McNEES WHITEPAPER

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The National Labor Relations Board 2022 Year End Review

AN OVERVIEW OF MAJOR DEVELOPMENTS IN LABOR LAW

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Introduction

2022 was a great year for U.S. labor unions and employees, but not so much for U.S. employers. The Biden National Labor Relations Board (NLRB) dug in and got to work, reversing precedent and charting a course to reinterpret the National Labor Relations Act (NLRA) in new and unimaginable ways.

The Board's General Counsel continued to issue Memoranda exposing her views on key issues, and the Board demonstrated its intentions to support her aggressive approach when given the opportunity. The Board, in its own right, proposed changing some key rules, including changing the test used to determine joint employment status, which was just adopted in 2020.

The Board did not stop with rule making. It continued to issue decisions driving a pro-labor agenda that we predicted last year. We will detail some of the most significant decisions below.

In Fiscal Year 2022, the Board issued 243 decisions, 132 unfair labor practice charge-related decisions, and 111 decisions in representation cases. The Board also dealt with a sharp increase in cases. According to its Annual Performance and Accountability Report, the Board processed nearly 18,000 unfair labor practice charges and 2,511 petitions for election. That last figure is staggering and represents an increase of nearly 900 election petitions from the year prior. That is a 53 percent increase over 2021. The Board had not received greater than 2,500 election petitions since 2016. That increase in representation petitions tracks well with the wide-ranging media attention around union organizing efforts at several large U.S. employers.

Critically for employers, those election petitions were processed quickly, and initial elections were conducted in a median of 37 days from the filing of the petition. When you put those statistics together that means there was a big increase in the number of union-organizing efforts and typically a very short period of time for employers to respond to those campaigns.

This sharp increase in cases apparently has had consequences for the Board. At the end of the calendar year, the Board was making headlines as it pled for additional funding, claiming that it would not have the ability to fulfill its mission without a funding increase. In its 2022 Fiscal Year report, the Board claimed that it would not have the capacity to keep pace with the increase in cases without a budgetary increase.

The agency also reported that it recovered over $51 million in backpay, damages, fees, dues, and fines for employees. In addition, 995 employees were offered reinstatement. Although it claimed to be underfunded, the Board certainly got a lot of things done.

We summarize the key labor law developments from 2022 in this Whitepaper.

General Counsel Advice Memoranda

General Counsel Jennifer Abruzzo set forth an aggressive and multi-faceted pro-union and pro-employee agenda. Highlighted below are some of the key initiatives that GC Abruzzo laid out in Advice Memoranda issued last year.

GC 22-01 – Ensuring Rights and Remedies for Immigrant Workers

Memorandum GC 22-01 outlines the General Counsel's plan to ensure that immigrant workers receive the protections of the Act, without regard to immigration status or work authorization. Among other things, the Memo provides that Board Agents "should advise every person giving affidavit testimony that an individual's immigration or work authorization status is not relevant to the investigation of whether the Act has been violated, and that the Board agent will not inquire about the individual's immigration or work authorization status."

The Memo also directed the regions to distribute information regarding the protections of the Act, the location of regional offices, and the security and safety procedures available to witnesses widely through local immigrant communities and advocacy groups. These materials will be distributed in multiple languages. It also calls upon the regions to develop "imaginative and robust remedies tailored" specifically for immigrant employees.

GC 22-02 – Seeking 10(j) Injunctions in Response to Unlawful Threats or Other Coercion During Union Organizing Campaigns

Historically, the Board's effort to obtain injunctive relief pursuant to Section 10(j) of the Act is sought in cases involving interference with organizing campaigns if a union supporter has been terminated in an alleged effort to stop a union organizing campaign. In GC Memo 22-02, GC Abruzzo announced that it was her belief that Section 10(j) injunctions should be sought immediately after employees have been subject to threats or other coercive conduct during an organizing campaign, and "before an employer follows through on its threats or coercion."

Certainly, such an approach will significantly expand the number of times the General Counsel's office seeks injunctive relief during a campaign. It is easy to see when an employee has been discharged. But alleged threats are another matter. Allegations regarding alleged threats or coercion are far more common than actual employee terminations. And often, such situations present as he said/she said, with an underlying factual dispute.

What does this mean for employers facing a union organizing campaign? It means that in addition to attempting to run an educational campaign to provide truthful and accurate information regarding the costs of union organizing, and avoiding unfair labor practice charges, employers are now faced with a significantly increased risk of a possible fast moving legal battle with the United States government.

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GC 22-04 Right to Refrain from Captive Audience Meetings
In what is likely the biggest bombshell from the General Counsel last year, GC 22-04 lays out her belief that mandatory captive audience meetings with employees violate Section 7 of the Act, despite the fact that such meetings have been deemed lawful for over 60 years. Babcock & Wilcox Co., 77 NLRB 577 (1948). Employers have relied on that well established precedent to conduct educational meetings with employees to ensure that workers hear and understand the key issues involved, including the costs, of union organizing. Such meetings, held on working time and while employees are being paid, are very common during organizing campaigns. Employers' rights to speak out against the union are grounded in the First Amendment of United States Constitution.

However, GC Abruzzo has taken issue with such meetings. In her memorandum, she states that "forcing employees to listen to such employer speech under threat of discipline—directly leveraging the employees' dependence on their jobs—plainly chills employees' protected right to refrain from listening to this speech in violation of Section 8(a)(1)." Although her position is directly contrary to 60 years of Board case law, she outlined her plan to litigate the issue and obtain a ruling that captive audience meetings, without certain prophylactic measures, are unlawful under the Act.

