

## EMPLOYERS AND LAWYERS, WORKING TOGETHER

# The Practical **NLRB** Advisor

## The NLRB regroups

### In this Issue

- 2** Brian in brief
- 3** “Joint employer” sanity restored
- 4** “Micro”-units fall from grace
- 6** A balanced approach to work rules
- 7** Giving meaning to “past practice”
- 8** ALJs regain settlement authority
- 9** General counsel charts the course
- 11** “Ambush” election rule revisited
- 13** The year ahead

The Trump National Labor Relations Board (NLRB) got off to a slow start during the fledgling administration’s first year in office. Here at the *Practical NLRB Advisor*, we counseled patience as the president assembled his Republican majority at the agency, noting that the nomination process is traditionally a slow one and that it has been even slower than normal for nominees of the current administration. The pace aside, the assumption was that, once fully functional, the agency would address the years of Obama-era decisional overreach. By September of 2017, with the confirmation of William Emanuel, the five-member Board had its first Republican majority in nearly a decade. In November 2017, a new general counsel took office—the first Republican to hold that post in more than seven years. The NLRB was finally poised to alter its decisional trajectory and to move the agency in a more moderate direction.

As the year drew to a close, it became apparent to employers that their wait was not in vain. Propelled, no doubt, by the end of Chairman Philip Miscimarra’s term in mid-December 2017, the Board issued a number of consequential decisions immediately prior to his departure. Those cases reversed controversial Obama-era decisions that, in many instances, had jettisoned long-standing Board precedent. A further harbinger of change was the first operations memorandum issued by Peter B. Robb, the agency’s new general counsel, in December. In addition

**THE NLRB REGROUPS** continued on page 3

## BRIAN IN BRIEF



When William Emanuel was sworn in as an NLRB member on September 26, 2017, the Board obtained its first Republican majority in nearly a decade. By statutory design, the Board majority is supposed to mirror the political party occupying the White House. In this instance, however, it took nearly nine months from Trump's inauguration to realize that

majority; moreover, it was short-lived. On December 16, 2017, the term of Chairman Miscimarra, a Republican, ended, and the Board membership was reduced to four who are evenly split along political lines.

The White House has recently announced the nomination of John F. Ring to fill the all-important fifth Board seat. His confirmation will restore the Republican majority. When that will happen, however, is another matter. Owing to an often protracted White House vetting process and, especially, to significant resistance from Senate Democrats, the current administration's record on seating nominees has been comparatively poor. Thus, Trump's four immediate predecessors in the White House had all obtained the confirmation of well over 400 of their respective nominees at a similar point in their terms. Barely 300 Trump nominees had been confirmed by late January 2018. Again, as of January, Trump had more nominations

pending than his four immediate predecessors, and the average time for actually confirming those nominees has been significantly longer than for prior administrations. The bottom line is that it will likely be a matter of months, not weeks, before Ring is seated and the Republican majority reestablished.

With an even-numbered and ideologically divided Board, no one expects any significant upcoming changes in the Board's decisional law. The recent past, however, illustrates how significant the filling of that single open Board seat can be. This issue of the *Advisor* reviews that recent past by examining the activity of the Board during the three-month Republican majority that ended with Miscimarra's term. That period was one of considerable productivity and significant change that witnessed the reversal of some of the Obama Board's most controversial decisions. The Board's actions that we review in the following pages are not only of great significance in themselves, but also as harbingers of the future course of the Board.

Sincerely,

**Brian E. Hayes**

Co-Chair, Traditional Labor Relations Practice Group  
Ogletree Deakins

[brian.hayes@ogletree.com](mailto:brian.hayes@ogletree.com)

202.263.0261

### 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.

#### Ogletree Deakins editors

**Brian E. Hayes, J.D.**, Co-Chair,  
Traditional Labor Relations Practice Group

**C. Thomas Davis, J.D.**, Co-Chair,  
Traditional Labor Relations Practice Group

**Hera S. Arsen, J.D., Ph.D.**, Senior Marketing Counsel,  
Firm Publications

#### Employment Law Daily contributors

**Joy P. Waltemath, J.D.**, Managing Editor

**Kathleen Kapusta, J.D.**, Employment Law Analyst

**Lisa Milam-Perez, J.D.**, Senior Employment Law Analyst

**THE NLRB REGROUPS** continued from page 1

to ending certain prosecutorial initiatives developed by his predecessor, the memo sets out a road map for the decisional and policy changes the new general counsel wants to put before the Board.

