McNEES WHITEPAPER

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AN OVERVIEW OF MAJOR DEVELOPMENTS IN LABOR LAW

McNees

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Introduction

2023 may prove to be a landmark year for U.S. labor law. There were several significant changes in the law that left employers reeling. The breadth and depth of these changes were staggering even for seasoned practitioners.

The National Labor Relations Board finalized two significant rule changes. The board continued to issue decisions reversing established precedent and the board's general counsel continued to issue memoranda offering her view on key labor issues, setting the course for even more changes.

The relentless pace of the implementation of the pro-labor agenda was hard to keep up with at times. We will detail some of the most significant developments below.

In fiscal year 2023, the board issued 246 cases, 161 unfair labor practice charge-related decisions and 85 decisions in representation cases. This represented a slight increase in the number of cases compared to last year. According to its Annual Performance and Accountability Report, the board received 321 unfair labor practice charges and election petitions during its last fiscal year. Unfortunately, the board also reported a 36 percent increase in its backlog of pending cases at the end of the year. That has resulted in a frustrating reality for many employers.

The board reported that about 90 percent of elections were held within 56 days of the filing of the petition. Critically for employers, unions won 76 percent of the time when they filed a petition for election last fiscal year. The number of election petitions continues to be high, and the union win rates are shockingly high as well.

Last year, the board did its part to ensure that the win rate remains high. The board issued pro-labor final rules speeding up the election process and relaxing the standard for determining whether an employer is a "joint employer" of a group of employees.

The board also reported that it recovered overall $56 million on behalf of employees, and 983 employees were offered reinstatement.

The board issued some critical decisions throughout the year, and in many cases reversed recently established or long-established precedent. A lot of employers are feeling the whiplash as the agency rolled back rules and precedent.

We summarize the key labor law developments from 2023 below.

General Counsel Advice Memoranda

General Counsel Jennifer Abruzzo continued to pursue an aggressive, pro-labor agenda and regularly used advice memoranda to outline her plans. Below we have summarized some of the key advice memoranda issued last year.

GC Memorandum 23-08 Non-Compete Agreements that Violate the National Labor Relations Act

On Feb. 21, 2023, the board issued *McLaren Macomb*, 372 NLRB No. 58 (2023), which held that employers violate the National Labor Relations Act (NLRA or Act) when they offer employees severance agreements that require employees to broadly waive their rights under the act. Specifically, the board held that where a severance agreement conditions receipt of severance benefits on the waiver of rights under the act, the mere proffer of the agreement itself violates Section 8(a)(1) of the act. The board held that such an offer has a reasonable tendency to interfere with or restrain the prospective exercise of those rights.

On March 22, 2023, Abruzzo issued Memo 23-08 to provide guidance on implementing *McLaren Macomb*. In the memo, the general counsel confirmed that severance agreements themselves are not unlawful, but confirmed that merely offering a severance agreement with certain provisions would represent a *per se* violation of the act regardless of surrounding circumstances.

As a reminder, McLaren Macomb held that the severance agreement at issue contained overly broad non-disparagement and confidentiality clauses. Specifically, the non-disclosure provision contained a non-disparagement clause that advised the employees that they are prohibited from making statements that could disparage the employer. The confidentiality clause advised employees that they were prohibited from disclosing the terms of the agreement to anyone unless compelled by law to do so. The severance agreement included sanctions for breaches of these provisions.

Keep in mind that for the most part, the act only protects employees and not supervisors, as defined by the act. Thus, in nearly all cases, offering a severance agreement to a supervisor that contains confidentiality and non-disparagement provisions will not run afoul of the act.

GC Memorandum 23-08 Non-Compete Agreements that Violate the National Labor Relations Act

In July 2021, President Joe Biden signed an executive order on "Promoting Competition in the American Economy" that, among other things, directed the Federal Trade Commission ("FTC") to consider curtailing the use of non-compete agreements. Then, in January of 2023, the FTC responded to the executive order by proposing a broad and sweeping rule that would prohibit employers across the country from entering into non-compete agreements with their workforce. Now, GC Abruzzo has joined this growing chorus, stating that non-compete agreements violate the act except in limited circumstances.

GC Memorandum 23-08 outlines the argument that non-compete agreements are overbroad and may violate the act "when the

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provisions could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access to other employment opportunities that they are qualified for based on their experience, aptitudes, and preferences as to type and location of work." GC Abruzzo reasons that this denial of access to employment opportunities chills protected activity under Section 7 because: (1) employees know they will have greater difficulty finding another job if they are discharged for exercising their rights to organize and act together to improve working conditions; (2) their bargaining power during strikes, lockouts and other labor disputes is undermined; and (3) as former employees of an employer, they are unlikely to "reunite" at a local competitor and encourage each other to exercise statutory rights to improve working conditions at their new employer.

