Ogletree Deakins

ISSUE 4 | WINTER 2017

The Practical NLRB Advisor

NLRB 2016 year in review

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The National Labor Relations Board (NLRB) continued making life more difficult for employers in 2016. The agency issued a host of decisions that significantly expand the number and type of individuals that unions can seek to organize and that make the process of organizing faster and easier for unions. For those employers already grappling with a unionized workforce, the Labor Board issued a large number of decisions affording greater leverage to unions both at the bargaining table and, thereafter, in the administration and enforcement of collective-bargaining obligations. In large measure, the NLRB continued to receive support by reviewing federal appellate courts that traditionally accord the agency's decisions a high degree of deference. Compounding the problem for employers, the Board made the resolution of unfair labor practice claims more difficult and the litigation and consequence of such claims more costly.

In this issue of the Ogletree Deakins *Practical NLRB Advisor*, we look back at the key developments at the Board in 2016 and discuss the consequences for employers.

BRIAN IN BRIEF

With two open seats on the five-Member National Labor Relations Board (NLRB) waiting to be filled by President-elect Trump, and with the General Counsel slot opening up in approximately 10 months, nearly everyone expects a dramatic shift in the Board's decisional and ideological arc. Many critics believe the Board's present path has been completely errant and has proved as destabilizing and disruptive as it has been unremitting. For example, a recent study has estimated that in the seven or so years of its existence, a majority on the Obama Board has collectively overturned more than 4,000 years of existing NLRB precedent. Similarly, under successive General Counsels, the agency has aggressively pursued an administrative and prosecutorial agenda that has often been predicated on novel and controversial interpretations of the National Labor Relations Act (NLRA). Perhaps never in the agency's 80-year history has there been such a widespread and concerted effort to fundamentally change the interpretation and enforcement of the NLRA.

As in physics, so in law and policy: any given action tends to produce an equal, but opposite, reaction. Thus, given the multiple policy and decisional shifts under the Obama Board, it should come as no surprise that most observers are expecting as many corresponding shifts under a new Trump Board.

Whether the new Board will swing the pendulum sharply in the opposite direction, or merely return it to a more central position, remains to be seen. It also remains to be seen how quickly, and in what order of priority, the Trump Board will address the problematic precedent of the last seven years. The necessity of having a "live" case in which to overturn precedent, and a host of other administrative and procedural issues, insure that the changes will not come overnight. After all, it took the Obama Board seven years to arrive at the current policy state.

The prospect of even more decisional change ahead makes the task of successfully dealing with NLRA issues a continuing challenge for employers. Charting a practical course amid a turning ideological tide requires a clear sense of one's location at the outset. To that end, in this edition of the *Practical NLRB Advisor*, we take a look back at developments in several areas of Board law and policy that took place last year. The retrospective will hopefully let readers know not only where they are now, but where they may be headed.

Sincerely,

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About Ogletree Deakins' *Practical NLRB Advisor*

At Ogletree Deakins, we believe that client service means keeping our clients constantly apprised of the latest developments in labor and employment law. With the whirlwind of activity taking place at the National Labor Relations Board (NLRB) in recent years—affecting both unionized and nonunion employers—a quarterly newsletter focused on the NLRB is an essential tool to that end.

Ogletree Deakins' *Practical NLRB Advisor* seeks to inform clients of the critical issues that arise under the National Labor Relations Act and to suggest practical strategies for working successfully with the Board. The firm's veteran traditional labor attorneys will update you on the critical issues in NLRB practice, with practical, "how to" advice and an insider's perspective. Assisting us in this venture are the editors of Wolters Kluwer Legal and Regulatory Solutions' *Employment Law Daily.*

The *Practical NLRB Advisor* does not provide legal advice. However, it does seek to alert employers of the myriad issues and challenges that arise in this area of practice, so that they can timely consult with their attorneys about specific legal concerns.

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More workers to organize

In 2016, the National Labor Relations Board (NLRB) continued issuing decisions that significantly expand the organizing opportunities for labor unions. Following up on its groundbreaking "joint employer" decision in *Browning-Ferris Industries of California, Inc. (BFI)*, subsequent Board decisions have now made it easier for unions to organize the growing ranks of the "contingent" workforce. The Board also issued decisions in which it narrowly construed the definition of "supervisor." By doing so it opened up to potential unionization individuals who play significant roles in managing an employer's operations. However, the Board opened up the largest new area—by far—for potential organizing by finding that graduate assistants at private colleges and universities are statutory "employees," and by asserting Board jurisdiction over schools that are chartered as public schools but not directly operated by government entities.

Permanents and temps together. In another example of its ongoing "contingent workforce" activism, the NLRB last July issued its decision in *Miller & Anderson, Inc*., in which it found appropriate a single bargaining unit comprised of both workers who are employed solely by a "user" employer and workers who are jointly employed by both the "user" employer and the "supplier" employer—most typically the staffing agency that furnishes those workers to the "user." With the exception of a brief period under a Clinton-appointed NLRB, such "mixed" bargaining units were not permissible because they effectively require two different employers to bargain with the same union on a multi-employer basis. Under the National Labor Relations Act (NLRA), employers cannot be compelled to bargain on a multi-employer basis, but can do so if both employers consent to the arrangement. In *Miller & Anderson*, the Board majority concluded that requiring the two employers to bargain with respect to a mixed unit is not actually multi-employer bargaining.

The ruling that contingent and permanent employees can be included in the same bargaining unit gives a "home" of sorts to the contingent workers, whose work is often ill-suited to inclusion within a bargaining unit. The decision also forms a predictable bookend to the NLRB's August 2015 decision in *Browning-Ferris*, which relaxed the NLRB's standards for finding joint-employer status. (The Spring 2016 issue of the *Practical NLRB Advisor* offers a detailed analysis of the *Browning-Ferris* decision and its implications.) Indeed, with *Miller & Anderson*, the other shoe has dropped, representing a significant threat to employers that have achieved efficiencies through the appropriate use of contingent workforces.

In nonunion workplaces that utilize contingent workers, unions now can petition to represent the primary workforce and the contingent workforce in a single bargaining unit, binding the staffing employer and the client employer to a duty to bargain with the union for both groups of employees simultaneously. In workplaces where the primary workforce already is represented by a union, and that primary workforce is supplemented by a contingent workforce from a staffing provider, unions may now have the opportunity to file unit clarification petitions seeking to accrete the contingent workforce into the existing bargaining unit without an election or, more likely, may seek a so-called "*Armour-Globe*" self-determination election, in which the contingent workforce would vote on whether or not to join the existing bargaining unit.

The consequences of *Miller & Anderson* for employers utilizing contract employees could be significant. If a staffing contractor manages its own employee relations poorly, and the contractor's disgruntled employees seek recourse through a union, the client employer can now find itself helplessly drawn into an organizing campaign and a bargaining relationship through no fault of its own. Yet, ironically, if a user employer tries to ensure that a staffing contractor with whom it does business is itself a fair employer—for example, by requiring in the staffing contract that it adopt certain basic employment policies or protections—it will almost certainly be deemed a joint employer with the staffing company on that basis.

The most fundamental problem with the *Miller & Anderson* model is that user and supplier employers have very different and often conflicting interests in employment and workplace issues. Yet these separate entities will now be forced to bargain together across the table from the union.

