If the new Board itself does not have sufficient impetus to act, Congress is certainly not shy about providing it. Thus, for example, in late June, the House Committee on Education and the Workforce advanced the [Workforce Democracy and Fairness Act \(H.R. 2776\)](#), which would roll back the revised representation election procedures (among other Obama Board actions), and the [Employee Privacy Protection Act \(H.R. 2775\)](#), which would reverse the Obama Board expansion and limit the amount of employee contact information that an employer must supply to a union when it petitions the NLRB for an election. While Congress is unlikely to take up a wholesale revision of the NLRA, it will certainly use its processes to pressure the new Board to make changes from within.

**2. “Micro” bargaining units.** The NLRB’s 2011 *Specialty Healthcare* decision departed from Board precedent and gave unions the ability to organize small groups of workers within single departments or job classifications, instead of requiring the union to convince the employer’s entire workforce at a given worksite to join. In allowing for “micro” bargaining units, the NLRB made it much easier for unions to win elections. *Specialty Healthcare* also made it much harder for employers to challenge the

appropriateness of a union’s gerrymandered bargaining unit. It also presented employers with the daunting prospect of having to negotiate and administer multiple “micro” collective bargaining agreements covering small pockets of workers.

Employers and business groups have consistently opposed the decision, arguing that organizers ought not to be able to cherry-pick small segments of employees to target in an organizing campaign. Unfortunately, the federal appellate courts have rejected arguments that the *Specialty Healthcare* standard is fatally flawed. Concluding that the Board had “clarified—rather than overhauled—its unit determination analysis,” the Fifth Circuit granted enforcement of a Board order finding that a “micro” bargaining unit was appropriate and that the employer unlawfully refused to bargain. Just a month earlier, the Fourth Circuit affirmed the Board’s holding as well. Several other circuits have upheld the Board in challenges to the *Specialty Healthcare* formulation as well. Any change in the *Specialty Healthcare* rubric will therefore have to come in the form of an entirely new analysis from the new Board—one that either expressly overrules or fundamentally modifies *Specialty Healthcare*—or through congressional action. A number of bills have been introduced in Congress to reverse *Specialty Healthcare* and rein in any profusion of micro-units. Our bet, however, is that the new Board acts first and accomplishes this same end by way of decision.

**3. Access to employer email.** In a significant setback for employer property rights, the NLRB’s sharply-divided 2014 decision in *Purple Communications, Inc.* held that if an employer provides employee access to company email systems, it must allow those employees to use the company email system for NLRA-protected activity, such as union organizing, during nonwork time. The decision overruled the Board’s *Register Guard* precedent, which held that employees do *not* have a statutory right to use their employer’s email systems for NLRA-protected purposes. A divided three-member panel reaffirmed its stance in a [March 2017 decision](#) on remand. In a dissenting opinion, Philip Miscimarra, the Board’s then sole Republican member, argued that *Purple I* was wrongly decided and that its standard was both legally incorrect and practically unworkable. He urged a return to the rule of *Register Guard*, which held that employers

may lawfully control the uses of their email systems, provided they do not discriminate against NLRA-protected communications by distinguishing between permitted and prohibited uses along Section 7 lines. With Miscimarra now serving as Board Chair and soon sitting in the majority, he will be in a position to effectuate a return to precedent once a suitable email access case makes its way to the Board.

**4. Demoting “supervisors.”** The question whether groups of workers are “supervisors” under Section 2(11) of the NLRA (and thus excluded from union organizing) is particularly vulnerable to political turnover at the Board, given the rather elastic statutory definition of the term. The Obama Board construed the “supervisor” exclusion quite narrowly, so that fewer individuals were supervisors and more were statutory “employees” subject to inclusion within a bargaining unit—even in cases in which those individuals appeared to meet the Board’s traditional criteria for supervisory status. For example, under well-established Board precedent, an individual is a supervisor if he or she exercises or effectively recommends one or more of the indicia of supervisory status set forth in Section 2(11). However, in *G4S Government Solutions, Inc.*, the Obama Board majority concluded that nuclear power plant security lieutenants—the highest-ranking officers on-site during nights and weekends—lacked authority to “responsibly direct” other guards, and therefore were not supervisors.

The NLRB continued to narrowly construe the definition in subsequent rulings, including *Veolia Transportation Services, Inc.*, in which it held “road supervisors” for a van shuttle service were not supervisors. The road supervisors observe drivers, ensure they abide by the policies and procedures of the local transit authority, and prepare written reports if the drivers breach these policies. But the majority reasoned that the reports were nothing more than “counselings” and did not amount to meaningful discipline sufficient to establish supervisory status. Miscimarra dissented in *Veolia* and raised the critical and perhaps obvious question: If the road supervisors were not supervising the van drivers, then who was supervising them? He urged that in determining supervisory status, the Board should ask this question as a matter of policy. Miscimarra and his Republican colleagues are now in a position to implement that recommendation and may do

so rather quickly since supervisory issues come before the Board constantly.