The memorandum outlines two circumstances where employer conduct should be deemed unlawful, "when employees are (1) forced to convene on paid time or (2) cornered by management while performing their job duties" to discuss Section 7 rights under the Act. As we know, Section 7 rights are extremely broad, and therefore, the GC's position here is staggering in scope. These prohibitions would seem to cover mandatory employer meetings on a broad range of topics, including safety and job duties, and supervisor conversations an equally broad array of subjects. Thus, it appears that the GC's approach could significantly upset fundamental workplace dynamics.

Whether the Board, and the appellate courts, agree with her position remains to be seen. We will certainly be following this one closely. In the meantime, employers facing union organizing campaigns should work closely with labor counsel to navigate educational employee meetings.

GC 22-06 Update on Efforts to Secure Full Remedies in Settlements
In September of 2021, GC. Abruzzo issued GC 21-06 and 21-07 related to remedial measures. We covered these memoranda last year. In June of 2022, GC Abruzzo issued GC 22-06, which identified various types of remedies that the regions should seek, and certain default language to be included, or excluded, in settlement agreements.

GC 22-06 highlights some of the "imaginative" remedies obtained by the regions, including the recovery of the cost of baby formula, the cost of retrofitting a car for a different job, and requiring senior management officials to read a copy of a Notice to all employees. Other interesting (maybe disturbing) remedies listed include an apology letter to reinstated employees, requiring application forms and recruitment advertisements to include a statement of employee rights; and requiring the employer to reimburse a union's bargaining costs during a period of alleged bad faith bargaining.

In the memo, GC Abruzzo also shared her opinion that settlement agreements should NOT include non-admissions clauses. Such clauses allow the parties to settle issues without the need for stating affirmatively that one party has violated the Act. This is often central to an employer's goals in settling a charge. Thus, GC Abruzzo's position will very likely make settlement much less likely.

The unwillingness to consider including such a standard, basic statement (which has zero impact on any potentially involved employees) will likely lead to more litigation and fewer settlements, further straining the Board's apparently limited resources.

GC 23-02 Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights.
On October 31, 2022, GC Abruzzo issued Memorandum GC 23-02, which outlined her position on the use of electronic monitoring and algorithmic management of employees. The memo sets forth her view that surveillance and other algorithmic-management tools may interfere with the exercise of Section 7 rights "by significantly impairing or negating employees' ability to engage in protected activity and keep that activity confidential from their employer."

The memorandum notes the numerous ways employers use electronic means to track employees, from cameras to GPS to wearable devices, and also touches on the increasing use of artificial intelligence and algorithm-based decision making in the workplace. It also correctly states that under existing Board case law, some employer surveillance activity is unlawful. The Board uses a balancing test to weigh an employer's justification for surveillance "against the tendency of that conduct to interfere with employees' right to engage in concerted activity." F.W. Woolworth Co., 310 NLRB 1197, 1197 (1993). The Board has held that without proper justification, photographing employees engaged in protected activities violates the Act. Also, under current case law, the use of existing security or other technologies in response to union organizing activity can violate the Act.

In GC 23-02, GC Abruzzo outlines a number of additional ways that the use of electronic monitoring and artificial intelligence could violate the Act, and states that she plans to urge the Board to adopt a new framework to proactively protect employees from monitoring and surveillance. That proposed framework will consist of the following:

> [A]n employer has presumptively violated Section 8(a)(1) where the employer's surveillance and management

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> practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act. If the employer establishes that the practices at issue are narrowly tailored to address a legitimate business need—i.e., that its need cannot be met through means less damaging to employee rights—I will urge the Board to balance the respective interests of the employer and the employees to determine whether the Act permits the employer's practices. If the employer's business need outweighs employees' Section 7 rights, unless the employer demonstrates that special circumstances require covert use of the technologies, I will urge the Board to require the employer to disclose to employees the technologies it uses to monitor and manage them, its reasons for doing so, and how it is using the information it obtains. Only with that information can employees intelligently exercise their Section 7 rights and take appropriate measures to protect the confidentiality of their protected activity if they so choose.

This will be another issue that we will monitor (sorry, bad pun) closely in the new year.

Proposed Rule Makings

Board Proposes Changes related to the use of Videoconference Technology

Late last year, the Board published an Advance Notice of Proposed Rulemaking (ANPRM) in the Federal Register seeking public input on the use of videoconference technology to conduct unfair labor practice and representation case proceedings, and on potential amendments to its procedural rules regarding the use of videoconference technology. During the COVID-19 pandemic, the Board sanctioned entirely remote hearings in both unfair labor practice and representation cases, and the Board indicated that it tends to resume conducting in-person hearings in the future. The Board is considering, however, whether to allow virtual hearings as an option in the future.

The ANPRM seeks public input on experiences with virtual hearings and the need for, and content of, potential amendments to the Board's rules regarding use of videoconference technology to conduct remote hearings. Responses were due on or before January 4, 2022.

Board Proposes Change to Joint Employer Standard

Whether two entities are "joint employers" is an important question under the NLRA. On September 6, 2022, the NLRB issued a Notice of Proposed Rulemaking, which would drastically alter the test used for determining joint-employer status under the NLRA ("2022 Proposed Rule"). The 2022 Proposed Rule would rescind the joint-employer rule very recently issued in 2020 and replace it with a union-friendly test that would expand the circumstances in which one employer may be subject to liability and bargaining obligations related to another employer's employees.

The Board's standard for determining joint-employer status has shifted over the past seven years with each new presidential administration. For at least thirty years prior to 2015, the Board's longstanding rule was that an employer could be considered a joint employer of a separate employer's employees only if it exercised "direct and immediate" control over those employees' essential terms and conditions of employment (e.g., wages, benefits, hours of work, hiring, discharge). Indirect control or a reserved but unexercised right to control, was insufficient.

