



EMPLOYERS AND LAWYERS,  
WORKING TOGETHER

## The Practical **NLRB** Advisor

### An *Epic* win for employers

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The statutory protection of “concerted activity” contained in Section 7 of the National Labor Relations Act (NLRA) does not extend to the right to pursue class or collective actions; therefore, the NLRA does not bar employers from using arbitration agreements that include a class waiver, the Supreme Court of the United States has held. In *Epic Systems Corp. v. Lewis*, issued on May 21, 2018, a Court majority held that if parties enter into a contract to arbitrate employment disputes and proceed to specify the rules that will govern such arbitrations—including individual rather than class or collective action procedures—then the Federal Arbitration Act (FAA) commands federal courts to enforce that agreement according to those terms. Reiterating that the FAA strongly favors the arbitration of disputes, including employment-related disputes, the Court, in a decision authored by Justice Neil Gorsuch, resolved a circuit split that arose after the National Labor Relations Board (NLRB) issued *D.R. Horton, Inc.*, a controversial 2012 decision in which the Obama Board first embraced the notion that class waivers interfere with employees’ rights under the Act. The ruling is one of the most significant employment decisions in years.

In each of a trio of cases consolidated for argument before the Supreme Court, the employer required its employees, as a condition of employment, to consent to individual arbitration of any employment-related disputes between the parties. In contravention of the “individual arbitration only” provisions of their employment

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## BRIAN IN BRIEF



As the length of this installment of the *Practical NLRB Advisor* indicates, there has been considerable recent activity in the area of traditional labor law. The reviewing circuit courts have been busy, and the Supreme Court's decisions in *Epic Systems Corp. v. Lewis* and *Janus v. American Federation of State, County, and Municipal Employees, Council 31* are

destined to have a profound impact on the labor movement and on labor-management relations. The National Labor Relations Board (NLRB) itself, however, has been somewhat muted, churning decisions that, in the main, apply extant law. There are, however, clear indications that a significant alteration in the Board's decisional arc is on the horizon.

The general counsel (GC) has released a memorandum to the regional offices with a laundry list of issues to be submitted to the NLRB's Division of Advice. However, any decisional change in many of these areas may be a long time off, since the GC's action will only affect matters at the start of a long decisional pipeline. Some recent actions by the Board itself, however, portend the prospect of more immediate change. Thus, the Board has already solicited and received more than 7,000 comments on possible revisions to its representation case rule, solicited briefing from stakeholders on the extant *Purple Communications* decision regarding the Section 7-based right

of employees to use their employer's email systems, solicited public comment on the question of whether independent contractor misclassification constitutes an unfair labor practice, and—as this issue was going to press—released a proposed joint-employer rule that, if promulgated, effectively will undo the Obama Board's controversial *Browning-Ferris* decision.

While the emerging agenda of the Trump Board is ambitious, there are countervailing forces that may slow its progress. With two members that have extensive private practice experience, and a Board inspector general who many argue exceeded his authority and misconstrued the applicable principles, the Board must now resolve the broadening recusal issue. Should, as many predict, the majority in the House of Representatives shift in November, this process will become even more politicized and difficult to resolve. Beyond the recusal issue, a change in House leadership would no doubt result in an uptick in oversight and budgetary hearings that will distract from the agency's work. Finally, the unexpected and controversial renomination of Democrat Mark Gaston Pearce, whose term expired in August, will, at best, complicate the Board's output as the confirmation process unwinds. While change is plainly in the wind, its pace remains unclear.

Sincerely,

**Brian E. Hayes**

Co-Chair, Traditional Labor Relations Practice Group  
Ogletree Deakins

### 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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agreements, an employee, in each case, filed a wage suit in federal court, seeking to proceed as a class or collective action and asserting that the NLRA created a protected statutory right to do so. The FAA's "savings clause" renders an arbitration agreement unenforceable if it violates some other federal law, and class action waivers are invalid under Section 7 of the NLRA, they argued. The Supreme Court rejected this view, explaining that the savings clause merely recognized that standard defenses to contract enforcement, such as fraud and duress, apply in the same manner to arbitration contracts. "The notion that Section 7 confers a right to class or collective actions seems pretty unlikely when you recall that procedures like that were hardly known when the NLRA was adopted in 1935," Justice Gorsuch wrote. The Court's holding was not surprising to most observers, given the Court's pro-arbitration jurisprudence in recent years. Still, the decision provided welcome relief and clarity to employers that they can now implement arbitration agreements containing class action waivers without fear that they may run afoul of the NLRA.

**NLRB implications.** *Epic Systems* has important implications for nonunion employers. There is no longer a risk of being caught up unexpectedly in litigation before the Labor Board when seeking to enforce their arbitration agreements in defending against wage and hour actions and other lawsuits. Moreover, labor unions can no longer attack an employer's arbitration agreement as a basis for bringing unfair labor practice charges as they seek leverage during union organizing campaigns.

Prior to the Supreme Court's *Epic Systems* decision, while most federal courts had rejected the NLRB's reasoning in *D.R. Horton*, two courts of appeals had upheld the Board's decision. That left employers operating in multiple circuit court jurisdictions to grapple with conflicting legal obligations. It was precisely this "circuit split" that prompted the Supreme Court to definitively address the issue. In light of the Court's *Epic Systems* decision, all NLRB rulings premised on the *D.R. Horton* decision are effectively null and void. The Board issued a statement soon after the Supreme Court handed down its decision, indicating that it will "expeditiously" resolve the dozens of open arbitration cases currently before it. A number of similar Board rulings are currently pending before federal appeals courts, the agency noted.

From the standpoint of traditional labor law, *Epic Systems* is also instructive in that the decision takes a restrained view of what constitutes "protected concerted activity" under Section

7 of the NLRA. The statute guarantees employees "the right of self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." In *D.R. Horton*, the NLRB ruled that class and collective actions fall within this definition. However, the high court interpreted Section 7 to focus more narrowly on the right to organize unions and bargain collectively. The phrase "other concerted activities for the purpose of collective bargaining or other mutual aid or protection" appears at the end of a detailed list of activities related to self-organization, the majority observed, explaining that as a matter of statutory construction, where a more general term follows more specific terms in a list, the general term is usually understood to "embrace only objects similar in nature to those objects enumerated by the preceding specific words." Consequently, the Court construed Section 7 as protecting only those "things employees 'just do' for themselves in the course of exercising their right to free association in the workplace."

