A JOURNEY OF **ONE THOUSAND STEPS**

The NLRB's Effort to Restore Common Sense in Labor Law

U.S. CHAMBER OF COMMERCE
Employment Policy Division

A Journey of One Thousand Steps:
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Introduction

In January 2017, the nascent Trump administration swept into Washington after what turned out to be a raucous campaign and equally unexpected election outcome. The arrival of the new president abruptly punctuated the eight years of the Obama administration with a different philosophy—and style—to say the least. For observers of labor policy, many questions arose about how the new administration would approach this corner of the policy universe. But one thing was certain—the days of the lopsided, union-friendly Obama era had ended.

With the new administration in place, attention turned to the leadership of the U.S. Department of Labor (DOL) and the National Labor Relations Board (NLRB), both of which had been stacked with appointees sympathetic to, if not straight out of, the world of organized labor. The early appointments at the DOL provided increased hope that the Trump administration would staff the department with policymakers with a more balanced approach to the department's regulatory efforts.

Similarly, the NLRB was ripe for different leadership, and its majority finally shifted from Democratic to Republican control on September 26, 2017, with the appointment of Member William J. Emmanuel, who joined then-Chairman Philip A. Miscimarra and Member Marvin Kaplan to break a 2-2 deadlock. That development gave the new majority the ability to revisit policies adopted by the previous Democratic majority and return to numerous longstanding precedents that it had overturned.

Early in 2017, the U.S. Chamber of Commerce published the report *Restoring Common Sense to Labor Law: Ten Policies to Fix at the National Labor Relations Board*, which highlighted 10 particularly egregious policy shifts at the Board during the Obama administration that "stretched the boundaries of common sense and existing jurisprudence."[1] From permitting small groups of employees in a larger workplace to unionize to curtailing employers' private property rights, the NLRB undermined numerous well-understood legal doctrines in a zealous effort to facilitate union organizing efforts.

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Indeed, by one estimate, the NLRB upended 4,559 years of precedents, leaving much work to be done to restore balance—and in some cases, common sense—to the Board's policies.[2] Almost exactly three years after the Board's majority shifted to Republican control, this paper examines several cases and regulatory actions at the NLRB that have sought to return the agency to its traditional role of behaving more like an impartial referee than one side's quarterback.

Inasmuch as the Chamber's previous report covered 10 specific policies, this paper focuses mainly on how those issues have developed since 2017, but it is by no means an exhaustive list of the actions taken by the current Board majority to counter the lopsided policies of its predecessors. Indeed, the Board has pursued numerous changes through case law as well through regulation, all in an effort to restore the balance and commonsense approach that had all but disappeared.

Specialty Healthcare and 'Micro' Units

The Obama-era NLRB's implementation of so-called micro units stood out among the many policy shifts because it rejected longstanding precedents about the composition of bargaining units in a workplace and adopted a standard that made it much harder for employers to challenge a union's proposed unit.

The policy permitted small subsections of employees to form a bargaining unit, presumably to facilitate a union's ability to get the proverbial camel's nose under the tent when trying to organize a particular employer where the union did not have or did not think it had majority support. By doing so, the union could claim a partial victory, add to its dues-paying rolls, and gain access to the employer's facilities.

The vehicle for the NLRB's micro-unit policy shift was its 2011 decision in *Specialty Healthcare & Rehabilitation Center of Mobile.*[3] In its ruling, the NLRB adopted a standard for determining what constitutes an appropriate bargaining unit that essentially rubber stamped whatever a petitioning union proposed.

Under the *Specialty Healthcare* standard, as long as the union's petitioned-for bargaining unit comprised a clearly identifiable group of employees, the group generally would be considered appropriate unless an employer could demonstrate that excluded employees had an "overwhelming community of interest" with those included in the proposed unit. Absent that, the union's choice of a proposed bargaining unit would be allowed to hold a representation vote.

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The standard also took into consideration how much organizing activity had already occurred within the proposed unit, and it had the effect of excluding employees who under previous Board law would likely have been included.

When the NLRB issued its decision, it attempted to understate the implications that *Specialty Healthcare* might have. In fact, it issued a press release announcing its "new approach" to the formation of bargaining units in which it asserted that the standard applied only to non-acute health care facilities and specifically denied that it would apply to other industries.[4]

That denial did not last long, however, as the Board went on to apply the overwhelming community-of-interest standard for challenging bargaining unit determinations to numerous other industries. In doing so, micro-unions were created in the retail, manufacturing, rental car, delivery, and general aviation industries, among others—none of which were much akin to non-acute health care, to be sure.

Six years after the issuance of *Specialty Healthcare*, the NLRB revisited that precedent with its 2017 decision in *PCC Structurals, Inc*., which reversed the overwhelming community-of-interest standard and reinstated the traditional standard that had governed previously.[5] In that case, the Board determined that a regional director had incorrectly approved a petitioned-for unit of approximately 100 full-time and regular part-time workers at several Oregon facilities of the employer, as opposed to a wall-to-wall unit of 2,565 production and maintenance employees in approximately 120 job classifications, which the employer contended was the appropriate unit.

The question of what is appropriate hinges on the underlying purpose of collective bargaining, which the Board in 1962 opined has a "two-fold objective of insuring to employees their rights to self-organization and freedom of choice in collective bargaining and of fostering industrial peace and stability through collective bargaining."[6]

The first is that employees have the right to bargain collectively through a labor union that is "designated or selected for the purposes of collective bargaining by the majority of the employees *in a unit appropriate for such purposes*."[7]

Calling it "fundamentally flawed," the newly constituted Board in 2017 rejected *Specialty Healthcare* and returned to its traditional community-of-interest standard. Accordingly, *PCC Structurals* marked one of the first steps toward undoing the damage caused by the Obama-era NLRB.

The second benchmark for the Board is to determine the appropriateness of a bargaining unit "in each case" as required by Section 9(b) of the NLRA. The Board noted that Congress left it up to the NLRB to resolve disputes over bargaining units, rather than require unions in the workplace as a blanket rule or leave the issue solely up to the employer or the employees to decide.

Last, with a brief review of the NLRA's legislative history, the Board concluded "that Congress intended that the Board's review of unit appropriateness would not be perfunctory." In other words, "the statutory language plainly requires that the Board 'in each case' consider multiple potential configurations," and it "may not certify petitioned-for units that are 'arbitrary' or 'irrational.'"[8]

Arbitrary and irrational would be two apt adjectives for much of the Obama-era NLRB's decision-making, and the Board in *PCC Structurals* criticized *Specialty Healthcare* for giving "all-but-conclusive deference" to a union's proposed bargaining unit. Calling it "fundamentally flawed," the newly constituted Board in 2017 rejected *Specialty Healthcare* and returned to its traditional community-of-interest standard. Accordingly, *PCC Structurals* marked one of the first steps toward undoing the damage caused by the Obama-era NLRB.

Ambush Elections

In December 2014, the NLRB issued its controversial ambush election rule, which was a regulation that implemented numerous procedural changes to representation election procedures. The 2014 rule actually was the Board's second attempt to implement sweeping changes, as it had first proposed

doing so in 2011. However, the Board's overreach was beaten back twice in federal court in a lawsuit initiated by the U.S. Chamber of Commerce Litigation Center.[9] In February 2014, the NLRB re-proposed the 2011 rule, including some of the more burdensome items that the Board had jettisoned in 2011, and the final rule arrived 10 months later.

Both iterations of the ambush election rule reflected the NLRB's pro-labor leanings. The overall goal was to make it significantly easier for unions to organize a workplace, and the means of doing so would eviscerate employers' legal rights and hamstring their ability to respond to union organizing efforts in any meaningful way. To that end, the rule significantly shortened the time period for union certification elections and enacted dramatic changes to pre- and post-election procedures.

Some of the significant provisions of the ambush election rule included:

- Requiring a pre-election hearing within eight days of receipt of the election petition.
- Requiring employers to submit a Statement of Position within seven days of receipt of an election petition, with the proviso that if an employer failed to raise a particular issue in this filing, it would be precluded from presenting evidence on the issue or cross-examining a witness on the issue at the representation hearing, which raised significant due process concerns, particularly for small businesses that may not have legal counsel.
- Limiting the issues and evidence that could be presented at a pre-election hearing, thus potentially leaving important questions—like who is actually eligible to vote—unresolved prior to a union election.
- Eliminating appeals of pre-election decisions by the regional director.
- Eliminating the 25-day grace period, between the end of the hearing and the election, which would make it very difficult for workers to get balanced information about unions.
- Requiring employers to give union organizers personal information about their workers, including home addresses, telephone numbers, shift schedules, work locations, and, where available, email addresses.

