



# McNEES WHITEPAPER

**The National Labor Relations Board 2020 Year End Review**  
AN OVERVIEW OF MAJOR DEVELOPMENTS IN LABOR LAW

February 2021



By [Adam L. Santucci, Esq.](#), [Micah T. Saul, Esq.](#) and [Langdon T. Ramsburg](#)

## Introduction

In our last Review, we reported that the National Labor Relations Board had a very busy year. Despite the challenges of the COVID-19 pandemic, 2020 was also a fairly busy year for the Board. In its final year, the Trump Board produced a number of key decisions for employers. Whether those decisions stand the test of time remains to be seen, because the Biden Board will soon begin its work. In the meantime, we will review the highlights from 2020 and preview some of the possible changes that may be down the road.

Like so many of us, the Board was forced to convert nearly of its employees to remote work in March of 2020, and ultimately transitioned most of its activities to a virtual environment. This included videoconferencing for unfair labor practice (“ULP”) and representational proceedings. The Board also continued to conduct representational elections, following a brief two-week shut down.

But the Board did accomplish a good bit of work. In Fiscal Year 2020, the Regional Offices issued 809 complaints. The Board issued 374 decisions in contested cases, including 251 ULP cases and 123 representational cases. The agency reported that it recovered over \$39 million in backpay, fees, dues, and reimbursements for employees. In its Annual Performance and Accountability Report, the Board again highlighted its effort to reduce its backlog of cases and efforts to close cases faster.

The Board also continued to focus on rulemaking efforts in 2020. The Board issued final rules and several notices of proposed rulemaking, which we will outline below. The Board’s General Counsel was also busy issuing advice memoranda with the goal to guide employers and unions alike, both on standard labor relations issues and on the implications of the COVID-19 pandemic. The Board also issued a number of critical decisions throughout the year.

We summarize the key labor law developments from 2020 and highlight some possible areas of change below.

## The Board’s Rulemaking Efforts

The Board continued its ambitious rulemaking agenda in 2020. Under the leadership of Chairman John Ring, the Board has focused more on rulemaking, as compared to decisional law. In many ways, rulemaking allows for greater transparency and presents the opportunity to provide more guidance.

### Joint Employer Standard

On February 26, 2020, the Board issued a final rule governing joint-employer status under the National Labor Relations Act (“NLRA”). The final rule restored the test that the Board had applied for several decades prior to the 2015 Obama-era decision in *Browning-Ferris*, 362 NLRB No. 186 (2015). The final rule provides clear guidance on the test that will be applied in determining whether one or more employers will be considered

a joint employer under the NLRA, which should be a welcome change for those striving for compliance in this area.

The 2015 *Browning-Ferris* decision issued by the Obama Board vastly expanded the situations in which a franchisor or a source employer could be deemed a joint employer with its franchisee or with a user of a contingent workforce. In *Browning-Ferris*, the Board held that a joint-employer relationship may be found if two or more entities “are both employers within the meaning of common law, and if they share or codetermine those matters governing the essential terms and conditions of employment,” such as wages, hours, work assignments, and control over the number of workers and scheduling. The Board further found that a joint employer is not required to exercise its authority to control the terms and conditions of employment, and recognized that control may be “reserved, direct and indirect.”

In December of 2017, the Trump Board decided *Hy-Brand Industrial Contractors*, 365 NLRB No. 156 (2017) (set aside on other grounds) and announced that it would return to the prior standard that required proof of a joint employer’s actual exercise of control over essential employment terms, rather than merely having reserved the right to exercise control. However, in late February 2018, the Board issued an order vacating *Hy-Brand* based on a determination by the Board’s Ethics Official that one of the three Board Members who participated in the decision should have recused himself. With that disqualification no Board quorum existed and the decision was set aside.

Then, in September of 2018, the Board issued a notice of proposed rulemaking regarding the standard for determining joint employer status. According to its Annual Performance and Accountability Report, the Board received nearly 29,000 comments on the proposed rule. After processing those comments, on February 26, 2020, the Board issued its final rule.

The final rule provides, “a business is a joint employer of another employer’s employees only if the two employers share or codetermine the employees’ essential terms and conditions of employment.” The final rule outlines the list of essential terms and conditions of employment as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. Critically, to be a joint employer, a business must possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment. No longer is indirect and contractually reserved but never exercised control alone enough to find joint-employer status. The final rule also defines many of the key terms used in the joint employer test.