In a 2015 decision, Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, 362 NLRB 1599 (2015) ("Browning-Ferris I"), the Obama-era Board overruled this precedent and announced a new joint-employer test. Under Browning-Ferris I, the Board no longer required that the joint employer's control over terms and condition of employment be exercised directly and immediately. Rather, one company could be deemed the joint employer of another company's employees based solely on either indirect control or a contractually reserved but never exercised right to control such terms and conditions. Another way to say this is "theoretical" control.

In February 2020, the Trump Board issued a rule that reinstated and clarified the joint-employer standard that was in place prior to Browning-Ferris I. See 29 C.F.R. § 103.40 ("2020 Rule"). The 2020 Rule made it clear that an employer can be a joint employer of a separate employer's employees only if it possesses and actually exercises substantial direct and immediate control over one or more essential terms or conditions of their employment. Under the 2020 Rule, evidence of indirect control, or contractually reserved but never exercised control, is probative of joint-employer status, but only to the extent it supplements and reinforces evidence of direct and immediate control. The 2020 Rule also provided an exhaustive list of "essential terms and conditions of employment" and defined "direct and immediate control" with respect to each listed term or condition of employment.

The 2022 Proposed Rule, which has been issued by the Biden Board, would rescind the 2020 Rule and replace it with a new rule incorporating the Browning-Ferris I standard. The 2022 Proposed Rule would provide as follows:

- An "employer" is an employer of particular "employees" (as those terms are defined in the NLRA) if the employer has an employment relationship with those employees under common-law agency principles.
- For all purposes of the NLRA (i.e., union elections and unfair labor practices), two or more employers of the same group of employees are joint employers of those employees if the employers "share or codetermine those matters governing employees' essential terms and conditions of employment."
- To "share or codetermine those matters governing employees' essential terms and conditions of employment," an employer must either possess the authority to control (directly, indirectly, or both) or exercise the power to control (directly, indirectly, or both) one or more essential terms and conditions of employment.

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- Indirect control, control exercised through an intermediary, or a contractually reserved but never exercised right to control, is sufficient to establish joint-employer status. Thus, like the Browning-Ferris I standard, the 2022 Proposed Rule eliminates the requirement that control be exercised directly and immediately.

- "Essential terms and conditions of employment" are defined generally to include, "but are not limited to: wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance" [emphasis added]. Notably, unlike the 2020 Rule, this list is not exhaustive, and the Board contemplates that what are "essential" terms and conditions could change over time, as well as vary from industry to industry or occupation to occupation. The 2022 Proposed Rule also does not define what it means to "possess the authority to control" or "exercise the power to control" with respect to any particular essential term or condition of employment.

- Evidence of an employer's control over matters that are immaterial to the existence of an employment relationship, or that do not bear on the employees' essential terms and conditions of employment, is not relevant to joint-employer status.

- The party asserting that an employer is a joint employer has the burden to prove by a preponderance of the evidence that the entity is a joint employer under the requirements of the 2022 Proposed Rule.

Not surprisingly, the Board was divided 3-2 over the decision to issue the 2022 Proposed Rule. Chairman McFerran and Members Wilcox and Prouty were in favor of the proposed rule, while Members Kaplan and Ring – who were on the Board in 2020 – dissented. In their dissenting statement, Members Kaplan and Ring argued that there was no valid justification to engage in another joint-employer rulemaking a mere two-and-a-half years after the 2020 Rule was promulgated. They also argued that the 2022 Proposed Rule is contrary to the common law, inconsistent with the policies of the Act, arbitrary and capricious, and fails to provide any meaningful guidance to regulated parties.

The 2022 Proposed Rule was subject to a public comment period that ended on November 7, 2022. The public then had another 14 days, or until November 21, 2022, to file comments in response to comments submitted during the initial comment period. The Board must then consider the public comments before issuing a final rule. If the Board does issue a final rule, we anticipate that it will be substantially similar to the 2022 Proposed Rule, although possibly modified to incorporate some of the public comments.

We also anticipate, however, that any final rule will be subject to legal challenges for the reasons articulated by Members Kaplan and Ring in their dissenting statement.

A Summary of the Board's Significant Decisions

With a majority of democratic members in place, it was widely expected that the Board would reverse decisions issued by the Board during the Trump Administration. In large part, that expectation became a reality in 2022. Not only did the democratically-controlled Board reverse Trump era decisions, in some instances it also created some new, historically unrecognizable standards. Some of the decisions most impactful to employers are discussed here.

Board Holds Tesla Work Shirt Policy Unlawful
Tesla maintained a policy that required production employees to wear a uniform. The uniform was a black shirt with Tesla's logo and black pants without any metal that could cause scratches to vehicle paint. On occasion, the employees were permitted to substitute the uniform with all black clothing. Tesla had union organizing campaign in 2017, during which production employees began wearing black shirts that had the union's logo and slogan. In turn, Tesla started to strictly enforce its uniform policy and prohibit employees from wearing shirts that were not all black – including the shirts with the union's logo and slogan. However, the employees were permitted to wear union stickers on their uniforms. The union filed an unfair labor practice charge.

The Board held that Tesla's prohibition of shirts with union logos and slogans violated the Act. Historically, employers have been permitted to maintain policies that require employees wear specified uniforms. However, absent "special circumstances," an employer may not prohibit employees from wearing buttons, pins, stickers or other union insignia. During the Trump Administration, the Board issued a decision that modified this standard. It held that if the policy prohibiting union insignia was facially neutral, such a policy will only violate the Act if the employer's justifications were outweighed by the adverse impacts to employees' rights under the Act.