**5. Students are “employees.”** According to the Obama NLRB, university graduate students who teach courses, grade papers, and perform other academic duties are employees, although they are clearly, first and foremost, students. In a divided 3–1 decision, *The Trustees of Columbia University in the City of New York*, the Board applied a new standard under which graduate and undergraduate teaching assistants who have a common-law employment relationship with their private university are employees under the Act. The majority reasoned that statutory coverage exists by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach—such as the primarily educational relationship between the students and the universities. Therefore, the Board majority reversed its long-standing contrary holding in *Brown University*. The decision unleashed a significant amount of union organizing activity at private colleges and universities. The majority view in *Columbia University* has been widely criticized from both a legal and policy perspective, and many have advocated for a return to the *Brown University* standard. A majority of Board seats will soon be filled by individuals who likely think that way as well.

**6. Stripping employers’ managerial control.** The Obama Board has imposed additional constraints on employers’ management rights—in the period before a collective bargaining agreement (CBA) has been negotiated, during the mid-term period, and following the expiration of a contract. In *Total Security Management Illinois 1, LLC*, the Board held that an employer must bargain with a newly-certified union before it can impose “discretionary” discipline such as a suspension, demotion, or termination—even before a CBA is in place. In *Graymont PA, Inc.*, a Board majority held that an employer was not privileged to promulgate mid-term changes to its absenteeism policy in reliance on a contractual management rights clause giving it the right to establish “reasonable workplace rules and regulations.” A divided four-member NLRB held in *E.I. Du Pont de Nemours* that the employer violated the Act when it made unilateral changes to bargaining unit employees’ benefit plans after the operative CBA expired, issuing a doctrinal edict that “discretionary unilateral

changes ostensibly made pursuant to a past practice developed under an expired management rights clause are unlawful.” The majority overturned several Bush-era NLRB decisions along the way and rejected the long-standing “past practice” defense. Under the ruling in *DuPont de Nemours*, once a contract expires, the management rights clause is no longer in effect and can no longer justify unilateral changes.

In *Lincoln Lutheran of Racine*, a divided five-member decision, the Board held an employer unlawfully ceased checking off union dues after a CBA had expired. The majority reasoned that, like most other terms and conditions of employment, an employer’s obligation to check off union dues continues after expiration of the CBA that establishes such an arrangement. Under the Board’s long-standing *Bethlehem Steel* rule, an employer’s obligation to check off union dues ends when the CBA expires. But the majority overruled *Bethlehem Steel* and its progeny to the extent they stood for the notion that dues checkoff does not survive contract expiration under the “status quo” doctrine. In its place, the Board established a new rule: An employer’s obligation to refrain from unilaterally changing mandatory subjects of bargaining, such as dues checkoff, applies both when a union is newly certified and the parties have yet to reach an initial agreement and when the parties’ existing CBA has expired and negotiations have yet to result in a subsequent agreement. The dissenting Republican Board members noted that *Lincoln Lutheran* abandoned long-standing precedent and argued that the *Bethlehem Steel* exception was justified by both statutory and policy considerations.

The extent of, and any limits to, management rights is, perhaps, *the* most significant NLRB issue for unionized employers. Those employers have been on the losing end of this equation for a number of years, but expect that will change dramatically under the new Board.

**7. Mining for motive.** Another divided NLRB decision sharpened the focus on an employer’s motive in deciding whether it violates the NLRA by permanently replacing economic strikers—and dramatically tilted the playing field in favor of unions. *American Baptist Homes of the West d/b/a Piedmont Gardens* threatened to open the floodgates to second-guessing an employer’s reasons for retaining permanent replacement workers. If it were

to stand, the decision would chill the hiring of long-term replacements and hamper employers’ ability to maintain operations during an economic strike. The right to hire permanent replacements for economic strikers is well-settled; and prior to the Board’s decision in *American Baptist Homes*, an employer’s motivation for doing so was essentially “immaterial.” Now, however, to lawfully exercise its right, an employer may be required to justify its legitimate business reason for hiring replacements, and its “motive” will be subject to endless second-guessing by the NLRB, which will look to isolated statements and other “evidence” of an unlawful discriminatory or retaliatory motive. Since the economic consequences of being wrong are so significant, by making the “right” to utilize permanent replacements turn on unpredictable, after-the-fact, and subjective second-guessing by the Labor Board, *American Baptist* has made the “right” more an illusion than a reality. The business necessity to hire permanent replacements during an economic strike is as clear as the law that extends that right to employers. A Trump Board is very likely to restore such clarity.