The joint employer question is critical for a number of reasons, including exposure to liability under the NLRA, issues related to unfair labor practice charges, collective bargaining and more. Time will tell if the Biden Board will seek to unwind the final rule and implement a new or different joint employer test.

continued

## **Representational Election Rules**

For years we have been following developments related to the Board's representational election rules. In 2015, new election rules took effect that shortened the period of time between the filing of a petition for an election and the actual election. This change was viewed almost universally as benefiting labor unions. The truncated timeframe, as well as the significant administrative burdens placed on employers in that timeframe, appeared to be engineered solely to help unions win more elections. The new rules, known as the ambush election or quickie election rules, were finalized in 2014 and became effective in April of 2015.

In December of 2017, the Board issued a Request for Information, seeking public input on the quickie election rules, and the Board's rules in representation cases generally. On December 18, 2019, the Board published a Notice of Final Rulemaking announcing significant changes to the election rules. In general, the Board extended the timeframe between the time of filing of a petition and the election, and provided employers with more time to comply with the onerous administrative burdens placed on them during the pre-election period. We reported on the rule changes, which were implemented on May 31, 2020, in detail last year.

On August 12, 2019, the Board issued a separate Notice of Proposed Rule Making that outlined three separate, proposed changes to the representation election regulations. The changes involved the Board's blocking charge policy; the immediate imposition of a voluntary recognition bar; and the contract bar created by the establishment of a Section 9(a) relationship in the construction industry based solely on contract recognition language.

The change to the blocking charge policy modified the Board's long-standing rule that requires a union representation election (or decertification election) to be placed on hold if a ULP charge has been filed regarding conduct leading up to the election. Often times, ULP charges are filed to simply delay the election as a tactical move. The revised blocking charge rule would create a vote and impound process. In other words, the election would not be blocked by filing a ULP charge, but the votes would not actually be counted until after the ULP charge is resolved.

The voluntary recognition bar had provided that the representational status of a union voluntarily recognized by the employer cannot be challenged for a "reasonable period of time" after the voluntarily recognition. Since 2011, the reasonable period of time has been defined as six (6) months to a year. The rule changed that definition and reinstated a pre-2011 rule, which provides that employees or a rival union could challenge the union's status during the 45-day period following the voluntarily recognition.

The revision to the rules governing recognition in the construction industry require unions to actually have evidence

to demonstrate that a majority of employees favored union recognition. In the past, a written agreement that such majority support existed was enough. Moving forward, in order to protect employee free choice, actual evidence, other than the contract, must be provided.

The Board reviewed the comments received on these proposed rules and issued its final rule on these three changes on April 1, 2020, which became effective on July 31, 2020.

Voter List and Military Ballots Notice of Proposed Rulemaking On July 28, 2020, the Board published yet another Notice of Proposed Rulemaking related to the representational election rules. This rulemaking focused on two voting related issues. One proposed change would amend the Board's Rules and Regulations to eliminate the requirement that employers provide available personal email addresses and home and personal cellular telephone numbers of all eligible voters to the Regional Director and the union during an election campaign. The Board cited employee privacy interests as the basis for this proposed change.

The second proposed change would provide for absentee ballots for employees who are on military leave. The public comment period for this NPRM closed on October 13, 2020, but a final rule had not been issued by January of 2021. Time will tell if these proposed rules are made final.

## **General Counsel Advice Memoranda**

The Board's General Counsel, Peter Robb, issued a number of important advise memoranda during 2020. These memos provided critical guidance not only to the Board's Regional Offices, but also employers and unions.

### **COVID-19 Related Guidance**

On March 27, 2020, the General Counsel issued Memorandum GC 20-04, Case Summaries Pertaining to the Duty to Bargain in Emergency Situations, which addresses the rights and obligations of employers and labor unions related to efforts to control the spread of the coronavirus. The focus was the Board's decisional law regarding an employer's duty to bargain during an emergency.

On September 18, 2020, GC 20-14, Summaries of Advice Merit Determinations Related to Coronavirus Disease, was issued. GC 20-14 discussed a number of complaints directly related to COVID-19 that were actually received by the Board, including cases involving protected concerted activity, Weingarten rights, layoffs, recall, bargaining, and refusal to provide information.

