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## The Practical **NLRB** Advisor

### *D.R. Horton's* day of reckoning?

#### In this Issue

- 2** Brian in brief
- 5** New General Counsel will hit the reset button
- 7** More changes at the agency
- 9** Other NLRB developments
- 13** Coming up...

*In an effort to control its litigation costs, XYZ Company implemented a Mutual Arbitration Agreement (MAA). The company required all new hires and current employees to execute the agreement as a condition of their hire or continued employment.*

*Under the terms of the MAA, an employee agrees to resolve any employment-related disputes against XYZ through binding arbitration. The agreement further provides that an appointed arbitrator will be authorized to hear only an individual employee's claims and will have no authority to consolidate the claims of more than one employee to undertake a "class or collective action" proceeding or to grant relief to a group or "class" of employees in one proceeding. Finally, by executing the MAA, the employee waives the right to file an employment-related civil action against the company, and the right to have his or her dispute resolved by a judge or jury.*

*Despite having signed the MAA, a company employee filed a putative collective action against XYZ under the Fair Labor Standards Act (FLSA), alleging that he had been misclassified as exempt from overtime. His attorney notified the company that he had been retained to represent a nationwide class of similarly situated employees and gave formal notice by letter of his intent to initiate arbitration. The attorney also informed XYZ that he represented five other current and former employees. However, XYZ's attorney replied to the employee's counsel that this notice was ineffective,*

**RECKONING** continued on page 3

## BRIAN IN BRIEF



There is no more complex and influential role at the National Labor Relations Board (NLRB) than that of the General Counsel (GC). An NLRB member can determine a case outcome, or change the direction of the law, only with the concurrence of colleagues. By contrast, the GC alone decides not only if the agency will pursue a case, but also the legal theories it will advance in doing so. The General

Counsel's comparative operational independence does not end there. Thus, every decision an NLRB Board member makes is subject to federal court review, but a GC's decision to issue, or not issue, a complaint in an unfair labor practice case is virtually unreviewable.

The volume of the GC's work further amplifies the influence of the office. While the Board issues formal decisions in an average of about 250 unfair labor practice and 50 representation cases a year, the GC's office processes over 20,000 unfair labor practice complaints and over 2,000 representation case petitions annually. Even from an administrative perspective, the GC has an outsized presence. While a Board member has a staff of approximately 10 lawyers based in Washington, D.C., the GC is ultimately responsible for more than 1,500 lawyers, field examiners, and support personnel based not only in Washington, but in 26 regional offices throughout the country. Whether viewed from an administrative or immediate policy perspective, the GC's office has far greater day-to-day impact on the regulated community than the Board itself. Few employers that have a brush with the agency will ever have their cases reach the

Board level. All of them, however, will deal with, and be affected by, the GC's office.

For all of these reasons, the confirmation of Peter B. Robb as the NLRB's new General Counsel may actually constitute the clearest line of demarcation between the Obama Board and the Trump Board. Following Obama appointees Lafe E. Solomon and Richard F. Griffin, Jr.—two of the more expansionist, pro-labor GCs in memory—Robb's tenure will almost certainly result in a shift in policy. How dramatically the trajectory of the GC's office may change, or what particular policies he may want to “tee up” for Board revision, however, remains to be seen.

As this issue of the *Practical NLRB Advisor* notes, the clearest sign of the GC's priorities and the direction of the policy agenda will likely be reflected in the new GC's anticipated “Mandatory Submission” memo to the Board's regional offices. In their own respective submission memos, Solomon and Griffin each identified more than 30 issues or case types that the regions were required to send to Washington for review. Most observers believe that Robb's laundry list will likely be even longer than those of his predecessors. The *Advisor* will continue to track not only Robb's regional office memoranda, but all the additional signposts of what most believe will be an office and an agency about to undergo a major transition.

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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**RECKONING** continued from page 1

*citing the language of the MAA barring the arbitration of collective claims.*

*Soon thereafter, XYZ was hit with an unfair labor practice complaint. The National Labor Relations Board (NLRB) General Counsel alleged that the company violated the National Labor Relations Act (NLRA) by maintaining the MAA. According to the complaint, the MAA's class action waiver interferes with employees' substantive rights under the NLRA to engage in concerted protected activity.*

**What does the NLRA have to do with this?**

In its controversial decision in *D.R. Horton*, the NLRB invalidated the company's MAA. It held, for the first time, that an employer violates the NLRA when it requires employees to sign arbitration agreements preventing them from joining together, as a class, collective, or group action to pursue employment-related claims in any forum, whether in arbitration or in court.