Moreover, the general counsel argued that non-compete agreements chill employees from engaging in five specific types of protected activity:

- They chill employees from concertedly threatening to resign to demand better working conditions.
- They chill employees from carrying out concerted threats to resign or otherwise concertedly resigning to secure improved working conditions.
- They chill employees from concertedly seeking or accepting employment with a local competitor to obtain better working conditions.
- They chill employees from soliciting their co-workers to go work for a local competitor as part of a broader course of protected concerted activity.
- They chill employees from seeking employment, at least in part, to specifically engage in protected activity (e.g., union organizing) with other workers at an employer's workplace.

In the general counsel's view, the "proffer, maintenance, and enforcement" of non-compete agreements that would reasonably tend to chill employees from engaging in these activities would violate the act unless they are "narrowly tailored to special circumstances justifying the infringement on employee rights." The general counsel did not explain what she believes might constitute "special circumstances," although she provided examples of what likely would not: avoiding competition from former employees, retaining employees and protecting special investments in employee training. Those activities, according to the general counsel, would not justify the use of a non-compete agreement.

The general counsel also acknowledged that employers have a legitimate business interest in protecting proprietary or trade secret information, but noted that such interests can be protected by narrowly tailored "workplace agreements." She also allowed that some non-compete agreements might not violate the act if they do not restrict employment relationships, such as if they restrict ownership interests in a competing business or independent contractor relationships, or under "special circumstances" (again, undefined) that justify a narrowly-tailored non-compete.

Again, while the NLRA protects "employees" (union and non-union), it does not protect "supervisors" who are excluded from Section 7's protections. As such, non-compete agreements with supervisors or managers should not be affected by the memorandum. That said, the general counsel is looking for a case to bring to the board and in that regard, directed the regional offices to submit to the Division of Advice cases involving non-compete agreements that are "arguably unlawful" under her analysis.

Whether the general counsel's position ultimately carries the day remains to be seen. Although the current employee-friendly board may be sympathetic to her position, the federal courts of appeals – which review board decisions – may not. We anticipate that there will be legal challenges by employers to an adverse board decision.

GC Memorandum 24-01 and GC 24-02

Last year, GC Abruzzo also issued GC Memorandum 24-01, Guidance in Response to Inquiries about the board's decision in Cemex Construction Materials Pacific, LLC and GC Memorandum 24-02, Guidance Memorandum on 2023 election rule representation case procedure changes. We cover the *Cemex* decision and the 2023 Election Rule procedures in more detail below.

Rule Makings

Board Adopts Lax Joint Employer Standard

Whether two entities are "joint employers" is an important question under the Act. In a Final Rule published on Oct. 27, 2023, the board revised the standard for determining whether another employer may be the joint employer of a group of employees. The final rule establishes that two or more entities may be considered joint employers of a group of employees if each entity has an employment relationship with the employees, and if the entities share or codetermine one or more of the employees' essential terms and conditions of employment. The effective date of the new rule is Feb. 26, 2024.

The final rule follows a notice of proposed rulemaking, which was published on Sept. 6, 2022, and rescinds and replaces the 2020 final rule that was promulgated by the prior board and which took effect on April 27, 2020.

Clearly, the board's standard for determining joint-employer status has shifted over the past several years with each new presidential administration. For at least 30 years prior to 2015,

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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. The 2023 final rule reverses that long-held view

The 2023 rule considers the alleged joint employers' authority to control essential terms and conditions of employment, whether such control is exercised and without regard to whether any such exercise of control is direct or indirect.

The final rule included the following list of essential terms and conditions of employment:

1. Wages, benefits, and other compensation;
2. Hours of work and scheduling;
3. The assignment of duties to be performed;
4. The supervision of the performance of duties;
5. Work rules and directions governing the manner, means and methods of the performance of duties and the grounds for discipline;
6. The tenure of employment, including hiring and discharge; and
7. Working conditions related to the safety and health of employees.

The Final Rule provides that either indirect or reserved control is enough to find joint employer status, including situations in which an alleged joint employer maintains authority to control essential terms and conditions of employment but has not yet exercised such control. We liken this to imaginary control.

Certainly, the new rule will result in many more joint employer relationship findings under the act. However, the new standard will only be applied to cases filed after the Feb. 26, 2024, effective date.

Board Reinstates Ambush Election Rules

Effective Dec. 26, 2023, the board rolled back the 2019 Representation Election Rules and reinstated the prior rules, first adopted in 2014, which had become known as the "Quickie" or "Ambush" election rules. The time period between the initial filing of a petition for election and the actual election is often critical for employers. It may be the only opportunity the employer has to present its side of the unionization question. The less time before the election, the less time to educate employees. The final rule was published on Aug. 25, 2023, and became effective Dec. 26, 2023.

The final rule allows pre-election hearings to happen more quickly, most often in seven days, or approximately 10 days sooner than under the 2019 rule. In addition, regional directors will have more limited discretion to postpone pre-election hearings. The final rule also requires the employer to post and distribute the notice of petition for election to inform its employees about three days sooner than under the 2019 rule

The final rule also strives to limit pre-election litigation and instead, to hold more hearings after the election. This can be problematic for employers for a number of reasons, including when considering who is eligible to vote and who is not. Under the final rule, generally, only issues necessary to determine whether an election should be conducted will be litigated in a pre-election hearing.