The Office of General Counsel also issued three separate memoranda addressing practical issues that arose as the agency, and most employers, moved to remote work, including GC 20-06, Temporary Change in Board's Standard Notice Posting Remedy; GC 20-10, Suggested Manual Election Protocols (during the COVID-19 pandemic); and GC 20-12, Remote

continued

Unfair Labor Practice Hearings During COVID-19 pandemic.

### **Guidance Regarding Representational Election Rules**

The General Counsel also issued guidance to the public concerning recent Board changes to the representational election rules and the policies regarding blocking charges, the voluntary recognition bar, and construction industry union recognition matters, which are outlined above.

In GC 20-07, Guidance Memorandum on Representation Case Procedures Changes, the Board's 2019 final rule governing the processing of representation cases was detailed. Guidance was provided to employers, unions, and the Regional Directors regarding implementation of the new rules.

GC 20-11, Guidance Memorandum on Representation Case Procedure Changes Regarding Blocking Charge Policy, Voluntary Recognition Bar, and Section 9(a) Recognition in the Construction Industry was also issued. This memorandum detailed the Board's changes to its blocking charge policy, voluntary recognitions and contract bar, and proof of majority-based recognition in the construction industry.

## **A Summary of the Board's Significant Decisions**

As noted above, there were a number of significant Board decisions in 2020, and some of the key decisions are summarized here.

### **Board Adopts Single Rule to Evaluate Employee Misconduct**

The Board has traditionally applied separate tests to evaluate whether employee discipline violated the NLRA, depending on the context of the underlying misconduct. This has resulted in heightened protection for employee misconduct that takes place during the course of protected activity, such as strikes. However, in *General Motors LLC*, 369 NLRB No. 127 (2020), the Board abandoned the context-specific analysis to apply one consistent standard.

Historically, the Board's *Wright Line* standard was used to determine whether employee discipline was an unlawful response to employee protected activity. In other cases, the Board presumed that discipline based on abusive conduct during Section 7 protected activity violated the NLRA, unless the Board determines that the abusive conduct was so out of bounds that it lost the protection. Two different standards have been used for evaluating these cases.

In evaluating employee misconduct that occurs in the workplace, the Board had applied the four-factor *Atlantic Steel* test, which considers "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an

employer's unfair labor practice." In the case of social-media posts and most cases involving discussions among employees in the workplace, the Board has examined the totality of the circumstances to determine whether employee discipline was unlawful.

The Board has used yet another standard to evaluate employee misconduct during a strike. In the context of a picket-line, the Board had applied the *Clear Pine Mouldings* standard, which also considered all of the circumstances in determining whether non-striking employees reasonably would have been coerced or intimidated. If so, then the misconduct lost the protection of the NLRA.

In *General Motors LLC*, the Board held that these varied standards failed to yield predictable, equitable results. The Board tossed out these varied context specific tests and standards. The Board found that these tests often produced absurd results, citing to cases overturning employee discipline and requiring employers to reinstate employees accused of making threatening and racist comments toward coworkers and supervisors. As a result, the Board concluded that the appropriate approach is to apply the *Wright Line* analysis in evaluating employee misconduct regardless of the context.

Under *Wright Line*, an employee must show that (1) the employee engaged in Section 7 protected activity, (2) the employer knew of that activity, and (3) there is a causal connection between the discipline and the Section 7 activity. If this initial case has been made, the burden of shifts to the employer to prove it would have taken the same action even in the absence of the protected activity.

It is very likely that the Board's decision will result in fewer disciplinary decisions being overturned and will result in more predictability for employers. Time will tell if the Biden Board seeks to dismantle *General Motors*.

### **Board Restores Decades Old Case Law Related to Employee Discipline Prior to Negotiation of a First Contract**

In July of 2020, the Board restored a prior standard, one that had stood for about 80 years before being overturned in 2016, which governs an employer's duty to bargain over employee discipline during the time period between when a new union is certified and a first contract is negotiated.

In *800 River Road Operating Company, LLC d/b/a Care One at New Milford*, 369 NLRB No. 109 (2020), the Board reinstated the rule that had long held that employers have no duty to bargain before imposing discretionary discipline, which is consistent with the employer's existing policy or practice, prior to bargaining a first contract with a newly certified union.