An "individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7 . . . central to the [NLRA's] purposes," the Board reasoned in *D.R. Horton*. In an appeal of the Board's decision handled by Ogletree Deakins, the U.S. Court of Appeals for the Fifth Circuit **denied** the NLRB's petition for enforcement. Reversing the agency on the class waiver holding, the appeals court noted that the NLRB had failed to give the Federal Arbitration Act (FAA) its due. That statute favors the arbitration of disputes as a matter of federal policy and specifically makes arbitration agreements enforceable according to their terms.

The NLRB's view, as reflected in *D.R. Horton*, has since been soundly rejected by a number of federal courts of appeal. However, two other circuit courts of appeal have subsequently agreed with the Board's view in *D.R. Horton* and affirmed its reasoning. This "split in the circuits" caused the Supreme Court of the United States to grant certiorari in the matter.

The high court is now poised to resolve the dispute that has percolated for the nearly six years since the NLRB first issued its controversial decision in *D.R. Horton*. On October 2, 2017, the opening day of its current term, the Supreme

Court heard oral argument in three consolidated cases that will decide the future of class action waivers in the employment context. These cases—*National Labor Relations Board v. Murphy Oil USA, Inc.*, *Epic Systems Corp. v. Lewis*, and *Ernst & Young LLP v. Morris*—not only kicked off the Court's new term, but they will also likely be the most important employment decisions to be issued by the Court in the coming year.

**Background.** From 2012 to 2016, the overwhelming majority of federal and state courts rejected the NLRB's position regarding class action waivers. These courts included the Second, Fifth, and Eighth Circuits. Although the Fifth Circuit refused to enforce the Board's *D.R. Horton* decision, the NLRB adhered to its own position in dozens of subsequent Board cases, including *Murphy Oil*.

In 2016, however, the Seventh and the Ninth Circuits broke ranks and became the first federal appellate courts to side with the NLRB. They were followed by the **Sixth Circuit** in 2017 leading to this year's Supreme Court showdown. On one side in the Supreme Court's consolidated proceeding is *Murphy Oil*, in which the Fifth Circuit reasserted its rejection of the NLRB's position in *D.R. Horton*, and on the other side are the Seventh Circuit (*Lewis*) and Ninth Circuit (*Morris*), which adopted the Board's view that class action waivers are illegal under the NLRA.

In addition to the parties, dozens of amici also have filed briefs before the high court, including scores of groups representing employers. **Ogletree Deakins filed one such amicus brief** on behalf of the Society for Human Resource Management, National Association of Home Builders, National Federation of Independent Business, and Council on Labor Law Equality. In the strangest twist of all, however, the United States government itself, through the Solicitor General, has filed a brief in opposition to the Board's view and in support of the Fifth Circuit's decision. It marks a rare situation in which the United States government actually opposes the views of one of its own independent agencies.

**What we heard from the Supreme Court.** Ogletree Deakins attorneys **Ron Chapman, Jr.**, a shareholder in the Dallas office, and **Christopher C. Murray**, a shareholder in the Indianapolis office, who represented D.R. Horton in the successful Fifth Circuit appeal in that case, were present for

the Court's oral argument. "While you never know how the Court will rule, a few telling moments stood out," they said.

Most of the current justices' views on arbitration and class action waivers in arbitration are fairly well known. The Court has issued a series of decisions on these issues in recent years, including, most notably, *AT&T Mobility LLC v. Concepcion* in 2011. This line of cases generally affirms the enforceability of class action waivers in arbitration agreements under the FAA, but none of the Court's prior cases dealt specifically with *employment* arbitration or the NLRA.

In these earlier decisions in the area, the Court has been sharply split, with many 5–4 votes, with the late Justice Scalia, who passed away in February 2016, in the majority of those decisions. His absence created the prospect of a 4–4 tie prior to Justice Neil Gorsuch joining the Court in April 2017.

Since his confirmation, all eyes have been on Justice Gorsuch in search of any clue as to his likely view of the law. Indeed, Ogletree Deakins has previously [analyzed his prior rulings on arbitration](#) in an effort to discern his potential position. Justice Gorsuch provided few clues himself at the oral argument, where he was uncharacteristically quiet and asked no questions from the bench. In contrast, Justices Breyer, Kagan, Sotomayor, and Ginsburg engaged in questioning that plainly evidenced support for the Board's position, leaving observers with little doubt where they are likely to come out on the issue. Chief Justice Roberts and Justice Alito, on the other hand, posed questions that, while more subtle, seemed to support the employers' arguments. Like Justice Gorsuch, Justice Thomas followed his usual pattern and did not ask any questions or make any comments.

As with most divided cases at the Supreme Court these days, that leaves Justice Kennedy as the possible swing vote. In several instances during argument, Kennedy made the point that other types of concerted action are still permitted under an arbitration agreement with a class action waiver. For example, he noted employees can hire the same lawyer, advance the same evidence, and collaborate in the prosecution of their claims. These are the same arguments made to the Fifth Circuit in *D.R. Horton* and again to the Supreme Court by a number of amici. At times during the argument, it appeared that Justice Breyer and the Chief Justice were actively vying for Justice Kennedy's support.