The Final Rule also implements additional changes that are designed to ensure that elections are held more quickly. For example, under the new rule, regional directors will ordinarily specify the election details (the type, date(s), time(s), and location(s) of the election and the eligibility period) in the decision and direction of election and will ordinarily simultaneously transmit the notice of election with the decision and direction of election. This is much earlier in the process. The final rule also eliminated the 20-business-day waiting period between the issuance of the decision and direction of election and the election. Regional directors are now required to schedule elections for "the earliest date practicable" after issuance of a decision and direction of election.

It is clear that all of the above changes, and some we did not highlight, are designed to assist labor unions in winning more elections despite the fact that unions are already winning over 70 percent of the time that a petition is filed.

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.

The Stakes Have Been Raised for Repeated or Egregious Violations of the National Labor Relations Act

On April 20, 2023, the board issued another labor-friendly decision in Noah's Ark Processors, LLC, 372 NLRB 80. The decision makes clear that the board is prepared to wield its

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considerable authority in sanctioning employers who commit either repeated or egregious violations of the NLRA.

In Noah's Ark, the board considered an unfair labor practice charge filed by the union that alleged that the employer bargained in bad faith with the union during contract negotiations in January of 2020. The charge was filed against the backdrop of contentious negotiations that first began in 2018. During the 2018 and 2019 negotiations, the employer declared impasse and unilaterally implemented its last, best and final offer.

In early 2019, the union filed its first unfair labor practice charge arising out of the parties' bargaining efforts. On that charge, the board concluded that the employer had bargained in bad faith by declaring impasse when one did not exist. It issued an injunction against the employer, requiring it to bargain with the union in good faith.

During a 2019 bargaining session after the board's first injunction, the employer presented regressive proposals to the union and further sought to remove employee benefits and union rights. The employer presented this as its last, best and final offer in January 2020. When the union rejected the offer, the employer again declared impasse and implemented the regressive proposal, prompting the union to file a second unfair labor practice charge.

Unsurprisingly, the board found that the employer committed a second unfair labor practice charge by failing to comply with the injunction and refusing to bargain with the union in good faith. In the April 2023 decision, the board held that when it finds unfair labor practices justify a broad cease and desist order – typically issued when an employer is a repeat offender or engages in egregious misconduct under the NLRA – it will consider several additional remedies.

The non-exhaustive list of remedies published by the board includes:

- Adding a comprehensive Explanation of Rights to the remedial order that gives employees a more extensive description of their rights under the NLRA;
- Requiring the employer to read and distribute the notice of the board's decision any Explanation of Rights to employees (including potentially requiring supervisors or particular officials involved in the violations to participate in or be present for the reading and/or allowing presence of a union agent during the reading);
- Mailing notice of the board's decision and any Explanation of Rights to directly to employees' homes;
- Requiring a person who bears significant responsibility (e.g. senior management officials or executives) in the respondent's organization to sign the Notice;
- Publication of the Notice in local publications of broad circulation and local appeal (such as newspapers);
- Requiring that the Notice/Explanation be posted for an extended period of time;
- Visitation requirement, permitting representatives of the board to inspect the respondent's bulletin boards and records to determine and secure compliance with the board's order;
- Reimbursement of the union's bargaining expenses, including making whole any employees who lost wages by attending bargaining sessions conducted in bad faith.

In other words, the board will now consider remedial action against repeat or egregious offenders that includes public and potentially costly consequences.

The Board Continues Imposing Limits on Employers' Ability to Act Unilaterally

The board's string of union-friendly decisions continued in two decisions issued on Aug. 30, 2023; *Wendt Corp.*, 372 NLRB 135, and *Tecnocap LLC*, 372 NLRB 136. Those decisions overruled different aspects of the board's 2017 decision in *Raytheon* Network Centric Systems, 365 NLRB No. 61.

Under *Raytheon*, employers had the ability to make discretionary unilateral changes to the terms and conditions of bargaining unit employees' employment during negotiations for a first contract with a newly elected labor union and after the expiration of an existing collective bargaining agreement. The only caveat was that these unilateral changes were required to be consistent with the employer's past practice. *Raytheon* also authorized employers to act unilaterally after the expiration of an existing labor agreement if its action was consistent with a past practice established under the management rights clause of the expired contract. Under *Wendt* and *Tecnocap*, such unilateral action is now unlawful.

The employer's workforce in *Wendt* had recently elected to be represented by a union. While the employer was negotiating an initial contract with the newly elected union, the employer implemented layoffs that included members of the new bargaining unit. The employer's decision to lay these employees off was consistent with a practice that it had established before its employees organized. The employer therefore believed that the layoffs were lawful under *Raytheon*. The board had other ideas.