Although there will be a pause while the process of filling Miscimarra's vacant seat unfolds, the flurry of year-end activity by the NLRB signals the beginning of a concerted

effort to restore a measure of balance and common sense to the agency. "After eight years of reversing decades of legal precedent and skewing the playing field decidedly against employers, the NLRB seems headed toward creating a less polarized labor environment," wrote [Eric C. Stuart](#) and [Christopher R. Coxson](#) of Ogletree Deakins' Morristown, New Jersey, office, in an Ogletree Deakins [blog post](#). This issue of the *Practical NLRB Advisor* takes a closer look at these promising developments. ■

## "Joint employer" sanity restored

The NLRB both alarmed and confounded the business community with its 2015 decision in *Browning-Ferris Industries of California, Inc.* *Browning-Ferris* radically changed the decades-old test for determining if two separate businesses could, nonetheless, be deemed to be the "joint employer" of a given group of employees. The decision posed a significant threat to the viability of many traditional business-to-business models. Indeed, for some business models, the threat was plainly existential. In the *Browning-Ferris* decision, a sharply divided Board adopted a new standard for determining joint-employer status that was, at once, both extraordinarily expansive and frustratingly vague. Thus, under *Browning-Ferris*, one entity could be deemed a joint employer of another entity's employees where the former had "potential" or "indirect" control over those employees. Such terms were vague on their face, and the Board did little to clarify them and thus provide guidance to employers in structuring their commercial relationships. As a consequence, franchisors became rightly concerned about suddenly being at a heightened risk of liability for unfair labor practices committed by independent franchisees, and manufacturers became correctly concerned about the prospect of winding up at a bargaining table alongside their unionized contract labor suppliers. (See the [Spring 2016 issue](#) of the *Practical NLRB Advisor* for a detailed look at the *Browning-Ferris* decision and its aftermath.)

On December 14, 2017, however, these employers received some welcome news from the Trump Board in the form of its decision in *Hy-Brand Industrial Contractors, Ltd.* In *Hy-Brand*, a new Board majority overruled *Browning-Ferris* and roundly rejected its reasoning and lack of precision. In

a lengthy opinion, the Board majority in *Hy-Brand* explained why *Browning-Ferris* was legally untenable and unsound as a matter of labor policy, largely tracking the reasoning of Chairman Miscimarra's dissent in that case.

With its decision in *Hy-Brand*, the Board reinstated the traditional and long-standing test for joint-employer status under the National Labor Relations Act (NLRA). Thus, to be deemed a joint employer under the NLRA, an entity must exercise *actual* and *direct* control over the "essential employment terms" of the employees in question. Merely reserving potential control will not be sufficient. As the new majority noted: "[A] finding of joint-employer status shall once again require proof that putative joint-employer entities have exercised joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control), the control must be 'direct and immediate' (rather than indirect), and joint-employer status will not result from control that is 'limited and routine.'" Rather, that control must "meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."

With its decision, the new Board has restored a substantial degree of clarity and stability in this area of law. In doing so, *Hy-Brand* has provided the business community with greater assurance that properly designed and administered business models may continue to be utilized without the heightened risk of joint-employer liability. Since these business models traditionally provide entrepreneurial opportunity and promote operational efficiency, the decision is unquestionably beneficial to the business climate.

Mark G. Kisicki, an attorney in the Phoenix office of Ogletree Deakins, discussed the *Hy-Brand* decision and the Board's rationale for overturning *Browning-Ferris* in this Ogletree Deakins [blog post](#).

**Tips and takeaways.** Remember that while businesses are less likely under *Hy-Brand* to be deemed joint employers under the Act, companies may still qualify as joint employers under the traditional, pre-*Browning-Ferris* test. Franchisors, contractors, and companies with joint ventures or that use labor or staffing services should review their franchise, subcontract, joint business venture, and contract labor agreements and practices, and evaluate whether those agreements and practices should be modified—or at a minimum, be aware of the risk of being deemed a joint employer, even under the NLRB's traditional test. All employers' human resources personnel should also educate their management personnel to ensure they understand the joint-employer concept and the corresponding need to limit—to the greatest extent possible—their exercise of direct supervisory control over another company's employees if they wish to minimize the risk of being deemed a joint employer under the Act.

**Watch for:**

- The District of Columbia Circuit Court of Appeals granted the NLRB's request to remand *Browning-Ferris* to the Board for reconsideration in light of *Hy-Brand*. The case was before the appeals court on the employer's petition for review.

- The Teamsters union, however, has both challenged *Hy-Brand* and moved the court to reconsider its decision remanding *Browning-Ferris* on various procedural grounds, contending that Board Member William Emanuel should be recused in *Browning-Ferris* and thus should not have participated in *Hy-Brand*, which purported to overrule that case.
- Senate Democrats, too, have challenged the *Hy-Brand* ruling, similarly contending that Emanuel should not have been involved in deciding the case. In its aftermath, ranking members of the U.S. Senate Health, Education, Labor and Pensions (HELP) Committee and U.S. House Education and the Workforce Committee sent Emanuel a letter questioning his role in the case and seeking answers about his past employment representing employers at a management-side law firm.
- The original 2015 *Browning-Ferris* decision prompted legislation in both houses of Congress to overrule its controversial joint-employer standard. Most recently, on November 17, 2017, the U.S. House of Representatives passed the Save Local Business Act ([H.R. 3441](#)), which would amend the NLRA (as well as the Fair Labor Standards Act) to undo the *Browning-Ferris* joint-employer standard legislatively. The intervening *Hy-Brand* decision does not, however, necessarily render the proposed legislative fix moot. The legislation would be a more permanent solution to the issue and would attempt to take the joint employment question out of the NLRB's hands altogether. Doing so through legislation would ensure that a future pendulum swing at the Board will not again leave businesses vulnerable to the vagaries of any transitory NLRB policy. ■