The Board in Tesla, Inc., 371 NLRB 131 (Aug. 29, 2022) reversed that decision, returning to the historical "special circumstances" standard. Notably, the Board held that it made no difference that employees were permitted to wear union buttons and insignia on their uniform – essentially, an employer cannot tell an employee how to exercise her rights under the Act. Ultimately, it found that Tesla did not have a special circumstance to justify its prohibition of employees wearing union shirts. Although the Board stated it was returning to special circumstances standard, its decision sweeps broader than that. As the dissenting members of the Board pointed out, the Board's holding effectively renders all uniform policies (even those facially neutral) presumptively unlawful unless there is a special circumstance.

Return to Specialty Healthcare Micro Unit Standard
In American Steel Construction, 372 NLRB 23 (Dec. 14, 2022), the Board overturned another Trump era decision – this time related to "micro units." In 2020, a union filed a petition to represent journeymen and apprentice field ironworkers employed by American Steel Construction. In response, the company

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contested the appropriateness of the petitioned-for unit because it believed the unit should also include painters, drivers, and shop fabricators.

Under the Obama Administration, the Board issued a decision holding that a bargaining unit is appropriate if the employees in the unit share a readily identifiable "community of interest." If an employer asserts that the unit inappropriately excluded other employees, the employer must show that the excluded employees have an "overwhelming community of interest" to require those employees be included. The Trump Board overturned the "overwhelming community of interest" test. Instead, its ruling required a comparative analysis and weighting of the interests that are shared and distinct between included and excluded employees. Under this test, employees within the petition-for unit are only sufficiently distinct (justifying the exclusion of others) if the excluded employees have distinct collective bargaining interests that outweigh similarities of the unit. Thus, under the Obama era test, the unit is presumptively appropriate, and the employer has the ultimate burden to include employees. Under the Trump era test, the unit is presumptively inappropriate, and the union has the ultimate burden to exclude employees.

The Board in American Steel Construction overturned the Trump era rule and returned to the "overwhelming community of interest" test. Under the American Steel Construction test, the Board will approve a "subdivision" of employees if the unit: (1) shares an internal community of interest; (2) is readily identifiable as a group based on job classifications, departments, locations, etc.; and (3) is sufficiently distinct. If challenged, the Board will determine whether the excluded employees have an "overwhelming community of interest" with the employees in the unit. Only if there is no rational basis for exclusion, will the excluded employees be included.

Remedies Available to Employees Expanded

In Thryv, Inc., 372 NLRB 22 (Dec. 13, 2022), the Board set out a new rule expanding the categories of damages an employee may recover when an employer commits an unfair labor practice. In 2019, Thryv, Inc. conducted an employee reduction in force. In so doing, it engaged in limited bargaining with the union over the transfer of some employees and the layoff of others. The union also asked for information related to the layoffs, which the company did not provide. Thryv, Inc. ultimately implemented the layoffs without any agreement from the union. The Board found that its failure to provide information and its layoff (without sufficient bargaining) were unfair labor practices.

As part of its unfair labor practice charge, the union included the common request that employees be "made whole." Historically, a "make whole" remedy has included backpay, reinstatement, and compensation for other direct harms. In Thryv, Inc. the Board broadened the scope of remedies available. It held that make whole relief includes all direct or foreseeable pecuniary harms suffered as a result of the unfair labor practice. In the context of layoffs, the Board suggested that an employee may be forced to incur out-of-pocket expenses for medical bills and credit card debt, and such expenses are foreseeable harms.

With respect to the employees who were laid off by Thyrv, the Board ordered payment of loss of earnings and other benefits, costs related to search for work and interim employment expenses, and compensation for adverse tax consequences of the lump sum backpay award. Following this decision, it will take time to realize just how broad this ruling will sweep in future cases.

Changes to Rights of Property Owners to Exclude Picketing and Leafletting Rejected

The Board's decision in Bexar County Performing Arts Center Foundation ("Bexar"), 372 NLRB 28 (Dec. 16, 2022) addressed a longstanding (and long litigated) question related to the right of property owners to prevent off-duty workers from entering their property. Employees of the San Antonio Symphony performed routinely at the Tobin Center, a facility owned by Bexar Performing Arts Center Foundation. In the 2016-2017 performance season, the symphony experienced a work shortage, and it reduced its normal number of performances. As a result, a ballet that also utilized the Tobin Center chose to use recorded music for its performances instead of live music by the symphony. In response, members of the symphony engaged in leafletting in the entrance of the Tobin Center. The facility informed them they had to move across the street to a public sidewalk to distribute literature. The union filed an unfair labor practice charge.

Pursuant to the Board's historical standard, a property owner can exclude a contractor's employees (who are regularly employed on the property and are present to engage in organizational activity) only where the owner is able to demonstrate that the employees' activity significantly interferes with his use of the property or where exclusion is justified by other legitimate business reasons. However, the Trump Board overturned this standard. Instead, the Trump Board held that a property owner can prohibit a contractor's employees from accessing the property unless "those employees work both regularly and exclusively at the property" and "the property owner fails to show that they have one or more reasonable nontrespassory means to communicate their message." Applying that standard, the Board found that the Tobin Center could prohibit the symphony employees from leafletting.

The Trump Board's new standard, however, was struck down by the D.C. Circuit. The court found that the implementation of its new standard was arbitrary. It found that the requirement that employees "regularly" and "exclusively" work on the property was applied in an arbitrary way. The court remanded it to the Board to apply its new standard in a non-arbitrary manner or develop a new test. By the time it had been remanded, the composition of the Board had changed. The Biden era Board abandoned the new test. It returned to the historical test that only allows exclusion if the activity significantly interferes with use of the property or there is some other legitimate business reason.