**What now?** "At this point, the only thing that is certain is that the Court is divided," Chapman and Murray said. That in turn means the Court will issue at least two opinions, which probably will delay release of the decision until sometime in the first quarter of 2018.

What are employers to do in the meantime? An employer that is currently contemplating a mandatory arbitration agreement with a class waiver may want to delay implementation until the justices give their thumbs-up, suggests Brian E. Hayes, a shareholder in the Washington, D.C., office of Ogletree Deakins, co-chair of the firm's Traditional Labor Practice Group, and a former NLRB member. Given the clear division on the high court, and a degree of uncertainty as to where Justice Kennedy will ultimately land, employers may want to bide their time a little. Moreover, any decision may contain unanticipated elements that will impact precisely how employers draft their agreements. Rather than implementing an agreement now, only to find that it might need to be modified in a few months, a moderate delay probably represents the more prudent course.

Employers that already have such agreements in place should consider the following: Unless there is an intervening change from the new Board majority or General Counsel, regional offices may well continue issuing complaints based on the *D.R. Horton* decision. However, it is unlikely in the extreme that such cases will actually be litigated. Rather, the litigation will wind up being held in abeyance pending the Supreme Court's decision.

The stakes in the current litigation are very high for employers that have come to increasingly rely on individual arbitration as a means of controlling litigation costs, ensuring the expedient resolution of employment disputes, and reining in excessive damages awards. Advocates have claimed that already some 55 percent of private nonunion employees are covered by mandatory arbitration agreements, 23 percent of which bar class and collective proceedings. This number will either drop to zero or increase dramatically depending upon what the Supreme Court decides.

If the Supreme Court decision clearly strikes down the Board's *D.R. Horton* rationale and holds class action waivers do not violate the NLRA, then the road ahead for such agreements will be cleared. Even a dispositive decision to the opposite effect, although unwelcome, will at least result

in finality and clarity. However, if the Court somehow lands on a “middle ground,” then another round of litigation, policy revisions, and Board decision-making may await.

Finally, beyond the purely practical ramifications, it is important to place the *D.R. Horton* decision in its larger context. The decision was emblematic of the Obama Board's activism and its extraordinarily expansive view of the coverage and sweep of the NLRA—an era in which the Board majority predicated violations on new and novel theories and found the Act implicated in issues never previously considered.

This view has had more than its share of critics. Indeed, in the context of *D.R. Horton* and the Board's foray into the procedural aspects of other adjudicatory forums, Chapman and Murray are among those who have chided the Board for “deviating from 80 years of precedent by seeking to solve perceived problems that are well beyond the Board's limited jurisdiction to address.” Supreme Court affirmation of the Board's *D.R. Horton* decision will undoubtedly encourage future NLRBs to continue engaging in similar “mission creep,” while its rejection will remind future Boards about the limitations of its own authority. ■

## New General Counsel will hit the reset button

A critical factor in restoring balance at the National Labor Relations Board (NLRB) will be the upcoming change in the General Counsel's (GC) office. With the nomination and Senate confirmation of management-side attorney Peter B. Robb to replace outgoing General Counsel Richard F. Griffin, Jr., the current trajectory of the agency appears headed for a change from the ground up.

“The position of General Counsel at the NLRB is unlike any other in the federal government in that, at the NLRB, the General Counsel acts as a prosecutor with unreviewable discretion on the issuance or refusal to issue unfair labor practice charges and is in charge of directing the NLRB's regional offices and their lawyers,” explains [Harold P. Coxson](#), a shareholder in the Washington D.C., office of Ogletree Deakins. “The General Counsel's role is, in effect, to be the ‘gatekeeper’ for the Board, controlling both the cases and legal theories that reach the Board for decision.”

The General Counsel's prosecutorial discretion is absolute. Thus, the GC has unreviewable authority to decide whether or not a complaint should issue in any one of the thousands of unfair labor practice charges received by the NLRB's regional offices every year. However, the GC's ability to influence the development of Board law goes well beyond simply making complaint/no complaint decisions. The GC's office directs the prosecutorial function at a far more granular level. Thus, in addition to authorizing the issuance of a complaint, the GC can also dictate what legal theories and arguments should be advanced and argued before the Board in support of the complaint. In this way, the General Counsel plays a key role in shaping the development of Board law by “teeing up”

critical issues for eventual Board consideration and decision. The General Counsel accomplishes these goals through the oversight of the agency's regional offices and operations, through his control over the agency's Division of Advice, and through the issuance of formal General Counsel memoranda that instruct the agency's attorneys and investigators on how to handle cases and issues, particularly issues that, in the General Counsel's estimation, warrant particular focus.