## “Micro”-units fall from grace

In *PCC Structurals, Inc.*, a December 15, 2017, decision, the NLRB overturned the controversial “overwhelming community-of-interest” test in bargaining unit determinations, finding the test, as set out in the Obama Board's 2011 *Specialty Healthcare and Rehabilitation Center of Mobile* decision, to be “fundamentally flawed.” The divided five-member decision restored the Board's “appropriate unit” analysis to the traditional community-of-interest standard outlined in *United Operations, Inc.*, an analytical framework the Board had utilized for most of its 80-year history. As a result, in determining whether a petitioned-for bargaining unit is appropriate, the Board will, once again, focus not only

on the commonality between individuals *within* a petitioned-for bargaining unit, but also on the commonality of those employees with individuals *outside* the petitioned-for unit. “The Board noted that at no point does the burden ever shift to the employer to show an overwhelming community of interest between the excluded and petitioned-for employees,” wrote [James H. Fowles](#) and [Sara E. McCreary](#) of Ogletree Deakins' Columbia, South Carolina, office. (Fowles and McCreary blogged about the *PCC Structurals* decision in detail [here](#).) *PCC Structurals* also restored the Board's traditional presumptions with respect to the appropriateness of certain units within particular industries.

From the employer perspective, *Specialty Healthcare* was among the most problematic of the Obama Board decisions. Under the standard it imposed, bargaining unit determinations were left largely in the hands of the union, and unions had been able to effectively “gerrymander” those units in order to obtain a favorable election outcome. Its undoing represents a significant change in the way bargaining units are configured, and it will have a direct impact on representation elections and bargaining.

According to Fowles and McCreary, the likely consequences of *PCC Structurals* are that far fewer narrowly drawn bargaining units will be deemed appropriate and that the NLRB’s regional directors will order many fewer elections among “micro” bargaining units, or, more accurately, units that compose only a small segment of an employer’s nonunion workforce. “The decision in *PCC Structurals* is expected to change the landscape of future representation cases and the impact thereof on employers and unions alike,” they note. “In general, unions will likely find it much more difficult to obtain elections in narrow employee units. Conversely, employers will likely find it easier to show that larger groupings of employees are the ‘smallest appropriate unit’ in response to union petitions in small employee groups.”

**General counsel provides guidance.** On the heels of the Board’s decision, the NLRB’s associate general counsel issued Memorandum **OM 18-05**, *Representation Case Procedures in Light of PCC Structurals, Inc.*, offering guidance to the agency’s regional directors and to parties with “currently active” representation cases on how to proceed with respect to bargaining units decided under the now-defunct *Specialty Healthcare* standard. The guidance is good news for employers for several reasons.

The change in Board law ushered in by *PCC Structurals* is retroactive—it applies to all cases that are “currently pending.” The memo makes clear that, in the instance of an active case, *PCC* affords employers the opportunity to revisit a bargaining unit configuration with which they disagree, even if they have already stipulated to it, and it also emphasizes that regional directors have wide discretion to revisit unit determinations, even when neither party has made such a request, by issuing a Notice to Show Cause in light of the “unusual circumstances” present here.

Significantly, the memo also recognizes that, in light of the return to the traditional unit determination analysis, there will be a greater need for hearings on community-of-interest questions, and it reminds regional directors that they have discretion to delay hearings, postpone deadlines, and extend the time period for holding a representation election—the “quickie” election rule notwithstanding—in light of the “substantial change” in Board law.

**Tips and takeaways.** Employers with representation cases currently at the regional or Board level should evaluate whether the case posture and the procedures set forth in OM 18-05 allow for reconsideration of an adverse bargaining unit determination. In light of *PCC Structurals*, employers have more opportunity to structure the workplace in ways to avoid “sufficiently distinct” communities of interest for smaller bargaining units than they did when trying to establish that excluded employees shared an overwhelming community of interest with smaller employee groups.

*PCC Structurals* does not directly affect situations where an election has already been held and certified in a unit configured under the *Specialty Healthcare* rubric. As a general proposition, the Board typically accords comity to prior unit determinations and would certainly attach significance to any resulting bargaining history. Thus, *PCC Structurals* may not directly benefit employers dealing with established micro-units. Any potential indirect benefit is likely a matter for future litigation and decision-making.

**Watch for:** How will the decision in *PCC Structurals* impact the number of election petitions that get filed? Having lost the ability to “gerrymander” bargaining units, will organized labor’s interest in utilizing the Board’s electoral processes diminish even further? How will the decision impact representation case procedures under the Board’s revised case-handling procedures? The impact on case processing is certainly unclear. The current rules were established while the *Specialty Healthcare* rubric was in place and, as Fowles and McCreary point out, “are very different than those that existed in the pre-*Specialty Healthcare* environment.” It remains to be seen if the “quickie” election rules can actually work in a post-*Specialty Healthcare* world. Fowles and McCreary note the following possibilities:

- Employers will, in many instances, enjoy greater leverage when negotiating stipulated election agreements.
- Where unions seek a less comprehensive unit, they may be less inclined to push for the shortest election date possible, since the likelihood that such a unit will be expanded has now greatly increased.
- The number of representation case hearings actually making it “on the record” may rise, given the expected increase in factual and legal arguments against micro-units. In other words, regional directors may find it more difficult to quickly determine that a “question concerning representation” exists, which will in turn make it harder for a regional director to shut down a hearing and proceed quickly to an election. ■

## A balanced approach to work rules

On December 14, 2017, in *The Boeing Company*, a divided NLRB reversed *Lutheran Heritage Village-Livonia*, a 2004 decision that had created an unworkable standard for determining the legality of employer rules and policies. Utilizing the *Lutheran Heritage* formula, the Obama Board repeatedly struck down even seemingly innocuous employer rules and handbook provisions. Indeed, in terms of both the sheer number of allegations and Board decisions, the legality of employer work rules was the most prevalent NLRA issue of the last several years.