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Board Affirms Johnny's Poultry Warnings Obligation

There is one notable Board decision that reaffirmed its prior precedent. In Sunbelt Rentals, 372 NLRB 24 (Dec. 15, 2022), the Board considered the standard to apply when an employer interrogates an employee while preparing a defense to an unfair labor practice charge. Under a longstanding standard of the Board, an employer may interrogate employees to prepare a defense only when the employer provides safeguards: the employer must communicate the purpose of the questioning; provide assurance that no reprisal will follow; express that participation is voluntary; the questioning is done without hostility or coercion; and the questions only address topics necessary to prepare a defense to the charge.

The Board considered other potential standards, such as a totality of circumstances test and a rebuttable presumption test. Nevertheless, it reaffirmed its longstanding standard. It found that it best served the interest of the Act, and it provided a bright line rule to protect employees in circumstances that have a high potential for coercion.

Reversing Precedent Yet Again, the Board Holds that Employers Must Continue Dues Checkoff After Expiration of Collective Bargaining Agreement

In Valley Hospital Medical Center, 371 NLRB No. 160 (Sept. 30, 2022) (Valley Hospital II), a divided NLRB held that employers must continue to deduct union dues from employees' pay and remit such dues to their union – a process known as "dues checkoff" – even after the expiration of the collective bargaining agreement containing a checkoff provision. The decision demonstrates the current Board's rather unfriendly approach to employers. It also illustrates how employers have been whipsawed in recent years by swings in Board precedent depending on the Board's political makeup.

In Valley Hospital II, the employer and union were parties to a collective bargaining agreement that had a dues-checkoff clause. Over a year after the agreement had expired, the employer ceased deducting union dues from its employees' pay. The practical effect was that the union would have to collect dues directly from the employees. The union objected and claimed that the employer's action violated the NLRA.

Under well-established U.S. Supreme Court precedent, where a collective bargaining agreement has expired, an employer must generally refrain from unilaterally changing terms and conditions of employment until the parties either negotiate a new contract or bargain to lawful impasse. However, in its 1962 decision, Bethlehem Steel, 136 NLRB 1500 (1962), the Board held that an employer's obligation to checkoff union dues ends when the collective bargaining agreement containing a checkoff provision expires. As such, an employer could unilaterally – and lawfully – cease dues checkoff upon expiration. For over 50 years, the Bethlehem Steel rule was consistently applied by the Board and enforced in the United States Courts of Appeals.

But things changed in 2015. The Obama Board overruled Bethlehem Steel and held that an employer's obligation to check off union dues continues after expiration of the collective bargaining agreement establishing such an arrangement. Lincoln Lutheran of Racine, 362 NLRB 1655 (2015). Lincoln Lutheran was short-lived, however, because in 2019, in an earlier decision in the Valley Hospital case, the Trump Board overruled Lincoln Lutheran and reinstated the Bethlehem Steel rule. Valley Hospital Medical Center, 368 NLRB No. 139 (2019) (Valley Hospital I). The union appealed to the United States Court of Appeals for the Ninth Circuit, which remanded the case to the Board.

On remand in Valley Hospital II, the Board – now controlled by Biden-appointees – reversed its decision in Valley Hospital I, once again rejected Bethlehem Steel, and reinstated the rule of Lincoln Lutheran. The Board majority observed that the NLRA's policies would be furthered by holding that dues checkoff provisions survive expiration of the collective bargaining agreement. The majority also distinguished dues checkoff provisions from other contract terms that do not survive contract expiration – mandatory arbitration, no-strike, and management-rights clauses – reasoning that the latter category involves the waiver of rights the parties would otherwise enjoy and thus are presumed not to survive contract expiration. The majority concluded that it would apply its decision retroactively in all pending cases – even in cases in which the employer acted in reliance on Valley Hospital I. Finally, the majority ordered the employer to make the union whole for dues that it should have deducted and remitted had it not ceased dues checkoff, but prohibited the employer from recouping from the employees any dues amounts that it was required to reimburse. This is a particularly harsh remedy because union dues are a financial obligation that employees owe to their union. The employer simply performs an administrative service of facilitating union dues collection.

Members Kaplan and Ring dissented. They quoted language from the Taft-Hartley Act providing that employers may not deduct union dues from their employees' pay unless "the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner." The "logical implication" from the reference to "applicable collective agreement," they argued, was that employers may terminate dues-checkoff provisions upon expiration of the agreement containing such provisions. They also argued that the majority decision impermissibly interferes with the bargaining process by "eliminating one of employers' legitimate economic weapons" to persuade unions to agree to a successor collective bargaining agreement. Finally, they argued that it would be manifestly unjust to apply this decision retroactively to employers who acted pursuant to current Board law (Valley Hospital I) and to "a practice that had been settled law for decades"; and that the make-whole order barring the employer from recouping funds that it had already paid the employees in dues money was "clearly punitive" and exceeded the Board's remedial authority.

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Valley Hospital II is the latest swing in the dues checkoff "pendulum." Going forward, employers who are parties to collective bargaining agreements containing dues-checkoff provisions must continue to deduct and remit dues after the agreement expires. Failing to do so could not only violate the NLRA, but also make the employers financially responsible for the union dues of their employees

Board Issues Guidance for Determining Whether an Election Will be Conducted by Mail

In Starbucks Corporation, 371 NLRB No. 154 (2022), the Board provided guidance to Regional Directors to aide them in exercising their discretion in determining whether an election should be conducted by mail ballot, as opposed to an in-person manual-ballot election, due to COVID-19-related conditions.

The decision, based on an election held in a Starbucks coffee shop in Seattle, modified one of the six factors in the Board's 2020 decision in Aspirus Keweenaw. Previously, Aspirus factor 2 permitted Regional Directors the discretion to direct mail-ballot elections based on either a recent increase in newly confirmed COVID-19 cases or recent testing positivity rates in the county encompassing the employer's facility, using data collected primarily by state and local governments. The Starbucks decision changed this factor, and now allows Regional Directors the discretion to order a mail-ballot election in communities where the Centers for Disease Control (CDC) has determined that the risk of COVID-19 transmission in a particular community is "high." This is to be determined based on the CDC's county-based community level tracker tool. The remaining five factors of Aspirus remain the same.