It has become customary for all new General Counsel to issue a memorandum to all of the agency's regional offices listing the type of unfair labor practice charges and issues they want sent to Washington for review before any regional action is undertaken. The GC utilizes this mechanism to set the decisional agenda for the Board. Most observers expect that the new General Counsel will issue such a memorandum shortly after his confirmation and that the “target list” will be a long and varied one.

**The outgoing General Counsel.** Richard Griffin's four-year term as NLRB General Counsel expired on October 31, 2017. Griffin had previously served as a Board member from January 2012 through August 2013; however, his appointment was invalidated by the Supreme Court's decision in *NLRB v. Noel Canning*. The former union attorney's tenure as GC was clearly an activist one. His prosecutorial decisions in a number of instances steered the Board into uncharted doctrinal waters.

Among Griffin's more controversial actions:

- He issued a formal memorandum concluding that Northwestern University football players are statutory

employees under the National Labor Relations Act (NLRA), at least for purposes of addressing unfair labor practice allegations. Griffin made his office's "prosecutorial position" known after the Board itself had wisely, and unanimously, declined to tackle the question after some players filed a high-profile representation petition. Griffin announced his conclusion in a broader issuance on the status of university faculty, staff, and students under the NLRA in the unfair labor practice context.

- He repeatedly delivered an emphatic message as to where he believed the NLRB should stand on the highly controversial "joint employer" issue. Thus, Griffin **authorized** 13 complaints against a global restaurant corporation after concluding that it was a putative joint employer with its franchisees and, thus, potentially liable for alleged unfair labor practices committed by such franchisees. The company, "through its franchise relationship and its use of tools, resources and technology, engages in sufficient control over its franchisees' operations, beyond protection of the brand, to make it a putative joint employer with its franchisees, sharing liability for violations of our Act," the General Counsel's investigation found.
- He waded into the "Fight for \$15" movement and the corresponding wave of work protests by urging the NLRB to "modify" the current Board law on intermittent and partial strikes to effectively protect the new tactics being used by employees and unions. In an **operations memorandum**, the GC's office advised the regions that the Board's "present test for determining whether multiple short-term strikes are protected is difficult to apply" to these "new models" of labor activism—which, in Griffin's view, should fall within the Act's protective umbrella. His office instructed the regional offices to be on the lookout for cases that may be appropriate for analysis under a new framework—a rubric that "more effectively protects the right to strike" and "dispenses with the unpersuasive rationales relied on in the past." To that end, the GC's office provided **model language** to be incorporated in briefs to administrative law judges and the Board as an alternative argument to extant Board law. The GC's office then directed the regions to submit all cases to the

Division of Advice in which the region concluded that a complaint was unwarranted under current law but might be appropriate under this alternative framework.

- Griffin also sought to upend the NLRB's *Levitz Furniture* framework for determining whether an employer is privileged to withdraw recognition from an incumbent union that has lost majority support, by issuing a **memorandum** urging the Board to adopt a position that withdrawal is permissible only on the basis of a formal decertification election. He asserted that an election requirement is more aligned with the oft-stated principle that "Board elections are the preferred means of testing employees' support." The stated rationale struck many as ironic, coming, as it did, from a former union lawyer and in light of the union movement's long-standing and dogged support of card-check legislation that would largely replace the Board's election processes. Griffin, again, provided the regions with a model brief in support of this position, arguing that a Board election was the only reliable way to establish that an incumbent union had lost its majority support. Glossed over in the GC's analysis was the fact that unions invariably utilize "blocking charges" to delay such decertification elections for months or longer.

**Griffin's replacement.** Peter Robb, President Trump's nominee to replace Griffin, has been a critic of the Obama NLRB and the Board's revised "ambush" election rule, in particular. Early in his legal career, Robb served as an NLRB field attorney and subsequently was chief counsel to former Republican Board member Robert Hunter from 1981 to 1985. Most recently, Robb was director of the labor and employment law practice group for a New England law firm, where he has represented trade associations and corporations. His decades of experience representing management in labor matters ensure that Robb understands the business challenges in which employers operate, and he will likely play an instrumental role in restoring balance at the agency.

Robb's nomination was approved on a 12–11 party-line vote by the Senate Health, Education, Labor and Pensions (HELP) Committee on October 18, 2017. On November 8, 2017, his nomination cleared the full Senate. ■

## More changes at the agency

President Trump's two appointments to the National Labor Relations Board (NLRB) are now seated. Marvin E. Kaplan, a former chief counsel at the Occupational Safety and Health Review Commission and Republican labor counsel to the House Committee on Education and the Workforce, was sworn in on August 10, 2017. William J. Emanuel, a former management-side attorney at a national employment law firm, was confirmed on September 25, 2017, and sworn in on the 26th. With Emanuel seated, the five-member NLRB now has a Republican majority for the first time in nearly a decade.