The *Lutheran Heritage* test essentially invalidated any facially neutral work rule or policy that an employee might “reasonably construe” as interfering with his or her protected rights under the NLRA. The test gave no consideration to the employer’s reasons for implementing the rule. More often than not, in the hands of the Obama Board, this “test” boiled down to a majority of Board members speculating about what an employee might think. The inevitable results of such an arbitrary and subjective test were decisions that were often contradictory, defied common sense, and were just plain wrong. Most importantly, it greatly hampered employers in their legitimate, and otherwise perfectly legal, efforts to ensure order, discipline, and productivity in the workplace, and to protect their legitimate interests. So confusing and intrusive was the Board’s involvement that some employers either abandoned or seriously considered abandoning publishing written rules or policies for fear of NLRB second-guessing—a result ultimately, and ironically, to the detriment of employees.

“Following on the *Lutheran Heritage* case, the Obama Board had expanded—to previously unimagined degrees—its ability

to fly-speck company rules and policies,” said Charles E. Engeman, an attorney in Ogletree Deakins’ office in St. Thomas in the Virgin Islands. (Engeman wrote about the *Boeing* case in an Ogletree Deakins [blog post](#).) “The case also had put both unionized and nonunion employers that maintained employee handbooks directly in the crosshairs of unfair labor practice charges and election objections instigated by disgruntled unions and employees—as almost every handbook maintained by even the most conscientious employer could be found to have violated the ‘standard’ created in *Lutheran Heritage*.”

The Trump Board highlighted numerous problems with *Lutheran Heritage* in its 3–2 *Boeing* opinion. The standard “defies common sense,” Chairman Miscimarra had previously stated in his dissent to an earlier 2017 case. Consequently, with Miscimarra heading up a new majority, it was not unexpected that the Trump Board would abandon the standard and adopt a new balancing test first urged by him in his lengthy dissent in *William Beaumont Hospital*. Under the balancing test enunciated in *Boeing*, the Board, in reviewing employer rules, “will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.” [Emphasis in original.] This new approach comports with the Board’s obligation to weigh an employer’s justification for its work rule or policy against its likely interference with employees’ NLRA-protected activities.

The Board noted that under this standard, rules and policies under analysis will, moving forward, naturally fall into one of three categories: (1) rules that are lawful; (2) rules that call for individualized scrutiny; and (3) rules that are unlawful.

## Work rules: three categories

**Category 1:** "...rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule."

**Category 2:** "...rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications."

**Category 3:** "...rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule."

Applying its new standard, the Board reversed an administrative law judge's finding that Boeing's rule restricting the use of cameras and camera-enabled devices such as cell phones on company property violated the NLRA. According to the Board, the employer's legitimate business justification to protect proprietary information and national security interests outweighed any potential infringement on employees' Section 7 rights.

**Tips and takeaways.** The Board is taking a more measured approach to reviewing employer work rules, and the new framework offers useful guidance. However, the Board will still, in some cases, undertake a case-by-case analysis,

which means one cannot predict with razor-sharp precision whether a particular rule will survive Board scrutiny. Note that the facts of the *Boeing* case were somewhat unique: A federal defense contractor, Boeing raised legitimate, heightened security concerns to justify its work rule. An employer at a less high-stakes facility may have less leeway under the Act to bar the use of cameras altogether.

Continue to review handbooks with an eye toward whether any of their provisions have a potential chilling effect on employees' Section 7 activity. Consider the legitimate justification for your work rules. Document the rationale for the policy when drafting the rule, and include the justification in the text of the written rule. Be prepared to articulate and support that justification in the face of a challenge. Moreover, keep in mind that rules implemented in response to union activity will continue to be viewed with disfavor by the Board. Employers will face a much higher hurdle in attempting to justify any such *post hoc* restrictions.

Note that the new standard applies retroactively, so employers with pending unfair labor practice cases challenging handbook provisions or work rules will enjoy the benefit of the new balancing test. Finally, for new unfair labor practice charges challenging the legality of facially neutral work rules, employers should consider litigating, where they may have been inclined under *Lutheran Heritage* to settle.