Unfortunately, despite the initial success in challenging the rule, those victories were essentially about procedural flaws, and challenges to the substance of the final rule did not enjoy the same fate. The Associated Builders and Contractors of Texas and the U.S. Chamber each filed lawsuits against the NLRB in federal courts—one in Texas and the other in the District of Columbia, respectively. When all was said and done, the NLRB's final ambush election rule withstood these challenges, and the Board began operating under the revised procedures as prescribed.

With the Trump administration's appointees in the majority, the NLRB on December 14, 2017, published a Request for Information (RFI) in the *Federal Register*, asking for public input regarding the Board's 2014 rule.[10] The RFI asked the public whether the Board should alter or even rescind the ambush election rule, and the publication of such a request appeared to be a precursor to a new rulemaking to curtail the ill effects of the rule.

In December 2019, the Board released a direct-to-final rule revising its representation election procedures to address a variety of issues emanating from the ambush election rule. The new rule gave employers more time to file Statements of Position prior to a pre-election hearing, whereas the ambush rule allowed only seven days.

The rule also required certain disputes over voter eligibility to be litigated before a representation election occurs unless both parties agree otherwise and allowed parties to file post-hearing briefs, while the ambush rule did not allow either.

As to its decision to issue a final rule without the standard public comment period, the NLRB asserted that it had amended its election process many times before without notice and comment because its changes, including the final rule, were procedural as defined in the Administrative Procedure Act (APA) and therefore exempt.[11]

When the new election rule came out, the AFL-CIO criticized the Board's decision not to publish a proposal seeking public comments, and to no one's surprise, the federation on March 6, 2020, filed a lawsuit alleging that the agency violated the APA when it issued its direct-to-final rule.

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The lawsuit repeated the federation's complaint, saying that it would have filed comments if it could have. The suit also alleged that the new rule was "arbitrary and capricious" for failing to consider data about the effects of the ambush election rule, and it asked for a declaratory judgment against the new rule, which initially was scheduled to take effect on April 16, 2020, and a permanent injunction against its implementation.[12]

The U.S. District Court for the District of Columbia on May 30 issued a decision vacating significant portions of the NLRB's rule. The decision found that "the challenged portions of the regulation at issue are not procedural rules that are exempted from the notice-and-comment rulemaking requirements of the APA. … and because each of these specific provisions was promulgated without notice-and-comment rulemaking, each one must be held unlawful and set aside." Yet the court declined to vacate the other portions of the rule and remanded the matter back to the NLRB for its consideration.

The same court on July 1, 2020, issued an order that expanded on its previous ruling and reiterated its view "that no fair assessment of the regulatory provisions leads to the conclusion that the challenged parts of the 2019 Election Rule are mere procedural rules" and provided a lengthy analysis of how they are instead "substantive" rules under the APA.

However, the court limited its vacatur of the election rule to the APA issues and did not address the AFL-CIO's claim that the entire rule should be stricken for being arbitrary and capricious. Thus, some elements of the rule passed muster, while others were remanded to the NLRB for its consideration. As of this writing, the case is before the United States Court of Appeals for the District of Columbia

Circuit (D.C. Circuit). Another federal judge on October 23, 2020, paused the AFL-CIO's challenge to a second set of election procedure changes while jurisdictional arguments over the first rule are being litigated.[13] That ruling allows the NLRB to proceed with those changes pending the appeal.

Browning-Ferris and the Joint Employer Standard

Perhaps the most noteworthy—and ideologically-driven—of the Obama NLRB policy shifts was the Board's effort to redefine the concept of joint employment in order to force more employers into collective bargaining relationships.

The shift came in the form of the Board's deeply flawed *Browning-Ferris* decision in 2015, which held that two employers could be joint employers if they have indirect control of the same employees, or even had the potential to control those employees, whether or not such control was exercised.[14]

The *Browning-Ferris* decision upended decades of precedent and stability, and it created massive uncertainty within the business community about previously well-understood legal principles (e.g., franchising and subcontracting) that affected millions of small businesses. Through its reasoning, the Board replaced a relatively clear, understandable standard for determining whether a joint employment relationship existed with an expansive and vague test that led almost immediately to litigation.

The intellectual forebear of the revamped joint employer standard was David Weil, the administrator from 2014 to 2017 of the Department of Labor's Wage & Hour Division (WHD), which enforces minimum wage and overtime regulations. Prior to his time in government, Weil authored the book *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, where he spelled out his intellectual theory of employment and advocated a rewrite of labor law.[15]

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According to Weil's theory, as outlined in the summary for his book, "large corporations have shed their role as direct employers of the people responsible for their products, in favor of outsourcing work to small companies that compete fiercely with one another. The result has been declining wages, eroding benefits, inadequate health and safety conditions, and ever-widening income inequality."[16]

Weil brought that notion of employers with him to the WHD, where he authored an Administrator's Interpretation that enhanced the division's ability to tie multiple employers together for alleged violations of federal laws, and his colleagues at the NLRB decided to apply the same logic to the NLRA.[17]

For about 30 years before *Browning-Ferris,* two separate business entities were considered joint employers if both entities exercised direct and immediate control over the terms and conditions of

employment of the same workers. This meant that both entities actually shared the ability to hire, fire, discipline, supervise, and direct the workers in question.

In *Browning-Ferris*, the Board changed the standard to one that would hold employers engaged in numerous common businesses relationships—such as franchising and contracting—potentially liable for employees they did not actually employ and workplaces they did not actually control.

Compounding the unsettling effect of *Browning-Ferris* itself was the ping-pong match that the legal battle over it became. As the United States Court of Appeals for the District of Columbia Circuit considered the company's challenge, the Board's Republican majority issued a short-lived decision in a case called *Hy-Brand* that aimed to reverse *Browning-Ferris*.[18]

In its decision, the Board made clear its views about how seriously misguided *Browning-Ferris* was, saying that the new joint employer standard "is a distortion of common law as interpreted by the Board and the courts, it is contrary to the Act, it is ill-advised as a matter of policy…"

In its decision, the Board made clear its views about how seriously misguided *Browning-Ferris* was, saying that the new joint employer standard "is a distortion of common law as interpreted by the Board and the courts, it is contrary to the Act, it is ill-advised as a matter of policy, and its application would prevent the Board from discharging one of its primary responsibilities under the Act, which is to foster stability in labor-management relations."[19] But that was not the last word on the issue.

A series of events ensued that delayed the resolution of *Browning-Ferris* in the courts, while the Board a few weeks after issuing *Hy-Brand* vacated it for procedural reasons, thus restoring the standard under *Browning-Ferris*.[20] Ultimately, the employer community in June 2018 petitioned the NLRB for a rulemaking to address the joint employer issue,[21] and a few months later the Board released a Notice of Proposed Rulemaking proposing to reverse the *Browning-Ferris* standard.[22]

Following the proposed rule and review of public comments, the NLRB on February 25, 2020, announced that it would issue the final joint employer rule. As expected, the Board's final rule established a straightforward standard for joint employment stating that "an entity may be considered a joint employer of a separate employer's employees only if the two share or codetermine the employees' essential terms and conditions of employment, which are exclusively defined as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction."[23]

The crux of the new standard was that the exercise of control must be of such a significant nature that it *meaningfully* impacts terms and conditions of employment. Moreover, it also "makes evidence of indirect control and contractually reserved but unexercised authority probative of joint-employer status insofar as it supplements and reinforces evidence of direct and immediate control over essential terms and conditions of employment." In other words, indirect or unexercised control on their own will not establish joint employment.

While *Browning-Ferris* created a new precedent as a matter of case law, the Board's final rule was issued using the more rigorous rulemaking process under the APA. As such, any effort to amend or rescind the new standard will be required to follow the same procedure, which is more difficult and can take years to complete. Thus, the current Board's effort should restore stability in this area of the law, where it is much needed.