As the current NLRB is likely to contract the expansive view of Section 7 advocated by the Obama Board, the Court's decision in *Epic Systems* will likely bolster that effort since it clearly cautions against stretching the definition of "protected concerted activity" beyond its original statutory reach.

**Implications for employment litigation.** Employers are increasingly using arbitration agreements with class waivers to control litigation costs and to reduce the potential exposure of class litigation. With the important legal clarification provided by the Supreme Court in its *Epic Systems* ruling, the number of employers adopting this strategy will likely rise considerably. Such agreements may also serve to reduce the filing of questionable class claims in order to extract an early settlement from employer/defendants facing the high cost of court litigation.

Notwithstanding the "sky-is-falling" claims from plaintiffs' counsel, arbitration agreements with class waivers do not foreclose employees from bringing employment disputes. For example, counsel for the named plaintiff in *Epic Systems* promptly released a statement after the Supreme Court issued its decision, indicating that their client will continue to pursue his claims through individual arbitration. Moreover, several plaintiffs' firms confronted with mandatory arbitration agreements containing class waivers have adopted the strategy of filing individual arbitrations for every would-be

class member—a tactic aimed at increasing their settlement leverage by increasing an employer’s potential costs.

Even in the wake of *Epic Systems*, employers need to carefully consider whether arbitration is right for them and realize that it does have its downsides. First, arbitration itself has often become more procedurally complicated and therefore more expensive in recent years. Second, *Epic Systems* does not preclude *all* collateral attacks on the validity of arbitration agreements, only those predicated on an alleged violation of the NLRA. Thus, an employer could wind up in court defending its arbitration agreement on a number of other grounds. Third, some arbitrators are inclined to “split the baby” and issue compromise awards, seeking to please both parties to a dispute. For this and other reasons, arbitration can result in conflicting awards and unpredictable outcomes. Lastly, and perhaps most importantly, arbitration awards, unlike court judgments, are nearly impossible to successfully appeal. Since such awards are meant to be “final,” the grounds for appealing them are extremely narrow. Consequently, an employer can get stuck with an award that is based on “bad law” and yet have no viable appeal.

#### Tips and takeaways.

- As Justice Gorsuch noted, under the FAA, the usual defenses to contract enforcement apply to arbitration agreements, such as fraud, duress, and unconscionability. When drafting arbitration agreements, ensure their terms are enforceable and that they are

executed fairly, in order to fend off these potential defenses to individual arbitration.

- Notwithstanding the FAA, claims arising from some federal statutes—for example, the Sarbanes-Oxley Act—are expressly not subject to arbitration. Moreover, on the heels of the #MeToo movement, legislative efforts to prohibit mandatory arbitration of claims related to sexual harassment and discrimination continue to gain traction. These claims, however, tend to be individualized in nature and are seldom brought on a class basis, so the impact on class litigation is less pronounced.
- State-law restrictions on class arbitration may also prove problematic. For example, California’s Private Attorneys General Act (PAGA) expressly prohibits arbitration of “representative” claims arising under the statute. *Epic Systems* did not expressly consider the viability of state statutes such as PAGA.
- In *Epic Systems*, Justice Gorsuch noted, “Congress is of course always free to amend this judgment.” It was just that in the majority’s view, there was nothing in the NLRA indicating “a clear intention to displace the Arbitration Act.” Thus, there is nothing standing in the way of a future Congress amending federal labor law to undo the decision in *Epic Systems*. Indeed, a number of employee advocacy groups have already urged Congress to do just that in the wake of the decision. While such Congressional action looks exceedingly unlikely in today’s political climate, the winds in Washington have been known to often shift unpredictably. ■

## Ogletree Deakins’ DIY Arbitration Agreements tool

With the Supreme Court’s landmark decision in *Epic Systems Corp. v. Lewis*, the landscape for arbitration agreements has changed in favor of using arbitration for employment disputes. Ogletree Deakins has launched an innovative new product that will help employers quickly and conveniently generate arbitration agreements with class action waivers.

**DIY Arbitration Agreements** is a simple, automated tool that guides users through a series of questions and then, based on their answers, generates an arbitration agreement with class action waivers in mere minutes—and tailored to their business needs.

The tool provides step-by-step instructions through a short series of questions. After users answer the questions, the DIY Arbitration Agreements tool generates an agreement tailored to their business needs. The customized arbitration agreement is then immediately available in Microsoft Word and PDF formats. The innovative tool automates the customization process, allowing clients to tailor the agreement to their business needs simply by answering a few questions.

Our team of attorneys developed this tool to help clients meet their goals in the most cost-effective manner possible.

## NLRB issues proposed joint-employer rule

Frustrated in its attempt to undo the Obama-era *Browning-Ferris Industries* decision through case adjudication, the National Labor Relations Board (NLRB) has resorted to the formal rulemaking process, rarely used by the agency, to resolve the critical and contentious issue of how “joint employer” is to be defined under the National Labor Relations Act (NLRA). As this issue of the *Practical NLRB Advisor* was going to press, the NLRB issued a [notice of proposed rulemaking](#) that would establish a new standard for determining whether a business entity is a joint employer under the Act.

In a nutshell, the proposed joint-employer standard conforms to the standard set forth in *Hy-Brand Industrial Contractors, Ltd.*, the ill-fated decision issued by the Trump Board in December 2017 but subsequently vacated due to an internal NLRB squabble over whether Board Member William J. Emanuel ought to have recused himself from the case.

The NLRB published a formal notice of proposed rulemaking on September 14, 2018. A 60-day comment period follows, to allow stakeholders the opportunity to weigh in. In the interim, the business community is saddled with the current *Browning-Ferris* framework while the rulemaking process is underway. However, the current Board is unlikely to issue decisions under the *Browning-Ferris* standard during the pendency of a rulemaking process clearly aimed at undoing or substantially altering that same standard. That reality could mean that Board cases involving the joint-employer standard could wind up “frozen” at the agency until the rulemaking process is complete.