The Board decided to apply the Starbucks decision prospectively only.

Board Decisions on Appeal

It was a fairly active year for Board decisions on appeal, with over twenty reported decisions from the federal Courts of Appeal in 2022. We discuss a few here.

Fifth Circuit Holds that President Biden's Removal of Former General Counsel Robb was Lawful

The fallout from President Biden's unprecedented firing of former General Counsel Peter Robb continued into 2022. As the new year began, one question remained unsettled: Can a President remove the Board's General Counsel without cause before his term expires? Although the Board held that the President has such authority in a late 2021 decision, see Aakash, Inc., 371 NLRB No. 46 (Dec. 30, 2021), no federal appellate court had decided the issue. In Exela Enterprise Solutions, Inc. v. NLRB, 32 F.4th 436 (5th Cir. 2022), the U.S. Court of Appeals for the Fifth Circuit weighed in and held that President Biden lawfully removed Robb.

In Exela, a union won a Board-conducted election at Exela's site in New Jersey. Exela filed objections to the election. The Regional Director overruled the objections and certified the union as the collective-bargaining representative. Exela refused to bargain, which prompted the union to file an unfair labor practice charge with the Board. The then-Acting General Counsel, Peter Sung Ohr, issued a complaint alleging Exela violated the NLRA by refusing to bargain with the union.

Meanwhile, on his first day in office, President Biden removed former General Counsel Robb without cause prior to the end of Robb's four-year term. President Biden designated Ohr as Acting General Counsel, and Ohr issued the complaint against Exela. Exela argued that the complaint issued by Acting General Counsel Ohr was ultra vires because the President unlawfully removed Robb without cause.

The Fifth Circuit disagreed. The court noted that the U.S. Supreme Court recently affirmed the well-settled rule that "[w]hen a statute does not limit the President's power to remove an agency head, [courts] generally presume that the officer serves at the President's pleasure." The court examined the NLRA and found no provision protects the General Counsel from removal. While Congress "clearly and unequivocally" gave removal protections to the Members of the Board – the NLRA provides that Board Members "may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause" – Congress did not grant similar protections to the General Counsel of the Board. The court was unwilling to read Congress's silence as an "invitation" to graft onto the NLRA a for-cause limitation.

The court then rejected Exela's other arguments. For example, Exela argued that the statutory language providing that the General Counsel "shall be appointed by the President . . . for a term of four years" should be read as limiting the President's removal power by providing for an absolute four-year term. However, Supreme Court precedent squarely rejected this reading of "shall be appointed." Rather, the court explained, the language "shall be appointed . . . for a term of four years" only limited the General Counsel's term to four years and did not provide protection from removal. The court also rejected Exela's argument that removal protections were implicit from the NLRA because the General Counsel is "tantamount" to a Board Member. The court reasoned that the NLRA's reference to "General Counsel of the Board" does not make the General Counsel a Member of the Board. Moreover, the NLRA creates a "division of labor" between the Board – which performs quasi-legislative, quasi-judicial functions – and the General Counsel – who performs prosecutorial functions.

Accordingly, the court held that the NLRA does not provide removal protections to the General Counsel, that President Biden lawfully removed former General Counsel Robb, and, therefore, that the complaint issued by Acting General Counsel Ohr was proper. Given the judicial imprimatur on a President's authority to remove a General Counsel without cause and before the expiration of the four-year term, no one should be surprised if a Republican wins the White House in 2024 and fires current General Counsel Jennifer Abruzzo on the new President's first day in office.

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Third Circuit Holds that "Salt Mine" Tweet was not an Unlawful Threat of Reprisal for Protected Union Activity

In FDRLST Media, LLC v. NLRB, 35 F.4th 108 (3d Cir. 2022), the U.S. Court of Appeals for the Third Circuit held that a Twitter post by an executive officer that he would "send [employees] back to the salt mine" if they unionized was a facetious and sarcastic remark, not a true threat of reprisal, and therefore did not violate the NLRA. In so holding, the court emphasized the importance of context and surrounding circumstances when analyzing the lawfulness of employer speech. The court also admonished the Board to carefully distinguish between what is a threat from what is constitutionally protected speech.

FDRLST Media operates The Federalist, a right-leaning internet magazine that publishes commentary on political issues of current interest, including labor issues. In 2019, the media reported that unionized employees of Vox Media, a left-leaning digital media company, walked off the job during contract negotiations. In response, Ben Domenech, FDRLST Media's executive officer, posted a tweet from his personal Twitter account that read: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." More than 80,000 Twitter users followed Domenech's account, and his tweet appeared in their feeds. At the time of the tweet, the employer had just seven employees. At least one employee viewed the tweet, but, significantly, there was no evidence that any employee expressed any concern over the message.

The following day, a Massachusetts resident (Fleming) with no employment or other connection to FDRLST Media filed an unfair labor practice charge with the Board. The Regional Director issued a complaint. Following a hearing, an administrative law judge concluded that the tweet violated Section 8(a)(1) of the NLRA. Noting that "salt mine" was an idiom "most often used to refer to tedious and laborious work," the ALJ determined that a "reasonable interpretation" of the tweet was that working conditions would worsen if employees tried to unionize. The Board affirmed the ALJ's decision.

The employer appealed to the Third Circuit. The court first held that the NLRA places no limitation on who may file an unfair labor practice charge. Any person – including a politically motivated busybody from Massachusetts – can file a charge with the Board. As such, the Board had the authority to address Fleming's charge.