Both user and supplier employers should continuously evaluate the nature of their relationship and refine their contracts to clearly delineate and allocate their respective authorities and rights of control, including any *potential* rights of control. Avoiding a joint-employer finding in the first place will, of course, obviate any problems presented by the *Miller & Anderson* decision. Employers with union-represented primary workforces that also utilize a contingent workforce that is currently excluded from the bargaining unit should evaluate their existing labor contracts and work practices for any vulnerabilities associated with the contingent workers and assess any accretion or *Armour-Globe* potential.

***Browning-Ferris* applied, and challenged.** The reverberations from the Board's 2015 decision in *Browning-Ferris* continue to be felt by employers. For example, in *Retro Environmental, Inc./Green Jobworks, LLC*, a divided NLRB panel last August applied the *Browning-Ferris* standard to reinstate an election petition predicated on the existence of a joint-employer relationship between two employers. However, even as the Board, its regional offices, and its administrative law judges continue to apply the *Browning-Ferris* test in deciding new joint-employer cases, the legal soundness of the standard is by no means resolved. The employer in *Browning-Ferris* has petitioned the United States Court of Appeals for the D.C. Circuit for review of the NLRB decision, and the case remains pending before the appellate court.

Apart from possible appellate court reversal, several bills have been introduced in Congress seeking to roll back *Browning-Ferris*, by amending the text of the NLRA itself to reaffirm that an employer must have "actual, direct and immediate" control over an employee to be considered a joint employer—not merely the reserved or theoretical right to exercise such control. House Republicans also have sought to attach a policy rider to the NLRB's annual appropriation that would effectively kill the *Browning-Ferris* decision. While the effort was not successful in the last round of appropriations measures, recent election results could materially alter the legislative landscape.

Franchise fallout. Meanwhile, the *Browning-Ferris* decision continues to cause major disruptions in the franchise industry, fueled by the fact that the agency set its sights on one of the nation's most venerable fast-food corporations. In a dispute currently pending before the agency, the NLRB General Counsel alleges that the national corporation is a joint employer with its franchisees even though it plays no role in hiring, firing, disciplining, paying, or supervising its franchisees' employees.

Given the elasticity of the *Browning-Ferris* standard, franchisors are justifiably concerned about what terms of a particular franchise relationship may be enough to make them a joint employer with their franchisees and expose them to new obligations and liabilities. A finding of joint-employer status in the pending NLRB case would not only render the franchisor liable for any alleged labor law violations committed by its franchisees' supervisors and agents, it would make the corporate franchisor a party to any local negotiations, make it the object of union information requests, and strip it of any secondary activity protections. Little wonder critics charge that a finding of joint-employer liability in the pending case could seriously damage or destroy the franchise model itself and have decidedly negative economic consequences. Franchising has long provided an opportunity for individuals with entrepreneurial drive but limited capital to start their own businesses by benefiting from the significant branding value a franchisor can provide. As such, the practice has been a leading driver of jobs and growth. However, the NLRB's recent actions render the franchise structure decidedly less attractive, with potentially profound repercussions.

Finally, the NLRB in 2016 appeared poised to assert that "gig" economy participants—whose entrepreneurial role is decidedly unlike that of the industrial master-servant dynamic contemplated when the NLRA was enacted—are also statutory employees covered by the Act. Taken together, the NLRB's attacks on the contingent workforce, franchise models, and other nontraditional work relationships reflect a concerted effort by the Board to pull within its dwindling orbit the growing number of individuals who work under new types of models in a rapidly evolving economic landscape.

Supervisors aren't "supervisors." A more traditional labor law issue which the NLRB routinely decides is whether a particular individual or group of workers are "supervisors" under Section 2(11) of the NLRA and thus not "employees" within the meaning of the statute. The definition in Section 2(11) is elastic and the Board has articulated varying modes of factual analysis to determine supervisory status. Obviously, if the statutory exclusion is read narrowly it means fewer individuals are "supervisors," and more are subject to union organizing efforts. A narrow reading also means that individuals who play important roles in the operation of a business, and upon whom an employer justifiably relies, may nonetheless be deemed a statutory employee included in a potential bargaining unit with rank and file employees. The current Board majority has a history of reading the statutory exclusion narrowly, and it continues to find that individuals are *not* supervisors under the Act—even when they appear to meet the historical statutory criteria.

For example, under well-established precedent, an individual is a supervisor if he or she exercises or effectively recommends one or more of the indicia set forth in Section 2(11). However, in its February 2016 decision in *G4S Government Solutions, Inc.*, the Board narrowed the definition of "supervisor" and concluded that nuclear power plant security lieutenants were not statutory supervisors. Lieutenants regularly lead teams under their command in training exercises to prepare for any armed attacks on the plant and command the truck convoy when nuclear material is transported within the site. During nights, weekends, holidays, and any other times when nonessential personnel are away from the site, lieutenants are the highest-ranking officers at the site. Still, the Board majority held the lieutenants lacked authority to "responsibly direct" other guards using independent judgment, and rejected the employer's evidence of supervisory status, which focused on the criteria of responsible direction, assignment, and discipline.

In subsequent rulings, the NLRB continued to restrict the number of individuals that fall within the definition of a "supervisor" under the NLRA. In a May 2016 decision, the Board in *Veolia Transportation Services, Inc.* held that road supervisors for a van shuttle service were not statutory supervisors, contrary to the employer's assertion. The road supervisors observe drivers, ensure they abide by the policies and procedures of the local transit authority, and prepare written reports if the drivers breach these policies. Nonetheless, the Board majority reasoned that these reports were nothing more than "counselings" or "warnings," and did not amount to meaningful discipline sufficient to establish supervisory status. Therefore, the Board held, a Regional Director should not have dismissed a representation petition encompassing these individuals within a proposed bargaining unit.

Dissenting in *Veolia Transportation*, Board Member Philip Miscimarra asked the critical and perhaps obvious question: "If the road supervisors were not supervising the van drivers, who *was* supervising them?" He urged, to no avail, that the question should be considered in determining supervisory status as a matter of policy. As evidenced by subsequent decisions, his colleagues declined to take up that recommendation. For example, in *Peacock Productions of NBC Universal Media, LLC*, the Board held that freelance and run-of-show producers for a television production company were not supervisors because they did not assign or effectively recommend the assignment of other employees to their production. Additionally, the Board observed that the employer failed to establish that the producers responsibly directed other employees or had authority to hire, or effectively recommend the hiring, of actors on productions.

These decisions are cautionary tales suggesting that employers may be required to provide an abundance of evidence in support of any supervisory claims and may be required to establish that the individuals in question actually exercise supervisory authority. If an employer wants to ensure that the NLRB will find that its supervisors are indeed "supervisors," it should take steps to ensure they do, in fact, exercise independent authority in supervising and directing other employees and should carefully document the exercise of such authority.

Managers aren't "managers." Similarly, in *Wolf Creek Nuclear Operating Corp.*, a divided Board held that security training instructors (again, at a security-critical nuclear power plant, no less) were not managerial employees, and reversed a Regional Director's order finding that that an *Armour-Globe* self-determination election of instructors was inappropriate. In the Board's view, any discretion that they exercised in developing training programs, overseeing threat-response drills, and other functions was severely restrained by Nuclear Regulatory Commission regulations. Thus, just as it further constrained the meaning of "supervisor" under the Act, the Board also narrowed the scope of the Act's "managerial exception," opening up yet another subset of trusted employees to union organizing efforts.