The NLRB’s proposed joint-employer rule will be discussed in further detail in the next issue of the *Practical NLRB Advisor*. ■

## Board to review its recusal process

Still grappling with the fallout after the National Labor Relations Board’s (NLRB) inspector general (IG) concluded that Board Member William J. Emanuel should have recused himself from the *Hy-Brand Industrial Contractors, Ltd.*, case, the NLRB on June 8, 2018, announced it will undertake “a comprehensive review of its policies and procedures governing ethics and recusal requirements for Board Members.”

The IG had determined that Emanuel, who cast the deciding vote in the divided *Hy-Brand* decision, should have recused himself from the case. Following that determination, a Board panel, in February of 2018, vacated the *Hy-Brand* decision. (The [Spring 2018 Practical NLRB Advisor](#) offered a detailed look at these unusual machinations that resulted in the reinstatement of the *Browning-Ferris* standard, which continues to remain in effect, for now.)

The IG’s [conclusion](#) that Emanuel should have recused himself in *Hy-Brand* was, at best, controversial and, at worst, incorrect. Neither Emanuel nor his former law firm represented any party in *Hy-Brand*. His former firm did, however, represent one of the employers involved in the *Browning-Ferris* decision and did file a brief in the case. The

IG concluded that *Hy-Brand* and *Browning-Ferris*, although completely different cases, had somehow “merged” into a “single matter” and that *Hy-Brand* was essentially a “do-over” for the *Browning-Ferris* litigants. As such, the IG further concluded that Emanuel’s participation in the case was in conflict with the ethics pledge set out in [Executive Order 13770](#). Whatever one’s view of the IG’s convoluted logic may be, there is no dispute that it has created confusion and uncertainty not only with respect to the joint-employer issue, but, more broadly, with respect to the proper standard for recusal in future cases.

Given the confusion and lack of predictability spawned by the IG’s report, NLRB Chairman John F. Ring has wisely proposed that the Board examine every aspect of its current recusal practices in light of the statutory, regulatory, and presidential requirements governing them. The agency will review and evaluate all existing procedures for determining when recusals are required, as well as the roles and responsibilities of agency personnel in connection with making those determinations. The latter consideration has been prompted by serious questions as to whether

**RECUSAL PROCESS** [continued on page 6](#)

## Public-sector union ‘agency shop’ fees are unconstitutional

On June 27, 2018, the Supreme Court of the United States held that laws permitting public-sector unions to compel nonmembers to pay a “fair share” or “agency shop” fee toward the costs of collective bargaining and contract administration are unconstitutional. In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, the Court concluded that “the compelled subsidization of private speech seriously impinges on First Amendment rights.” The 5–4 opinion overturned a 40-year-old precedent, *Abood v. Detroit Board of Education*, which permitted public-sector unions to impose such fees despite constitutionality concerns.

Under an agency shop arrangement, all employees within a bargaining unit covered by a collective bargaining agreement must pay a fee to the union—even employees who are not

*The majority now concluded that “public-sector agency-shop arrangements violate the First Amendment, and Abood erred in concluding otherwise.”*

members of the union. These fees are intended to contribute toward the costs of contract negotiations, grievance administration, and other services that the union is legally obligated to provide to members and nonmembers alike. In *Abood*, a 1977 decision, the Supreme Court cleared the way for public employee unions to impose agency shop fees on government employees, along with private-sector workers.

However, Justice Samuel Alito, writing for the Court majority in *Janus*, observed that *Abood* was “something of an anomaly.”

The decision was inconsistent with other First Amendment cases, the Court found, and has been undermined by more recent decisions. The majority now concluded that “public-sector agency-shop arrangements violate the First Amendment, and *Abood* erred in concluding otherwise.”

Consequently, public-sector unions “may no longer extract agency fees from nonconsenting employees”; nor may state entities assist in doing so pursuant to an agency fee/checkoff, or similar contractual provision, in any collective bargaining agreement.

**Private-sector unions may also feel the sting.** The *Janus* decision does not directly affect private-sector employers. Turning, as it does, on the First Amendment, the holding applies only to public-sector employers. In most of the 28 states with right-to-work legislation on the books, it already was illegal for employers—public or private—to require employees to join a union, or to pay agency fees, as a condition of employment. But *Janus* effectively rendered every state a right-to-work state, at least with respect to public workers.

*Janus*, however, does have some indirect implications for private-sector unions. For example, many labor unions represent workers in both public- and private-sector workplaces. For such unions, *Janus* will have a direct impact on their overall finances, with a resulting effect on their relationship with all employers. Moreover, private-sector employees who are

### RECUSAL PROCESS [continued from page 5](#)

the IG even had the authority to make the recusal call in the *Hy-Brand* case and whether Board members other than Emanuel had the right to essentially compel his recusal. Ring said the Board will seek outside guidance, including a review of the recusal practices of other independent agencies with adjudicatory functions. The NLRB will issue a report of its findings and establish clear procedures for ensuring compliance with all ethical and recusal obligations.

“Recent events have raised questions about when Board Members are to be recused from particular cases and the appropriate process for securing such recusals,” Ring said. “We are going to look at how recusal determinations are made to ensure not only that we uphold the Board’s strong ethical culture, but also to ensure each Board Member’s right to participate in cases is protected in the future. Those who rely on us to decide labor matters need to know their cases will be decided under proper procedures that ensure an appropriate Board majority.”

opposed to union membership are likely to find that, with the *Janus* wind at their back, courts, and a more business-friendly National Labor Relations Board, are more willing to give serious scrutiny to how unions apportion bargaining and nonbargaining costs for nonmembers, and to union policies that impose undue burdens on workers seeking to resign from their union or to revoke their consent to dues checkoff.

**State action afoot.** Unlike private employers, which are covered by the National Labor Relations Act, public employers are governed by individual state labor laws. Prior to *Janus*, 26 state legislatures had enacted right-to-work laws barring compulsory union membership or agency fees in both public and private employment. Since *Janus* was handed down, a well-funded campaign by organized labor in Missouri convinced voters to reject a right-to-work legislative initiative in the state. The Missouri outcome is a reminder that organized labor, notwithstanding *Janus*, continues to wield considerable political clout and that it is likely to pursue all available avenues, including *increasing its private-sector organizing efforts*, in an attempt to limit its financial losses.