*Miscimarra's departure will leave the NLRB with a 2–2 split, essentially deadlocking the Board on most critical issues until President Trump names his replacement and the Senate confirms the choice.*

However, this majority may be fleeting, since Board Chairman Philip A. Miscimarra has announced he will leave the agency when his term ends on December 16, 2017, and the White House has not yet announced a nominee to replace him. Miscimarra's departure will leave the NLRB with a 2–2 split, essentially deadlocking the Board on most critical issues until President Trump names his replacement and the Senate confirms the choice. The process of getting nominees actually seated has been a frustratingly slow one for the current administration. Consequently, at least for the short term, there may be only a brief window of opportunity for the new Republican majority to address any of the problematic decisions of the Obama Board. Miscimarra has indicated he intends to make optimal use of this short period of time, signaling that we can expect a rush of Board decisions before his term ends. Even a rush of cases, however, may not put much of a dent in the mountain of new precedent authored by the Obama Board: "According to one study, the equivalent of 4,559 years of cumulative Board

precedent was reversed in favor of decidedly pro-union decision making during the Obama years," notes **Thomas M. Stanek**, a shareholder in the Phoenix office of Ogletree Deakins. Beyond addressing all of these decisions, the new Board majority may also want to address the Obama Board's "ambush" election rules. Since doing so would involve notice and comment rule-making, it is a much longer term prospect for a new Board majority.

In addition to the upcoming change in the General Counsel (GC) position, discussed in detail in the previous article,

there have already been a number of other significant personnel developments on the GC side of the agency. This summer, Barry Kearney, who as Associate General Counsel of the Division of Advice was

one of the agency's longest-serving employees, retired. Kearney has been replaced by Jayme Sophir, who will now head the division. The Division of Advice provides guidance to the Board's regional offices in complex or novel unfair labor practice cases and is responsible for the initiation of injunction actions by the General Counsel under Sections 10(j) and 10(l) of the National Labor Relations Act (NLRA). Sophir is a longtime agency attorney who has worked in the Advice Division since 1988. She was previously an attorney in private practice.

There have also been three newly appointed Regional Directors for the agency. Regional Directors have significant authority in administering the Act in the geographic areas under their jurisdictions. The NLRB has recently named new Regional Directors for Region 12 in Tampa, Florida; Region 16, covering the Fort Worth, Houston, and San Antonio areas of Texas; and Region 10 in Atlanta. All three new Regional Directors are long-term, career NLRB attorneys. ■

## GC considers office closures

The NLRB has 26 regional offices and “resident offices” within those regions. Over the summer, General Counsel Griffin announced he was considering proposals to close several of these subregional offices in an effort to reduce costs, noting the agency could make use of new technologies that could allow agency employees to work remotely and continue to serve the communities in their respective regions. The NLRB has staff working as “resident agents” in seven states. While the final decision will now rest with a new General Counsel, it seems likely that he or she will also consider such streamlining moves. The following offices face possible closure:

- The San Diego, California, office, which handles cases arising in Southern California and is part of Region 21, based in Los Angeles
- The San Antonio, Texas, office, which handles cases arising in 70 counties in South to West Texas, including two of the five most populous counties in the state; the office is part of Region 16, based in Fort Worth. The region has another resident office in Houston.
- The Little Rock, Arkansas, office, which handles cases arising in Arkansas and neighboring counties and is part of Region 15, based in New Orleans
- The Anchorage, Alaska, office, which handles cases arising in Alaska and is part of Region 19, which maintains its regional office in Seattle, Washington
- The Tulsa, Oklahoma, office, which handles cases arising in Oklahoma and is part of Region 14; the regional office is in St. Louis, Missouri, with a subregional office in Overland Park, Kansas.

Any proposed office closure invariably creates controversy and political pushback. Employees working in the targeted offices naturally chafe over the prospect of having to relocate, and the agency’s own union will very likely oppose any planned office closures. In addition, there is always opposition that comes from union, and even employer, stakeholders. Parties that have gotten accustomed to dealing with a nearby subregional office do not relish the prospect of having to travel to a regional office located farther away to attend representation case hearings or conduct other business with the agency. The issue may be magnified as tightening agency budgets are likely to restrict the ability of agency personnel to travel to stakeholder locales. Despite the controversy and pushback, a decreasing caseload and the realities of a constrained budget regime may make the downsizing inevitable.