Student-"employees." Finally, the NLRB in a divided 3-1 decision held that Columbia University "student assistants who perform work at the direction of their university for which they are compensated are statutory employees." In its August 2016 ruling in *The Trustees of Columbia University in the City of New York*, the Board applied a new standard that graduate and undergraduate teaching assistants who have a common-law employment relationship with their private university are statutory employees. The Board majority reasoned that statutory coverage under the NLRA exists by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach—such as the primarily educational relationship between the students and the university here. Thus, the Board reversed its holding in *Brown University*, which, according to the majority, had deprived an entire category of workers of the protections of the Act without a convincing justification. As anticipated, the decision has resulted in a significant amount of organizing activity at private colleges and universities.

Expanding its jurisdiction. In addition to expanding the type of educational workers covered by the NLRA, the Board also expanded the type of institutions it deems to be covered. Thus, in two cases it asserted jurisdiction over nonprofit corporations that operate charter schools under an agreement with a public school district. A divided Board concluded that these entities were more akin to government contractors, which fall within the Board's jurisdiction, than to political subdivisions of the state, which fall outside the agency's jurisdiction. The Board majority held the charter schools were unlike political subdivisions, since they were not created by the state nor administered by individuals responsible to public officials or the general electorate. Further still, the majority argued in *The Pennsylvania Virtual Charter School* and *Hyde Leadership Charter School–Brooklyn* that there were no persuasive reasons to decline to assert jurisdiction as a matter of discretion. ■

Union organizing made easier

Micro-units upheld. In 2016, several federal appellate courts upheld the National Labor Relations Board's 2011 *Specialty Healthcare* decision, which departed from Board precedent to sanction union elections among small "micro"-units within a company. Employers and business groups have consistently opposed the decision, arguing that organizers could cherry-pick small segments of employees to target in a union organizing campaign. Employers have argued that the balkanization of the workforce and the collective-bargaining process that *Specialty Healthcare's* "overwhelming-community-of-interest" standard engenders is contrary to the letter and spirit of the National Labor Relations Act (NLRA).

Unfortunately, the federal appellate courts have sided with the current NLRB and rejected the arguments from employers to the effect that the *Specialty Healthcare* standard is fatally flawed. For example, the United States Court of Appeals for the Fifth Circuit ruled that a retailer failed to show a unit consisting solely of cosmetics and fragrances employees at one of its stores was clearly not appropriate or that the Board had abused its discretion by adopting and applying *Specialty Healthcare's* overwhelming-community-of-interest test.

The retail employer had argued that the unit approved by the Board was clearly not appropriate because all sales employees at the store represented "a homogenous work force." The Board, however, found "little evidence of temporary interchange between the petitioned-for employees and other selling employees." Although the unit argued for by the employer may have also been "an appropriate bargaining unit," the appellate court found that it could not say the smaller unit approved by the Board was "clearly not appropriate" based on the employees' "community of interests." Concluding that in *Specialty Healthcare* the Board "clarified—rather than overhauled—its unit determination analysis," the court granted enforcement of a Board order finding that the bargaining unit was appropriate and that the employer unlawfully refused to bargain.

Just a month earlier, the United States Court of Appeals for the Fourth Circuit ruled that the Board did not violate the NLRA or abuse its discretion when it certified a bargaining unit comprised solely of maintenance employees at an ice cream production facility. Rejecting the assertion that even under *Specialty Healthcare's* overwhelming-community-of-interest standard, a maintenance-employee-only unit was improper, the Fourth Circuit explained that the employer overstated the significance of the Board's decision. As such, the court denied the employer's petition for review and enforced the Board's order finding that the employer unlawfully refused to bargain with the union.

Two months after the Fifth Circuit's decision, the United States Court of Appeals for the Third Circuit also upheld the *Specialty Healthcare* standard. The Board's interpretation of the standard for unit determination was reasonable and it properly applied that framework, the appellate court said, refusing to grant an employer's petition for review based on its claim that dockworkers should have been included in a bargaining unit of city and road drivers.

While the employer argued that the *Specialty Healthcare* Board failed to provide a reasoned explanation for the "adoption" of the overwhelming-community-of-interest test, the Third Circuit found that the ultimate holdings of *Specialty Healthcare* with respect to the unit-determination standards were not departures from Board precedent. The appellate court also rejected the company's contention that the *Specialty Healthcare* Board's overwhelming-community-of-interest test violated Section 9(c)(5) of the NLRA because it ensured that the union's choice was almost always the controlling factor. The employer offered no showing that the Board privileged the unit determinations of employees. Rather, the Board has been clear that it will not approve "fractured" units or arbitrary segments of employees, the appellate court said. Thus, the overwhelming-community-of-interest test clarified in *Specialty Healthcare* did not conflict with Section 9(c)(5).

The current Board majority continues to consistently support the *Specialty Healthcare* test. For example, in April 2016 a Board majority in *Volkswagen Group of America, Inc.* denied Volkswagen's request for review of a Regional Director's decision directing a union election among a micro-unit of maintenance workers at the automaker's Chattanooga, Tennessee, plant. Volkswagen asked the Board to reverse the decision approving a United Auto Workers (UAW) election within a discrete 160-employee group after the union's earlier bid to organize the entire 1,400-worker plant failed. UAW Local 42 won an election among the smaller unit, with over 70 percent of the maintenance workers voting in favor of the union. But Volkswagen refused to bargain, contending the bargaining unit was inappropriate. A 2-1 Board majority concluded that Volkswagen raised no substantial issues that warranted Board review, and upheld the decision and direction of election, finding the petitioned-for unit satisfied *Specialty Healthcare* criteria.

"Quickie" election rule upheld. Also in 2016, the Fifth Circuit, in *Associated Builders and Contractors of Texas, Inc. v. NLRB*, upheld the Board's controversial "quickie" election rule, which modifies the procedures for union representation elections. The modified procedures significantly accelerate the NLRB's union election processes, limit the ability to litigate legal issues prior to the election, and provide unions with enhanced employee contact information. In affirming a lower court ruling that refused to enjoin the rule, the Fifth Circuit found that the rule did not, on its face, violate the NLRA or the Administrative Procedure Act (APA).

Employer groups had challenged three categories of rule provisions:

(1) rule changes that limit the scope of the pre-election hearing, particularly the deferral of individual voter eligibility issues;
(2) rule changes that require employers to disclose to unions personal employee information; and
(3) rule changes that cumulatively shorten the time period between petition and election to less than 30 days.