The NLRB also revisited the *Browning-Ferris* decision as it applied to that company. On July 29, 2020, the Board issued a supplemental decision and order roundly criticizing the 2015 decision that had created the new joint employer standard, which the Board had then applied retroactively.[24] The supplemental decision reviewed the analysis of the federal appeals court decision in the case and noted that it faulted the Board for applying the standard retroactively without sufficient justification.[25]

For its part, the current Board called the retroactive application "manifestly unjust" and proceeded to vacate the entire 2015 ruling naming Browning-Ferris as a joint employer. It then summarily removed the company as a joint employer in the case, thus ending one of the NLRB's most controversial policy changes from the Obama era.

Employer Discipline Before First Contracts

One of the NLRB's less known policy shifts of late involves an employer's right to discipline employees when a union has a new collective bargaining relationship with it but before a new contract is in place. In June 2020, the Board released a decision in *800 River Road Operating Company, LLC d/b/a Care One at New Milford*, in which it reversed a 2016 decision that had imposed a new, burdensome obligation on employers in such instances.[26]

Released in August 2016, the NLRB addressed in *Total Security Management Illinois 1, LLC* the question in pre-contract disciplinary cases "whether an employer has a duty to bargain before disciplining individual employees, when the employer does not alter broad, preexisting standards of conduct but exercises discretion over whether and how to discipline individuals."[27] The *Total Security* decision was the second time that the Obama-era Board considered this issue, which it first addressed in the tortured 2012 *Alan Ritchey* case.[28]

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In *Alan Ritchey*, the NLRB faulted that company for exercising *discretion* in following its own disciplinary policies, such as being lenient on an employee when more severe discipline might have been imposed normally. That decision extended the reach of the general rule that an employer may not alter the "terms and conditions of employment" once a union has been elected to represent employees, but it subsequently was invalidated by the Supreme Court's decision in *NLRB v. Noel Canning*, which found President Barack Obama's recess appointments of two Board members to be unconstitutional.[29]

With *Alan Ritchey* set aside, *Total Security* was the Board's next successful attempt to adopt the same policy, about which dissenting Republican Member Philip A. Miscimarra said "[t]he new obligations take a wrecking ball to eight decades of NLRA case law."[30]

Indeed, the Board noted in *800 River Road* that "for 80 years, from the [National Labor Relations] Act's inception until issuance of that [*Total Security*] decision. … the Board did not recognize a pre-disciplinary bargaining obligation," a policy that the Obama-era Board "dismissively" overruled. It further observed that *Total Security* conflicted with Board and Supreme Court precedent, misconstrued the general rule against material changes before a first contract is adopted with a new union, and imposed "a complicated and burdensome bargaining scheme that is irreconcilable with the general body of law governing statutory bargaining practices." Saying, "*Total Security* must be overruled," the current Board set it aside in favor of a more balanced approach as had existed without controversy for decades.

The Employee Handbook and Section 7 Rights

One of the most intrusive, albeit at times slightly comical, aspects of the NLRB under the Obama administration was the Board's following of Section 7 of the NLRA to illogical extremes. Section 7 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…

It also guarantees the right not to engage in those activities, but the Board clearly emphasized Section 7's protected "concerted activities" through many of its decisions and on a variety of topics.

The NLRB's emphasis on Section 7 rights became so myopic that it resulted in a string of decisions eroding employers' private property rights and injecting confusion in areas of the law with contradictory regulatory requirements, such as harassment in the workplace. More generally, the Board's stance stripped employers of long-standing protections and placed them in legal jeopardy if they failed to follow the NLRB's flawed, expansive interpretation of the NLRA.

Fortunately, the current Board has been reexamining the extent to which Section 7 protects certain behavior, and in doing so, it is restoring a bit of sanity into the law.

A. Decriminalizing the Employee Handbook

The NLRB took the concept of protected concerted activity under Section 7 to such extremes that it led to a string of cases in which the Board nitpicked employers' handbooks looking for alleged NLRA violations. The absurd result of that effort was the Board's overturning of theretofore uncontroversial, or even commonsense, workplace policies designed to ensure a safe and pleasant work environment. In its quest to overturn such policies, the Board relied on a 2004 decision known as *Lutheran Heritage*, which attempted to provide a framework for evaluating whether a work rule violates the NLRA.[31]

In *Lutheran Heritage*, the NLRB ruled that an employer's policy or rule would be found unlawful if it barred otherwise protected activity. Moreover, even if a rule did not expressly prohibit protected activity, the NLRB declared it would be found unlawful under three scenarios: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict Section 7 rights."[32] In its interpretations, though, the Obama-era Board took a particularly expansive view of what one might "reasonably construe" to be unlawful infringements on Section 7 rights, such as workplace policies protecting confidential or proprietary information, requiring employees to be respectful toward each other and even customers, or prohibiting defamation of an employer.

In its decision, the new Board majority found "multiple defects are inherent in the *Lutheran Heritage* test" and went on to identify the numerous ways that the precedent was deeply flawed, saying "*Lutheran Heritage* has required perfection that literally is the enemy of the good…"

To address what became an unwieldy interpretation of Section 7 under *Lutheran Heritage*, the Board in December 2017 restored a more reasonable one with a decision in *The Boeing Company.* In its decision, the new Board majority found "multiple defects are inherent in the *Lutheran Heritage* test" and went on to identify the numerous ways that the precedent was deeply flawed, saying "*Lutheran Heritage* has required perfection that literally is the enemy of the good" and that it "paradoxically is too simplistic at the same time it is too difficult to apply."[33]

With *Boeing*, the NLRB overruled the *Lutheran Heritage* standard and replaced it with a new one. Under the new standard, "when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule."

The Board further delineated three categories of work rules:

> Category 1 will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. …
>
> Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
>
> Category 3 will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not

> outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.[34]

The Board also noted in announcing its decision that "the *maintenance* of particular rules may be lawful, [but] … the *application* of such rules to employees who have engaged in NLRA-protected conduct may violate the Act, depending on the particular circumstances presented in a given case."[35]

In addition, the Board observed that "the balancing of employee rights and employer interests is not a new concept with respect to the Board's analysis of work rules,"[36] but as interpreted by the Obama-era majority, the standard under *Lutheran Heritage* left much to be desired. The new test under the *Boeing* decision should provide a more reasonable approach to determining whether a policy actually violates the NLRA's protections.

B. Curtailing Bad Workplace Behavior

A particular manifestation of the Board's focus on Section 7 was that it declared that various instances of bad workplace behavior, such as cursing, the use of racial epithets, and harassment, fell under the broad protection of Section 7 rights.

To do so, the Board adopted a forgiving interpretation of a 1979 case known as *Atlantic Steel*, which overturned the dismissal of an employee who called his supervisor a "lying s.o.b." while discussing a grievance.[37] In that case, the Board established a four-part test to evaluate "(1) the place of the discussion; (2) the subject matter … (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" when determining Section 7 protection.

Applying the *Atlantic Steel* test, the Obama-era Board went on to issue decisions in several cases, including *Plaza Auto Center*,[38] *Pier Sixty*,[39] *Cooper Tire*,[40] and *United States Postal Service*,[41] which collectively held that racist remarks and extreme profanity were protected under Section 7 in some situations.

Early in his tenure in late 2017, current NLRB General Counsel Peter Robb issued a guidance memo signaling his intent to revisit—and presumably curtail—the extent of Section 7 protections, among several other topics. Indeed, Robb's memo specifically identified "Concerted activity for mutual aid and protection" first among his list of issues…

Early in his tenure in late 2017, current NLRB General Counsel Peter Robb issued a guidance memo signaling his intent to revisit—and presumably curtail—the extent of Section 7 protections, among several other topics. Indeed, Robb's memo specifically identified "Concerted activity for mutual aid and protection" first among his list of issues "where we also might want to provide the Board with an alternative analysis."[42] For its part, the Board took up the cases of *Alstate Maintenance, LLC* and *General Motors LLC* and used them as vehicles to address the Section 7 question.[43]

The Board in January 2019 issued its decision in *Alstate Maintenance* in which it decided that an employer was justified in terminating an employee for complaining about a work assignment in front of a customer. After being terminated for his behavior, the employee filed an unfair labor practice charge with the NLRB claiming Section 7 protection because he "spoke in the presence of other skycaps and a supervisor and included the word 'we' in his statement." In its ruling, the current Board reversed a decision from 2011 in *WorldMark by Wyndham*,[44] which had held that protesting publicly in a group meeting was protected Section 7 activity, saying that "[t]he applicable standard should not sanction an all-but-meaningless inquiry in which concertedness hinges on whether a speaker uses the first-person plural pronoun in the presence of fellow employees and a supervisor."[45]

On September 5, 2019, the Board issued an invitation for briefs in asking the public to provide input about the standard for Section 7 protections and whether the Board should change it, especially in light of other laws.[46] In its invitation, the Board noted that its previous "treatment of such language (as well as sexually offensive language) has been criticized as both morally unacceptable and inconsistent with other workplace laws by Federal judges," and while "the courts of appeals have not repudiated the Board's tests in this area, the vehemence of judicial criticism must give us pause."