It took advantage of the opportunity to overturn *Raytheon's* acceptance of an employer making unilateral actions while negotiating an initial labor contract with a newly elected union. The board held that now, employers can only make such unilateral changes when it "has shown the conduct is consistent with a longstanding past practice and is **not** informed by a large measure of discretion." In other words, if significant

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management discretion informs the decision to make a unilateral change when a labor contract is not in effect, the change violates the NLRA. The board went one step further and clarified that employers cannot justify a unilateral change that would otherwise violate the NLRA by relying on a past practice that was established before its employees organized.

Tecnocap arose out of a situation wherein an employer attempted to justify a unilateral change to employee work schedules based on a past practice that was established under the management rights clause of an expired labor agreement. During negotiations of a successor contract, the employer sought to alter the length of bargaining unit employees' shifts. When the expired contract was in effect, there was no question that such unilateral action was permissible. However, the board clarified that when a past practice is established under the terms of an expired contract's management rights clause, the practice itself does not survive expiration of the labor contract. Thus, the board concluded that the employer violated the NLRA by changing its employees' schedules.

Wendt and *Tecnocap* will remain the law of the land for the foreseeable future. As long as those decisions remain valid, employers are well-advised to carefully consider making any unilateral changes to the terms and conditions of bargaining unit employees' employment in the absence of a valid labor agreement authorizing such action.

The NLRA Protects Employees Who Advocate for Non-Employees

The current board further expanded workers' rights in its Aug. 31, 2023, decision in *American Federation for Children, Inc*., 372 NLRB 137. There, the board overturned its 2019 decision in Amnesty International, 368 NLRB No. 112. Broadly, Section 7 of the NLRA assures employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." In Amnesty International, the board clarified that an employee's advocacy for a non-employee was not protected activity under Section 7.

The board changed its stance in A*merican Federation for Children*. In that case, a current employee was lobbying support for a former employee, whose employment was terminated after she was no longer authorized to work in the U.S. The former employee regained her work authorization and applied for reemployment. According to the employer, one of its current employees told others that one of the company's managers was racist for not supporting the re-hire of the former employee. The employer disciplined its current employee for making incendiary and unjustified comments about the manager.

The board determined that the discipline violated Section 7 of the NLRA. In so doing, it clarified that the former employee was covered by the NLRA because the act covers job applicants. But the board did not stop there. It went further to explain that even if the former employee was not an applicant (and thus, not an "employee" for purposes of the act), the current employee's advocacy for her former colleague would still be protected activity under Section 7. This is because the board found that such advocacy was for the "mutual aid and protection" of current employees because the former employee "was desired as a co-worker [and] her rehire would have improved the employment terms and conditions of the employees working with her."

It must be emphasized that Section 7 rights extend to most private sector employees in the U.S., including those who are not members of labor unions. As a result, all employers must carefully weigh disciplinary action arising out of employee engagement in group activity, even when that activity relates to non-employees.

Board (Again) Changes Retaliation Analysis Under NLRA

Now more than ever, it seems that employees are willing to express themselves. While open communication with and among employees is usually a good thing, sometimes an employer's rules are broken in the process. A worker might call her supervisor a nasty name while complaining about her production team's overtime assignments. An employee could use profanity to describe working conditions in a social media post. An employee on strike may threaten a company executive.

In such cases, an employer is likely to consider disciplining the employee for breaking its rules, but if those employees were engaged in activity protected by the act, the employer's attempt may run afoul of the law. But that was not always the case.

During the Trump Administration, the board announced that it would apply the same test when determining whether disciplinary action is lawful, regardless of the context in which the employee's misconduct occurred. In *General Motors, LLC*, the board held that in order to prove that disciplinary action violates the act, an employee was required to 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 an employee met this initial burden, an employer could still avoid liability by proving that it would have taken the same action in the absence of protected activity. Many employers welcomed this universal test, as it standardized the law regardless of the context in which the employee's misconduct happened. But, alas, the *General Motors* standard is no more.

The board issued its ruling in *Lion Elastomers LLC II*, which overruled *General Motors* and adopted in its place setting-

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specific tests to evaluate the propriety of employee discipline. Now, the setting of an employee's misconduct once again determines the standard by which disciplinary action will be judged. The setting-specific tests are set forth below.

First, when discipline arises out of an employee's conduct toward management in the workplace, the board will apply the test originally established in *Atlantic Steel*. That test considers the following four factors:

1. The place of the interaction between employee and management;
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.

Next, when discipline arises out of an employee's misconduct on social media or while interacting with a co-worker in the workplace, the board will apply its "totality of the circumstances" test without regard to any particular factor. This test was originally enunciated in *Pier Sixty, LLC*.

Finally, when discipline arises out of an employee's misconduct on the picket line, the board will again consider the *Clear Pine Mouldings* standard. Under that test, the board examines the totality of the circumstances to assess whether non-striking employees reasonably would have been coerced or intimidated by the misconduct. If so, discipline is proper.

As the current board continues to unwind many of the employer-friendly rules established by the previous board, employers must now remember that context matters when disciplining employees for conduct that occurs during otherwise protected activity. One size no longer fits all.