**8. Scrutinizing work rules.** One of the defining trends of the Obama NLRB was its unprecedented scrutiny of employers’ handbook policies and other workplace conduct rules. In case after case, the Board found seemingly benign handbook provisions and other common employment policies to have unduly interfered with employees’ protected rights—and in doing so, expanded the very notion of what constitutes protected, concerted activity under the NLRA. The foray into employee handbooks also marked an aggressive expansion of the Board’s statutory mission into nonunion employer territory. We took a detailed look at Board case law in this area in the **Fall 2016 issue** of the *Advisor* and discussed the troublesome implications of these rulings for employers. Miscimarra has been a frequent dissenter in these handbook cases, and, in a lengthy dissent in *William Beaumont Hospital*, outlined a detailed path the Board could follow to fundamentally change the way the Board analyzes these cases. It would be surprising if he did not lead his new Republican colleagues down this path in short order.

**9. Hamstringing employee discipline.** The Obama NLRB oftentimes seemed almost incapable of finding that any type of employee behavior, no matter how outrageous, exceeded the bounds of statutory protection if it took place

in the context of pursuing some form of concerted activity. Unfortunately, these conclusions have been treated with deference by reviewing federal courts, which have routinely upheld the Board. In *DirecTV, Inc. v. NLRB*, for example, the D.C. Circuit upheld the Board's conclusion that a group of television installation technicians did not lose the protection of the Act when they aired a dispute with their employer over a new pay-docking policy on the local news. The appeals court acknowledged the tension between employees' right to engage in protected, concerted activity and an employer's reasonable expectation of loyalty from its employees; nonetheless, it affirmed the Board's findings that the employees' actions were not "flagrantly disloyal" or "wholly incommensurate" with their underlying grievance, and that their comments to the media were not "maliciously untrue" and were not intended to "unnecessarily tarnish their employer."

In *Plaza Auto Center, Inc.*, a divided Board panel ruled that an auto salesman's outburst while engaged in otherwise-protected activity did not cost him the NLRA's protection. The salesman had been complaining regularly about the lack of breaks during "tent sales," challenging the commission structure, and engaging in other "negative stuff." In a raised voice, he called the owner a "f\*\*\*ing crook" and an "a\*\*hole" and, for good measure, added that the dealership's manager was "stupid" and that "nobody liked him." Then he stood up, pushed his chair aside, and said that if the owner fired him, he would regret it. The owner called his bluff and discharged him—in violation of the NLRA, according to the Board majority. Reapplying the four-factor *Atlantic Steel* test for determining when an employee's improper conduct strips the employee of the Act's protections, the majority found his activity remained protected despite the outburst.

More recently, the Second Circuit affirmed the Board's finding that a caterer unlawfully discharged an employee because he fired off comments on Facebook during his work break, disparaging his supervisor and insulting the supervisor's mother: "Bob is such a NASTY MOTHER F\*\*\*ER don't know how to talk to people!!!!!! F\*\*\* his mother and his entire f\*\*\*ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!" While his conduct sat at the "outer-bounds of protected, union-related comments," it was not so "opprobrious" as to lose the protection of the NLRA, the appeals court concluded in *NLRB v. Pier Sixty, LLC*. The profane outburst came on the heels

of what the employee regarded as the latest instance of management's continuing disrespect for employees, the court reasoned; moreover, it explicitly protested that mistreatment and exhorted coworkers to take action.

Noting that "impulsive behavior" by picketing employees is expected, and termination for picket-line conduct violates the NLRA unless the conduct coerces or intimidates employees from exercising their protected rights under the Act, a divided Eighth Circuit in *Cooper Tire & Rubber Co. v. NLRB* enforced a Board order finding that an employer unlawfully fired a locked-out picketer who yelled racist remarks at a van carrying African-American replacement workers. The employee shouted, "I smell fried chicken and watermelon," in addition to similar comments. He kept his hands in his pockets the whole time and made no overt gestures. In the absence of threats or violence, the court deemed his conduct "totally uncalled for and very unpleasant" but found it could not objectively be seen as an implied threat of the kind that would coerce or intimidate a reasonable replacement employee from working. The court majority was unswayed by the employer's concern that reinstating the employee would conflict with its Title VII obligations. Even if the comments had been made in the workplace instead of on the picket line, they would not have created a racially hostile work environment under Eighth Circuit precedent, the majority reasoned. A dissenting judge argued the decision was tantamount to requiring the employer to violate Title VII and other discrimination laws, adding: "No employer in America is or can be required to employ a racial bigot."