To succeed on their facial challenge, the employer groups had to show that "no set of circumstances exists under which the [Rule] would be valid." Emphasizing the high burden faced by the plaintiffs, the appellate court held that the challenged provisions neither exceeded the scope of the Board's authority under the NLRA nor violated the APA's arbitrary and capricious standard. ■

More leverage to labor

A number of National Labor Relations Board (NLRB) decisions in 2016 gave labor unions significantly more leverage in their relationships with employers. For example, the Board issued rulings that will hinder employers in exercising their long-recognized legal right to permanently replace economic strikers and that will allow unions to challenge an employer's pre-contract authority to discipline employees, its post-contract right to act unilaterally in accord with past practice, and its mid-contract right to act unilaterally. Other decisions will restrict the unilateral ability of an employer to protect its business through the use of noncompete agreements and may hamper the purchaser of a business from unilaterally altering existing working conditions under the "perfectly clear successor" doctrine. Further still, Board decisions last year will make it much more difficult for employers to effectively address problematic behavior that occurs during the exercise of employees' Section 7 rights.

Putting the thumb on the union side of the scale

Permanent replacements: mining for motive. In May 2016, a divided NLRB issued its decision in *American Baptist Homes of the West dba Piedmont Gardens*, a significant case affecting the right of employers to replace striking workers. An employer's right to permanently replace economic strikers has been well-settled for decades and an employer's motive in exercising its replacement rights has largely been treated as immaterial. In *American Baptist,* however, a Board majority has now held that an employer's *motive* in replacing strikers is a critical factor in determining whether such a right was lawfully exercised.

In the case itself, the employer had permanently replaced economic strikers; however, there was evidence that agents of the employer had claimed that the employer hired the permanent replacements to "teach striking employees a lesson" and/or to "prevent future strikes." The Board majority held that such statements demonstrated that the employer did not replace the workers for a legitimate business purpose, but did so in furtherance of an "independent unlawful purpose"—to retaliate against the strikers and to discourage future protected activity. The dissent in *American Baptist* noted that virtually every strike situation involves hard feelings and a degree of animus and, most importantly, that the phrase "independent unlawful purpose" had always been construed to mean purposes unrelated to the strike itself.

Linguistic disputes aside, the case now casts considerable uncertainty over a given employer's decision to permanently replace strikers. Now, if an employer does permanently replace economic strikers it can anticipate that its motives will be second-guessed by the NLRB, the statements of its supervisors and agents will be reviewed and analyzed for evidence of "bad motive," and it may be called upon to provide a "neutral" business justification for its replacement decision. If an employer's decision to permanently replace is ultimately found unlawful, the employer could be required to dismiss workers to whom it promised "permanent" positions and could face backpay liability under certain circumstances. By injecting the element of after-the-fact second-guessing as to an employer's subjective motive, the case is likely to chill many employers from exercising their replacement rights. This, in turn, may adversely affect an employer's ability to maintain effective operations during a strike, thus giving striking unions a significant amount of new negotiating leverage.

"Negotiating" discipline. In the wake of the Board's decision in *Total Security Management Illinois 1, LLC*, newly organized employers, once again, face novel bargaining obligations with respect to employee discipline. The case resurrects the bargaining obligation first articulated in *Alan Richey,* a 2012 case that was eventually invalidated because it was decided by a legally deficient Board quorum. Specifically, the Board majority in *Total Security* again held that a newly organized employer that has not yet negotiated and executed a collective-bargaining agreement with its employees' union representative, must notify and bargain with that representative whenever it intends to impose "discretionary" discipline on a bargaining unit member.

Thus, during the period when parties are negotiating an initial collective-bargaining agreement, the Board will require an employer to give the incumbent union notice and an opportunity to bargain over each and every discretionary disciplinary action it intends to take prior to the imposition of the sanction. Any form of discretionary discipline, such as a suspension, demotion or termination, that alters an employee's terms of employment triggers the interim bargaining obligation.

Although the Board decision clearly imposes the obligation, it frustratingly sheds little light on the nature, scope, and duration of the requisite interim bargaining, and likewise offers scant guidance to differentiate between "discretionary" and "mandatory" discipline. Newly unionized employers that have not negotiated a complete collective-bargaining agreement will either have to negotiate an interim disciplinary process with the incumbent union or be prepared to handle most disciplinary matters through *ad hoc* bargaining. Both paths afford a newly certified union with a degree of new negotiating leverage.

Noncompetes as a bargaining subject. In *Minteq International, Inc.*, the NLRB held that an employer acted unlawfully by requiring new employees to sign a noncompetition and confidentiality agreement as a condition of employment without first giving the incumbent union notice and the opportunity to bargain over the agreement.

The Board held such agreements are a mandatory subject of bargaining and that the management rights clause in the parties' collective-bargaining agreement was not sufficiently specific to show that the union waived its right to bargain over the noncompete at issue. The Board rejected the argument that no bargaining was required because the management rights clause gave the employer the unilateral right to promulgate work rules. The noncompete, the Board reasoned, affected employees' terms and conditions of employment in ways that extended far beyond mere work rules governing employee conduct in the workplace.

The decision is significant as one of many in which the current Board rejects the notion of a bargaining waiver based on contract language and, instead, requires additional bargaining during the term of the contract. It is further significant because noncompetition/nondisclosure agreements play a significant role in protecting an employer's economic self-interest. As such, employers may be willing to make additional bargaining concessions in other areas in order to achieve agreement with respect to a noncompete agreement, thus giving unions enhanced bargaining leverage.

"Perfectly clear" successes and failures. Under the United States Supreme Court's 1972 decision in *National Labor Relations Board v. Burns International Security Services, Inc.,* even a "successor employer" is not bound by the substantive terms of a collective-bargaining agreement negotiated by its predecessor and is ordinarily free to set initial terms and conditions of employment unilaterally. However, as the case notes, there are instances in which it is "perfectly clear" that the new employer plans to retain all of the employees in the unit, and, under such circumstances, the new employer must first bargain with the union before changing existing terms and conditions of employment. The determination of whether a successor is a "perfectly clear" one or not is obviously critical since it directly impacts the right of an employer that acquires a new business to make immediate unilateral changes to wages, hours, and working conditions. It also implicates significant liability issues in those instances where the new employer believes it is not a "perfectly clear" successor and makes such changes without first bargaining, only to find out later that its belief was incorrect.

Last year, the Board examined the "perfectly clear" successor doctrine on a number of occasions. While the cases reached differing results, they all demonstrate the often confusing, but consistently detailed, fact analysis underpinning a "perfectly clear" finding.

For example, in *Paragon Systems Inc.* the Board found that an employer was not a "perfectly clear" successor under *Burns* because it did not show an intent to retain a predecessor's security officers when it posted a job fair memo seeking to hire guards. On its face, the memo did not state that security officers who completed the application or attended the job fair would be offered employment. Because the memo did not suggest that hiring was inevitable, it was not an invitation to accept employment. Similarly, a federal contractor in *Data Monitor Systems, Inc.* did not become a perfectly clear successor, the Board found, because it did not promise continued employment and did not communicate in any way that filling out an employment application was simply an administrative formality that would ensure continued employment. In this instance, because the contractor's actions clearly communicated that it had not yet made its hiring decisions, it was under no obligation at that point to make a simultaneous announcement of its intent to change terms and conditions of employment in order to avoid "perfectly clear" successor status.