Legislators in many traditionally “blue” states are actively seeking to shore up organized labor in the wake of *Janus*. A number of union-friendly state legislatures are weighing “members only” laws that would permit unions to provide services only to dues-paying workers. For example, in April of this year, in anticipation of the *Janus* outcome, New York Governor Andrew Cuomo signed legislation to protect union membership in the state’s public-sector workplaces and added safeguards against federal government actions that, he contends, undermine organized labor. Passed in a budget measure, New York **Senate Bill 7509** attempts to tackle the so-called “free rider” problem that arises when unions are required by law to provide services to nonmembers pursuant to their role as workers’ exclusive bargaining representative. Specifically, the measure provides that a union’s duty to a nonmember is limited to collective bargaining, and that unions are not required to represent nonmembers in investigatory interviews, grievances, or other administrative proceedings, among other services. The legislation also allows unions to provide enhanced services to its dues-paying members in the form of legal, economic, or job-related benefits or support.

Additionally, after the Supreme Court issued the *Janus* decision, Cuomo signed an **executive order** (EO) purportedly intended to fend off “harassment and intimidation” by

anti-union activists seeking to encourage state workers to withdraw from their unions. In a press statement from the governor’s office, Cuomo asserted that outside anti-union groups are using Freedom of Information Act policies to hunt down state employees in the union ranks and encourage them to renounce their memberships. Cuomo directed state agencies that they are not to give out employees’ home addresses, home or cell phone numbers, or personal email addresses—*except* to a union that is the employees’ certified bargaining representative, or a union seeking to be certified as such, or as otherwise required by law. In yet another gift to organized labor, the EO directs state employers to provide an incumbent union with the name, address, and work location of all new hires into the bargaining unit in order to give the union the opportunity to recruit the new hires for membership.

Cuomo said in addition to the EO, he intends to propose legislation in New York prohibiting the disclosure of personal information for *all* public-sector employees, including municipal workers.

Many observers have noted that “blue-state” legislation aimed at assisting unions in a post-*Janus* world may spawn further litigation, with nonmember employees arguing such legislation impermissibly discriminates against them because of their choice to refrain from union membership.

**Takeaways for public employers.** How will *Janus* impact federal, state, and local government employers? As noted, they are likely to face more aggressive organizing efforts, and will require robust pre-planning if they intend to actively oppose such efforts. In addition, public employers will likely face new bargaining scenarios as unions seek to make membership more attractive to rank-and-file employees. Additionally, public-sector employers will need to take the following immediate steps in the wake of *Janus*:

- Cease making payroll deductions for union agency fees from employees who are not union members, notwithstanding collective bargaining agreement provisions that require the employer to deduct these fees
- Create opt-in forms, securing written consent from those nonmember employees who wish to continue paying agency fees to the union
- Determine if they must engage in “effects bargaining” over the elimination of the payroll-deduction provision
- Decide how to respond to union requests or bargaining

demands to bar disclosure of union members' contact information to third parties

- Assess the continuing legality of any collective bargaining provisions affecting employees' right to withdraw from union membership
- Tailor their employee communications regarding *Janus* and its implications to any applicable state laws

**A blow to organized labor, but not a fatal one.** In striking down agency fees, the Supreme Court squarely rejected the unions' justifications for such fees, including avoiding "free riders" and promoting "labor peace." Indeed, the Court dealt a body blow to public-sector unions, which have relied heavily on nonmember fees as a critical revenue stream. The *Janus* decision surely poses a threat to the ongoing financial viability and security of unions with large populations of government workers.

However, organized labor has struck a defiant tone following the decision. "All over the country, workers are

organizing and taking collective action as we haven't seen in years. More than 14,000 workers recently formed or joined unions in just a single week. This followed a year where 262,000 workers organized and the approval rating of unions reached a nearly 14-year high," an emphatic AFL-CIO noted in a post-*Janus* press statement. Whether the underlying assertion of an increase in unionization is a likely result of *Janus* or an exercise in desperate wishful thinking remains to be seen. One thing is, however, clear. The full fallout from *Janus* is not over, and the additional potential ramifications for public-sector unions are decidedly negative. For example, the questions of whether public-sector unions will have to pay back agency fees that they have already collected and, if so, how far back would such obligation go remain unsettled. While these and other questions involving the impact of *Janus* may take years to resolve, the immediate impact has been a serious blow to public-sector unions, and the eventual resolution of these other questions may only make it worse. ■

## GC offers guidance on work rules, 10(j) injunctions

On June 6, 2018, National Labor Relations Board (NLRB) General Counsel (GC) Peter B. Robb issued a general counsel memorandum, **GC Memo 18-04**, providing guidance to the Board's regional offices on how common employer work rules fit into the rubric that the NLRB established in its December 2017 decision in *The Boeing Company*.

In *Boeing*, the NLRB revamped the standard it will use to decide whether an employer's handbook policies or other work rules interfere with employees' protected rights. The *Boeing* decision marked an end to the overreaching analytical framework adopted by the Obama Board. Under that framework, the Obama Board found a host of common, and common-sense, employer handbook provisions violated the National Labor Relations Act (NLRA) even though they were never adopted or even enforced for such a purpose.

The new test enunciated in *Boeing* balances the potential impact of a rule on employees' NLRA-protected rights against the employer's "legitimate justifications" for implementing the measure. Under this new approach, employer rules and policies will fall into one of three

categories. The GC memo gives examples of common rules and where they will fall within these categories:

**Category 1:** Rules that are facially lawful:

- General civility rules
- No-photography and no-recording rules
- Rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations
- Disruptive behavior rules
- Rules protecting confidential, proprietary, and customer information or documents
- Rules against defamation or misrepresentation
- Rules against using employer logos or intellectual property
- Rules requiring authorization to speak for the company
- Rules banning disloyalty, nepotism, or self-enrichment

Robb's memo instructs regional offices that, absent withdrawal, any charges alleging that rules in this category are facially unlawful should be dismissed. However, if a region believes that special circumstances render a normally lawful rule under Category 1 to be unlawful (due to a unique



industrial setting, the history of the rule's application, or direct evidence of a chilling effect on employees, for example), the case is to be submitted to the Division of Advice.