The new Board majority is likely to be far more sensitive to the need for greater civility in the workplace, the necessity of toning down workplace rhetoric, and the need to protect the rights of *all* employees. Almost everyone anticipates a less myopic and more balanced approach to the question of where the boundary for protected conduct should be drawn. Hopefully, the more balanced views of the Trump Board will receive the same deferential treatment by the courts of appeals as did the views of their predecessors.

**10. Class action waivers.** The Obama NLRB confounded employers in December 2012 when it issued its *D.R. Horton* decision, asserting the novel proposition that class action waivers in mandatory arbitration agreements interfere with employees' rights under Section 7 of the NLRA. The

Board remained adamant in this stance over several years of case adjudication and, despite an early rebuke from the Fifth Circuit, the agency found support for its position in several circuits, including some employment cases in which the NLRB itself was not involved. The Supreme Court of the United States has agreed to consider the issue early in its coming term, setting oral argument for its opening week. Given the high court's consistent holdings on the supremacy of the Federal Arbitration Act, and the right to enter into agreements to individually arbitrate claims, most observers expect the justices will reject the NLRB's stance. Watch

for an in-depth discussion of the class action waiver cases before the Supreme Court in the next issue of the *Advisor*.

"The business community is hopeful that a new NLRB will review the previous Board's dramatic policy shifts on these and other issues," said **James J. Plunkett**, Senior Government Relations Counsel in the Washington, D.C., office of Ogletree Deakins. However, if Congress and the courts act before a new Board does, Plunkett notes that "they could establish the contours for what the Board can or cannot do in these areas." ■

## Joint-employer standard

Of the many Obama Board actions that rankled employers (and Republicans in Congress), its *Browning-Ferris* decision is among those to have drawn the most ire. The divided 2015 ruling extended potential liability for labor law violations to entities that, under long-standing principles, would not have been deemed "employers," including franchisors and companies that use contractors to perform certain operations. The controversial decision was immediately met with sharp criticism and charges of NLRB overreach, and scrutinized in congressional committee hearings. The case is also the subject of an appeal currently awaiting decision from the D.C. Circuit.

We discussed the potential implications of this controversial ruling in the [Spring 2016 issue](#) of the *Advisor*. Legislation recently introduced in Congress, however, would reverse the Board's decision, averting these negative consequences. On July 27, members of the House Committee on Education and the Workforce introduced the Save Local Business Act, which would amend the NLRA and the Fair Labor Standards Act to restore the long-standing definition of "employer" under federal law. [H.R. 3441](#) would cancel out the *Browning-Ferris* "right to control" test for joint-employer status and return to a pre-1984 standard. In order to be deemed a joint employer and thus potentially liable for labor violations, it would not be enough merely to possess the authority to assert control over employees' terms and conditions of employment; an entity would have to actually exercise "actual, direct, and immediate" control

over the employees in question—and not in a limited and routine manner. Rather, an entity would need to exercise "significant control over the essential terms and conditions of employment" in order to meet the definition of "employer." This is a more demanding standard to meet, and a far more realistic approach—one that makes sense when applied to contemporary economic realities.

Whether reversed legislatively, on appeal, or through eventual overturning by the Trump NLRB, the *Browning-Ferris* decision sits atop almost everyone's reversal list.

**Contingent workers.** A bookend to *Browning-Ferris*, and another stark example of the Obama Board's "contingent workforce" activism, was the controversial *Miller & Anderson, Inc.* decision in which the NLRB condoned a single bargaining unit comprised of both workers who are employed solely by a "user" employer and workers who are jointly employed by both the "user" employer and the "supplier" employer—most typically the staffing agency that furnishes those workers to the "user." With but a few Clinton-era exceptions, the Board has deemed such "mixed" bargaining units impermissible because they effectively require two different employers to bargain with the same union on a multi-employer basis. But the majority in *Miller & Anderson* concluded that requiring the two employers to bargain with respect to a mixed unit isn't really multi-employer bargaining. Once the joint-employer bookend falls, the *Miller & Anderson* bookend is almost certain to follow.

## Other NLRB developments

Here is a brief summary of other noteworthy developments in recent months:

### Circuit court decisions

**Revised successor bar doctrine upheld.** The National Labor Relations Board (NLRB) had a rational basis for revising the so-called successor bar doctrine in its 2011 *UGL-UNICCO Service Co.* decision, the U.S. Court of Appeals for the First Circuit held, noting that the agency explained its reason for doing so and “marshalled new factual support for its doctrinal move.” The Board also properly applied the doctrine in finding an employer that took over a bankrupt company unlawfully refused to bargain with the union that represented a group of truck drivers at the acquired business. In *UGL*, the Board overruled *MV Transportation*—a Bush-era case that had created an immediate window, following a sale or merger, during which a union’s representative status could be challenged by 30 percent of employees, the employer, or a rival union. *UGL* marked a return to the doctrine established in the Board’s 1999 *St. Elizabeth Manor, Inc.* decision, which held a new bargaining relationship between an incumbent union and a new employer was protected for a reasonable period of time and not subject to any challenge to the union’s representative status. Under *UGL*, an incumbent union is entitled to represent a successor’s employees for a reasonable period of not less than six months before its majority status can lawfully be questioned.