In reaching this conclusion in *800 River Road*, the Board

continued

reversed its 2016 decision in *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016), which had required employers to bargain over employee disciplinary action upon commencement of a collective-bargaining relationship. Specifically, Total Security required employers to provide a new union with notice and opportunity to bargain regarding the discretionary aspects of an existing disciplinary policy before issuing “serious discipline” to a bargaining unit employee.

In reversing *Total Security*, the Board was fairly critical of its holding. The Board noted that the decision was inconsistent with United States Supreme Court and Board precedent, and created a “complicated and burdensome” scheme that was inconsistent with the general body of law surrounding bargaining practices.

Although the *800 River Road* decision will be applicable to a limited number of cases, it is important for employers who have recently been forced to bargain with a new union.

### **Board Holds Employers Have Right to Conduct Employee Searches on Company Property**

In *Verizon Wireless*, 369 NLRB No. 108 (2020), the Board reversed an Administrative Law Judge’s (“ALJ”) ruling that Verizon Wireless’s policy permitting company searches of employees’ personal property, including vehicles, on company property violated the NLRA. The ALJ had held that the policy infringed on employees’ rights to engage in concerted activity for mutual aid or protection under Section 7 of the NLRA. In reversing the ALJ’s ruling, the Board held that employers may monitor employees on the job by searching employees’ personal property on company property and/or employee activities on company computer networks and electronic devices.

In analyzing the employee search policy, the Board applied the test established in *Boeing Co.*, 365 NLRB No. 154 (2017) for analyzing employer policies. The *Boeing* test requires the Board to first determine if a reasonable interpretation of the employer’s policy would potentially interfere with Section 7 rights under the NLRA. If not, the rule is considered lawful. If the rule could be reasonably interpreted to interfere with Section 7 rights, the Board must balance: (1) the nature and extent of the potential impact on employee rights; and (2) the employer’s legitimate justifications for the rule.

The Board held that a reasonable employee would not interpret the search policy to interfere with Section 7 rights, but would view the policy as designed to protect company assets and employees. The Board went further and held that the search policy would be also permissible because the employer’s legitimate interest in conducting searches – to prevent theft and to ensure workplace safety – outweighed any minor impact on employees’ rights under the NLRA.

The ALJ had also held that Verizon’s policy permitting company monitoring of company computers and devices did not violate

the NLRA, and the Board affirmed this conclusion. The Board, relying on *Purple Communications, Inc.*, 361 NLRB 1050 (2014), found that employers may lawfully monitor employee use of company computers and email.

### **Board Holds that Policy Governing Outside Employment Lawful**

In *G&E Real Estate Management, Inc.*, 369 NLRB No. 121 (July 16, 2020), the Board again applied its *Boeing* test to find that an employer’s policy did not violate the NLRA. The policy prohibited employees from having secondary or outside employment that might present a conflict of interest with the company’s business or the employee’s job duties.

An ALJ had held that the policy was unlawful because employees “could” interpret it as restricted activity protected by Section 7 of the NLRA. The Board disagreed and reversed the ALJ’s ruling. The Board clarified that under *Boeing*, the question was how employees would interpret the rule, not how employees “could” interpret the rule. Under the proper analysis, the Board found that the policy was clearly aimed at addressing potential and actual business conflicts of interest and not protected activity. As such, employees would not interpret the rule to restrict such protected activity. Therefore, the policy was found to be lawful.

### **Board Decisions on Appeal**

2020 was another fairly active year for Board cases on appeal, with over 30 cases decided by various courts of appeal. The rulings were mixed – some in favor of employers, some clearly not. A few are summarized here.

#### **D.C. Circuit Reaffirms Weingarten Requires Affirmative Request for Representative**

In *Circus Circus Casinos, Inc. v. Nat’l Labor Rels. Bd.*, 961 F.3d 469 (D.C. Cir. 2020), the employer, a hotel and casino in Las Vegas, hired a carpenter as a temporary employee to upgrade aspects of the hotel rooms. Shortly after his employment began, the temporary employee attended a department meeting in which he and a coworker expressed concern to a supervisor that second-hand marijuana smoke from the hotel rooms would trigger a positive drug test. Despite verbal assurances from the supervisor that second-hand exposure would not be sufficient to cause employees to test positive, the temporary employee insisted that additional commitments would be required to assuage his concern. According to the employee, the supervisor got angry and stated, “maybe we just won’t need you anymore.”