The court then turned to the merits and concluded that a reasonable employee would not have viewed the tweet as a threat. At the outset, the court recognized that employers are not prohibited from communicating their views on unions – even anti-union views – to their employees as long as they do not threaten employees with reprisals or promise them benefits with respect to unionization. To determine whether the tweet was a prohibited threat, the conduct must be examined in light of all of the circumstances. As the court explained, "[c]ontext is an important part of language, and that's especially true where, as in this case, pure speech is at issue." However, the court found, the Board disregarded relevant contextual evidence and ignored the circumstances surrounding the tweet. Had it done so, the court reasoned, the Board could not have concluded that a reasonable employee would have viewed the tweet as a threat of reprisal.

> For starters, FDRLST Media is a tiny media company. Its six employees (not including Domenech) are writers and editors. The tweet's suggestion that these employees might be sent "back" to work in a "salt mine" is farcical. The image evoked – that of writers tapping away on laptops in dimly-lit mineshafts alongside salt deposits and workers swinging pickaxes – is as bizarre as it is comical. So from the words of the tweet alone, we cannot conclude that a **reasonable** FDRLST Media employee would view Domenech's tweet as a plausible threat of reprisal.

Furthermore, because The Federalist "publishes commentary on a wide variety of contemporary newsworthy and controversial topics," including labor relations, and Domenech used his personal Twitter account to promote the magazine's commentary, the court found that a reasonable employee would more likely view the tweet as "commentary on a . . . contemporary newsworthy and controversial topic" than as a threat to her employment.

The court also noted that no FDRLST Media employee perceived the tweet as a threat, which was especially significant and should have been considered by the Board because the charge was filed by an unrelated third party. The mode of communication also weighed against finding that the tweet was a threat. Domenech posted his message on Twitter and sent it to his 80,000 followers, not to the email inboxes of FDRLST Media employees.

Finally, the court explained that in protecting employees' rights under the NLRA, neither the Board nor the court can violate an employer's free speech rights under the First Amendment. Section 8(c) of the Act implements the First Amendment by providing that the "[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . ., shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." Because Section 8(c) manifests Congress's intent to encourage free debate on labor issues, the NLRA must be narrowly construed when applied to pure speech such that only statements that constitute a true threat are prohibited. As such, the Board must carefully distinguish threats from constitutionally protected speech by examining the employer's statement in its full context and considering the audience and surrounding circumstances. The Board's "acontextual" analysis of Domenech's tweet fell far short of this standard.

Although the facts of FDRLST Media may be unique, the decision is still an important victory for employer free speech. The basic principles that the court applied to Domenech's "facetious and sarcastic tweet" are just as relevant to other forms of employer speech about unions. Given the General Counsel's determination to outlaw captive audience meetings – an effort that really targets

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the message underlying these meetings – the federal appellate courts may be called upon again to protect employers' rights to express views on unions and vindicate the "open marketplace" of ideas created by the First Amendment.

D.C. Circuit Holds that Employer Unlawfully Discharged an Employee for Vulgar Workplace Graffiti
The rights of employees under the NLRA may sometimes clash with the obligations of employers under other federal statutes, such an employer's obligation to maintain a harassment-free workplace. Where the policies of the NLRA conflict with another federal statute, courts have stressed that the Board may not ignore the other statute but must enforce the NLRA in a manner that minimizes the impact of its actions on the policies of the other federal statute. Moreover, an employer may defend against allegations that it disciplined an employee engaged in protected activity by demonstrating that its motive was adherence to federal anti-discrimination law. But as the U.S. Court of Appeals for the District of Columbia Circuit held in Constellium Rolled Products Ravenswood, LLC v. NLRB, 45 F.4th 234 (D.C. Cir. 2022), this defense will be ineffective if the evidence shows the employer selectively enforced, or failed to enforce, its work rules and policies.

In Constellium, the employer (Constellium) unilaterally changed the system for scheduling overtime assignments. Under the new system, employees interested in working overtime had to write their names on sign-up sheets posted outside the lunchroom and near a timeclock. The change sparked immediate protest by some of Constellium's unionized workers. Among other acts of protest, employees commonly used the term "whore board" to describe the overtime sign-up sheet. Constellium apparently tolerated the use of the term until an employee (Williams) wrote "whore board" at the top of two sign-up sheets. Constellium suspended Williams and ultimately terminated his employment.

The Board initially held that Constellium's suspension and discharge of Williams violated the NLRA because Williams wrote "whore board" while engaged in a continuing course of protected activity and did not lose the NLRA's protection. When the D.C. Circuit reviewed this decision, it largely upheld the Board's conclusion. Nevertheless, the D.C. Circuit remanded the case to the Board to address the potential conflict between the NLRA and Constellium's obligation to maintain a harassment-free workplace.

On remand, the Board took a different approach and applied the Wright Line framework for deciding whether an employer unlawfully disciplined an employee who engaged in abusive conduct in connection with protected activity. Under Wright Line, 251 NLRB 1083 (1980), the General Counsel must make a prima facie showing that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity. If the General Counsel makes this showing, the employer has the burden to prove that it would have taken the same action in the absence of the Section 7 activity. Applying Wright Line, the Board found that the General Counsel made its prima facie showing and that Constellium failed to show that it would have disciplined Williams absent his Section 7 activity.