**Watch for:** The parameters of these new categories of work rules will be fleshed out going forward, as the Board decides handbook cases and populates these new categories along the way. One hopes the resulting case law will give rise to effective "safe harbors" or at least afford a greater measure of predictability for employers as they draft and enforce work rules. ■

## Giving meaning to "past practice"

Although met with less fanfare than the Board's other December 2017 decisions that broadly impacted both unionized and nonunion companies, employers with ongoing collective bargaining relationships were nevertheless encouraged by the issuance of *Raytheon Network Centric Systems* on December 15. The decision is an important one that restores the balance between labor and management when they are engaged in negotiations for successor

contracts. The Obama Board's decision in the *DuPont* case, *E.I. du Pont de Nemours, Louisville Works (Du Pont III)*, had served to shift that balance heavily in favor of unions in the event of a contract expiration during negotiations. Unionized employers typically cannot make changes with regard to any mandatory subjects of bargaining without first giving the union notice and an opportunity to bargain. However, an employer may have the right to first act unilaterally where its actions are

consistent with settled past practice. In *DuPont*, however, the Board majority held that because such past practices were established under a contractual management rights clause, they effectively “died” with the expiration of that contract. Thus, an employer could not rely on past practice to act unilaterally during any hiatus period between labor contracts.

“Since first decided in 2010 and throughout the appeals process, unions used the Board’s *DuPont* case, most recently reissued in 2016, *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (*DuPont III*), to leverage companies into difficult post-expiration disputes over ‘changes’ to the terms and conditions of employment,” Kenneth B. Siepman and Matthew J. Kelley, attorneys in the Indianapolis office of Ogletree Deakins, noted in a recent [blog post](#) discussing the case in detail. With *Raytheon*, “the Board returned to a common-sense approach to past practice during contract negotiations,” they wrote.

“Unions utilized *DuPont* in conjunction with the NLRB’s general prohibition against single-issue impasse to put employers in untenable bargaining situations,” Siepman and Kelley explained. “Once a contract expired, the Board in *DuPont* held, a company could not follow an established past practice if there was any discretion in the company’s decision. As a result, employers were held hostage in bargaining while difficult choices needed to be made on strict timelines.” They note: “*DuPont* created a Hobson’s choice for employers, most specifically regarding healthcare benefits.”

“Under *DuPont*, unions were empowered to drag negotiations on past contract expiration without striking and create leverage as open enrollment periods approached. The choice for employers: carve out small groups of unionized employees from broader company-wide healthcare plans at great cost and expense while bargaining continued; agree to whatever union demands were still left on the table; or move to declare impasse on all remaining issues.”

This is exactly what happened to Raytheon in the underlying case. For more than a dozen years, at the same time each year, the company made minor modifications to its healthcare plan—tweaking coverage and modifying plan options—and each year the employees selected from the available options. This annual unilateral adjustment by the company had become an established past practice. Prior to *DuPont*, the employer would have been privileged, post-contract, to continue unilaterally making such changes as were consistent with the past practice without first providing the union with notice and an opportunity to bargain, since doing so did not constitute a “change” in the terms and conditions of employment. However, *DuPont* effectively eliminated an employer’s right to act unilaterally in such circumstances, unless the employer did not exercise any discretion of any kind. In its December 2017 decision, however, the NLRB overruled *DuPont* as inconsistent with a long line of Board precedent, and held Raytheon’s modifications to its healthcare plans were a continuation of past practice. Raytheon’s actions did not constitute a “change” in the terms and conditions of employment, the Board found, because they were similar in kind and degree to an established past practice of comparable unilateral actions and such past practice survives the expiration of the collective bargaining agreement.

**Tips and takeaways.** The Board’s decision in *Raytheon* “provides employers more flexibility to act during any hiatus between collective bargaining agreements, so long as the employer can point to a past practice of unilateral modifications similar in kind and degree with the contemplated action,” Siepman and Kelley note. “The decision also limits unions’ ability to hold employers hostage on potential unilateral actions through dilatory bargaining. The ability to implement does not, however, eliminate the employer’s obligation to continue bargaining over the contemplated modification, even though the union cannot prevent implementation.” ■

## ALJs regain settlement authority

In *University of Pittsburgh Medical Center (UPMC)*, issued on December 11, 2017, the NLRB restored the authority of the Board’s administrative law judges (ALJs) to accept “reasonable” settlement offers in unfair labor practice cases. The Board overruled *United States Postal Service*, a 2016 Obama Board decision that held that an ALJ could not

accept an employer’s settlement offer over the objection of the general counsel or charging party unless the proposal provided a full remedy for all violations alleged in the complaint. Prior to *Postal Service*, an ALJ could accept a respondent’s partial proposed settlement, despite objections from the general counsel or charging party, as long as the

judge determined the offer was “reasonable” based on a set of factors delineated in *Independent Stave*, a 1987 case. In *UPMC*, the Board returned to the pre-*Postal Service* law and practice. Of course, an ALJ’s decision to accept a partial settlement offer always remains subject to Board review if either the general counsel or charging party files exceptions to the decision. In returning to the long-standing traditional law and practice, the new Board majority observed that an ALJ’s acceptance of reasonable settlement terms at an early stage of an unfair labor

practice case will often leave parties in a better position than would likely result from protracted Board litigation.