Board's Cemex Standard Breaks New Ground and Turns Union Organizing On its Head

In what may prove to be the most significant decision of 2023, the board cast aside over 50 years of established law and created a new standard that will further tilt the playing field in favor of labor unions in the union election process. In *Cemex Construction Materials Pacific, LLC*, the board not only changed the standard union election process, but also adopted a new standard that will result in more bargaining orders, which will force employers to bargain with a union despite the employees' preference to remain union free.

At the urging of its general counsel, the board overturned the rule it established in 1971 in a case known as *Linden Lumber*, which permitted an employer to refuse a union's demand for voluntary recognition based upon a showing of cards signed by a majority of employees in the bargaining unit and, instead, insist upon a board-conducted election in order to determine whether the employees actually wanted to be represented by the union. Notably, the board's decision in *Linden Lumber* was subsequently affirmed by the U.S. Supreme Court.

The board's decision in *Cemex Construction Materials* overrules *Linden Lumber* and replaces it with a new, pro-union standard. Here is what the board said:

> Under the standard we adopt today, an employer violates Section 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as Section 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly files a petition pursuant to Section 9(c)(1)(B) of the Act (an RM petition) to test the union's majority status or the appropriateness of the unit, assuming that the union has not already filed a petition pursuant to Section 9(c)(1)(A).
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> . . . We conclude that an employer confronted with a demand for recognition may, instead of agreeing to recognize the union, and without committing an 8(a)(5) violation, promptly file a petition pursuant to Section 9(c)(1)(B) to test the union's majority support and/or challenge the appropriateness of the unit or may await the processing of a petition previously filed by the union.

Essentially, this means that if a union asserts that it has majority status, which is typically done by offering to demonstrate that a majority of employees in the proposed unit have signed union authorization cards, the employer must either recognize and bargain with the union or file a petition to request that the board conduct an election.

This now puts the onus on the employer to trigger the board's election process.

But wait, there is more!

The board went on to hold that if the employer commits an unfair labor practice that requires setting aside the election, the petition (whether filed by the employer or the union) will be dismissed and the employer will be subject to a remedial bargaining order. Previously, such an extraordinary measure — known as a *Gissel* bargaining order named after another SCOTUS case — required a showing of unfair labor practices during the pre-election period that were so egregious that a re-run election could not be conducted fairly. In those limited circumstances, the board would order the employer to bargain with the union even though the union had just lost the election. In other cases where employers committed unfair labor practices during the pre-election period, the board would require a re-run election.

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Under this new standard, any unfair labor practices committed by an employer during the pre-election period will result in a bargaining order, unless the violations are so minimal that it is virtually impossible to conclude that they could have affected the election results.

As a result, employers presented with authorization cards signed by a majority of employees in an appropriate unit will be between a rock and a hard place and will be forced to choose between recognizing and bargaining with the union or filing a petition for election, knowing that most any unfair labor practice found to have occurred in the pre-election period will result in a bargaining order.

The board did note that an employer that refuses to bargain without filing a petition may still challenge the basis for its bargaining obligation in a subsequently filed unfair labor practice case. However, its refusal to bargain, and any subsequent unilateral changes it makes without bargaining, are at its own risk.

In *Cemex Construction*, the board concluded that: (1) the respondent refused the union's request to bargain; (2) at a time when the union had in fact been designated representative by a majority of employees; (3) in a concededly appropriate unit; and then (4) committed unfair labor practices requiring the election to be set aside, violating Section 8(a)(5) under the standard we announce today.

But wait, there is still more!

The board held that its decision, setting aside decades of case law, would be applied retroactively.

What does this all mean?

Employers may begin to recognize and bargain with unions even without a valid union election. Other employers may go through the election process without running an educational campaign. That will likely result in more wins for unions. And for those who do decide to educate employees, many of those employers will face bargaining orders.

The board's decision in *Cemex Construction Materials* and the new standard it creates will undoubtedly be appealed and the issue will likely make its way to the U.S. Supreme Court. The ultimate fate of the board's new standard remains to be seen.

In the meantime, employers should take any indication of card-signing activity very seriously. Under this new standard, the best time to educate employees about what it might really mean to form a union (and what it does not mean) will be before the employer is presented with a showing of majority support.

Board Topples Boeing Handbook Standard and Again Reverses Course on Confidentiality

On Aug. 2, 2023, the board again reversed precedent on the issue of how work rules will be judged for compliance with the act. In Stericycle, the board reversed and remanded an ALJ's decision that found the employer violated Section 8(a)(1) by maintaining work rules addressing personal conduct, conflict of interest, and confidentiality of harassment complaints.

In ruling against the employer, the ALJ had applied the standard established in *Boeing Co*. 365 NLRB No. 154 (2017). The *Boeing* rule required the evaluation and balancing of two factors: 1) the extent of the potential impact on NLRA rights; and 2) legitimate justifications associated with the rule. The current board determined that the *Boeing* balancing test gave too much weight to the employer's interest.