The upshot of the *Alstate Maintenance* and *General Motors* decisions is that the current Board has jettisoned the Obama-era NLRB's approach to what normally is considered outlandish and termination-worthy behavior.

In response to its request, the NLRB received numerous amicus briefs with differing views on the extent of Section 7 rights. Armed with those views, the Board in July 2020 announced its decision in *General Motors* in which it reversed the Obama-era Board's policy of protecting abusive behavior such as racism and profanity in some cases. In lieu of what became a cumbersome, situation-specific approach to evaluating such behavior, *General Motors* restored the Board's standard for evaluating abusive conduct with its so-called *Wright Line* test from 1980.[47]

That case laid out in lengthy detail the tension in competing analyses over employer discipline and the motivation for it. The Board declared that it would require first a "*prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." If the general counsel could provide such a showing, it would then be up to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct."[48]

The upshot of the *Alstate Maintenance* and *General Motors* decisions is that the current Board has jettisoned the Obama-era NLRB's approach to what normally is considered outlandish and termination-worthy behavior. As a result, employers will be able to dismiss individuals who engage in objectionable or abusive behavior, at times even if they are involved in union-related or other "concerted activities."

C. Restoring Employer Control of Email Systems

In December 2014, the NLRB issued a 3-2 decision in *Purple Communications, Inc*., in which it held that Section 7 protects employees' use of email systems at work to communicate about organizing and related activity.[49] More specifically, the Board's decision stated that if an employer allowed employees to utilize an email system for any purpose other than work, then the employer likewise had to allow them to use the system for union-related business or other protected activities.

Purple Communications overruled a previous 2007 holding in *Register-Guard*, which had found that employees have "no statutory right to use [an employer's] email system for Section 7 purposes." That position reflected the Board's view that employers have a fundamental right to control the use of their property, including email systems, which the *Purple Communications* decision called "clearly incorrect."[50]

In December 2019, the current Board revisited the topic of access to employer email in *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino* and reversed the Obama-era's own reversal of precedent.[51] In its decision, the Board noted that "decades of Board precedent establish that the Act generally does not restrict an employer's right to control the use of its equipment" and that *Purple Communications* "impermissibly discounted employers' property rights in their IT resources while overstating the importance of those resources to Section 7 activity."[52] It therefore restored the *Register-Guard* precedent with exceptions in "rare cases" when using an employer's email system is "the only reasonable means for employees to communicate with one another.

Reclassifying Alleged Misclassification

Another example of overreach during the Obama-era was a determined effort between both the Board and General Counsel Richard Griffin to make less feasible a business practice that has been around for hundreds of years: independent contracting. The concept of independent contracting itself is straightforward—an individual agrees to perform services for another for compensation but without creating a traditional employer-employee relationship. In this way, independent contractors find opportunities to make money, work flexible hours, and manage their own business affairs as they see fit.

With the advent of smartphones and other technological advances in recent years, business opportunities for independent contractors have grown enormously. However, just as those opportunities have grown, so has interest from certain quarters in undermining them.

The reasons for doing so vary, but a key issue is the fact that independent contractors are specifically exempted from unionizing under the NLRA. With more and more people taking advantage of modern services such as ridesharing or delivery via a phone app, there are likewise more people working in those fields. As long as the latter remain independent contractors, though, they are beyond the grasp of organized labor, which the NLRB sought to change.

The Board's stance toward independent contracting has vacillated over time, and the Obama-era majority attempted to inject its views on the matter in its 2014 *FedEx Home Delivery* decision. In that

case, the Board sought to "more clearly define" the elements for evaluating a "putative independent contractor."[53] In particular, the decision addressed the concept of "entrepreneurial opportunity for gain or loss, a factor that the Board has traditionally considered," and it declared that the drivers in question were employees rather than independent contractors.[54] In doing so, the NLRB breezily dismissed—or "decline[d] to adopt"—a previous decision by the U.S. Court of Appeals for the District of Columbia Circuit, which had already articulated its own contrary opinion in 2009.

In its earlier decision, also dealing with FedEx Home Delivery drivers, the D.C. Circuit had found that FedEx drivers were independent contractors, saying that the entrepreneurial opportunity was "an important animating principle" for evaluating the various common law elements of employment and concluding that "the Board's determination otherwise was legally erroneous."[55]

After the second *FedEx Home Delivery* case arrived in 2016, the D.C. Circuit the following year issued a judicial smack down saying that "[i]t is as clear as clear can be that 'the same issue presented in a later case in the same court should lead to the same result.'… Doubly so when the parties are the same."[56]

While the legal machinations with the *FedEx* case were ongoing, the NLRB general counsel's office played its own part in weakening the status of independent contractors as well. Indeed, General Counsel Griffin sought a ruling from the Board that the alleged misclassification of workers constitutes a violation of Section 7 rights in and of itself. His Division of Advice had opined as much in December 2015 in an ongoing unionization dispute over whether truck drivers at the ports of Los Angeles and Long Beach were to be considered independent contractors or employees.[57]

After the second *FedEx Home Delivery* case arrived in 2016, the D.C. Circuit the following year issued a judicial smack down saying that "[i]t is as clear as clear can be that 'the same issue presented in a later case in the same court should lead to the same result.'… Doubly so when the parties are the same."

After settling a ULP charge that it had threatened or coerced its employees, the employer in the case, Pacific 9 Transportation, distributed notices to drivers stating that they were independent contractors and could not form a union.

That move prompted the NLRB regional director to seek guidance from the Division of Advice, which it provided, saying that "the Employer's misclassification of its drivers as independent contractors interfered with and restrained the drivers in their exercise of Section 7 rights, in violation of Section 8(a)(1) [of the NLRA]."[58] The case did not, however, provide the vehicle, so to speak, for Griffin to bring the issue of misclassification before the Board, as the case never reached that far before it was closed.

In March 2016, Griffin released a General Counsel's memo requiring NLRB regional offices to submit cases involving alleged misclassification to his headquarters office for review as one of his topics of "policy concern."[59] It did not take long for the regional offices to tee up another case for Griffin to try to bring to the Board.

In May 2016, the same regional office of the NLRB issued a complaint based on an unfair labor practice charge brought by the International Brotherhood of Teamsters alleging that a different trucking company, Intermodal Bridge Transport, had violated the NLRA by classifying drivers as independent contractors. That case took almost four years to complete, and the Board ultimately issued a decision in March 2020.

With a Republican majority in place, the outcome was different from what it likely would have been otherwise. While the current Board agreed that the individuals were, in fact, employees, it declared that the employer had not violated the NLRA by misclassifying them as independent contractors.[60]

The Division of Advice also opined in September 2016 on the status of independent contractors in the so-called gig economy by declaring in an advice memorandum that drivers for Postmates, an app that allows drivers to pick up and deliver orders for customers (similar to Uber and Lyft drivers' role in providing rides to customers), was the employer of those drivers.[61]

All of the various maneuvering during the Obama era over the issue of independent contracting teed up yet another area of the law ripe for a course correction. To that end, the current Board reestablished the *status quo ante* that had existed prior to its "legally erroneous" rulings in the *FedEx Home Delivery* cases.

Its 30-page tome relied on the Board's decision in *FedEx Home Delivery*, and while the release of the advice memo raised eyebrows among observers of labor policy, it was not necessarily surprising.

All of the various maneuvering during the Obama era over the issue of independent contracting teed up yet another area of the law ripe for a course correction.