## Other NLRB developments

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

### Circuit court decisions

**Stand-alone class waiver OK.** The U.S. Court of Appeals for the Fifth Circuit, following its own decision in *D.R. Horton, Inc. v. National Labor Relations Board*, refused to enforce the NLRB's finding that an employer violated the National Labor Relations Act (NLRA) by maintaining and enforcing a "stand-alone" class action waiver agreement. Unlike the typical class action waiver that is part of a pre-employment arbitration agreement, the agreement in *Convergys* contained no arbitration provision. It was merely an agreement by the employee that he or she would not pursue any employment-based class or collective action against the employer (*Convergys Corp. v. National Labor Relations Board*, August 7, 2017).

In part, the Board's position that class action waivers are unlawful has been rejected by a number of courts because it conflicted with the Federal Arbitration Act (FAA) and its requirement that arbitration agreements be enforced according to their terms. This argument did not apply in *Convergys* because the waiver was not part of any arbitration agreement. The Fifth Circuit panel held, however, that this distinction did not matter since, in *D.R. Horton*, it also rejected the Board's more fundamental position that the NLRA creates a *substantive right* to participate in class or collective actions. Under the Fifth Circuit's view, such participation is merely *procedural* and can be restricted by agreement whether tied to an arbitration provision or not. Judge Higginbotham dissented, finding that such waivers are permissible only when part of an arbitration agreement and, thus, are protected by the explicit language of the FAA.

**Waiver language not overbroad.** Two days later, in a reprise of its *Convergys* decision, the Fifth Circuit refused to enforce another Board decision finding a stand-alone waiver unlawful. In *LogistiCare Solutions, Inc. v. National Labor Relations Board*, the NLRB had additionally found that the waiver violated the NLRA because it was "overbroad" and employees would reasonably interpret it to restrict their right to file charges with the NLRB. The Fifth Circuit, however, rejected this argument as well, noting that the waiver

referred to "trial lawyers," "trial by jury," and "lawsuits," and did not contain generic references to "claims" or "disputes." Nor did the waiver reference an "agency," "other civil proceeding," or anything else that would suggest that it was intended to prohibit employees from filing charges with the Board (*LogistiCare Solutions, Inc. v. National Labor Relations Board*, August 9, 2017).

**Picketer's racist comments protected.** An employer unlawfully fired a striking employee who yelled racist remarks at African-American replacement workers but who otherwise did not behave threateningly, a divided U.S. Court of Appeals for the Eighth Circuit ruled in enforcing a Board decision and order. "Impulsive behavior on the picket line" is expected, observed the appeals court, and termination for picket line conduct violates the NLRA unless the conduct tends to "coerce or intimidate employees in the exercise of rights protected under the Act." The employer had locked out union employees after contract renewal negotiations broke down. While the union picketed, the employer continued to operate the plant using replacement employees, many of whom were African-American. One of the locked-out picketers, directing his comments to a van carrying replacement workers, yelled, "Hey, did you bring enough KFC for everybody?" and "Hey anybody smell that? I smell fried chicken and watermelon." Instead of recalling him with the other locked-out workers when the strike ended, the employer fired him for his statements (*Cooper Tire & Rubber Co. v. National Labor Relations Board*, August 8, 2017).

The appeals court found that it was not "illogical or arbitrary" for the NLRB to protect the employee's statements—which were not violent in character, did not contain overt or implied threats, and were not accompanied by threatening behavior or intimidating actions toward the replacement workers. The court was unpersuaded by the employer's argument that reinstating the employee would conflict with its obligations under Title VII of the Civil Rights Act. The court majority observed that 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.

However, Judge Beam, dissenting, disagreed. "No employer in America is or can be required to employ a racial bigot," he argued, and the majority's decision was "tantamount to

requiring” that the employer violate federal anti-discrimination and harassment laws, including Title VII.

**Bargaining unit of riggers OK.** Essentially deferring to the NLRB’s unit determination authority and its *Specialty Healthcare* rubric, the U.S. Court of Appeals for the District of Columbia Circuit rejected a challenge to the certification of a bargaining unit of “riggers” despite their high degree of functional integration with other employees of a staging company. It found there was enough evidence that the riggers constituted a sufficiently “identifiable group” to constitute a separate unit under *Specialty Healthcare*. The appeals court also rejected challenges to the “overwhelming community of interest” standard referenced in *Specialty Healthcare (Rhino Northwest, LLC v. National Labor Relations Board*, August 11, 2017).

**Supervisory test.** The NLRB applied an analysis that was squarely at odds with controlling circuit precedent when it found that licensed practical nurses (LPNs) were not supervisors, a divided panel of the U.S. Court of Appeals for the Third Circuit ruled, vacating the Board’s decision and ordering it to determine on remand whether the LPNs had the authority to effectively recommend discipline of others so as to qualify as statutory supervisors. In the underlying representation case, the employer claimed that its LPNs were statutory supervisors under the NLRA because they had authority to discipline other employees or effectively recommend such action. The Board, however, disagreed, relying heavily on evidence that upper management independently investigated the LPN’s write-ups and that few LPNs had actually submitted such write-ups. In refusing to enforce the Board’s order that the employer bargain in the LPN unit, the court noted that the factors relied on by the Board are not appropriate ones under the law in the Third Circuit. The court remanded the case to the Board and set out the following factors, which the Board must consider in redoing its supervisory analysis: (1) whether the employee has the discretion to take different actions, including verbal counseling or taking no formal action; (2) whether the employee’s action “initiates” the disciplinary action; and (3) whether the individual’s action functions like discipline because it increases severity of the consequences of a future rule violation (*National Labor Relations Board v. New Vista Nursing and Rehabilitation*, August 29, 2017).