Under the new rule, the general counsel bears the burden of determining if the rule is presumptively unlawful. The employer then bears the burden of proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored policy.

The Stericycle rule is open to very broad application. Many employers have expressed concern that their handbooks need to be substantially revised. This practitioner views the issue differently. It is true that the board's use of the term "employee personal conduct" is likely to encompass the vast majority of your policies that could lead to employee discipline. An employer could decide to add a business justification to each of its policies, but doing so would not necessarily solve the problem. The current NLRB general counsel has proven to be quite the pro-union activist. Placing the business rationale in your policies will likely give her more ammunition to find a policy presumptively unlawful. In addition, it may constrain an employer's ability to rebut the presumption of illegality by limiting the arguments used for making a business case for the rule to those stated in the policy.

So, what is an employer to do? We recommend you consider the business case for the rules you have in place and consider eliminating those policies that have no business purpose. The board may offer guidance on how or if policies should be modified. Until then, employers should exercise caution on issuing discipline based on any rule that may be affected by the *Stericycle* decision. Seek advice of counsel before issuing discipline to employees, especially in instances where employer is facing a union organizing campaign.

Some examples of policies that will likely need to be reviewed are as follows:

- Restricting employee's use of social media
- Restricting criticisms, negative comments and disparagement of the company's management, products

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or services.

- Promoting civility
- Prohibiting insubordination
- Requiring confidentiality of investigation of complaints
- Restricting behaviors such as using cameras or recording devices in the workplace
- Outlining rules for safety complaints
- Restructuring the use of company communications resources such as email
- Limiting recordings or the use of smart phones and other devices
- Restricting meetings with co-workers or the circulation of petitions
- Limiting comments to the news media or government agencies

These are simply examples of rules that might be affected by this recent decision. It remains to be seen how broadly the Board will apply the Stericycle rule.

Stericycle also expressly overruled *Apogee Retail d/b/a Unique Thrift Store,* 368 NLRB No. 144 (2019). In *Apogee*, the board held that confidentiality requirements during the course of a workplace investigation were presumptively lawful. These rules did not require a case-by-case balancing of interests because such rules are key in serving the employer's interest in addressing complaints, as well as the employees' interest in having an effective system in place to address and resolve workplace complaints based on accurate inforzxmation. Confidentiality rules will now be evaluated under *Stericycle*

Board Clears Path to Removing "Concerted" From Protected Activity

On Aug. 31, 2023, the board issued a decision in *Miller Plastic Products, Inc.* that will make it easier for a single worker's action to be considered "concerted" under the act. In a 3-1 decision, the board overruled its 2019 decision in *Alstate Maintenance*, which had narrowed the circumstances in which the board considered solo protests to be concerted activity and, thus, protected activity under the act.

For reference, in *Alstate Maintenance*, an employee working at JFK International Airport was terminated for a comment he made about not receiving a tip. Specifically, the employee in *Alstate Maintenance* made his comment about poor tips to a manager with colleagues nearby. In determining whether the employee's solo action constituted concerted activity, the board found that he was raising a "purely personal grievance" as opposed to a group complaint. As such, the comment did not reflect a group complaint nor an intent to initiate a group action. The board in *Alstate Maintenance* listed several relevant factors to determine if a solo action constituted concerted activity, including whether the employee protested a change in job terms in a formal meeting and whether there was an actual objection as opposed to a question about a change.

The board in *Miller Plastic* rejected the *Alstate Maintenance* decision, finding that it "imposed significant and unwarranted restrictions on what constitutes concerted activity." The board in *Miller Plastic* held that *Alstate Maintenance* had adopted an unduly restrictive test for defining concerted activity by introducing a rigid checklist of factors in place of the board's more holistic approach that was applied in the past. Indeed, the board in *Miller Plastic* has effectively reaffirmed the principle originally announced in *Meyers Industries*, which held that "the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence." Applying these principles, the board in *Miller Plastic* held that the employer violated the act when it fired an employee for blurting out during a March 2020 meeting that he and his co-workers "shouldn't be working amid the exploding COVID-19 crisis."

Moving forward, an employee's conduct will be considered protected activity based on the "totality of the record evidence," which will include all relevant facts and circumstances. Chairman of the NLRB, Lauren McFerran, sees its return to the "holistic" approach as beneficial to employees, as she stated, "[b] y returning to the board's traditional approach, we better protect employees who seek to improve their working conditions."

In keeping with its recent trend of employee-friendly decisions, the board's recent decision in *Miller Plastic* could lead to more decisions where an employee's solo action, such as voicing a complaint during a work meeting, is considered protected activity under the NLRA. This decision will also make it more difficult to predict what solo actions are considered protected activity and which are merely personal gripes, as each case will be fact-specific.