The appeals court rejected the employer’s contention that the *UGL* standard did not merit *Chevron* deference given the Board’s flip-flopping over the years, noting that an agency “is not forever bound by an earlier resolution of an interpretive issue.” It must, however, offer a “reasoned explanation” when it does change direction, and expressly articulate that it is parting with precedent, which the Board did here. Specifically, there was a sharp uptick in the number of corporate mergers and acquisitions and, as a result, a corresponding increase in successorship situations. This led the Board to conclude that, rather than a rebuttable presumption of continuing majority support, the successor bar better effectuated the policies of the National Labor Relations Act (NLRA) “in the context of today’s economy.” This reasoning was sound and, in the view of the appeals

court, the Board had “brought up to date the commercial reality ignored by the *MV Transportation* majority” (*NLRB v. Lily Transportation Corp.*, March 31, 2017).

**Weingarten rights—a lawful response when a union rep cannot be found.** The District of Columbia Circuit rejected the NLRB’s conclusion that an employer acted unlawfully when a supervisor asked an employee to fill out a written statement after he had requested a union representative. The appeals court concluded the Board’s finding was inconsistent with established precedent and not supported by substantial evidence. In assessing a situation to determine whether an employee’s *Weingarten* rights have been violated, the Board must take into account the context in which a request for union representation has been made, said the court, and the mere fact an employee’s request for union representation cannot be met does not mean the employer can do nothing further, and does not, without more, mean the employer has committed an unfair labor practice.

In this case, a hotel bellman was summoned to meet with supervisors after a guest complained about him. Informed that the meeting could result in discipline, the bellman declined to provide a statement without a union representative present. When a union representative could not be located, the bellman again refused to provide a statement. Following the refusal, the hotel placed him on leave with pay pending further investigation and instructed him to leave the premises.

The Board found that the hotel violated the NLRA. The appeals court, however, disagreed, concluding that the supervisors’ actions were fair, reasonable, and entirely consistent with *Weingarten*. After the bellman asked for a union representative, they worked diligently to comply with his request. Before ending the interview, they gave him the option to fill out a written statement, which he refused to do. It was clear that the employer never resisted or undermined the employee’s invocation of his right to seek union representation. There was no suggestion that the supervisors threatened or intimidated him, and they stopped asking questions after he requested a union representative (*Bellagio, LLC v. NLRB*, April 25, 2017).

**Employer must bargain over noncompete.** A unionized employer unlawfully implemented a mandatory confidentiality and noncompete agreement for new hires without giving the union notice and an opportunity to bargain, the D.C. Circuit held, upholding an NLRB finding that the employer violated Section 8(a)(5) of the NLRA. The appeals court also affirmed the Board's holding that two specific provisions of the agreement—an at-will clause and a prohibition on “Interference with Relationships”—independently violated Section 8(a)(1) of the Act. The employer argued it had the right to impose the new agreement because it was at “the core of entrepreneurial control” and had “only an indirect and attenuated impact on the employment relationship.” The Board, however, had found the agreement did have a direct economic impact on employees since it imposed a cost on them in the form of lost employment opportunities and also imposed “costs on employees by broadly restricting their ability to benefit from their discoveries, inventions, and acquired knowledge” obtained by working for the company. Consequently, the agreement was precisely the kind of matter that was suitable for bargaining, the appeals court said (*Minteq International, Inc. v. NLRB*, April 28, 2017).

**Another circuit rejects class action waivers.** Adding its voice to the debate, a divided Sixth Circuit agreed with the NLRB that an employer violated the NLRA by barring employees from pursuing class or collective workplace legal claims. The appeals court joined the reasoning of the Seventh and Ninth Circuits, holding that arbitration provisions that mandate individual arbitration of employment-related claims violate the NLRA and fall within the savings clause of the Federal Arbitration Act (FAA). The appeals court also found that the Fifth Circuit reached the incorrect conclusion in *D.R. Horton, Inc. v. NLRB*, which held that arbitration provisions mandating individual arbitration of employment-related claims do not violate the NLRA and are enforceable under the FAA. Of course, the final word on the matter will come from the Supreme Court of the United States, which, when it reconvenes in October, will take up the question of whether class and collective action waivers in employment arbitration agreements violate the NLRA and whether the FAA, in any case, trumps the NLRA (*NLRB v. Alternative Entertainment, Inc.*, May 26, 2017).