The D.C. Circuit affirmed the Board's decision. First, the court held that the conclusion that Williams's writings were protected activity was the law of the case and was not altered by the Board's shift to the Wright Line framework. Second, the court found that the Board's conclusion that Constellium acted with animus when it disciplined Williams was supported by the evidence, specifically Constellium's tolerance of graffiti and common use of vulgar language without imposing discipline, including regular use of the term "whore board" by other employees and even by supervisors, and a "general laxity" toward vulgar and profane language in the workplace. Constellium's willingness to tolerate "extensive" vulgarity, profanity, and graffiti supported the conclusion that the termination was based on Williams's protest of overtime practices, and not his vulgarity. Finally, based on much of the same evidence, the court agreed that Constellium failed to prove that it would have terminated Williams in the absence of his protected activity. The court also noted that Constellium could not rely on its code of conduct and anti-harassment policy because it had not enforced such policies consistently, if at all.

The lesson from Constellium is that employers must apply and enforce their work rules and policies – including anti-discrimination and anti-harassment policies – consistently and evenhandedly. Employers may defend against allegations that their discipline of employees violated the NLRA by demonstrating that their motive was compliance with anti-discrimination and anti-harassment laws. But if they selectively enforce their work rules and policies, or don't enforce them at all, this defense will be ineffective.

Ninth Circuit Holds Board May Order Employer to Reimburse Union for Legal Fees Incurred During Collective Bargaining

In NLRB v. Ampersand Publishing, LLC, 43 F.4th 1233 (9th Cir. 2022), the U.S. Court of Appeals for the Ninth Circuit held that the Board did not abuse its discretion when it ordered an employer (Ampersand) to reimburse a union for the legal fees it incurred during collective bargaining. Ampersand and the union met several times over the course of a year and a half to negotiate a collective bargaining agreement. During this period, the union filed various unfair labor practice charges against Ampersand arising from its actions during the bargaining process. The Board found that Ampersand had committed several unfair labor practices, including bad faith bargaining. The Board also found that Ampersand engaged in unusually aggravated misconduct, which warranted more than a traditional remedy. As such, the Board ordered Ampersand to reimburse the union for the costs and expenses incurred by the union during the collective bargaining sessions.

The Ninth Circuit affirmed the Board's order. The court first distinguished between an award of litigation expenses incurred in Board proceedings – which are punitive in nature and outside the Board's statutory authority – and an award of bargaining expenses – which are compensatory in nature and within the Board's statutory authority. The court then observed that the NLRA grants the Board broad discretion to remedy unfair labor practices, and it may take any "affirmative action" that "will effectuate the policies" of the NLRA. The court concluded that the award of legal fees against Ampersand fell within the "heartland" of the Board's statutory remedial authority. Because the Board found that Ampersand refused to bargain with the union in good faith, the remedy directly targeted Ampersand's violation, compensated the union for resources that were wasted because of Ampersand's unlawful conduct, and restored the economic status quo.

Ampersand follows the General Counsel's aggressive push to seek full remedies in settlement agreements and from the Board in litigated cases. Ampersand is also consistent with the Board's late 2022 decision in Thryv, which expanded the Board's traditional "make whole" remedies to include all "direct or foreseeable pecuniary harm" resulting from unfair labor practices. The stakes are much higher for employers facing potential liability under the NLRA, and employers should account for these expanded remedies when deciding whether to defend or settle alleged unfair labor practice charges.

Key Labor Related RICO Decision

In an important decision for employers and unions alike, the Third Circuit Court of Appeals, the federal appeals court with jurisdiction over Pennsylvania, New Jersey, Delaware, and the U.S. Virgin Islands, held that a union could be liable under the federal Racketeering Influenced and Corrupt Organizations (RICO) Act. The decision opens a new avenue for unionized employers to seek to address inappropriate conduct during labor disputes, and no doubt will influence the tactics of organized labor during such periods of conflict.

In Care One Mgmt. LLC v. United Healthcare Workers East, the court was asked to consider an employer's appeal of the trial court's decision denying its RICO Act claims against the United Healthcare Workers East SEIU 1199, New England Health Care Employees Union, and the Service Employees International Union. Although the RICO Act is a criminal statute, individuals and entities can also bring civil claims under RICO. Essentially, in such cases, the plaintiff must establish that the defendant is conducting a pattern of racketeering activity through certain criminal predicate acts. In Care One, the employer alleged that the unions engaged in a pattern of racketeering through mail and wire fraud as well as extortion.

Specifically, the employer alleged that, when negotiations for a new collective bargaining agreement failed, the unions called for a strike at various impacted facilities. The employer alleged that the evening before strike was to start, the facilities were vandalized by union members. The employer also alleged that the unions publicly attacked the employer and that such attacks were false and fraudulent. In addition, the employer alleged that the unions asked elected officials to initiate a government investigation into the employer's labor and business practices.

The district court granted the union's motion for summary judgment and dismissed the RICO claims. The district court concluded that there was not sufficient evidence to establish that the union had authorized or directed the alleged inappropriate and criminal conduct.

However, the Third Circuit disagreed and reversed. The Third Circuit found that there was at least enough evidence that a jury could find that the union's members had committed the vandalism at the employer's facilities and that the union had authorized such conduct given the timing of the incidents (the night before the strike). The court also found there was a question about whether the request for the government to investigate the employer was inappropriate and unlawful. The Third Circuit remanded the case for further proceedings.

There is no doubt that labor disputes can get ugly and, when they do, one side may be looking for a remedy. From the employer's perspective, although Care One sets a high bar, the decision has certainly opened the door to another possible remedy to address a labor union's conduct during a labor dispute. It is likely that unions will also take heed of the Care One decision when considering what conduct to employ during a labor dispute.

Summary

As expected, the Board advanced a decidedly pro-labor agenda in 2022. The General Counsel also outlined an aggressive agenda for 2023. Therefore, we expect many more important decisions next year. The Board also appears poised to go to war with several of the nation's largest employers, which should make for even more interesting developments. Please subscribe to our blog to keep up with the action: www.palaborandemploymentblog.com.