**Discharge for refusal to sign confidentiality agreement violated NLRA.** The U.S. Court of Appeals for the Second

Circuit agreed with the Board that an employer’s confidentiality agreement violated the NLRA because employees would reasonably construe the agreement to prohibit them from discussing wages or other terms and conditions of employment. Moreover, the court further agreed with the Board that the employer violated the Act by discharging an employee who refused to sign the agreement. The court rejected the employer’s argument that, in refusing to sign, the employee was not engaged in concerted activity and therefore his discharge did not violate the Act. It noted that an employer may not require even one individual employee to agree to abide by unlawful restrictions as a condition of employment. “That the employees have not yet organized in order to protest the unlawful nature of the restriction at issue does not make it any less unlawful,” the court explained in affirming the judgment of the NLRB (*National Labor Relations Board v. Long Island Association for AIDS Care, Inc.*, August 31, 2017).

**Successor (and joint) employer must bargain.** The new operators of a Job Corps Training Center committed numerous unfair labor practices when they took over a Department of Labor (DOL) contract from a unionized predecessor operator, the Fifth Circuit held. The court found there was sufficient evidence to support the Board’s conclusions that the new operator was a successor employer, as well as a joint employer along with the previous operator. The court also affirmed the Board’s findings that the new operator violated the Act by refusing to hire five incumbent employees in an effort to avoid becoming a legal successor; unlawfully imposed initial terms and conditions of employment; and frustrated bargaining by refusing the union president access to its property (*Adams and Associates Inc. v. National Labor Relations Board*, September 15, 2017).

On appeal, the respondent challenged the Board’s joint employer finding by contending that the Board’s 2015 *Browning-Ferris* decision was flawed. The appeals court, however, noted that the Board had, in fact, also applied its pre-2015 test in finding a joint employer relationship in the case. Although the question was a difficult one, the Fifth Circuit found sufficient indicia of joint employment to defer to the Board’s determination and render the two entities jointly and severally liable for the unfair labor practices.

**Unlawful threat of plant closure.** The NLRB properly determined that an employer had acted unlawfully by threatening plant closure if a union was not decertified,

a divided Eighth Circuit held. Although the employees had repeatedly petitioned for decertification of the union, the Board found that the petitions were tainted by the employer's unlawful assistance and its unfair labor practices aimed at discouraging employee support for the union. The court, however, did not sustain the Board's finding that the employer violated the Act by making statements suggesting unionization was futile, since the Board did not determine that those statements contained a threat of reprisal or a promise of benefit (*Southern Bakeries, LLC v. National Labor Relations Board*, September 27, 2017).

In a partial dissent, Judge Gruender argued that the Board's decision and remedy, which effectively precluded decertification, protected the union at the expense of employees who had repeatedly sought to remove the union as their representative. He argued that the employees were paying for the employer's wrongdoing and could be indefinitely precluded from the opportunity to decertify the union since any such effort would be blocked until the NLRB determines that a "reasonable time" has passed.

**Arbitration deferral standard prospective.** The NLRB properly determined that its new standard for deferring to arbitral decisions, which it previously announced in *Babcock & Wilcox Construction Co. Inc.*, should only be applied prospectively, the U.S. Court of Appeals for the Ninth Circuit ruled. Accordingly, the appeals court upheld the NLRB's decision to affirm an arbitral decision denying an employee's unfair labor practice complaint under the previous standard. In *Babcock & Wilcox*, the Board announced it will now defer to an arbitral decision in cases involving potential 8(a)(1) and 8(a)(3) violations only if the party urging deferral shows that (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award. The new standard shifts the burden of proof and makes deferral to an arbitral decision less likely. The Board, however, declined to apply the more favorable standard to the employee's case, citing its impact on the settled expectations of employers and unions that had bargained for dispute resolution mechanisms under the old standard. Finding no error in this decision, the appeals court denied the employee's petition for review (*Beneli v. National Labor Relations Board*, October 17, 2017).