**Tips and takeaways.** It is always prudent for a respondent to carefully consider its settlement options. The Board’s *UPMC* ruling facilitates that end by restoring a measure of authority and discretion to the trial judge in the process. Thus, a charging party or the general counsel’s representative can no longer “hang up” a settlement by insistence on a term that the ALJ determines is not necessary to effectuate the purposes of the NLRA. ■

## General counsel charts the course

On December 1, 2017, the Board’s new general counsel (GC), Peter B. Robb, issued **General Counsel Memorandum 18-02**. The memo sets out comprehensive instructions to all of the Board’s regional personnel with regard to the handling of unfair labor practice matters and provides a clear indication of those issues and cases he would like the new Trump Board to revisit. Through the issuance of the memo, the new GC is “unequivocally indicating that the era of unbridled activism and overreach by the Board will likely end,” wrote Eric C. Stuart and Christopher R. Coxson in their Ogletree Deakins **blog post** discussing the guidance.

The memo directs the Board’s regional offices:

- To apply current Board law in deciding cases;
- To adhere to stated legal arguments in pending court cases, unless instructed to take a different position; and
- To disregard certain directives issued by Robb’s predecessors. These earlier directives were all aimed at expanding extant law in ways decidedly unfavorable to employers.

More importantly, and beyond the specific instructions, the memo provides a road map, or list of those issues and cases the general counsel would like the new Board to revisit and potentially change or reverse. The general counsel has no statutory authority to issue decisions. However, the GC serves as the Board’s “gatekeeper” and has the ability to “tee up” cases and issues for consideration and decision-making by the Board. By identifying those types of cases that regions must first submit to the agency’s Division of Advice in Washington, D.C., the GC has clearly indicated the decisional direction he would like to see the new Board take.

In generic terms, the memo identifies a wide range of cases that regional offices must now submit to Advice, including all cases that (1) have overruled precedent and involved one or more dissents over the past eight years; (2) contain issues the Board has not yet decided; and (3) are believed to be of importance to the general counsel.

**Issues to be submitted to the Division of Advice.** The memo goes on to specifically identify a host of unfair labor practice issues that are subject to mandatory submission, including the following matters:

- Cases involving concerted activity for mutual aid or protection
  - where only one employee has “an immediate stake in the outcome”
  - where the employee displays “obscene, vulgar, or other highly inappropriate conduct”
- Charges based on employer handbook rules
  - Application of the *Lutheran Heritage* test
  - Rules that (1) prohibit “disrespectful” conduct, the use of employer trademarks or logos, or cameras or other recording devices in the workplace; or (2) require employees to maintain the confidentiality of workplace investigations
- Cases involving employee use of employer email systems to engage in Section 7 activity
- Matters involving strikes, work stoppages, and prior initiatives favoring protection of such activity
- Claims regarding off-duty employee access to employer property
- Charges centering on *Weingarten* rights, particularly those involving
  - conduct of union representatives
  - application in the drug testing context

- Charges involving maintenance of the status quo during collective bargaining negotiations
- Findings of joint-employer status (under *Browning-Ferris* based on evidence of indirect or potential control over working conditions of another employer's employees)
- Cases involving successorship liability
- Charges alleging an employer duty to bargain over discretionary discipline prior to execution of a collective bargaining agreement
- Cases implicating the survival of dues check-off provisions following contract
- All matters involving nontraditional or new unfair labor practice remedies

**Previous GC memoranda rescinded.** The memo also specifically rescinds certain enforcement and policy initiatives established by predecessor GCs Lafe E. Solomon and Richard F. Griffin, Jr., including:

- GC 15-04 (Report of the General Counsel Concerning Employer Rules), which both reflected and resulted in the Board's singular preoccupation with employer handbooks, policies, and work rules
- GC 17-01 (General Counsel's Report on the Statutory Rights of University Faculty And Students in the Unfair Labor Practice Context)
- GC 16-03 (Seeking Board Reconsideration of the *Levitz* Framework). Under *Levitz*, an employer can lawfully withdraw recognition if it has "objective evidence" that a union has lost its majority status, even if the union has not been formally decertified in a secret ballot election. This earlier, and now rescinded, memo had instructed regions to pursue cases in an effort to have the Board adopt a rule that "absent an agreement between the parties, an employer may lawfully withdraw recognition from a Section 9(a) representative based only on the results of an RM or RD election."

- GC 13-02 (Inclusion of Front Pay in Board Settlements)
- GC 12-01 (Guideline Memorandum Concerning *Collyer* Deferral Where Grievance-Resolution Process is Subject to Serious Delay)
- GC 11-04 (Revised Casehandling Instructions Regarding the Use of Default Language in Informal Settlement Agreements and Compliance Settlement Agreements)
- OM 17-02 (Model Brief Regarding Intermittent and Partial Strikes)

**Previous GC initiatives to be terminated.** Finally, the memorandum terminated certain prosecutorial initiatives set out by Robb's immediate predecessors in their own memoranda, including those that would seek to:

- extend the *Purple Communications* decision to other electronic systems
- narrow employer rights under Section 8(c) of the Act to communicate with employees during a union organizing campaign about the realities of unionization
- shift the burden of proof to employers seeking a mitigation of damages in cases involving "salts"
- find that a misclassification of employees as independent contractors is in and of itself a violation of the Act
- overturn Board law holding that *Weingarten* rights apply only in unionized settings.