To that end, the current Board reestablished the s*tatus quo ante* that had existed prior to its "legally erroneous" rulings in the *FedEx Home Delivery* cases.

In January 2019, it issued a decision in *Super Shuttle*, which overturned *FedEx Home Delivery* and "clarified the role entrepreneurial opportunity plays in its determination of independent-contractor status, as the D.C. Circuit has recognized."

The ruling backed away from the Board's custom of ignoring federal circuit courts under its theory of "non-acquiescence," under which the Board declines to follow an adverse circuit court ruling until that ruling is upheld by the Supreme Court, saying that "the *FedEx* Board impermissibly altered the common-law test and longstanding precedent."[62]

Shortly after the *Super Shuttle* decision, the Division of Advice in April 2019 issued another advice memorandum in which it determined that drivers using the popular ridesharing application Uber are not employees of the company.

The memo evaluated the numerous factors for determining employment, noting that "the extent of company control—by minimally impacting economic and entrepreneurial opportunity—weighs in favor of independent-contractor status for" Uber drivers.[63]

Accordingly, the memorandum determined that such drivers are in fact independent contractors and underscored Robb's approach to this long-debated employment issue, which generally seems more likely to allow app-based companies to continue to deliver economic opportunities for entrepreneurs and leave them free from needless government meddling, at least from the NLRB.

Restoring Private Property Rights

As noted in the previous section with regard to employers' email systems, during the Obama era the NLRB did not grant much deference to employers' private property rights, and it extended that philosophy to physical as well as virtual property. Traditionally, employers have had the ability to keep certain areas of their physical property off limits from union organizers, with some limitations.

As a 1956 Supreme Court case, *NLRB v. Babcock & Wilcox*, explained, an employer's obligations under the NLRA are to refrain from interfering with or discriminating against employees' exercising their rights, but the law "does not require that the employer permit the use of its facilities for organization when other means are readily available," provided that "the employer's notice or order does not discriminate against the union by allowing other distribution."[64] In the Obama era, however, the Board took steps to undermine employers' ability to control their own premises, notwithstanding the Court's caveat.

The issue of access to employer property arose in different contexts, but the tendency of the Board's approach was to curtail employers' rights. The previous general counsel, Richard Griffin, who hailed from the world of organized labor, sought to expand protections for employees engaging in traditionally unprotected activities such as intermittent strikes, including in-store demonstrations, which have become increasingly common in retail and fast food, among other sectors.

The issue of access to employer property arose in different contexts, but the tendency of the Board's approach was to curtail employers' rights.

The Board during the Obama era issued decisions that eschewed the private property interests of employers in *Wal-Mart Stores* and *Capital Medical Center.*[65] In *Wal-Mart*, the Board found unlawful the company's discipline of employees who had engaged in a protest within a store, in front of customers, because "their protest was peaceful and largely confined to a small, partially enclosed customer waiting area near the front of the large, multi-story department store."[66] That decision ultimately meandered into federal court, where the case was dismissed in 2018 at the request of all parties involved after reaching a settlement.[67]

The Board similarly ruled against Capital Medical Center for "attempting to prevent … off-duty employees from picketing, threatening the employees with discipline and arrest for engaging in picketing, and summoning the police to the scene," which happened to be on the premises of the employer's hospital and in some cases near the entrance. As the Board explained, the Administrative Law Judge (ALJ) who first heard the case applied a 1945 Supreme Court case known as *Republic*

Aviation, "[a]lthough she acknowledged that *Republic Aviation* did not involve picketing" in finding that the employer allegedly violated the NLRA.[68]

Member Philip Miscimarra noted in his dissent that "hospitals have an especially important interest in preventing the on-premises picketing of patients and visitors," but the Board's decision granted on-premises picketing the same protection as handbilling and solicitation at the expense of the employer's property interests, despite Board and Supreme Court precedents.[69]

Since regaining the majority, the current Board has issued decisions that have restored the longstanding protections for employers' private property interests. In 2019, three particular cases touched on this issue: *Tobin Center for the Performing Arts*, *Kroger Limited Partnership*, and *UPMC*.[70]

In *Tobin*, the Board reversed two Obama-era cases that similarly had undermined employers' rights, *New York New York Hotel & Casino* and *Simon DeBartolo Group*, which it said "failed to properly accommodate the property owner's property rights, including its right to exclude."[71] The employer in *Tobin* had maintained a consistent policy of prohibiting solicitation of any kind on its property and removing any transgressors from the premises. Off-duty symphony performers who sometimes played at the Tobin Center attempted to hand out leaflets on the Center's property protesting the use of recorded music but were removed according to its policy, which generated the NLRB complaint.

In its decision, the Board provided a new standard that balanced the Section 7 rights of employees with the private property rights of the employer, saying that "employees' Section 7 rights are not absolute. When Section 7 rights conflict with a property owner's property rights, an accommodation between the two "must be obtained with as little destruction of one as is consistent with the maintenance of the other."[72]

Since regaining the majority, the current Board has issued decisions that have restored longstanding protections for employers' private property interests.

The Board in *Kroger* addressed a similar issue regarding whether the NLRA requires an employer to allow onto its property a nonemployee union representative to solicit customers to boycott the store under the discrimination caveat found in the Supreme Court's *Babcock* decision.[73] The *Kroger* decision overruled the Board's 1999 precedent in *Sandusky Mall*, which "interpreted the *Babcock* exception to require an employer to grant access to nonemployee union agents for any purpose if the employer has allowed 'substantial civic, charitable, and promotional activities' by other nonemployees."[74]

Noting that "*Sandusky Mall* and its progeny have been roundly rejected by the courts of appeals," the Board in *Kroger* declared that it "improperly stretched the concept of discrimination well beyond its accepted meaning in a manner that finds no support in Supreme Court precedent or the policies of the [National Labor Relations] Act."

Instead, the Board adopted a new standard that requires the general counsel to "prove that an employer denied access to nonemployee union agents while allowing access to other nonemployees

for activities similar in nature to those in which the union agents sought to engage."[75] Thus, employers may exercise their private property rights by deciding which kinds of activities it wishes to permit, such as selling Girl Scout cookies, versus those it does not, such as in-store protests and demonstrations.

The majority decision in *UPMC* changed Board law, again citing the Supreme Court's *Babcock* precedent to define the circumstances under which an employer must allow access to its property. In particular, it addressed situations in which a hospital, such as UPMC, generally allows public access to its cafeteria. In those cases, the Board has said that an employer may not "restrict public-cafeteria access for nonemployee union organizers who engage in solicitation and other promotional activities but are not 'disruptive.'"[76]

Similar to *Sandusky Mall*, the Board noted that its "approach has been soundly rejected by multiple circuit courts" because it effectively "eliminated altogether the applicability of *Babcock's* general rule limiting nonemployee union access to private property." The result was the creation of a "'public space exception' that requires employers to permit nonemployees to engage in promotional or organizational activity in public cafeterias or restaurants absent evidence of inaccessibility or activity-based discrimination," which is not supported by the NLRA or *Babcock*. As in *Kroger*, the Board declared that "the employer may decide what types of activities, if any, it will allow by nonemployees on its property."[77]

Arbitration Agreements

Many employers utilize arbitration agreements with class action waivers to provide for timely resolution of workplace disputes, which benefits employees and limits costly and needless class action litigation. During the Obama administration, however, the NLRB claimed that these agreements violated workers' rights to engage in concerted activity under its expansive Section 7 theory.

That position was not consistent with the NLRA and conflicted with the fundamental principles of another federal statute, the Federal Arbitration Act (FAA), but as in other cases, the Obama-era Board took a rather myopic view of things and all but ignored these issues. The result was a six-year tussle over the proper interpretation of the FAA and the scope of Section 7 rights with respect to mandatory arbitration.