## Board rulings

**Restricting use of customer information OK.** Although employees generally have a right to appeal to an employer's customers for support during a labor dispute, a retailer's rules prohibiting disclosure of customer information did not interfere with employees' protected rights. The rules in question restricted the use or disclosure of Social Security and credit card numbers, and prohibited the use of customer contact information obtained from the company's own confidential records. In a somewhat atypical alignment of views, both a Republican and a Democrat Board member held that employees would not reasonably construe the rules in question to prohibit Section 7 activity (*Macy's Inc.*, August 14, 2017).

Their remaining Democrat colleague, however, disagreed. In dissent, Member Pearce argued that the majority interpreted the rules more narrowly than they were written. Because the employees worked in retail or customer service, they would reasonably interpret the rules as prohibiting or restricting their disclosure and use of customer information for *all* purposes, including those implicating their Section 7 rights. Additionally, he noted that the rules did not distinguish between information obtained from the retailer's confidential records and customer names and contact information available to all employees and used in the course of their normal work duties.

**Video crew members are employees.** Applying the standard articulated in *FedEx Home Delivery*, a divided NLRB panel found that crewmembers who produced electronic content for video display at professional basketball games were statutory employees, not independent contractors. In *FedEx Home Delivery*, the Board asserted its reliance on common-law agency principles in determining whether individuals are employees or independent contractors. The Board majority argued it was applying those principles in finding the crewmembers were employees since their putative employer maintained multiyear relationships with them, utilized them to accomplish a core part of its business, dictated when and where they worked, provided all of the key instrumentalities necessary to accomplish their work, and exerted significant control over the work itself and the circumstances under which it was performed (*Minnesota Timberwolves Basketball, LP*, August 18, 2017).

Chairman Miscimarra, however, dissented, arguing that the Regional Director correctly determined that the crewmembers were independent contractors since they controlled most aspects of the work they performed, were not directly

supervised during games, performed work that required a high degree of skill, were paid on a per-game basis regardless of how long they actually worked, and all the crewmembers had a realistic opportunity to work for other employers.

**Nonunion hiring preference OK.** On remand from the U.S. Court of Appeals for the First Circuit, a three-member panel of the NLRB found that an employer did not unlawfully discriminate against union workers at one of its three hospitals by denying them preferential internal hiring status for job vacancies at its two other nonunion hospitals. Previously—applying the analytical framework established by the Supreme Court in *National Labor Relations Board v. Great Dane Trailers, Inc.*—the NLRB had found that the employer violated Section 8(a)(3) by maintaining and enforcing a hiring/transfer policy that gave preference to unrepresented employees over represented employees in filling positions at its nonunion facilities. The Board found that the policy had at least a “comparatively slight” impact on represented employees’ Section 7 rights and the employer failed to meet its burden to prove that the policy served a “legitimate and substantial business justification.” The First Circuit, however, vacated the order, finding that the Board had wrongly rejected the employer’s argument that the hiring/transfer policy served the legitimate business interest of leveling the playing field between represented and unrepresented employees. Accepting the appeals court’s decision as the law of the case, the Board, following remand, held that the hiring/transfer policy served the employer’s legitimate and substantial business interest. The General

Counsel made no showing that the employer’s conduct was improperly motivated, nor was the policy “inherently destructive” of employees’ Section 7 rights (*Southcoast Hospitals Group, Inc.*, October 6, 2017).

## Advice memorandum

**Weingarten rights in nonunion workplaces.** In an advice memorandum released on September 7, 2017, the NLRB’s Office of the General Counsel concluded that Region 6 should use a pair of cases against an employer as vehicles to press the Board to extend *Weingarten* rights to unrepresented employees. The memorandum urges the Region to argue that the Board should find that the employer violated Section 8(a)(1) by forcing one employee to submit to an investigatory interview without the assistance of a coworker and by forcing another to submit to an investigatory interview in the presence of an anti-union employee witness who was unilaterally designated by the company.

The union that filed charges in the two cases urged the Board to reconsider and overrule *IBM Corp.* and recognize employees’ *Weingarten* rights in a nonunion setting. Alternatively, it urged the Board to find that *IBM* does not apply to the unique facts here. The Board in *IBM* concluded that due to policy considerations, it would no longer find that employees in nonunion workplaces have the right to a coworker representative. The Office of the General Counsel argued that *IBM* was wrongly decided and thus the Board should overrule *IBM* and once again recognize employees’ *Weingarten* rights in a nonunion workplace. ■

## Coming up...

The year 2017 was, to say the least, a change year in American politics and at the NLRB. The pace of that change was perhaps slower than employers would have liked during the first half of the nascent Trump administration's first year. But the summer brought significant developments at the NLRB. The changeover to a Republican majority at

the Board bodes well for employers, and we can expect a number of employer-friendly rulings to report before Chairman Miscimarra closes out his brief term at the helm come December. A look at those decisions, and prognostications for another year of change ahead, will be the focus of our next issue of the *Practical NLRB Advisor*.

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