On the other hand, in *Nexeo Solutions, LLC*, the Board found an employer was a "perfectly clear" successor as of the date when bargaining unit employees were informed they would be transferred to a new business and the employer said it would provide equivalent salaries and benefits comparable in the aggregate to those provided by a predecessor. In this case, the Board held the employer was obligated to bargain with a union, and so it violated the Act when it made unilateral changes to pension and benefit plans after taking control of operations. A Board majority reached a similar result in *Creative Vision Resources, LLC*, where it determined that an employer was a perfectly clear successor to a group of related companies and violated Section 8(a)(5) of the National Labor Relations Act by failing to provide a union with notice or an opportunity to bargain before imposing initial terms and conditions of employment that differed from those under the predecessor's collective-bargaining agreement.

Management rights wronged. A divided four-member NLRB held in *E.I. Du Pont de Nemours, Louisville Works* that the employer violated the Act when it made unilateral changes to bargaining unit employees' benefit plans after the governing collective-bargaining agreement expired. The Board majority held that "discretionary unilateral changes ostensibly made pursuant to a past practice developed under an expired management rights clause are unlawful." In so holding, the majority overturned several Bush-era NLRB decisions.

DuPont argued that it was privileged to make the unilateral changes in question because doing so was consistent with past practice. And, DuPont pointed out that the Board had previously sanctioned a past practice defense to unilateral benefits changes made post-contract expiration in its 2004 *Courier-Journal* cases. The Board majority, however, held that the "past practice" at issue was based on changes that were implemented pursuant to the management rights clause and that the management rights clause allowing such unilateral actions effectively expired when the contract ended. The majority attempted to distinguish the *Courier-Journal* cases by noting that the past practice in those cases had been to make unilateral changes *both* during the contract period *and* during hiatuses between contracts. Since employers are now precluded from making post-expiration changes based on an expired management rights clause, *DuPont* provides unions with considerably enhanced negotiating leverage.

What more can I say? In *Graymont PA, Inc.*, a Board majority held that an employer was not privileged to promulgate mid-term changes to its absenteeism policy in reliance on a contractual management rights clause giving it the right to establish "reasonable workplace rules and regulations." The majority concluded the management rights language was not specific enough to infer that the union "clearly and unmistakably" waived its right to bargain, mid-term, over implementation of the new absenteeism policy. The decision significantly diminishes the utility of management rights provisions and raises serious questions about the degree of specificity that is required in such clauses to allow unilateral employer action. The decision virtually guarantees that more mid-term management decisions will be subject to bargaining, yet again giving unions increased leverage as employers try to effectively manage the workplace. *Graymont* is also the next chapter in the long-running debate over the "clear and unmistakable waiver" theory and the "contract coverage" theory of mid-term bargaining obligation. (See "Circuit court pushback" on page 11.)

Diminishing control over misconduct

In 2016, the NLRB continued to extend legal protection to problematic and disruptive employee behavior, and, in one instance, a federal appellate court affirmed the Board's view. In *DirecTV, Inc. v. NLRB*, for example, a divided panel of the United States Court of Appeals for the D.C. Circuit—while acknowledging the tension between employees' right to engage in protected, concerted activity and an employer's reasonable expectation of loyalty from its employees—nonetheless upheld the NLRB's conclusion that a group of television installation technicians did not lose the protection of the Act when they aired a dispute with their employer over a new pay-docking policy on the local news. The appellate court affirmed a Board decision finding that the employees' actions were not "flagrantly disloyal" or "wholly incommensurate" with their underlying grievance and that their comments to the media were not "maliciously untrue." Notably, the majority said the Board could permissibly consider the employees' intent and find that the employees had merely sought to win over viewers to their cause, not induce them to cancel their satellite service or to "unnecessarily tarnish their employer."

Hospital picketing protected. Over the years federal courts have admonished the Board that in assessing the protected nature of employee conduct in the health care setting, it must be mindful that hospital patients require a quiet and nondisruptive environment in which to heal. Nevertheless, in *Capital Medical Center*, a divided Board found that a hospital employer unlawfully interfered with informational picketing by off-duty employees at nonemergency entrances by threatening the employees with discipline and arrest. The Board determined that the employer did not meet its burden of showing that prohibiting the type of picketing that occurred in this case was necessary to prevent patient disturbance or disruption of health care operations. At bottom, the majority's position is that on-premises picketing by off-duty employees is protected activity absent a demonstration by the employer that the picketing was, in fact, disruptive.

In-store work stoppage. A "sit-down" strike in which employees stop working but do not leave an employer's premises has traditionally been deemed to be unprotected. However, in the instance of a modern-day "sit down" in a retail store, a divided NLRB reached the opposite result. In *Wal-Mart Stores, Inc.*, the discount retailer was found to have unlawfully disciplined six store employees because they stopped work before and during the store's grand reopening to protest alleged mistreatment by a supervisor and to pressure the employer to give some temporary workers permanent positions. The Board majority concluded that the protest did not lose the protection of the Act since it was relatively small, brief, peaceful, and confined to the early morning opening hours.

As the line between protected and unprotected activity becomes fuzzier, unions and employee activists are often encouraged to continue to "push the envelope." The decision may thus invite more on-site protests. ■

Circuit court pushback

The decisional arc of the current National Labor Relations Board (NLRB) majority has met with much criticism from outside the agency and even from within, as Member Miscimarra's frequent dissents suggest. The appellate review road has also had its bumps for the current Board majority, with more than a few federal circuit courts declining to enforce the Board's orders and using the opportunity to criticize its decision-making.

For example, one appellate court judge had seen enough of the NLRB quietly tolerating offensive employee conduct in the name of protected activity. After writing the majority opinion in the D.C. Circuit's decision in *Consolidated Communications, Inc. dba Illinois Consolidated Telephone Co. v. NLRB*, and finding that an employer unlawfully suspended two employees for alleged misconduct during a strike and eliminated a position held by a union worker, Judge Millett wrote a separate concurrence taking the Board to task for its analysis of the striker misconduct at issue. Millett wrote that the Board too often takes a cavalier and enabling approach toward sexually and racially demeaning misconduct by some employees during strikes. Board decisions have repeatedly accorded protection to conduct that is not only intolerable by any standard of decency, but also illegal in every other corner of the workplace, the judge noted.

In an even more far-reaching decision, in *Heartland Plymouth Court MI, LLC dba Heartland Health Care Center–Plymouth Court v. NLRB*, the D.C. Circuit roundly criticized the Board for its reliance on "nonacquiescence" to justify its prosecution of a claim against an employer. Nonacquiescence refers to the Board policy of continuing to interpret the National Labor Relations Act (NLRA) in ways that have been found to be incorrect by a particular federal circuit court or courts. The rationale for the policy is that the NLRB has the responsibility to establish national labor policy and in doing so is free to disregard any contrary views by circuit courts of appeals since their jurisdictions are confined to specific geographic areas of the country. Thus, runs the theory, the NLRB can, for example, disregard what the First Circuit says because it has a right to convince other circuits that its view is correct.

In *Heartland,* the D.C. Circuit acknowledged the Board's role in establishing national labor policy, but found that the associated policy of nonacquiescence has its limits. The policy, the court observed, is warranted for the purpose of obtaining a "circuit split" on a particular legal issue under the NLRA, which the Board may then petition the Supreme Court to resolve. In *Heartland,* the legal issue over which the Board and the D.C. Circuit disagree has persisted for decades without the Board ever seeking Supreme Court resolution. Since the Board had not sought such resolution, and since the Board surely knew the long-held view of the D.C. Circuit, the appellate court panel concluded that the Board's enforcement effort in the D.C. Circuit was being maintained in bad faith. Thus, the appellate court not only refused to enforce the Board's order, but saddled the Board with paying a portion of the employer's legal costs.