**Category 2:** Rules that will require individualized scrutiny:

- “Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment . . . and do not restrict membership in, or voting for, a union”
- “Confidentiality rules broadly encompassing ‘employer business’ or ‘employee information’ (as opposed to confidentiality rules regarding customer or proprietary information . . . or confidentiality rules more specifically directed at employee wages, terms of employment, or working conditions)”
- “Rules regarding disparagement or criticism of the employer (as opposed to civility rules regarding disparagement of employees . . .)” (Emphasis in original.)
- “Rules regulating use of the employer’s name (as opposed to rules regulating use of the employer’s logo/trademark . . .)”
- “Rules generally restricting speaking to the media or third parties (as opposed to rules restricting speaking to the media *on the employer’s behalf* . . .)” (Emphasis in original.)
- “Rules banning off-duty conduct that might harm the employer (as opposed to rules banning insubordinate or disruptive conduct at work . . . or rules specifically banning participation in outside organizations)”
- “Rules against making false or inaccurate statements (as opposed to rules against making defamatory statements)”

Category 2 rules are not obviously lawful or unlawful and must be evaluated on a case-by-case basis under the *Boeing* balancing test. In the absence of Board jurisprudence applying *Boeing* to a Category 2 rule, regions should submit these rules to the Division of Advice.

**Category 3:** Rules that are unlawful:

- “Confidentiality Rules Specifically Regarding Wages, Benefits, or Working Conditions” (for example, a rule prohibiting employees from disclosing their salaries)
- “Rules Against Joining Outside Organizations or Voting on Matters Concerning Employer”

Robb directed the regions to issue complaints on these rules, absent settlement. However, he added, if a region believes that special circumstances render lawful a rule that normally would fall in this category, it should submit the case to the Division of Advice.

**Still undecided.** *Boeing’s* effect on rules about confidentiality of discipline or arbitration, or rules that potentially limit employees’ access to Board processes, has not yet been determined, according to the memo. Accordingly, when presented with such rules, regions are instructed to submit such matters to the Division of Advice.

**Additional guidance.** The test used by the Obama Board 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 Act. 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. Robb’s memo instructs the regional offices to focus instead on whether a rule would *actually* be interpreted to cover Section 7 activity.

There are two other key changes to the interpretive approach the Board will use: (1) the memo provides that any ambiguities in a work rule will no longer be reflexively interpreted against the drafter (i.e., the employer); and (2) “generalized provisions should not be interpreted as banning all activity that could conceivably be included.”

The memo also clarifies that *Boeing* did *not* alter well-established standards on certain kinds of rules where the Board has already struck a balance between employee rights and employer business interests, such as the balancing test involved in assessing the legality of no-distribution, no-solicitation, or no-access rules. Nor did *Boeing* alter the “special circumstances” test of apparel rules, although the new test may apply to aspects of apparel rules alleged to be unlawfully overbroad.

**The takeaway.** In addition to the guidance provided by the GC, Board case law that emerges as the *Boeing* test is applied going forward should continue to give employers a greater measure of predictability as they draft and enforce work rules, and give rise to effective “safe harbors.” As is made clear from the memo, however, the agency will continue, in many instances, to undertake a case-by-case analysis of a work rule, meaning that one cannot always predict with complete confidence whether a particular rule will survive Board scrutiny.

Nonetheless, the Board’s more rational enforcement posture, as reflected in the GC’s directive, should encourage employers to revisit their employee handbooks and other work rules and policies. Employers now clearly have more

leeway to craft and enforce rules that address the legitimate aims of ensuring appropriate workplace conduct and civility, protecting privacy and intellectual property, and advancing other practical business interests.

## Section 10(j) injunctions

While the NLRB and GC have made clear that the agency will depart from the Obama-era approach to work rule cases, another memorandum (GC 18-05), issued by Robb on June 20, 2018, indicates that the agency will largely stay the course with respect to deciding when it is appropriate to pursue injunctive relief in active cases.

In some cases, temporary injunctive relief under Section 10(j) of the Act “provides the only means of ensuring the protection of employees’ Section 7 rights and the Board’s remedial

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processes,” Robb wrote. Consequently, he directed the regional offices to continue to consider the propriety of interim injunctive relief in every case. He instructed the regions to promptly identify those cases that may call for injunctive relief, to investigate the merits and look for evidence of the impact of the alleged violations, and, soon after making a merit determination, to submit a recommendation to the Board’s Injunction Litigation Branch (ILB) regarding the need for an injunction.

**Types of cases.** Robb cited the following types of unfair labor practices as ones more likely than others to require injunctive relief in order to preserve the efficacy of the Board’s remedial powers:

- Discharges that occur during an organizing campaign
- Violations that occur during the period following certification when parties should be attempting to negotiate their first bargaining agreement
- Cases involving a successor’s refusal to bargain and/or refusal to hire

All such cases should be scrutinized to determine whether there is a threat posed by delayed remediation, Robb instructed. Consideration should also be given to seeking an

injunction in other types of cases, where a delay in obtaining remedial relief would be problematic.

**Expedited processing.** The GC instructed the regions to expedite the processing of potential 10(j) cases by giving them investigatory and merit determination priority, in order to obtain relief “as quickly as possible when there is still an opportunity to restore the status quo ante.” Appropriate cases should be brought quickly to a regional office agenda to determine whether there is merit; if there is, regions should promptly submit the case to ILB even if settlement discussions are ongoing, unless there is a very strong likelihood that such discussions will resolve the matter. Regions should submit a recommendation to ILB as soon as the merit determination of an initial charge would make 10(j) relief appropriate. The filing of multiple charges, or new charges raising additional violations, should not delay the submission.

Regions are to submit potential 10(j) cases to ILB *prior to* a hearing before an administrative law judge

(ALJ). Given the highly deferential standard that district courts apply when deciding whether to grant injunctive relief, Robb said it does not serve the NLRB’s purpose to delay seeking an injunction in order to bolster its theory of an NLRA violation with a favorable ALJ decision where a regional director has already found sufficient merit to issue a complaint. “In fact, it works against us by creating additional delay,” he wrote. Therefore, he said, only in the rarest of circumstances should a region wait to submit a potential 10(j) case to ILB until *after* a hearing has commenced, and those rare cases should occur only after consultation with ILB.