Weeks later, the temporary employee was required to undergo a medical examination. Pursuant to OSHA regulations, before the employee could be custom-fitted for a respirator, he was required to take a medical exam to ensure that he did not have underlying health problems that would be exacerbated by the use of a respirator. The employee went to his scheduled appointment, but he insisted on speaking with the doctor before completing

continued

his intake forms. When he was told that the doctor could not see him until he completed the forms, he left. When the employer learned that he refused to take the medical exam – in violation of company policy – it suspended him pending an investigation.

During his suspension, the company contacted the employee and instructed him to report for an investigative interview at a specified day and time. The company also provided the employee the phone number to his union representative if he wanted the representative to be present for the interview. At the time of interview, the employee stated that he tried to call his union representative three times and was present without representation. The company continued with the interview and subsequently terminated the employee's employment.

The employee filed an unfair labor practice alleging that the company ignored his request for representation during investigative interviews, as required by *NLRB v. J. Weingarten, Inc.* He also alleged that his supervisor interfered with his rights under the NLRA by discouraging him from raising concerns about the terms and conditions of work. Finally, he alleged that he was suspended and terminated for engaging in protected activity. The Board agreed and the employer appealed.

The D.C. Circuit reversed. First, it held that the employee's simple statement that he tried calling his representative three times and was present without representation did not trigger his rights under *Weingarten*. Rather, the burden is on the employee to affirmatively request representation. To invoke the right to representation, the employee's statement must be reasonably calculated to put the employer on notice of the employee's desire for union representation. Here, no such request was made, and the court held that there was no precedent to support the Board's decision. According to the court, the Board's holding was to transform the *Weingarten* right from one that must be invoked by the employee to one that employers must automatically assume has been invoked. The Board also rejected that the employee's supervisor discouraged him from expressing concerns about work conditions, or that the company terminated him because of any protected activity.

### **Third Circuit Holds that Relevant Portions of Asset Purchase Agreement Must be Disclosed**

In *Crozer-Chester Med. Ctr. v. Nat'l Labor Rels. Bd.*, 976 F.3d 276 (3d Cir. 2020), the union heard rumors that the employer was negotiating the sale of its assets to a prospective buyer. A few months later, the employer notified the union that it had reached a definitive agreement to sell its assets to the buyer. The employer sent a letter to employees informing them of the sale and that the employer would hire non-union employees in good standing subject to new initial terms set by the buyer. It also noted that the buyer would be assuming the employer's outstanding pension liability. Within ten days of receiving the letter, the union requested a complete copy of the asset purchase agreement, including all attachments and schedules, to carryout effects bargaining.

The employer denied the union's request, stating that the agreement was subject to a confidentiality agreement and could not be produced. In addition, it argued that the entire asset purchase agreement was not relevant to effects bargaining. After repeated requests for the agreement, the union filed unfair labor practice charges. The Board agreed with the union and ordered the employer to produce the entire asset purchase agreement. The employer appealed.

The Third Circuit agreed with the Board that the employer committed an unfair labor practice by refusing to produce the asset purchase agreement. There was no dispute that the employer was required to engage in effects bargaining. Yet, the Third Circuit reiterated that the duty to bargain generally includes an obligation of the employer to provide information that is needed by the bargaining representative for the proper performance of its duties. Despite the employer's argument that it had no duty to produce the agreement because the union failed to demonstrate it was relevant, the court concluded that the letter the employer sent to employees announcing the sale demonstrated that the agreement would contain provisions related to terms and conditions of work, and as a result, the relevance was readily apparent.

The Third Circuit also agreed with the Board and rejected the employer's confidentiality argument. It held that an employer cannot prevent disclosure of relevant documents on a simple assertion of confidentiality. Rather, the employer must legitimately demonstrate the claim of confidentiality must also try to accommodate the confidentiality of document and the requirement to engage in effects bargaining (like non-disclosure agreements with the union). Here, since the employer simply made assertions of confidentiality and did not try to accommodate the requirement to produce the asset purchase agreement, its confidentiality argument was unavailing.

The Court did agree with the employer, however, that the Board remedy (producing the entire asset purchase agreement) was overbroad. It held that only the relevant portions of agreement were necessary, such that the remedy was tailored to the unfair labor practice it was intended to address.