The Board Claims a Seat At the Bargaining Table, Weighing In on Integration Clauses and Zipper Clauses

In *Twinbrook OpCo LLC,* 373 NLRB No. 6, the board examined the difference between integration and zipper clauses. Although the two terms are often used interchangeably, the board explained that an integration clause "'exclud[es] from coverage any external agreements not made an explicit part of the parties' collective bargaining agreement,'" but a zipper clause states "that the parties have had the opportunity to bargain over all mandatory subjects of bargaining and that they waive their right

continued

to bargain over such matters during the term of the agreement." Id. at n. 4 (citations omitted).

This distinction can make a difference. Let us look at the facts of the case to understand why. Twinbrook OpCo purchased a skilled nursing facility and offered its employees continued employment at their same rate of pay. Then, Twinbrook OpCo continued the prior owner's practice of paying bargaining unit employees a shift differential for working second or third shifts. The company even increased the amount of that shift differential, without notifying the union that represented those employees or giving the union an opportunity to bargain over the change. Eventually, Twinbrook OpCo and the union agreed upon terms for their own CBA, which (a) did not include any reference to a shift differential; (b) provided that no employee's rate would be lowered; and (c) contained an *integration* clause that provided:

> This Agreement represents the entire understanding between the parties' and there are no agreements, conditions, or understandings, either oral or written, other than as set forth herein. It is further agreed that no amendment, change, modification or addition to this Agreement shall be binding upon either party hereto, unless reduced to writing and signed by both of the parties.

Twinbrook OpCo paid that increased shift differential for the first pay period covered by the new CBA before discontinuing the practice entirely, without notifying the union. The union filed an unfair labor practice charge, asserting that the company violated Section 8(a)(1) and (5) of the act when it ceased making the shift differential payments without providing the union with notice and the opportunity to bargain.

The board sided with the union, holding that (1) the CBA did not authorize the company to unilaterally eliminate shift differential payments and (2) the union did not waive its right to bargain over the termination of those payments. The integration clause was not a clear and unmistakable waiver of the union's right to bargain over a change in a mandatory subject of bargaining

Employers will now be required to rethink somewhat boilerplate contract language when preparing for negotiations.

Board Decisions on Appeal

Fifth Circuit Holds that Tesla's Uniform Policy is Lawful

In a unanimous decision, the Fifth Circuit Court of Appeals vacated the Board's 2022 ruling in Tesla, Inc. In 2022, the NLRB held that Tesla's uniform policy was unlawful because it prohibited employees from replacing their company-issued shirts with pro-union shirts. Tesla argued that the reason for its uniform policy was not to discourage pro-union attire, but rather, the policy was intended to minimize vehicle damage and improve identification of production associates so that they would be easily distinguished from production leads and inspectors, who wore different colored shirts. As a compromise, Tesla allowed employees to wear pro-union stickers on their company-issued shirts.

In vacating the Board's decision, the Fifth Circuit noted that Tesla's uniform policy, which served a legitimate business purpose, was not unlawful because it allowed employees to wear pro-union stickers on their company-issued shirts, thereby allowing them to still display union insignia at work. The Court went on to affirm that such displays could be subjected to limits that are justified by a legitimate business purpose. The Court further rebuked the Board's holding that all employer dress codes are presumptively unlawful as "irrational." The Court called out that view as an example of agency overreach.

Eighth Circuit Holds that Employer's "Mass Discharge" Not Unlawful

The Eighth Circuit Court of Appeals also got into the reversal game, and overturned a Board Order, which had reinstated employees who were fired for alleged union activity. In Strategic Technology Institute, several employees of a maintenance contractor for the U.S. Air Force began discussing unionization while at work. Around that same time, the Air Force discovered several performance and safety issues with the contractor's work, and issued corrective action reports to the maintenance contractor. In response, the maintenance contractor created an evaluation of employees based on performance, attendance, and ability to work with others. Ultimately, the company fired the 14 lowest-ranked employees, citing poor performance as the basis for their termination. Notably, these employees were terminated six weeks after management discovered that some of these employees were discussing unionization.

These terminations were challenged, as the Union argued that these employees were actually fired for their union activity in violation of the NLRA. The Board agreed and found that these employees had been discharged for their union activity based on the timing of the terminations, and further stated that because the terminations were a "mass discharge," the General Counsel is "not required to show a correlation between each employee's union activity and his or her discharge."

In reversing the Board's decision, the Eighth Circuit noted that the timing of the terminations would be relevant if there was direct evidence of anti-union animus on the part of the employer; however, the Court concluded that there was no direct evidence of anti-union animus on the part of the employer. Additionally, the Court explained that the Eighth Circuit had not adopted the "mass discharge" standard cited by the Board, and that even if it had, the Court would still require a nexus between anti-union animus and the terminations.

D.C. Circuit Partially Affirms Elimination of Election Rule

The D.C. Circuit Court of Appeals issued a decision vacating part of a rule issued by the Board in 2019, which eliminated several "quickie" representation election procedures that were established in 2014. For background, in 2019, the Board issued a rule that changed several provisions of the 2014 rule

and expedited the timeline for union representation elections. The 2019 rule imposed installed a more fair pace on the union election process and allowed for more time to resolve disputes. The 2019 rule was challenged by the AFL-CIO in the District Court of Columbia. The AFL-CIO argued the 2019 rule was substantive and that the Administrative Procedure Act required the Board to provide for public notice and comment, which had not occurred.