**The takeaway.** While employers generally find a more business-friendly climate at the NLRB, the agency will continue to seek prompt interim relief in those instances when it is determined that violations of the Act have occurred—particularly in instances where unfair labor practices occur during critical junctures in the election or bargaining “life cycle,” or where the detriment to affected employees may be significant. Therefore, in planning the defense strategy when facing an unfair labor practice charge, employers must evaluate the likelihood they will be directed, quite early on, to reinstate an employee or bargain with a union during the pendency of a Board proceeding. ■

## More organizational changes afoot

In an internal memorandum that the National Labor Relations Board (NLRB) General Counsel's (GC) Division of Operations-Management issued on July 30, 2018, [ICG 18-06](#), the GC's office announced the initial wave in a series of agency reforms intended to streamline Board proceedings at the regional level. The changes issued in this first round address the agency's processing of unfair labor practice complaints, and were to be implemented immediately, according to Beth Tursell, associate to the general counsel, who authored the memo. The changes include the following:

- **Designating decisional authority.** Regional directors, at their discretion, are to delegate case-handling decisional authority to the region's supervisors. Such authority includes the approval of dismissals, withdrawals, or settlements of unfair labor practice charges in certain cases, allowing regional directors to review fewer cases and enabling them to focus on more complex case-related matters. The memo indicates that 17 of the Board's

regional offices have already undertaken such delegation "with great success."

- **A centralized decision-writing team.** A "cadre of skilled decision-writers" will be appointed to focus mainly on drafting almost all pre-election representation case (R-case) decisions in order to expedite the process and ensure consistency. Such decisions typically resolve questions of voter eligibility, supervisory status, and bargaining unit scope.
- **Streamlining submissions to Advice.** The Board will develop ways to facilitate the prompt submission of key legal issues to the NLRB's Division of Advice, including the use of "short-form memos" by the regions when submitting to Advice. The divisions of Operations-Management and Advice will host roundtables to explore best practices for submissions.

These reforms were among those originally outlined in a 59-point list of proposals issued in January 2018. Tursell's memo indicated that the remaining proposals will be the subject of future reforms in "memos soon to follow." If fully implemented, the proposed changes will likely result in a fairly sweeping overhaul of the way the Board conducts its day-to-day business. ■

## Decertification petitioners can intervene

In another GC memorandum ([GC 18-06](#)), issued on August 1, 2018, General Counsel Peter B. Robb directed all regional offices that they should no longer oppose a timely motion to intervene in an unfair labor practice proceeding by any employee who has filed a decertification petition, or by any group of employees who have circulated a petition seeking their employers to withdraw union recognition, whenever the outcome of the unfair labor practice proceeding may impact the validity of the decertification or withdrawal of recognition process. Such individuals have a direct interest in the disposition of the related unfair labor practice proceeding; therefore, opposing their intervention is unwarranted, Robb wrote. A motion to intervene is appropriate at any stage, regardless of whether the decertification petition is being held in abeyance pursuant to NLRB case-handling procedures or has been dismissed subject to reinstatement.

## Executive order exempts ALJs from civil service rules

The federal government employs approximately 1,900 administrative law judges (ALJs) who work for a host of federal agencies ranging from the Securities and Exchange Commission (SEC) to various divisions of the Department of Labor (DOL). The National Labor Relations Board (NLRB) currently employs 34 ALJs. Their role is critical in the disposition of all of the Board's adjudicated unfair labor practice cases. All such cases are initially tried before an ALJ who then issues a decision and, where appropriate, recommended remedial order. These decisions and orders can be appealed to the Board in Washington; however, not all ALJ decisions are appealed, and even when they are, they are only rarely overturned.

On July 10, 2018, President Trump issued an executive order (EO) altering the manner in which ALJs are to be appointed to federal agencies. [Executive Order Excepting](#)

**Administrative Law Judges from the Competitive Service** places ALJ positions into the civil service “excepted service” category, exempting them from the competitive examination and other selection procedures through which ALJs have long been appointed. The directive notes that each federal agency should be able

### *In the wake of the Lucia decision, the NLRB addressed the constitutional validity of its own ALJs.*

to make assessments “without proceeding through complicated and elaborate examination processes or rating procedures that do not necessarily reflect the agency’s particular needs.”

The move further affords agency heads more flexibility and discretion to evaluate judge candidates based on such qualities as work ethic, judgment, subject matter expertise, and the ability to meet a particular agency’s needs—qualities commensurate with the significant authority conferred on them, according to the president. Excepted service agencies set their own qualification requirements; they are not subject to the appointment, pay, and classification rules of Title 5, United States Code. Rather than being subject to the qualifications established by Civil Service Rules and Regulations, excepted service appointments are made “in accordance with such regulations and practices as the head of the agency concerned finds necessary.”

The EO was issued on the heels of the decision that the Supreme Court of the United States issued on June 21, 2018, *Lucia v. Securities and Exchange Commission*, which held that ALJs employed by the SEC are “inferior officers” of the U.S. government under the Appointments Clause of the U.S. Constitution. The Appointments Clause, among other things, provides that such “inferior officers” may be appointed only by “the President, a court of law, or a head of department.” Since ALJs at the SEC are hired by the SEC commissioners’ staff, the Court held that such appointments were constitutionally invalid.

While the decision in *Lucia* directly pertained only to the SEC, it obviously raises questions about the constitutional validity of all federally appointed ALJs,

including those employed by the NLRB. In the wake of the *Lucia* decision, the NLRB addressed the constitutional validity of its own ALJs. In *WestRock Services, Inc.*, issued on August 6, 2018, a five-member NLRB affirmed the constitutionality of the NLRB’s ALJs under the Appointments Clause. The Board held that unlike SEC ALJs that were selected by staff, NLRB ALJs are appointed by the Board members themselves; thus, their appointment is constitutional as having been made by the “head of a department.” The Board in *WestRock Services* rejected the argument that the “Board” is not the constitutional equivalent of a “head of a department”; thus, the appointment of all NLRB ALJs is constitutionally infirm under *Lucia*. While the NLRB decision was unanimous, it seems very likely that this issue will ultimately require resolution by the federal appellate courts. ■

### **NLRB launches pilot ADR program**

The National Labor Relations Board (NLRB) has launched a pilot program to enhance the use of its alternative dispute resolution (ADR) program. According to the Board’s July 10, 2018, [release](#) announcing the rollout, the goal is to increase opportunities for parties with cases pending before the Board to engage in mediated ADR to help facilitate mutually satisfactory settlements. The program affords the parties greater control over the outcome of their cases.