A. Reversing the Attack on Class Action Waivers

The row over arbitration clauses began in 2012 when the NLRB handed down a decision in *D.R. Horton* in which it declared unlawful the company's practice of requiring employees as a condition of employment to agree to mandatory arbitration of employment disputes and a waiver of class action lawsuits.[78]

In the decision, the Board held that the NLRA's protection of collective action in dealing with workplace disputes essentially superseded longstanding judicial understanding that class actions are not a substantive right, but merely one option among many for seeking redress of a claim. Moreover,

it effectively ignored the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* issued in 2011, just a year before *D.R. Horton.*[79]

In *AT&T Mobility*, the Supreme Court overturned the Ninth Circuit, which had upheld a lower court that relied on the California Supreme Court's view, as expressed in its *Discover Bank* decision, that arbitration provisions disallowing class action proceedings are "unconscionable."[80] Likewise, it rejected the Ninth Circuit's view that the FAA did not preempt that court's decision. In the Supreme Court's eyes, simply put, arbitration agreements are legally enforceable contracts between two consenting parties, and the FAA requires that they be enforced according to their terms.

After *D.R. Horton*, the NLRB went about declaring unlawful similar arbitration agreement language in a series of cases. Eventually, several of those cases ended up in various federal courts, as well as the California Supreme Court—which seemingly accepted the rejection of its *Discover Bank* opinion—all of which declined to accept the NLRB's position outright.

Indeed, the Second, Eighth, and even the Ninth Circuit expressly rejected the Board's logic, such as it was. In December 2013, the Fifth Circuit Court of Appeals considered *D.R. Horton* and issued a stinging 2-1 opinion eviscerating the NLRB's position and finding no support for it.[81]

The culmination of the legal battle over arbitration agreements with class action waivers arrived in May 2018 when the Supreme Court answered the question, presumably for good.

Notwithstanding those court decisions, the NLRB continued its crusade against arbitration agreements under its non-acquiescence policy. Eventually two federal circuit courts agreed with the NLRB's stance on arbitration, thus creating a circuit split that opened the door for consideration of the issue by the Supreme Court.

In January 2017, the Supreme Court granted review of the NLRB's petition for *certiorari* in *Murphy Oil, USA* along with two other cases, *Epic Systems Corp. v. Lewis*; and *Ernst & Young LLP v. Morris*.[82] The Court heard oral arguments in October that year over the question whether "arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice" under the NLRA's Section 7 protection of concerted activities.

The culmination of the legal battle over arbitration agreements with class action waivers arrived in May 2018 when the Supreme Court answered the question, presumably for good.

In its decision, which consolidated all three of the cases on that issue for which it had granted *certiorari*, the Court held that under the FAA "arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act's saving clause nor the NLRA suggests otherwise."[83] With that crisp declaration, the NLRB's attempt to expand the scope of what is protected by Section 7 of the NLRA finally reached an end, at least in this area of the law.

B. Changing the Burden for Deference to Arbitration

Beyond the question of whether an employer could utilize an arbitration agreement to preclude class action proceedings, the NLRB also sought to insert itself into the outcomes prescribed in arbitrated cases involving unfair labor practice (ULP) charges. The Board upended decades of precedent—again—by changing the criteria under which it would defer to the decision of an arbitrator, essentially granting itself the power to second-guess outcomes it did not like.

Since at least the early 1940s, the NLRB has preferred to allow an employer and a union to exhaust contractual remedies for disputes when possible.[84] Moreover, longstanding Board precedent held that when a contested issue was both a contractual dispute as well as a ULP, the Board would defer to an arbitrator's decision and decline to pursue the ULP charge if certain conditions were met.

Those conditions were set out in the 1955 case *Spielberg Mfg. Co.*, in which the Board found that "the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrator's award" when "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act."[85]

The Board also articulated its position supporting deference in *Collyer Industrial Wire* and offered an additional condition in *Raytheon Co*., which required an arbitrator to consider the substance of an unfair labor practice charge. It further clarified in its 1984 *Olin Corp.* decision that it would defer to an arbitrator's decision if "the contractual issue is factually parallel to the unfair labor practice issue and ... the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice."[86]

In 2014, however, the Obama-era NLRB adopted a different standard for evaluating arbitrators' decisions with a 3-2 decision in *Babcock & Wilcox Construction Company*.[87] That case involved a forklift operator who was dismissed from the employer in question during a disciplinary meeting for alleged safety violations.

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Upon learning of a three-day suspension for those violations, the employee used some strong words, to put it politely, toward her supervisors, who took those words as a threat and fired her. The union filed a grievance alleging a ULP, and the case ended up before a joint labor-management Grievance Review Subcommittee for binding arbitration. The subcommittee upheld the firing after hearing from both sides because of the employee's insubordination and use of profanity.

The case then went before an administrative law judge at the NLRB, who reviewed the subcommittee's upholding of the arbitrator's decision. The ALJ recommended to the Board that it defer to the subcommittee's decision under *Spielberg* and other relevant precedents. Rather than

accept the ALJ's recommendation, the Board's Democratic majority elected to change the longstanding policy of deferring to arbitrators, which the general counsel had urged it to do.

Under the general counsel's proposal, "the Board would defer only if the statutory right was either incorporated in the collective-bargaining agreement or presented to the arbitrator by the parties, and if the arbitrator 'correctly enunciated the applicable statutory principles and applied them in deciding the issue.'" As a result, a party favoring deference to an arbitrator's decision would bear the burden of meeting the new standard, but even if it were to meet that burden, the Board maintained the right not to defer if it felt that an arbitrator's decision was "clearly repugnant" to the NLRA.[88]

Under the *Babcock & Wilcox* test, employees wishing to challenge disciplinary actions were thus presented more opportunities to do so, and employers faced the potential of dual adjudication proceedings before both an arbitrator and the NLRB.

In December 2019, the NLRB issued a decision in *United Parcel Service (UPS)* in which it rebuked the *Babcock & Wilcox* precedent, saying that it "represented a drastic contraction of deferral [sic] practices that had existed for decades."

In December 2019, the NLRB issued a decision in *United Parcel Service (UPS)* in which it rebuked the *Babcock & Wilcox* precedent, saying that it "represented a drastic contraction of deferral [sic] practices that had existed for decades."[89]

The decision faulted *Babcock & Wilcox* because it "drastically restricted'' the longstanding policies under *Spielberg* and *Olin*, among others, by holding open the door for the NLRB to overturn an arbitrator's decision "even if the arbitration procedures appear to have been fair and regular and the parties have agreed to be bound by the results of arbitration."

Applying its decision retroactively to any pending cases involving this issue, the NLRB overruled *Babcock & Wilcox*, which it said, "disrupted labor relations stability that the Board is charged by Congress to encourage."[90]

Management Rights Clauses

As the Board observed in the *UPS* arbitration case, the objective of the NLRA is to promote economic stability, not simply to impose the practice of collective bargaining on employers and unions as some labor activists might suggest.[91] With that in mind, the NLRB has historically allowed parties to a collective bargaining agreement to include management rights clauses to allow employers the flexibility to handle unforeseen—or unforeseeable—situations that might arise. Such clauses permit the employer to make unilateral changes to terms and conditions of employment without negotiating the changes first.

During the Obama administration, the NLRB made it more difficult for these management tools to pass legal muster. Near the end of that administration, the Board issued several decisions involving management rights clauses and found them to be unlawful in those cases, even though the unions involved essentially had agreed to waive the right to bargain on the issues in question.

In its 2016 *Graymont PA* decision, the Board found that the employer had unlawfully changed some of its work rules, its absenteeism policy, and its progressive discipline schedule by relying on a management rights clause instead of the collective bargaining agreement.[92] The management rights clause in question stated that the employer:

> [R]etains the sole and exclusive rights to manage; to direct its employees; … to evaluate performance, … to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies and procedures; [and] to set and establish standards of performance for employees…

However, an ALJ ruled that even though the management rights clause seemingly allowed the employer to make the types of changes in question, it did not deprive the union of the right to negotiate over them. The Board concurred with the ALJ's assessment and found that because the management rights clause failed to specifically reference the changes, it did not establish a "clear and unmistakable waiver" of the right to negotiate by the union.

The NLRB similarly addressed management rights in the consolidated cases of *E.I. du Pont de Nemours, Louisville Works* and *E.I. du Pont de Nemours and Company*, which bounced back and forth between the Board and the United States Court of Appeals for the District of Columbia Circuit in what the Board observed was "a lengthy litigation history."

The NLRB similarly addressed management rights in the consolidated cases of *E.I. du Pont de Nemours, Louisville Works* and *E.I. du Pont de Nemours and Company*, which bounced back and forth between the Board and the United States Court of Appeals for the District of Columbia Circuit in what the Board observed was "a lengthy litigation history."[93] Indeed, the proceedings began in 2010 and did not see a final resolution from the NLRB until February 2019.