On appeal, the D.C. Circuit considered the five challenged provisions of the 2019 rule and vacated and remanded the following provisions of the 2019 rule, finding them "substantive" instead of procedural:

Voter List Production – The 2019 rule extended the time for an employer to provide a complete list of all eligible voters to the union from 2 to 5 business days. The D.C. Circuit's holding means that means that employers must continue to produce voter lists in a shorter timeframe.

Delayed Certification – The 2019 rule restricted the regional director's ability to certify election results only after the period for a party to file a request for review had passed or until after the Board had ruled on any filed request for review. With this 2019 rule provision now invalidated, regional directors can certify results without waiting on a request for review.

Election Observer Qualifications – The 2019 rule imposed required that election observers be current members of the voting unit, or, if not such individuals were available, then the election observer could be a current non-supervisory employee. Now that this provision is vacated, parties may continue to select non-voting unit employees to serve as election observers.

The D.C. Circuit found the following two provisions of the 2019 rule to be valid, as they are rules of agency procedure and, thus, do not require notice and comment under the APA:

Pre-Election Litigation of Certain Issues – The 2019 rule allows parties to litigate disputes regarding voter eligibility, unit scope, and supervisory status before the election occurs.

Election Scheduling – The 2019 rule created a 20-business-day presumptive waiting period before the regional director schedules an election. This provides time for the agency to resolve any pre-election disputes.

Although the Board could still issue a notice and comment period for the three vacated rules, it seems unlikely, given the administration change, that this will occur. As for the other two provisions, since the matter has been remanded to the District Court to revisit the AFL-CIO's remaining claims against these rules, it remains to be seen if the current Board will support these two provisions either.

Key Labor Decisions

There was another significant development in 2023 involving the rights of management and labor. On June 1, 2023, the U.S. Supreme Court held that a company could sue a union over intentional damage caused during a labor dispute. In *Glacier Northwest v. International Brotherhood of Teamsters Loc. Union No. 174*, Glacier Northwest alleged that the union intentionally destroyed company property during a strike. Specifically, Glacier claimed that the union called for a work stoppage while concrete was being mixed, resulting in the hardening of the concrete, which not only ruined the concrete batch but also damaged company trucks. Seeking to hold the union responsible, Glacier sued the union in state court. The union argued that because this was a labor dispute matter, the act preempted any state court claims.

The Washington state court agreed with the union and that decision was upheld by the Washington Supreme Court, which reasoned that "the NLRA preempts [the company's] tort claims related to the loss of its concrete product because that loss was incidental to a strike arguably protected by federal law [the NLRA]." Following the Washington Supreme Court's decision, the U.S. Supreme Court decided to hear the case. In an 8-1 decision, the Supreme Court sided with Glacier, holding that because the union "took affirmative steps to endanger Glacier's property … the NLRA does not arguably protect its conduct." SCOTUS recognized that the NLRA protects the right to strike; however, it also noted that the National Labor Relations Board "has long taken the position – which the parties accept – that the NLRA does not shield those who fail to take 'reasonable precautions' to protect their employer's property from foreseeable, aggravated, and imminent danger due to the sudden cessation of work."

In light of this limitation on the right to strike, the U.S. Supreme Court held that the union did not meet its burden in asserting that the NLRA preempted the matter. Writing for the majority, Justice Amy Coney Barrett noted that, based on the allegations, "the Union executed the strike in a manner designed to compromise the safety of Glacier's trucks and destroy its concrete. Such conduct is not 'arguably protected' by the NLRA; on the contrary, it goes well beyond the NLRA's protections." Accordingly, the Supreme Court reversed the judgment of the Washington Supreme Court and remanded the case for further proceedings.

Justice Ketanji Brown Jackson authored the lone dissenting opinion in the case. In her dissent, Justice Jackson cautioned that the majority's decision would confuse lower courts as to how preemption applies and that this decision "risks erosion of the right to strike." Justice Jackson also noted that the Supreme

Court should have suspended its adjudication on this case because a complaint against the company is pending before the NLRB.

The upshot of the Supreme Court's decision is that unions may be exposed to lawsuits based on work stoppages that damage company property. Although unions were previously capable of being sued in state court for violent or threatening conduct, the Supreme Court's decision here goes a step further in finding that a union can be sued in state court if it is alleged that the union enacted a work stoppage in an attempt to damage company property intentionally. Moving forward, employers should be aware of their right to sue a union when a work stoppage intentionally damages company property.

Summary

As expected, the board continued to advance a very pro-labor agenda in 2023. Despite appropriately set expectations, many labor practitioners were blown away by how far the board went to reverse case law and pave the way for more successful union organizing. Hold on, 2024 may be another bumpy ride for employers. Please subscribe to our blog to keep up to date with all of the twists and turns: palaborandemploymentblog.com