Since December 2005, the Board’s ADR program has assisted parties in settling unfair labor practice cases. Parties that choose to participate are assisted by an experienced mediator (a Federal Mediation and Conciliation Service mediator or the ADR program director) to facilitate confidential settlement discussions and explore options to resolve the dispute. In addition to savings in time and money, parties who use the ADR program can broaden their resolution options—often going beyond the legal issues in controversy—to achieve more creative, flexible, and customized settlements, the NLRB says. The program is particularly useful for cases where traditional settlement negotiations are likely to be unsuccessful, or already have been unsuccessful.

The Board's Office of the Executive Secretary will proactively engage parties with cases pending before the Board to determine whether their cases are appropriate for inclusion in the ADR program. Parties may also request

*Purple Communications was one of a handful of Obama-era decisions that employers had found particularly problematic, and it was widely expected to be among the top contenders for reversal by a more business-friendly Trump NLRB.*

that their cases be placed in the program. Participation in the ADR program is voluntary, and a party that enters into settlement discussions may withdraw from participation at any time. There are no fees or expenses for using the program.

Parties utilizing the ADR program have reached settlements in approximately 60 percent of cases, all of which were ultimately approved by the Board. ■

### Persuader rule is formally withdrawn

The DOL has rescinded its controversial "persuader rule," which was rolled out in 2016 but quickly **invalidated** by a federal district court. The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) requires employers to report when employers hire labor relations consultants or others to engage in direct "persuader" activity to discourage employees from voting in favor of union representation. The statute's "advice exemption" excludes from those reporting requirements an employer's consultation with labor relations attorneys or consultants with respect to the employer's union avoidance efforts. Under the **revised regulation**, which has now been rescinded, a consultant's services would have been reportable even if the consultant or attorney had no direct contact with the employer's employees, as long as the *purpose* of the consultation was to directly or indirectly "persuade" employees. In effect, the regulation would have gutted the advice exemption.

For employers, the additional reporting burdens and free-speech implications of the 2016 rule would have been profound. Employers, management attorneys, and state bar associations also raised concerns the rule would erode attorney-client privilege. In response to a legal

challenge brought by a coalition of attorneys general from 17 states, the court issued a permanent nationwide injunction barring the DOL from enforcing the rule, finding it "defective to its core."

The Trump administration declined to defend the rule on appeal. Instead, in June 2017, it **proposed to rescind** it. In a **final rule notice** in the *Federal Register* on July 18, 2018, the DOL rescinded the rule in its entirety and directed employers and their attorneys to adhere to the reporting requirements in effect before the persuader rule was issued.

"For decades, the Department enforced an easy-to-understand regulation: Personal interactions with employees done by employers' consultants triggered reporting obligations, but advice between a client and attorney did not," said Nathan Mehrens, deputy assistant secretary for the DOL's Office of Policy, in an agency press release. "By rescinding this Rule, the Department stands up for the rights of Americans to ask a question of their attorney without mandated disclosure to the government." ■

### Should *Purple Communications* be overturned?

The National Labor Relations Board (NLRB) on August 1, 2018, invited briefs on the question whether it should adhere to, modify, or overrule its 2014 decision in *Purple Communications, Inc.*, which held that employees who are provided access to their employer's email system for work-related purposes are presumptively entitled to use that email system, on their nonwork time, for Section 7-protected communications.

The controversial Obama Board decision, which essentially required employers to open up their private email systems for use by employees to conduct union-related business, overturned the NLRB's 2007 decision in *Register Guard*, which held that facially neutral policies regarding the permissible uses of employers' email systems are *not* unlawful simply because they have the "incidental" effect

of limiting the use of those systems for union-related communications. *Purple Communications* was one of a handful of Obama-era decisions that employers had found particularly problematic, and it was widely expected to be among the top contenders for reversal by a more business-friendly Trump NLRB.

The case in which the Board has invited briefing is *Caesars Entertainment Corporation dba Rio All-Suites Hotel and Casino*, 28-CA-060841. The Board's invitation for briefs raised the following questions:

1. Should the Board adhere to, modify, or overrule *Purple Communications*?
2. If you believe the Board should overrule *Purple Communications*, what standard should the Board adopt in its stead? Should the Board return to the holding of *Register Guard* or adopt some other standard?
3. If the Board were to return to the holding of *Register Guard*, should it carve out exceptions for circumstances that limit employees' ability to communicate with each other through means other than their employer's email system (e.g., a scattered workforce, facilities located in areas that lack broadband access)? If so, should the Board specify such circumstances in advance or leave them to be determined on a case-by-case basis?
4. The policy at issue in this case applies to employees' use of the respondent's "[c]omputer resources." Until now, the Board has limited its holdings to employer email systems. Should the Board apply a different standard to the use of computer resources other than email? If so, what should that standard be? Or should it apply whatever standard the Board adopts for the use of employer email systems to other types of electronic communications (e.g., instant messages, texts, postings on social media) when made by employees using employer-owned equipment?

Questions about employees' nonwork access to employers' email systems and other "computer resources" take on growing significance in an era in which employer privacy concerns, and the need to guard intellectual property, are paramount. Notably, these questions also arise at a time when employees and organized labor have access to a wide array of

## Election rule comment request elicits 7,000 responses

On December 14, 2017, the NLRB published a request for public comment on the Board's revised representation election rule, with an eye to revisiting the "quickie" election procedures enacted in 2014 by the Obama Board. The revised election rule marked a drastic change in union election procedures, sharply reducing the time frame in which employers could respond to union petitions and curtailing employers' ability to timely challenge bargaining unit determinations and election irregularities. The new rule also added administrative burdens for employers. (For more on the revised representation election rule, see the [inaugural issue](#) of the *Practical NLRB Advisor*.)