In the meantime, the NLRB during the Obama administration declared that "discretionary unilateral changes ostensibly made pursuant to a past practice … are unlawful." At issue were the employer's unilateral changes to its "Beneflex Plan," which included coverage for medical, dental, life insurance, and financial benefits, after the expiration of its collective bargaining contracts with the union. When the employer changed the plan—as it had done before—the union objected and demanded to negotiate over the changes.

The Beneflex Plan documents contained the following management rights clause:

> The Company reserves the sole right to change or discontinue this Plan in its discretion provided, however, that any change in price or level of coverage shall be announced at the time of annual enrollment and shall not be changed during a Plan Year unless coverage provided by an independent, third-party provider is significantly curtailed or decreased during the Plan Year.

On its face, the clause would seem to have legitimized the employer's ability to make changes, but in 2010, the NLRB ruled that the company's management rights clause and the union's waiver of the right to demand bargaining ended with the contract.

The company appealed that decision in the D.C. Circuit, which remanded the matter back to the NLRB for a better explanation.[94] In 2016, the NLRB again found that "because the ostensible past practice was based on prior changes that were implemented pursuant to a management-rights clause in the contracts (i.e., the Beneflex reservation of rights provision), the Respondent's ability to continue making such changes did not survive the expiration of those contracts."[95]

Put another way, the NLRB found that the lack of a valid contract prohibited the company from exercising its right the contract made explicit when it was in force. However, on December 15, 2017, the Board reversed its prior rulings in *Raytheon Network Centric Systems*, in which it criticized the *E.I. du Pont* decision for requiring bargaining for routine changes "even if an employer continues to do precisely what it had done many times previously—for years or even decades."[96]

The Board went on to say that *E.I. du Pont* was "fundamentally flawed," and that it "is inconsistent with Section 8(a)(5) [of the NLRA], it distorts the long-understood, commonsense understanding of what constitutes a 'change,' and it contradicts well established Board and court precedent."[97] Because the *E.I. Du Pont* case was before the D.C. Circuit again, the NLRB asked the court to remand the case back to it for reconsideration in light of its *Raytheon* decision, which the court did.

The Board then proceeded in October 2018 to reverse its position in *E.I. Du Pont* with a decision in favor of the employer, and it denied a motion for reconsideration in February 2019, thus putting the tortured case—and the Obama-era majority's flawed logic—to rest.[98]

Likewise, the current majority has taken up other issues related to management rights clauses, which the Board rightly observed is "an issue that has repeatedly sown division among the members of the [NLRB] and between the Board and reviewing courts of appeals."[99] Among them are competing standards for determining when an employer's unilateral action is permitted by a collective bargaining contract.

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The Board outlined these standards, which it dubbed the "clear and unmistakable waiver" standard and the "contract coverage" standard, in its 2019 *MV Transportation* decision.[100] Under the former, an employer's unilateral action will be found unlawful unless the collective bargaining agreement "'specifically refers to the type of employer decision' at issue 'or mentions the kind of factual situation' the case presents."[101]

The Board's decision noted that federal courts and arbitrators do not use that standard, and in fact, some have outright rejected it. Instead, they apply the second one, which holds that a "unilateral

change in a term or condition of employment is covered by the contract if the change is 'within the compass' or 'scope' of a contract provision that grants the employer the right to act unilaterally."[102]

In *MV Transportation*¸ the Board declared that it had decided "to abandon the 'clear and unmistakable waiver' standard and to adopt the 'contract coverage' standard" because it is more consistent with the purposes of the NLRA.[103] More important, between that decision and *E.I. Du Pont*, it has taken important steps toward restoring longstanding, commonsense policies and stability in this area of the law as well.

Confidentiality

Another target of the NLRB's enforcement efforts was the use of confidentiality policies that many employers routinely maintain. Specifically, the Board took issue with the practice of requiring that information about workplace investigations be kept confidential, and it likewise undermined the ability of employers to safeguard witness statements during such investigations. It also undermined arbitration agreement provisions that contained confidentiality requirements.

A. Witness Statements and Workplace Investigations

The Board issued a noteworthy decision in 2012 commonly referred to as *Piedmont Gardens* in which it overturned a 34-year-old precedent regarding the disclosure of witness statements to labor unions.[104] That precedent derived from the Board's *Anheuser-Busch* decision in 1978 that protected witness statements from such disclosure with a "broad, bright line exception" to the general rule that an employer must provide to a union relevant information in workplace investigations.[105]

In his dissent from the *Piedmont Gardens* majority, then-Member Brian Hayes observed, "[t]he [*Anheuser-Busch*] rule protects the integrity of the arbitration process, protects employee witnesses who participate in workplace investigations from coercion and intimidation, and enables employers to conduct effective investigations into workplace misconduct."[106] Nevertheless, in lieu of the *Anheuser-Busch* exception, the Board in *Piedmont Gardens* adopted a more subjective test to evaluate whether an employer has a sufficient reason—in the eyes of the NLRB—to withhold witness statements from disclosure.

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Similarly, the NLRB in 2015 reversed longstanding precedent regarding confidentiality in workplace investigations in its *Banner Estrella Medical Center* decision, which held that requiring confidentiality during such investigations was presumptively unlawful—despite the fact that confidentiality may be *required* by other laws.[107]

In its decision, the Board declared that "an employer may restrict those discussions only where the employer shows that it has a legitimate and substantial business justification that outweighs

employees' Section 7 rights." That view reiterated the Board's opinion in an earlier 2011 decision, *Hyundai*, which found unlawful a confidentiality rule "without any individualized preliminary review to determine whether such confidentiality was objectively necessary."[108]

The current Board chairman signaled early in his tenure that he believed the criticism in the *Piedmont Gardens* minority dissents "warrant careful consideration," and he would be amenable to reconsidering it "in a future appropriate case."[109]

The Board did just that and elected to overrule *Banner Estrella* in December 2019 in the case of *Apogee Retail LLC*.[110] That case centered on the legality of two of the employer's rules, one that required employees to "'maintain confidentiality' regarding workplace investigations into 'illegal or unethical behavior' and the other prohibiting 'unauthorized discussion' of investigations or interviews 'with other team members.'"[111]

Using its standard as laid out in *Boeing*,[112] the Board declared "that investigative confidentiality rules are lawful and fall within Boeing Category 1—types of rules that are lawful to maintain—where by their terms the rules apply for the duration of any investigation."[113]

The current Board chairman signaled early in his tenure that he believed the criticism in the *Piedmont Gardens* minority dissents "warrant careful consideration," and he would be amenable to reconsidering it "in a future appropriate case."

However, with regard to the specific rules in question, the *Apogee Retail* decision noted that they were not limited to the duration of an investigation and therefore fell under *Boeing's* Category 2. As such, the Board sent the case back to its regional office to determine whether the employer "has one or more legitimate justifications for requiring confidentiality even after an investigation is over, and if so, whether those justifications outweigh the effect" on Section 7 protections.

Notwithstanding that procedural caveat, the decision in *Apogee Retail* achieved the objective of overruling *Banner Estrella*, which the Board faulted for three reasons: (1) it "failed to consider Supreme Court and Board precedent recognizing the Board's duty to balance an employer's legitimate business justifications and employees' Section 7 rights;" (2) it "failed to consider the importance of confidentiality assurances to both employers and employees during an ongoing investigation;" and (3) it "is inconsistent with other Federal guidance."[114]

B. Confidentiality in Arbitration Agreements

In a similar vein, the Board in June 2020 released a decision in *California Commerce Club, Inc.* addressing the question of whether confidentiality provisions in employment-related arbitration agreements violate the NLRA.[115] Its ruling further clarified the extent of the NLRA's general Section 7 protections, and it determined that provision does not necessarily apply insofar as arbitration agreements with confidentiality clauses.