### **D.C. Circuit Rejects Board Determination of Appropriate Bargaining Unit**

In *Davidson Hotel Co., LLC v. Nat'l Labor Rels. Bd.*, 977 F.3d 1289 (D.C. Cir. 2020), the union filed a petition to certify a single bargaining unit of hotel employees. The proposed unit included housekeeping employees and food and beverage employees but excluded front desk employees. The Regional Director refused to certify the unit because it excluded the front desk employees. Using the community-of-interest standard, the Regional Director determined that the interests of the front desk employees were not sufficiently distinct to warrant a separate unit. Accordingly, the Regional Director suggested that two units may be appropriate.

continued

In turn, the union filed two petitions to organize the housekeeping employees in one unit and food and beverage employees in a separate unit – again excluding the front desk employees from either unit. This time, the Regional Director certified the bargaining units and directed elections. The union won both. The employer refused to bargain to obtain judicial review.

The D.C. Circuit reversed the Board certification of the bargaining units. The court held that in the prior petition, the Regional Director determined that the interests of the front desk employees was not sufficiently different from the others. In the second petition for two separate units, the Regional Director failed to explain how that circumstance justified a different result. Moreover, the court pointed to Board precedent in which the Board rejected separate units of hotel employees under similar circumstances. In this case, the Board failed to address how those cases were distinguishable, too. Because there was precedent directly on point, and the Board failed to distinguish it, the court rejected the bargaining units.

## What Should Employers Expect from the NLRB During the Biden Administration?

As mentioned above, many of the employer-friendly Trump-era Board decisions and rules are likely to come under scrutiny by the Board once Democrats reclaim majority status in August 2021. Below, we examine several hot-button issues to which employers should pay particular attention over the next year.

### The Joint Employer Standard May be Altered

In our discussion of the Board's rulemaking efforts, we discussed the effect of its February 2020 final rule establishing a new joint employer standard. The Trump Board's final rule provided that "a business is a joint employer of another employer's employees only if the two employers share or codetermine" key facets of employment including wages, benefits, hours of work, hiring and firing, and supervisory oversight. Particularly friendly to employers was the final rule's proviso that a business must exercise its authority to codetermine these crucial terms and conditions of employment in order to be deemed a joint employer.

Because the joint employer standard was established via the rulemaking process, the Biden-era NLRB cannot simply issue case decisions to overturn, amend, or modify the rule. Under the Administrative Procedure Act, which establishes the processes by which federal administrative agencies operate (including the National Labor Relations Board), "rulemaking" is defined as "formulating, amending, or repealing a rule." This means that if the Board itself will seek to overturn the joint employer standard that was promulgated in February 2020, it must do so through the rulemaking process. The Board will draft a proposed rule, receive public comments, potentially amend the proposed rule, then promulgate the final rule. For the current rule, the process began in September 2018 and ended seventeen months later in February 2020.

What changes should employers expect from a new final rule modifying the current regulation? It is reasonable to expect that President Biden's labor policy will closely mirror that of the Obama administration, during which President Biden served as the nation's vice president. Accordingly, a Biden Board joint employer rule is likely to harken back to the *Browning-Ferris* rule, removing the requirement that a joint employer must exercise its right to co-determine essential terms and conditions of employment. Such a rule would surely expand the means by which businesses can be held liable as joint employers of workers in a variety of circumstances.

### Quickie Elections Might Make a Comeback

We also previously discussed the Board's 2019 final rule that reversed the 2014 and 2015 rules which created so-called "quickie elections." Between 2014 and 2019, employers were routinely ambushed by unions seeking to organize their workforces. The union-friendly election rules greatly reduced the time between the date an election petition is filed (remember, most petitions are filed by unions seeking to represent a business's employees) and the date of the election. The post-petition, pre-election period is key for employers, since it is usually the only time an employer has to present its case to employees regarding the question of unionization. Thus, the 2014 and 2015 rules put employers at a considerable disadvantage and were strongly favored by labor organizations.

Relief was granted to employers in 2019, when the Board promulgated a new rule that restored the pre-2014 pace to election procedures. Given that quickie elections were a powerful tool used to increase union membership, a Biden-era NLRB is likely to make election procedures more favorable to unions once again. If the Board takes such action, employers faced with these elections will be left with little time to make their case before votes are cast.