Heightened risk of damages

A potential windfall. After finding that a discharged employee was entitled to backpay, the National Labor Relations Board (NLRB), in its 3-1 decision in *King Soopers, Inc.*, modified the Board's current make-whole remedy to require employers to fully compensate employees for search-for-work expenses and expenses incurred in connection with interim employment. Specifically, the majority ruled former employees are entitled to search-for-work and interim employment expenses as a separate element of damages, not simply as an offset against wages earned from any interim employment. Previously, the NLRB used job-search and interim employment expenses to reduce the amount of an employee's interim earnings, which were then subtracted from his or her gross backpay. The majority, however, noted that under the traditional formula in situations in which search and employment expenses were greater than interim earnings, an employee would experience an uncompensated loss.

However, in his dissent, Member Miscimarra noted that the new approach will also produce a "windfall" when a wrongfully terminated employee's interim earnings exceed his or her gross backpay. Thus, an employee could wind up in a "more favorable financial position than would have resulted from uninterrupted employment with the respondent employer." He cautioned that the fundamental problem is that providing such a windfall exceeds the Board's statutory authority. Member Miscimarra noted that there were methods to address the unfair situation identified by the majority, without changing the formula in a way that could result in an impermissible potential windfall. The majority, however, declined to adopt Miscimarra's more moderate approach. The case has caused some observers to question what the current Board majority regards as the statutory limit of its remedial authority.

Controlling consent settlement agreements. In *U.S. Postal Service* a divided Board decided to strip the agency's administrative law judges (ALJs) of the authority to issue so-called "consent orders," that adopt settlement terms proposed by an employer in an unfair labor practice case, over the objection of the General Counsel and other parties to the case. Under prior practice, the Board would review such consent orders under the *Independent Stave* standard to evaluate whether the settlement effectuated the National Labor Relations Act (NLRA) despite objections from the General Counsel or charging party. Under *U.S. Postal,* however, an ALJ has no authority to accept an employer-proposed settlement over objection, unless the settlement provides for a "full remedy."

The decision directly affects employers' future efforts to remove or limit default language when agreeing to settle alleged violations of the NLRA. In the past, an employer faced with an intransigent NLRB regional office would often seek the assistance of the assigned ALJ to settle the case on the basis of the employer's proposal. Such unilateral settlement proposals, including those that contained limited or no default language, were regularly approved by ALJs where the judge found they were reasonable and effectuated the purposes of the Act. Under the new standard, however, if the General Counsel or charging party objects, an ALJ will no longer be able to accept settlements with any limitations, particularly with respect to default language.

The General Counsel's insistence on default language in Board settlements is viewed by many critics as, itself, unreasonable, since even a full litigation win for the General Counsel does not result in the imposition of default language. These critics argue employers are better off simply proceeding to a hearing on every complaint, knowing that a Board order could not result in any worse remedy than the General Counsel's proposed settlement and that there may be a chance of success on the merits. The Board simply cannot function without a very high settlement rate, and *Postal Service* makes settlement of cases less likely while producing little beneficial administrative effect.

Class action waivers. Continuing its offensive against mandatory arbitration agreements containing class action waivers, the Board in 2016 handed down a number of decisions finding that an employer acted unlawfully by maintaining and/or enforcing agreements that contain such provisions. For example, in *Ralph's Grocery Company* a divided Board held that the employer's policy and its enforcement violated the Act because it contained such a class action waiver. It also found the policy unlawful because it was ambiguous and would reasonably be construed by employees as prohibiting them from pursuing Board charges.

The NLRB systematically invalidated a spate of other employer arbitration agreements for the same reason, steadfastly adhering to its holding in both *D.R. Horton, Inc.* and *Murphy Oil USA, Inc.*, despite the rejection of its position by a number of federal courts. As Member Miscimarra has repeatedly pointed out in dissent, by adhering to its class action waiver position, the Board is defying the United States Court of Appeals for the Fifth Circuit and other federal courts that have rejected the agency's position. Even employer policies that provide employees with an opt-out or that expressly permit employees to file claims with an administrative agency, which, itself, can pursue a remedy on behalf of employees as a group, have not escaped invalidation by the Board.

The Board's condemnation of class action waivers has not, however, been universally rejected by reviewing federal courts. A divided panel of the United States Court of Appeals for the Ninth Circuit, in *Morris v. Ernst and Young*, agreed with the Board and concluded that class action waivers in arbitration agreements violate the NLRA and are, therefore, unenforceable. The Ninth Circuit relied on a similar recent decision from the United States Court of Appeals for the Seventh Circuit in *Lewis v. Epic Systems Corp.* These decisions go against the weight of authority on this important issue and are in direct conflict with the decisions of other courts of appeals, such as the Fifth Circuit's decisions in *D.R. Horton* and *Murphy Oil.*

The rulings in *Morris and Epic Systems*, as well as the Board's decision in *D.R. Horton*, call into question employers' ability to enforce a contract clause restraining employees from prosecuting wage and hour claims as members of collective or class actions, including through arbitration. Several petitions for writ of certiorari are pending with the Supreme Court on this issue, and Justice Scalia's upcoming replacement could determine the outcome.

Those employers not already utilizing arbitration agreements may want to consider waiting until the legal dust settles before implementing them. Employers already using arbitration agreements with class action waivers may want to consider revising their form agreements in two important ways. First, consider adding an opt-out provision if the agreement doesn't have one already. Second, include a provision stating that if the class action waiver is deemed unlawful for any reason, any class, collective, or group action will be heard in court and not by an arbitrator, as most practitioners agree that class arbitration is unwieldy and undesirable. ■

Handicapping the High Court

Given the conflicting views of a number of federal appellate courts, there is a high likelihood that the Supreme Court of the United States will wind up deciding whether class and collective action waivers in employment arbitration agreements violate the NLRA. On the one hand, the Fifth Circuit in *D.R. Horton* and *Murphy Oil*, and the United States Court of Appeals for the Eighth Circuit in *Cellular Services of Missouri*, have rejected the Board's view and refused to enforce its decisions. On the other hand, the Seventh Circuit in *Epic Systems* and the Ninth Circuit in *Morris* have supported the Board's view. Several petitions for certiorari are currently pending before the High Court, and the existence of this growing "split" among federal circuit courts has prompted most observers to predict that the Court will grant the petitions and resolve the dispute. In addition to the threshold issue of whether or not such agreements violate the NLRA, the Court may also determine whether, in any event, the Federal Arbitration Act (FAA) trumps the NLRA in this context. The FAA establishes a presumption in favor of enforcing arbitration agreements *as written*. That presumption can be overcome by another statute, but only if that statute contains a "congressional command" that is contrary to the FAA's enforcement mandate.