It should be noted that the general counsel issued his memorandum several weeks before the new Board issued its mid-December 2017 reversals of certain Obama-era cases. For example, the memo references cases arising under the *Browning-Ferris* joint-employer standard, a standard that the new Board has already overruled in *Hy-Brand*. Thus, in a few respects, the memo's directives have been mooted by subsequent Board action. In the main, however, it continues to be a signal of what is likely to be a pronounced ideological shift in agency decision-making. ■

## Employer email use: where things stand

In a significant setback for employer property rights, the NLRB, in 2014, issued a sharply divided ruling holding that if an employer gives its employees access to company email systems, it must allow them to use the company email for NLRA-protected activity, such as union organizing, during nonwork time. The decision, *Purple Communications, Inc.*, 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. On remand, a divided NLRB reaffirmed its earlier holding in *Purple Communications* in a March 2017 decision. In his dissenting opinion, then-member Miscimarra argued that *Purple Communications* was wrongly decided and that the standard it set was both legally incorrect and practically unworkable. He urged a return to the *Register Guard* rule, which held that employees do not have a statutory right to use their employer's email systems for Section 7 purposes. The Trump Board is widely expected to restore the *Register Guard* precedent once a suitable email access case makes its way onto the Board's docket. Indeed, in a recent issue of the *Practical*

*NLRB Advisor*, we included the *Purple Communications* case among our "Top 10 Targets for Reversal."

However, on December 19, 2017, the NLRB stood by its Obama-era position in the Ninth Circuit Court of Appeals, where *Purple Communications* is under review. The Board's current posture in the Ninth Circuit should not be construed as an affirmation of *Purple Communications* as a matter of policy and Board law, or as an indication that the new Board majority will not revisit the issue. Rather, the procedural stance in the Ninth Circuit case is consistent with General Counsel Robb's directive, as outlined in his GC memorandum, that the agency is not to depart from its current position in pending cases unless specifically directed to do so.

For now, employers have not been afforded a reprieve from the *Purple Communications* decision. Nonetheless, most astute NLRB observers expect a new Board majority to revisit the issue and very likely ensure that *Purple Communications'* intrusion on employer property rights will be short-lived.

## "Ambush" election rule revisited

On December 14, 2017, the NLRB published a **Request for Information** in the *Federal Register* seeking public comment on the Board's controversial 2014 representation election rule, which modified the procedures for conducting Board elections and sharply curtailed the time frame for union election campaigns from an average of six weeks to about three weeks. (For a detailed discussion of the election rule and its significance for employers, see the **inaugural issue** of the *Practical NLRB Advisor*.)

The Board's information request raised the following questions:

1. Should the 2014 election rule be retained without change?
2. Should the 2014 rule be retained, but with modifications? If so, what should be modified?
3. Should the rule be rescinded? If so, should the Board revert to the election procedures that were in effect prior

to adoption of the 2014 rule, or make changes to the prior representation election regulations? If the Board should make changes to the prior regulations, what should be changed?

While the three Republican members of the Board approved the information request, Democrats Mark Gaston Pearce and Lauren McFerran dissented.

**Ambushed: the impact.** On November 17, 2017, the NLRB released data on the impact of the "quickie" election rule on representation elections, and the results are somewhat surprising in the sense that the rule changes appear to have had only a minimal impact on union win rates—the suspected intent behind the rule change. "Win rates" should be completely irrelevant to the Board's reconsideration of the rule changes, though.

It is not the function of the Board to craft procedural rules that favor one party or the other, but to ensure that the process is well run and ensures that employees' rights are adequately protected.

On the other hand, what had been a median 38-day election cycle in 2014 was whittled to just 23 days (median) in 2017. Moreover, the procedural burdens on employers have been significant, and concerns over employers' due process rights and employee privacy remain.

**Tips and takeaways.** Regional offices will continue to apply the representation election procedures implemented in 2014 unless and until the rule is modified through the deliberative rulemaking process. That is, the "quickie" election rule remains in effect for the foreseeable future. Prudent employers should continue to presume that in the event a

petition were filed, they would face a three-week election cycle and thus should plan accordingly.

Meanwhile, *PCC Structurals* and the general counsel's follow-up operations memorandum may present an opportunity, in some cases, for a more deliberative process in determining the appropriate bargaining unit in representation cases. Employers faced with any union attempt to "gerrymander" a bargaining unit should challenge such efforts. In a post-*PCC Structurals* world, the likelihood of a regional office scheduling a hearing and subsequently finding a broader unit appropriate under such circumstances has increased exponentially.

**Watch for:** The Board initially set a February 15, 2018 deadline for submitting comments on the election rule. However, on January 26, 2018, the agency extended the window for responding to its formal information request to March 19, 2018. ■

## Top 10 targets: a status check

In our [Summer 2017 issue](#) of the *Practical NLRB Advisor*, we identified the top 10 Obama-era cases and initiatives likely to face reversal by a Trump Board. Here's a look at where they currently stand:

### OBAMA NLRB ACTIONS

1. *Browning-Ferris* joint-employer case
2. "Micro" bargaining units
3. Constraints on managerial control
4. Strict scrutiny of work rules
5. "Ambush" election rule
6. Union access to employer email
7. "Supervisor" definition narrowed
8. Graduate students allowed to organize
9. Questioning motive for replacing strikers
10. Hamstringing employee discipline

\*\* Class action waivers

### STATUS

**REVERSED**

**REVERSED**

**REVERSED, IN PART**

**BALANCING TEST ADOPTED**

**REVERSAL PENDING?**

**SAFE (FOR NOW)**

**SUPREME COURT TO DECIDE...**

**Stay tuned.** We'll discuss the outcome of the class arbitration waiver cases in a forthcoming issue of the *Practical NLRB Advisor* after the Supreme Court of the United States issues its highly-anticipated decision.