### Employer Email Systems Could Be Re-Opened for Union Business

In the 2019 case *Caesars Entertainment d/b/a/ Rio All-Suites Hotel and Casino*, the Board overturned its 2014 ruling in *Purple Communications*. In *Purple Communications*, the Board ruled that employers must allow their employees to use company email systems to engage in union activities and other protected conduct under the National Labor Relations Act. The rule shifted control over company electronic resources away from management and toward organized labor.

In *Caesar's*, the Board was tasked with considering whether an employer could lawfully permit employees from using its email systems for non-company business (including union activity). The Board overruled *Purple Communications* and held that such policies were lawful. It determined that in most workplaces, sufficient means of communication exist such that employees have no statutory right to engage in Section 7 activity through their employers' email systems. In other words, employers could prohibit employees from using company-owned email systems

continued

to send non-business communications, even during non-working time.

The Board also recognized that in rare instances where the employer's email system is the only reasonable means of employee communication with one another during non-working time, employees must be permitted to engage in Section 7 activity through the email system. Moreover, consistent with prior Board case law, employers must still refrain from implementing policies that specifically prohibit Section 7 activity, or which single out protected activity for restriction.

*Caesar's* dealt yet another blow to union organizing activities, as it removed an efficient, easy means of communication (company email systems) from labor organizations' toolboxes. We expect the Board to re-examine this issue under the Biden Administration, and likely reverse *Caesar's*. Doing so will again allow labor unions to use company information systems to conduct the business of organizing workforces. Handbook Policies Could Face Stricter Scrutiny

In 2017, the Board issued a decision in *Boeing Company* which clarified (and balanced) the manner in which it would evaluate employers' handbook policies to determine whether they violate the National Labor Relations Act. Since *Boeing* the Board has considered two factors when evaluating whether facially-neutral policies violate the NLRA:

- The nature and extent of the potential impact on employee rights protected by the NLRA; and
- The employer's legitimate justifications associated with the rule.

The Board also created three categories of work rules.

- **Category 1.** Lawful rules, where the rule does not expressly prohibit or interfere with NLRA rights or the potential adverse impact on protected rights is outweighed by the employer's justifications for the rule. Examples offered by the Board in this category are the no-cameras in the workplace rules and the civility rules.
- **Category 2.** Rules which require individualized scrutiny to determine whether any adverse impact on NLRA rights is outweighed by the employer's legitimate justifications.

- **Category 3.** Unlawful rules that prohibit protected conduct and the impact on those employee rights is not outweighed by employer justification. Policies prohibiting employees from discussing wages and benefits fall under this category.

Before *Boeing*, the Board employed an unwieldy, employee-friendly standard when evaluating the legality of facially neutral employment policies. That standard, which was originally issued in the Board's 2004 decision in *Lutheran Heritage*, held that an employer violated the National Labor Relations Act simply by maintaining a policy that could be "reasonably construed" by an employee to prohibit the exercise of rights protected by the NLRA – even if the employer never applied it to restrict employee rights. Whether the Board will re-adopt the *Lutheran Heritage* approach to facially neutral employer policies, or whether a new (but still labor-friendly) rule will be adopted, remains to be seen.

As the Board transitions to a Democrat majority in August 2021, we expect that it will begin the task of implementing President Biden's labor policy in earnest. Based on the President's campaign platform, and the Board's performance under the Obama administration in which he served as vice president, we expect that most of the Board's activity will be pro-labor. Employers are well-advised to carefully monitor the Board's decisions, proposed rules, and other guidance to ensure that they are prepared to make necessary adjustments as the pendulum swings away from management and back toward unions and workers.

## Summary

As detailed above, 2020 was a unique year for the Board. The Board, like all of us, was significantly impacted by the COVID-19 pandemic. Despite these challenges, the Board continued to focus on its rulemaking efforts designed to provide clear guidance to employers and unions. There were also some critical decisions issued, but perhaps not as many as in prior years. Still, in the vast majority of cases, employers welcomed those decisions. That is not likely to be the case as we turn to 2021 and the Biden Board begins its work.

We will keep you updated on these critical developments via our blog: [www.palaborandemploymentblog.com](http://www.palaborandemploymentblog.com)