The NLRB invited comments on whether the 2014 Election Rule should be retained, modified, or rescinded. The comment period closed on Wednesday, April 18, 2018 (the original February 12, 2018, deadline was extended), and nearly 7,000 timely responses were posted, without changes, on the NLRB's website. (Ogletree Deakins submitted comments to the NLRB on behalf of the Coalition for a Democratic Workplace and also submitted comments on behalf of the Society for Human Resource Management and the Council on Labor Law Equality.)

free and convenient alternative means with which to engage in Section 7-protected communication—avenues that do not infringe on employers' property and privacy interests.

Board Chairman John F. Ring was joined by Members Marvin E. Kaplan and William J. Emanuel in issuing the notice and invitation to file briefs; then-member Mark Gaston Pearce (who had voted in the majority in *Purple Communications* as then-chair) and Member Lauren McFerran dissented.

Briefs initially were due September 5, 2018; the Board subsequently extended the comment period to October 5, 2018. Comments timely submitted typically are reproduced in full on the NLRB's website. ■

## Is independent contractor misclassification an unfair labor practice?

The National Labor Relations Board (NLRB) has solicited comments on the question of under what circumstances, if any, an employer's act of misclassifying statutory employees as independent contractors should be deemed a violation of the National Labor Relations Act (NLRA). Independent contractor misclassification is an increasingly prevalent and oft-litigated labor and employment issue. Whether misclassification amounts to unlawful interference with protected rights under the Act is the point of contention here.

The case in question is *Velox Express, Inc.* (15-CA-184006). Charges were filed in September 2016 contending that the employer unlawfully discharged a courier-driver. In a

*Independent contractor misclassification is an increasingly prevalent and oft-litigated labor and employment issue. Whether misclassification amounts to unlawful interference with protected rights under the Act is the point of contention here.*

September 2017 decision, an ALJ found the charging party was a statutory employee covered under the NLRA—not an independent contractor, as the company asserted—and that her discharge was unlawful. The ALJ further ruled that other drivers were misclassified as independent contractors and found the misclassification was itself a violation of Section 8(a)(1) of the Act.

Briefs that were timely submitted by the Board's April 16, 2018 deadline are available for review on the [NLRB's website](#). ■

## Can a 9(a) bargaining relationship be established in the construction industry through contract language alone?

The National Labor Relations Board (NLRB) has invited briefs in *Loshaw Thermal Technology, LLC*, 05-CA-158650. The invitation for briefs asks for comments on whether the Board should adhere to, modify, or overrule its 2002 decision in *Staunton Fuel & Material*, and, if modified

or overruled, whether also to modify or overrule *Casale Industries*, a 1993 decision that set a six-month period for challenging the extension of Section 9(a) recognition by a construction-industry employer.

Most collective bargaining relationships are governed by Section 9(a) of the National Labor Relations Act (NLRA). This provision requires a union to demonstrate that it has the support of a majority of employees in the bargaining unit if it is to serve as their exclusive bargaining representative. In the construction industry, however, the NLRB presumes that bargaining relationships have been formed under Section 8(f), which has no such requirement. Under *Staunton Fuel*, "that presumption is overcome, and a 9(a) relationship is established, where language in the parties' collective bargaining agreement unequivocally indicates that the union requested and was granted recognition as the majority or 9(a) representative of the

unit employees, based on the union having shown, or having offered to show, evidence of its majority support," the Board explained in its invitation for briefs. Moreover, "under *Casale Industries* contract language alone would continue to be

sufficient to establish 9(a) status whenever that status goes unchallenged for 6 months after 9(a) recognition is granted."

Recently, the U.S. Court of Appeals for the District of Columbia Circuit in *Colorado Fire Sprinkler, Inc. v. National Labor Relations Board* rejected *Staunton Fuel's* holding that contract language alone might be enough to create a 9(a) bargaining relationship in the construction industry, creating a circuit split on the issue and prompting the Board to revisit its precedent and to seek comments on whether it should stand and, if modified or overruled, whether the Board should also modify or overrule *Casale Industries*.

Briefs from parties and interested amici must be submitted on or before October 26, 2018. ■

## NLRB offers employee buyouts

As foreshadowed in the National Labor Relations Board's fiscal year (FY) 2019 budget request (\$249 million, down

\$25.2 million from the then-unknown 2018 enacted level of \$274.2 million), the NLRB announced on August 7, 2018, that it will offer voluntary early retirement and voluntary separation to employees holding eligible positions in designated locations within the agency. The 2019 budget request would reduce the number of the agency's full-time-equivalent employees to 1,225, down 251. The Board is surveying employees who might be interested in the Voluntary Early Retirement Authority (VERA) and/or Voluntary Separation Incentive Payment (VSIP) programs, and was in the process of developing a VERA/VSIP plan for submission to the Office of Personnel Management (OPM) to be executed in FY 2018 and FY 2019.

The NLRB will offer both VERA and VSIP only to employees in targeted job categories. "For years, the deficits caused by flat funding of the Agency have been primarily addressed by voluntary personnel attrition," the Board said. "As a result, the NLRB has an imbalance

in staffing in both headquarters and the NLRB's regional offices. To ensure that the Agency is able to carry out its critical mission, the NLRB is utilizing the VERA and VSIP to realign Agency staffing with office caseloads." Utilization of VERA and VSIP will also permit the Board to reallocate limited resources and provide employees with the tools they need, including training and improvements in technology.

The requested funding would permit the Board "to evaluate, streamline, and prioritize mission functions and still be able to protect the rights of private sector employees and to educate employers and unions covered by the NLRA about their obligations," according to the agency's budget request. Field case-handling attorneys and examiners are already engaged in providing process improvement ideas to better serve the public and the agency's mission, the Board noted.

As of the close of the application period, 38 eligible employees had submitted applications for voluntary early retirement and separation. ■

## Other NLRB and labor developments

The *Practical NLRB Advisor* typically includes a brief summary of other noteworthy labor-law developments since our previous issue, including National Labor Relations Board rulings and appellate court decisions. In recent months, there has been a deluge of circuit

court rulings and Board decisions. We want to insure that these decisions are thoroughly covered for our readers, and for space reasons have decided to move the survey of these and other new cases to a subsequent issue. ■

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## Up next

In our next issue of the *Practical NLRB Advisor*, we'll analyze the NLRB's proposed joint employer rule, the context in which it was issued, and the likely impact of the rule on employers.

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