**Order to turn over witness statement enforced.** The D.C. Circuit affirmed a controversial 3–2 NLRB decision finding an employer violated the NLRA when it refused to

provide a union with a witness statement from a charge nurse who had seen a nurse's aide sleeping on duty. Leaving aside the larger issue, however, the appeals court did not address the Board's decision to overrule its blanket exemption protecting confidential witness statements from disclosure. The employer lacked standing to challenge the Board's new rule, the appeals court held, since the Board did not apply the rule in the case at hand (*American Baptist Homes of the West d/b/a Piedmont Gardens v. NLRB*, June 6, 2017).

**King Soopers affirmed.** One of many Board rulings that caused concern among employers was the NLRB's modification of its make-whole remedy to require employers to fully compensate discriminatees for search-for-work and work-related expenses incurred in connection with interim employment. Upholding the Board's action, the D.C. Circuit found the agency's change to its remedial framework was lawful, reasonable, and fully justified. In the past, the Board had declined to award search-for-work and interim employment expenses that exceeded a complainant's interim earnings, but it acknowledged it had never explained or justified its approach. In this case, the Board found its traditional approach not only failed to make victims of unlawful discrimination whole, but also likely discouraged complainants in their job search efforts. Its new remedial framework was necessary, the Board explained, to ensure that make-whole remedies fully compensated unlawfully-discharged employees for losses incurred, and deterred further violations of the Act (*King Soopers, Inc. v. NLRB*, June 9, 2017).

**Claim that sandwiches “contaminated” not protected.** In an *en banc* decision, the Eighth Circuit declined to enforce the NLRB's determination that a Jimmy John's franchisee violated the NLRA by disciplining and firing employees who used posters to disparage the employer's sandwiches. The court reasoned that the posters, which implied that Jimmy John's sandwiches posed a health threat to consumers, were so disloyal as to exceed the protections of the Act, under the Supreme Court's controlling *Jefferson Standard (NLRB v. Local Union No. 1229, IBEW)* test. The appeals court rejected the Board's apparently dispositive reliance on its finding that the posters were not “maliciously untrue.” The court did, however, enforce a separate portion of the Board's order finding that the employer acted unlawfully when its managers used Facebook postings to disparage and harass a leading union supporter for his protected activities (*MikLin Enterprises, Inc. d/b/a Jimmy John's v. NLRB*, July 3, 2017).

**Casino surveillance technicians are “guards.”** The day-to-day duties of surveillance technicians at two Las Vegas casinos included enforcing rules against coworkers, the D.C. Circuit concluded. As such, they were “guards” as defined by the NLRA. Section 9(b)(3) of the Act, in part, defines guards as individuals who “enforce ... rules to protect property of the employer or to protect the safety of persons on the employer’s premises.” Most significantly, Section 9(b)(3) prohibits the Board from certifying any union to represent guards if the union also admits as members individuals who are *not* guards. Since the union involved in this case concededly admitted nonguards as members, the appeals court refused to enforce the Board’s order directing the casinos to recognize and bargain with the union in a bargaining unit comprised of the surveillance technicians.

In finding the techs to be statutory guards, the court noted that they control the casinos’ surveillance, access, and alarm systems and help investigate errant employee behavior. The casinos rely on a sophisticated network of cameras, locks, alarms, and computers in safeguarding property and deterring, detecting, and prosecuting criminal acts. Surveillance techs work with both the surveillance and security departments and have wide-ranging duties installing the systems, as well as using hidden cameras in targeted investigations of other employees suspected of wrongdoing. Techs do not confront or interview the targeted employee; their role is limited to ensuring proper coverage and retrieving surveillance footage. But the techs’ participation is crucial because no other employees can install secret cameras. Moreover, the techs are “key employees” under Nevada gaming regulations, and therefore, they are subject to special restrictions and background checks. The record as a whole demonstrated that the techs performed “an essential step in the procedure for enforcement” of rules to protect the casinos’ property and patrons, including enforcement against their fellow employees, the appeals court concluded. Consequently, the techs were guards, and it was improper to certify the union as their bargaining representative (*Bellagio, LLC d/b/a Bellagio Las Vegas v. NLRB*, July 18, 2017).