Handbook cases

In our last issue of the *Practical NLRB Advisor*, we offered a deep dive into the NLRB's recent caselaw scrutinizing company handbooks and other employer work rules and policy proscriptions, in both union and nonunion settings. As we summarized there, the Board's intrusion on this employer terrain continued, unabated, in 2016. The Board's preoccupation with this issue has been both long-standing and frequent. Indeed, "[o]f the approximately 1,200 decisions issued by the Board in contested unfair labor practice cases over the last five years, more than 200 have, in some part, involved the legality of provisions in an employer's handbook or personnel policies," noted Tom Davis, Co-Chair of Ogletree Deakins' Traditional Labor Relations Practice Group. "It is, by far, the most prevalent issue in recent Board decisions."

The handbook cases have resounding implications and cut across the issues we discuss in our 2016 year-in-review. For example, the NLRB's willingness to find unfair labor practices in the pages of company handbooks gives organized labor an opportunity to "draw a foul" during organizing campaigns, and thus to challenge an adverse representation election outcome. The Board's eagerness to act as an uber-human resources office takes control from employers, making it all the more difficult for businesses to manage their own workforces. The cases serve as a way for the Board to flex its regulatory muscles and to assert its continuing relevance in all workplaces. Finally, the Board's work rule holdings expand the very notion of what constitutes protected, concerted activity under the NLRA and, as such, impose a greater risk of liability for employers.

General Counsel stirrings

Appointed by the president to a four-year term, the National Labor Relations Board's General Counsel is independent from the agency's five-member Board and has final authority with respect to the investigation of charges and issuance of complaints. The General Counsel also supervises the NLRB field offices in the processing of cases and issues memoranda to provide policy guidance. The current General Counsel, Richard F. Griffin, Jr., whose term does not expire until November of 2017, has been very active.

Withdrawal of recognition. In May 2016, Griffin issued a *memorandum* ordering the Board's regional offices to issue complaints in every case in which an employer withdraws recognition from a union without the union first being decertified as a result of a secret-ballot election. The memorandum directed the regions to issue unfair labor practice complaints even when a withdrawal is based on overwhelming "objective evidence" that the union has lost its majority status. Rejecting the objective evidence standard and making election results the sole basis for withdrawing recognition is a departure from long-standing Board precedent.

Under the Board's current standard, an employer is allowed to withdraw recognition if it is presented with objective evidence, such as a signed petition from a majority of employees represented by the union indicating that they no longer support or wish to be represented by the union. In abandoning this approach, the General Counsel's memorandum declares that the last 15 years have shown it to be unworkable. The memo contends that employers have not restricted themselves to withdrawing recognition only when the evidence "clearly indicates" a lack of support for the union. Further, the memo argues, the test has "created peril for employers in determining whether there has been an actual loss of majority support" for a union resulting in "protracted litigation undermining the core purposes of the Act."

The General Counsel does not have the authority to overturn Board precedent. Only the Board itself can do that. The purpose of the memo is to have regional offices issue complaints on the General Counsel's new theory so that he can subsequently argue to the Board on appeal that precedent should be changed. Accordingly, in his memo, the General Counsel provides the arguments and the model briefing that regional offices are to use in arguing the position to the agency's law judges and to the Board itself.

From a practical perspective, the memo alone will cause problems for employers regardless of whether or not a case eventually reaches the Board, and the Board ultimately adopts the General Counsel's position. Because the General Counsel has unreviewable authority over the "front end" of the unfair labor practice process he can continue to issue complaints based on his view even if the Board has not overturned existing precedent. Thus, even in the face of overwhelming objective evidence of the union's loss of support that would justify withdrawal under current law, an employer that does withdraw may face an NLRB complaint and litigation.

Misclassification as unfair labor practice. In August, the General Counsel, through the agency's Division of Advice, released another memorandum that is binding on its regional offices and that authorizes the issuance of an unfair labor practice complaint in certain situations in which an employer allegedly misclassifies employees as independent contractors. The employer involved in the advice memorandum advised its drivers that they were independent contractors and, as such, had no rights to form a union. The company further required the drivers to execute a "lease and transportation agreement." However, according to the memo, the company treated the drivers as "employees" in virtually every respect. This misclassification interfered with and restrained the drivers in their exercise of Section 7 rights in violation of Section 8(a)(1), the memo stated.

The memo then noted that, although the Board has never held that an employer's misclassification of statutory employees as independent contractors, in itself, violates Section 8(a)(1), there are several lines of Board decisions that support this finding. Accordingly, the Division of Advice—for the first time—authorized the issuance of a complaint for a violation of Section 8(a)(1) solely for the misclassification of independent contractor status.

The memo makes the future issuance of complaints for misclassification of independent contractor status a threat to employers across the country. The memo, in and of itself, does not change current law. It will, however, likely result in "teeing up" a case in which the Board could change the law. The memo also signals the desire of the General Counsel that in the future, the NLRB will be an even more active player in the government-wide assault on independent contractor status.

Intermittent strikes. Finally, in October of 2016, the General Counsel's office issued a memorandum asking the Board to clarify and modify its law on intermittent and partial strikes. Noting that employees are using new tactics, such as engaging in multiple short-term strikes, the memo explains that the Board's present test for determining whether these strikes are protected is difficult to apply to these situations and exposes employees to potential discipline for engaging in protected Section 7 activities.

In addition to asking the Board to take a fresh look at the law, the General Counsel's office has directed regional offices to be on the lookout for cases in which to issue complaints that might serve that end. To further "assist" the regions, the General Counsel once again provided them with model arguments and briefing on the issues involved in an intermittent or partial strike.

The framework proposed by the General Counsel would protect multiple strikes—even strikes over the same labor dispute, if they involve a complete cessation of work, and are not so brief and frequent that they are tantamount to work slowdowns; are not designed to impose permanent conditions of work, but rather are designed to exert economic pressure; and the employer is made aware of the employees' purpose in striking. According to the General Counsel, this rubric "more effectively protects the right to strike, dispenses with the unpersuasive rationales relied on in the past, and better addresses Supreme Court precedent."

Of special concern to employers, the memo directs the regions to submit a case to the Division of Advice even if they conclude that a complaint is not warranted under current law but may be appropriate under the analysis provided in the model brief. Once again, even if the General Counsel's theory does not reach the Board immediately, the existence of the memo is likely to encourage an increase in the multiple and short-term strike tactic. ■

Meanwhile, at the DOL . . .

Were it not for federal district courts in Texas in 2016, employers would have a lot more challenges to confront, courtesy of the U.S. Department of Labor (DOL).

Down goes the "persuader" rule

In June, a federal court in Texas in *National Federation of Independent Business v. Perez* issued a nationwide preliminary injunction against the DOL's controversial "persuader rule." The rule eviscerated the so-called "advice exception" contained in the Labor-Management Reporting and Disclosure Act (LMRDA) and would have required public disclosure of all financial arrangements between an employer and any labor relations consultant or attorney retained by the employer in conjunction with a union organizing effort if the consultant or attorney engaged in even "indirect" efforts to "persuade" employees to reject union representation. On November 16, the court issued a subsequent order making the preliminary injunction permanent.

"Not merely fuzzy." The Texas court determined that the DOL rule was riddled with legal infirmities. It found the rule to be unconstitutionally vague, as well as a violation of the constitutional rights to free speech and due process. It held that, in promulgating the rule, the DOL acted arbitrarily and capriciously, in excess of its statutory authority, and in conflict with the LMRDA. And, finally, it concluded that the rule ran afoul of the Regulatory Flexibility Act. "DOL's New Rule is not merely fuzzy around the edges," the court wrote. "Rather, the New Rule is defective to its core because it entirely eliminates the LMRDA's Advice Exemption."