## The year ahead

The decisions closing out Miscimarra's brief term as NLRB chairman marked a significant departure from Obama-Board case law and came as welcome relief for employers. Those decisions are largely a return to long-standing Board law, bolstered by lengthy opinions and well-reasoned analysis.

For the immediate future, there will be no further significant decisions or reversals coming from the Board since it has now been reduced to only four members, who appear split along traditional ideological lines. Any further groundbreaking decisional developments will have to wait until the fifth Board seat is filled. The White House has announced its nomination of John F. Ring, a practicing management-side attorney, to fill the empty post. Ring, however, must still face Senate confirmation, a typically long process, and one that has been almost interminable for Trump administration nominees. The

Senate HELP Committee originally scheduled a confirmation hearing for February 14, 2018. However, at the request of HELP Committee Democrats, the hearing was pushed back to March 1.

It also bears noting that Board Member William Emanuel has recused himself for a two-year period in cases involving some 150 clients for whom he performed legal work during the two years prior to his confirmation, as well as in cases where his former law firm represents a party. Thus, even when the Board is once again functioning with a full complement of members, some cases before the NLRB could, in theory, be deadlocked at 2–2. The issue, however, is largely academic since most non-precedent-setting cases are decided by a three-member panel and precedent-setting issues typically arise in multiple cases, including ones in which there is no recusal concern. ■

## Kaplan named NLRB chair

On December 22, 2017, President Trump appointed Marvin E. Kaplan chairman of the NLRB, to succeed Chairman Miscimarra, whose term expired on December 16. Kaplan was sworn in as a Board member on August 10, 2017, for a term ending August 27, 2020.

Prior to his appointment to the NLRB, Kaplan served as chief counsel to the chairman of the Occupational Safety

and Health Review Commission, and before that, he served as counsel to the House Committee on Oversight and Government Reform and as policy counsel for the House Committee on Education and the Workforce. Kaplan has also worked at the U.S. Department of Labor's Office of Labor Management Standards and with a law firm in private practice. He received his J.D. from Washington University in St. Louis and his B.S. from Cornell University.

## 2018 NATIONAL WORKPLACE STRATEGIES SEMINAR

Don't miss Ogletree Deakins' 2018 National Workplace Strategies seminar on May 9-12, 2018 at the Arizona Biltmore, Phoenix, Arizona. Ogletree Deakins' annual Workplace Strategies seminar is the premier event of its kind for sophisticated human resources professionals, in-house counsel, and other business professionals.

**Cost:** \$1,395.00 (\$895.00 for Ogletree Deakins clients)

**Hotel:** To obtain the Ogletree Deakins room rate of \$209, plus a \$10 resort fee per night at the Arizona Biltmore, [use this link](#) or call (800) 950-0086 and ask for the Ogletree Workplace Strategies rate. Please make your reservations by Monday, April 16, 2018 to take advantage of these special rates.

Register Online



[Click image for video](#)

**Download:** [2018 National Workplace Strategies Seminar](#)

**Questions:** Email [ODEvents@ogletreedeakins.com](mailto:ODEvents@ogletreedeakins.com) for questions about the 2018 Workplace Strategies Seminar.



Employers & Lawyers. Working Together

**Ogletree Deakins**

Ogletree Deakins represents employers of all sizes and across many industries, from small businesses to Fortune 50 companies. The firm was named "Law Firm of the Year" in the Litigation – Labor & Employment category in the 2018 edition of the *U.S. News — Best Lawyers*® "Best Law Firms" list.

Ogletree Deakins has more than 850 lawyers located in 52 offices across the United States and in Europe, Canada, and Mexico.

- |                 |              |               |                  |
|-----------------|--------------|---------------|------------------|
| Atlanta         | Greenville   | Morristown    | Sacramento       |
| Austin          | Houston      | Nashville     | San Antonio      |
| Berlin          | Indianapolis | New Orleans   | San Diego        |
| Birmingham      | Jackson      | New York City | San Francisco    |
| Boston          | Kansas City  | Oklahoma City | Seattle          |
| Charleston      | Las Vegas    | Orange County | St. Louis        |
| Charlotte       | London       | Paris         | St. Thomas       |
| Chicago         | Los Angeles  | Philadelphia  | Stamford         |
| Cleveland       | Memphis      | Phoenix       | Tampa            |
| Columbia        | Mexico City  | Pittsburgh    | Toronto          |
| Dallas          | Miami        | Portland      | Torrance         |
| Denver          | Milwaukee    | Raleigh       | Tucson           |
| Detroit (Metro) | Minneapolis  | Richmond      | Washington, D.C. |