**Joint-employer analysis rejected.** The D.C. Circuit found that the NLRB, in a pre-*Browning-Ferris* decision, had inexplicably departed from precedent when it held that CNN America was a joint employer along with the unionized outside contractors that provided staffing for the network’s technical operations. The matter arose after

CNN brought those technical functions in-house and then refused to recognize and bargain with the union that had represented the contractors’ employees. The appeals court held the NLRB’s joint-employer determination could not be sustained because its analysis was inconsistent with its own precedent—specifically, with two 1984 decisions that set the governing standard for determining joint-employer status. The court held that without addressing that precedent or explaining why it did not control the outcome, the Board’s decision could not be sustained. In contrast, the court pointed to the Board’s later decision in *Browning-Ferris*, which is also pending in the D.C. Circuit, but where the Board carefully examined three decades of precedent and articulated a specific and reasonable justification for overruling that precedent. Because the Board failed to either overrule or adequately distinguish or modify its own precedent in the CNN decision, the court rejected its joint-employer determination. However, the court went on to note: “Our conclusion does not bar the Board from finding CNN to be a joint employer by applying a different standard or sufficiently explaining the one it did apply.” While the court held that the Board’s finding of joint-employer status could not be affirmed, it further concluded that the Board’s decision finding CNN to be a legal successor could be, and was, sustained (*NLRB v. CNN America, Inc.*, August 4, 2017).

## Board rulings

**More Election Rule problems.** The NLRB found that the results of a Board election must be set aside where 90 percent of the addresses on the voter list provided by the employer were inaccurate, the names of at least 15 eligible employees were omitted, and the list did not provide phone numbers for any of the employees. In a partial dissent, Chairman Miscimarra observed that the decision illustrated the downside of the Election Rule’s preoccupation with speed between petition-filing and the election. Moreover, he asserted, the expanded voter-list disclosure requirements inappropriately failed to accommodate employees’ privacy interests. While he agreed with the Board that the election should be set aside because the bulk of the addresses were incorrect, he would not decide whether the omission of 15 employees from the list independently required a new election. Separately, the Board found that a string of text messages between a supervisor and an employee that included asking whether the employee was working for the employer or the union constituted unlawful interrogation (*RHCG Safety Corp.*, June 7, 2017).

**Employee unlawfully barred after filing suit.** An employer acted unlawfully by denying a former employee access to its hotel/casino facility after she and another employee filed a collective action. The employer routinely allowed former employees to patronize its facility and attend social functions, but denied the employee in question based on her protected activity, said the Board majority, concluding that Section 7 of the NLRA prohibits such retaliatory action. In dissent, Member Miscimarra argued that when enacting the NLRA, Congress did not intend to guarantee that all former employees would have a right of access to the private property of their former employers whenever they joined other employees in a non-NLRA lawsuit against their former employers. While the employer's action may have constituted retaliation for the worker's pursuit of the FLSA claim, the NLRB is not statutorily empowered to police the nonretaliation provisions of statutes other than the NLRA (*MEI-GSR Holdings, LLC*, May 16, 2017).

**Small company was successor of national company.**

A school district terminated the special education portion of its bus transportation contract with a large unionized transit company and awarded it to a small company specializing in transport services for special needs students. A divided NLRB determined that the small company became a legal "successor" to the larger unionized company and that it violated the NLRA by failing to recognize and bargain with the union as the exclusive bargaining representative of the drivers and monitors. Arguing that the majority disregarded and misapplied a fundamental aspect of successorship law, Member Miscimarra dissented. While both entities engaged in the business of transporting certain students from point A to point B, the essential part of the smaller company's business was unique and involved particularized transport needs associated with special education students. Further, it did not take over any of the larger company's facilities or purchase any of its buses or equipment. Further still, the smaller company did not take over its operations; rather, it merely took over the contract for special education children. It also configured new routes and increased the number of routes, and, although it hired some of the larger company's employees, it conducted a genuine application and hiring process. Thus, Member Miscimarra argued, the Board could not reasonably find that the essential successorship element of a substantial continuity of the business existed (*Allways East Transportation, Inc.*, May 11, 2017).

**Unlawful solicitation of grievances.** During the course of a union organizing campaign at a nursing home the chief operating officer (COO) of the home's parent corporation paid an infrequent visit to the facility. He was aware that there had been complaints about the home's interim director. During his visit he approached one of the employees who had complained and asked her "how things were going." The employee repeated her concerns about the interim director of nursing, and the COO told the employee that he would "follow up and look into" it. He also discussed the employee's union activities.

Over the dissent of Member Miscimarra, a Board majority found the exchange to constitute an unlawful solicitation of grievances and implied promise to remedy them. Because the employer had not previously addressed employee complaints in quite this manner, it failed to rebut an inference of illegality under the NLRB's *Maple Grove Health Care Center* framework, according to the majority (*Mek Arden, LLC d/b/a Arden Post Acute Rehab*, July 25, 2017).