The court also observed that although the ostensible purpose behind the rule was to inform employees when outside attorneys had been hired to persuade them not to unionize, employees would not typically have access to this information before they cast their votes. Under the "quickie" election rule most elections are conducted *less* than 30 days after a union files a petition with the National Labor Relations Board. However, under the persuader rule the filing of the LM-20 Form, which discloses the "persuader" agreement, was not required until 30 days *after* an employer entered into a reportable agreement. Thus, the court pointed out, contrary to the stated reason for the rule, the existence of most of these "persuader" agreements would not be known to employees by the time they voted in any union election.

No representation for union campaigns. Significantly, the court further noted that the public reporting requirement of the rule would discourage employers from retaining competent legal counsel and would impermissibly interfere with the attorney-client relationship. The American Bar Association criticized the rule citing the ethical dilemmas that it imposed on practicing labor attorneys who provide legal counsel to management clients. The existence and financial details of any attorney-client relationship are themselves regarded as confidential matters and are prohibited from unilateral disclosure under some state bar rules. Thus, lawyers in those states could be caught between conflicting federal reporting requirements and state bar rules. Several states, themselves, also opposed the rule, noting that the various states, not the federal government, have the right to regulate the practice of law in their respective states and to enforce rules designed to protect confidential attorney-client information. A number of labor law attorneys had asserted they would stop representing employers in election campaigns altogether rather than adhere to the mandates of the new rule as well as the considerable costs of compliance.

Undoing the advice exemption. Lawyers or consultants who merely provided advice to management clients and who did not meet directly with employees traditionally had no reporting obligation because of the advice exemption. The new rule, however, would have "interpreted" the exception in such a way as to effectively eliminate it. As the plaintiffs' lead counsel Jeffrey Londa, a shareholder in Ogletree Deakins' Houston office, observed: "DOL's problem [was] its insistence that persuader activity and advice are mutually exclusive categories," which meant that it sought to "categorize conduct that clearly constitutes advice as reportable persuader activity." The new rule erroneously insisted that "advice" can never have "an object . . . to persuade," but "that's not what the LMRDA says."

The permanent injunction was a "major victory for employers," Londa noted, "preserving their right to secure counsel when faced with union organizing."

Down goes the "blacklisting" rule

In October, another federal court in Texas entered a nationwide preliminary injunction in *Associated Builders and Contractors of Southeast Texas v. Rung*, barring the administration from implementing final rules to effectuate Executive Order (EO) 13673, the so-called "Fair Pay and Safe Workplaces" initiative. The preliminary injunction came just hours before the final Federal Acquisition Regulatory (FAR) Council Rule and DOL guidance were to be implemented. It barred implementation of those portions of the EO, colloquially known as the contractor "blacklisting" order, that would have required contractors and bidders to report any violations of several labor and employment statutes that they or their subcontractors committed. Also barred were provisions that would have restricted the use of arbitration agreements for certain types of employment disputes.

The executive order. EO 13673 required that in the case of certain procurement contracts for goods and services, a contractor, prospective contractor, or subcontractor was required to periodically report any administrative merits determination, arbitral award, or civil judgment rendered against it within the preceding three-year period that involved a violation of a host of employment laws. The information reported would then be considered by federal contract officers in determining whether or not a contractor or bidder had a sufficient record of integrity and business ethics to receive or maintain a federal contract. The information could obviously have a disqualifying effect even though the reported "violations" might not be final, were not confined to performance on past government contracts, and/or were not preceded by a hearing or subject to judicial review.

The EO also provided that for certain contracts, contractors and subcontractors would have to agree not to enter into any mandatory pre-dispute arbitration agreement with their employees or independent contractors on any matter arising under Title VII, as well as any tort related to or arising out of sexual assault or harassment.

Enjoined. The court enjoined the implementation of any portion of the FAR Rule or DOL guidance relating to the new reporting and disclosure requirements regarding labor law violations. In issuing the injunction, the court noted that the public reporting and disclosure requirements and the disqualification provisions contained in the EO, the FAR Rule, and the DOL guidance were nowhere found in, or authorized by, the Federal Property and Administrative Services Act, the claimed source of the authority for the provisions. Moreover, the requirements would make contractors publicly report mere allegations of labor law violations; and, on the basis of such unproven allegations, a contractor could either be disqualified or compelled to prematurely enter into a "labor compliance agreement." The court also enjoined the enforcement of the restriction on arbitration agreements, finding the restriction was not authorized by the Federal Arbitration Act absent a congressional command that would override the requirement that arbitration agreements be enforced in accordance with their terms.

The court also found that the procedural and remedial scheme envisioned by the order and implementing rules conflicted directly with the National Labor Relations Act and other labor laws. This approach of the EO also explicitly conflicted with those laws that already specify debarment procedures after full hearings and final adjudications for contractors that violate requirements specifically directed at government contracting. Moreover, the immediate disclosure requirement compelled contractors to engage in public speech on matters of considerable controversy adversely affecting their public reputations, thus infringing on their First Amendment rights. This requirement would have obligated federal contractors and their subcontractors to publicly report any labor law "violations" since October 25, 2015, regardless of whether they occurred while performing government contracts, were finally adjudicated or settled, or even occurred at all.

Jim Murphy, a shareholder in the Washington, D.C. office of Ogletree Deakins, noted that in finding that the government went too far in the regulations, the court focused on the overbreadth of the "administrative merits determination" concept and the fact that contractors could be denied contracts for violations having nothing to do with the contractor's government business.

Paycheck transparency provisions survive

The blacklisting rule's paycheck transparency requirements were *not* enjoined, however. The EO provided that covered contractors would be required to inform employees, in each paycheck, of their hours worked, overtime calculations, rates of pay, gross pay, additions and deductions from pay, and whether they have been classified as independent contractors. These requirements remain, and so employers that anticipate an award of one or more federal contracts or subcontracts of $500,000 or more (other than subcontracts for commercially available off-the-shelf items) after January 1, 2017, should continue with their compliance efforts, including:

- ensuring that wage statements and pay stubs contain the required information about gross pay, rate of pay, itemized additions to and deductions from gross pay, total hours worked, and overtime hours worked;
- ensuring that employees who are exempt from overtime requirements receive the required exemption notices prior to the time they perform work on a covered contract and/or in the first wage statement received for work on the contract; and
- identifying independent contractors who will be working on covered contracts and ensuring that each is properly notified of his or her being classified as an independent contractor on the contract at issue.

Guidance enjoined, too. In the wake of the injunction, the FAR Council issued a formal memorandum to provide guidance to federal procurement officials. The FAR Council directed federal agencies "to take all steps necessary with their workforces to comply with the Court Order and ensure the enjoined sections, provisions, and clauses of FAR Case 2014-025 are not implemented unless and until receiving further direction."

What now? The U.S. Department of Justice (DOJ), which represents the government, has filed an appeal asking the United States Court of Appeals for the Fifth Circuit to lift the preliminary injunction. But even if the government ultimately prevails in the litigation, the Trump administration will almost certainly take steps to rescind the final rule and discontinue the DOJ's defense in the Texas litigation. ■

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