## Legislative activity

**Undoing Obama Board actions.** On June 14, Sen. Lamar Alexander (R-TN) introduced the Workforce Democracy and Fairness Act, which would amend the NLRA to roll back the Obama-era's so-called "quickie election" rule. The Senate bill, **S. 1350**, would undo the revised election rule's problematic features, which sharply curtailed the time in which employers can respond to a union organizing campaign and the extent to which they can raise pre-election challenges. Specifically, the legislation would mandate that union elections not be held in fewer than 35 days; provide employers at least 14 days to prepare their cases to present before an NLRB election officer and protect their right to raise additional concerns throughout the pre-election hearing; require the NLRB to determine the appropriate bargaining unit and address any questions of voter eligibility *before* the union is certified; and give employers at least seven days to provide a list of employee names and one additional piece of contact information chosen by each individual employee in order to protect his or her privacy. The House Committee on Education and the Workforce cleared **H.R. 2776**, the House version of the bill, on June 29. The measure also rolls back the NLRB's controversial standard for recognizing "micro" bargaining units.

On June 29, the House advanced two other legislative proposals to reform the NLRA, passing each of them out of committee on a 22–16 party-line vote. The **Employee Privacy**

**Protection Act (H.R. 2775)**, introduced by Rep. Joe Wilson (R-SC), “[e]mpowers workers to control the disclosure of their personal information” by reversing policies ushered in by the Obama NLRB that afford labor unions greater access to employee contact information during union organizing campaigns. The **Tribal Labor Sovereignty Act of 2017 (H.R. 986)** would, according to the bill’s sponsor, Rep. Todd Rokita (R-IN), protect the sovereignty of Native American tribes from bureaucratic overreach and ensure tribes have control over their labor relations by exempting tribal enterprises from NLRB jurisdiction.

**Disarming the NLRB.** On July 20, Senator Mike Lee (R-UT) introduced legislation that would effectively strip the NLRB of its power to prosecute and adjudicate labor disputes. Instead, that power would be transferred to federal courts. Under the **Protecting American Jobs Act (S. 1594)**, the NLRB would continue to conduct investigations, but the Board would be unable to prosecute any alleged violations. The bill is cosponsored by Sens. Ted Cruz (R-TX), James

Lankford (R-OK), Tom Cotton (R-AR), Luther Strange (R-AL), and Marco Rubio (R-FL).

The measure also would limit the NLRB’s rulemaking authority to rules concerning the internal functions of the Board. The agency would be barred from “promulgating rules or regulations that affect the substantive or procedural rights of any person, employer, employee, or labor organization, including rules and regulations concerning unfair labor practices and representation elections.” Conforming amendments would be made to the NLRA.

According to Lee, “the NLRB has acted as judge, jury, and executioner for labor disputes in this country.” The Protecting American Jobs Act would restore “fairness and accountability” to federal labor laws. Lee introduced similar bills in the last two Congresses, but they never even received committee consideration. However, the legislation may have better odds given the current Republican majority in both houses of Congress. ■

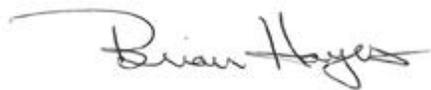
#### **BRIAN IN BRIEF** continued from page 2

of the delay has come from the administration itself, with a personnel selection and placement record that has been far from robust. Certainly, Senate Democrats, as the opposing party, have played their role, but in a post-filibuster era it is impossible to have one of the worst records in getting nominees timely confirmed without the nominating party itself taking a significant amount of responsibility for the delay.

Hopefully, when all of official Washington returns in September from its extended summer vacation, it will do so with a new sense of purpose on all fronts. A first sign that this is the case, at least on the labor front, would be the swift confirmation of William Emanuel. Of more significance would be the prompt announcement of two fully-vetted nominees to take the places of Philip Miscimarra and

Richard Griffin. There is an increasing sense of urgency on the management side. Hopefully, that will translate into action by the administration and Congress. The amount of work is daunting, and the window of opportunity is invariably narrower than anyone thinks.

*Sincerely,*



**Brian E. Hayes**

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## Coming up...

The NLRB's General Counsel plays a key role in shaping the types of cases and claims the agency will prosecute, and which legal theories to put before the NLRB for consideration. The role of the General Counsel—and the imminent turnover in that role from President Obama appointee Richard Griffin, a former union lawyer, to President Trump's impending nominee—will be the subject of the forthcoming issue of the *Practical NLRB Advisor*.

Before his slated departure in November, Griffin will argue the NLRB's position before the Supreme Court of the United States as it considers a trio of cases regarding the legality of mandatory class action waivers in arbitration agreements. We'll discuss the critical questions before the high court and the prospects for employers seeking to resolve employment disputes through individual arbitration in order to control litigation costs and potential liability.

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