With the Supreme Court's ruling that agreements requiring individual arbitration are enforceable under the Federal Arbitration Act irrespective of the NLRA's Section 7 protections,[116] the NLRB's

decision in *California Commerce Club* found that an agreement requiring arbitration to be "conducted on a confidential basis" with "no disclosure of evidence or award/decision" was governed by the FAA and therefore legal under the NLRA.[117]

At the same time, *California Commerce Club* did not provide blanket protection for arbitration agreements, and it made clear that "provisions that impose confidentiality requirements beyond the scope of the arbitration proceeding and 'the rules under which the arbitration will be conducted' receive no protection from the FAA."[118] That stipulation makes clear that arbitration agreements may still receive scrutiny from the NLRB, but in contrast to the previous majority, the current one will not apply such scrutiny by simply declaring a confidentiality provision to be facially unlawful.

Conclusion

The arrival of a new administration in the nation's capital always brings shifts in policy on any number of issues, both in labor law and beyond. That much is typical. But during the Obama administration, the NLRB, in particular, set about an unprecedented undermining of well-settled legal principles in the name of assisting unions facing a perilous decline in membership. In doing so, the Board took stances that sanctified the interests of organized labor while all but ignoring the legitimate interests of employers. The result was a series of decisions that resembled more of a fun-house mirror than clear, stable policy.

As the Trump administration took shape in 2017, a new season of policy shifts similarly arrived. Once the administration was able to install a majority at the NLRB, the Republican members had quite a chore in revisiting the work of their predecessors, but it is work they have done assiduously to establish a more balanced approach. Their track record on key issues has largely been positive, establishing a far more commonsense interpretation of the law that that protects workers' rights but also recognizes the reality of the modern workplace. Hopefully, this progress survives regardless of which administration is in place.

Endnotes

[1] U.S. Chamber of Commerce, *Restoring Common Sense to Labor Law: Ten Policies to Fix at the National Labor Relations Board*, February 28, 2017, available at https://www.uschamber.com/report/restoring-commonsense-labor-law-ten-policies-fix-the-national-labor-relations-board.
[2] Michael J. Lotito, Maurice Baskin, and Missy Parry, "Was the Obama NLRB the Most Partisan Board in History? The Obama NLRB Upended 4,559 Years of Precedent," Coalition for a Democratic Workplace and Workplace Policy Institute, December 6, 2016.
[3] *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) *enf"d. Sub nom.* 727 F.3d 552 (6th Cir. 2013).
[4] National Labor Relations Board, Office of Public Affairs, "Board issues Decision on Appropriate Unites in Non-Acute Care Facilities," Press Release (August 30, 2011).
[5] *PCC Structurals, Inc.*, 365 NLRB No.160 (2017).
[6] *Id.*, quoting *Kalamazoo Paper Box Co*., 136 NLRB 134, 137 (1962) (emphasis added; internal footnotes omitted).
[7] *Id.*, quoting Section 9(a) of the NLRA (emphasis added in Board's decision).
[8] *Id.*
[9] *Chamber of Commerce, et al. v. National Labor Relations Board*, No. 1:11-cv-02262-JEB (D.D.C.), appeal dismissed, No. 12-5250 (D.C. Cir.).
[10] National Labor Relations Board. Request for Information Regarding Representation Election Regulations, 82 Fed. Reg. 58783 (December 14, 2017).
[11] Administrative Procedure Act, 5 U.S.C. 553(b)(A).
[12] The NLRB subsequently altered the effective date to June 1, 2020, in response to the pending litigation.
[13] *AFL-CIO v. NLRB*, D.D.C., No. 20-01909, Minute order 10/23/20.
[14] *Browning-Ferris Industries of California, Inc., Newby Island Recyclery*, 326 NLRB 186 (2015).
[15] David Weil. *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*. Cambridge, MA: Harvard University Press, 2014.
[16] *Id.*
[17] David Weil. "Administrator's Interpretation No. 2016-1: Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act." Washington, D.C.: U.S. Department of Labor, Wage and Hour Division, 2016.
[18] *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co., as a single employer and/or joint employers and Dakota Upshaw and David Newcomb and Ron Senteras and Austin Hovendon and Nicole Pinnick*, 365 NLRB No. 156 (2017).
[19] *Id.*
[20] *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co., as a single employer and/or joint employers and Dakota Upshaw and David Newcomb and Ron Senteras and Austin Hovendon and Nicole Pinnick,* 366 NLRB No. 26 (2018).
[21] The Coalition for a Democratic Workplace, et al., "Rulemaking Petition In the Matter of Proposed Rule to Establish the Standard for Determining Joint-Employer Status Under the National Labor Relations Act." Washington, D.C.; June 13, 2018.
[22] The Standard for Determining Joint-Employer Status, 83 FR 46681 (September 14, 2018).
[23] Joint Employer Status Under the National Labor Relations Act, 85 FR 11184 (February 26, 2020).
[24] *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery and FPR-II, LLC d/b/a Leadpoint Business Services, and Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters*, 369 NLRB No. 139 (2020).
[25] *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).
[26] *800 River Road Operating Company, LLC d/b/a Care One at New Milford.*
[27] *Total Security Management, Inc.*, 364 NLRB 106 (2016).
[28] *Alan Ritchey, Inc.*, 359 NLRB 396 (2012).
[29] *NLRB v. Noel Canning, et al*., 573 U.S. 513, 134 S. Ct. 2550 (2014).

[30] *Total Security Management, Inc.*, Note 27, *supra*, Member Miscimarra concurring in part and dissenting in part.
[31] *Lutheran Heritage Village-Livonia* 343 NLRB 646 (2004).
[32] *Id.*
[33] *The Boeing Co.*, 365 NLRB 154.
[34] *Id.*
[35] National Labor Relations Board, Office of Public Affairs. "NLRB Establishes New Standard Governing Workplace Policies, and Upholds No-Camera Policy in Boeing." December 17, 2017.
[36] *The Boeing Co.*, Note 33, *supra.*
[37] *Atlantic Steel Company*, 245 NLRB 814 (1979).
[38] *Plaza Auto Center, Inc.*, 360 NLRB 972.
[39] *Pier Sixty, LLC*, 362 NLRB 505.
[40] *Cooper Tire & Rubber Company*, 363 NLRB 194.
[41] *United States Postal Service*, 364 NLRB 62 (2016).
[42] National Labor Relations Board, Office of the General Counsel. Memorandum GC 18-02, December 1, 2017.
[43] *Alstate Maintenance, LLC*, 367 NLRB 68 (2019) and *General Motors, LLC*, 369 NLRB 127 (2020).
[44] *Wyndham Vacation Ownership d/b/a WorldMark by Wyndham*, 356 NLRB 765 (2011).
[45] *Alstate Maintenance, LLC*, Note 43, *supra.*
[46] *General Motors, LLC*, Note 43, *supra*. Notice and Invitation to File Briefs. September 5, 2019.
[47] *Wright Line, a Division of Wright Line, Inc*., 251 NLRB 1083 (1980).
[48] *Id.*
[49] *Purple Communications, Inc.*, 361 NLRB 1050 (2014).
[50] *Register Guard*, 351 NLRB 1110 (2007), enf'd. in relevant part and remanded sub nom; *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). *Purple Communications*, Note 49, *supra.*
[51] *Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB 143.
[52] *Id.*
[53] *FedEx Home Delivery, an Operating Division of FedEx Ground Package Systems, Inc*., 362 NLRB 250 (September 30, 2014).
[54] *Id.* See also, *Corp. Express Delivery Sys.*, 332 NLRB 144, at 6 (December, 19, 2000).
[55] *FedEx Home Delivery v. NLRB*, 563 F3d 492 (DC 2009).
[56] *FedEx Home Delivery v. NLRB*, No. 14-1196 (DC Cir. 2017).
[57] *Pacific 9 Transportation, Inc.,* Case Number: 21-CA-150875.
[58] *Id.*, NLRB Division of Advice Memorandum, December 18, 2015.
[59] National Labor Relations Board, Office of General Counsel, Memorandum 16-01, "Mandatory Submissions to the Division of Advice," March 22, 2016.
[60] *Intermodal Bridge Transport*, 369 NLRB 27 (2020).
[61] *Postmates, Inc.*, Case 13-CA-163079, Advice Memorandum, September 19, 2016.
[62] *Super Shuttle*, 367 NLRB 75 (2019).
[63] *Uber Technologies, Inc*. Cases 13-CA-163062, 14-CA-158833, and 29-CA-177483.
[64] *NLRB v. Babcock & Wilcox, Inc*., 351 U.S. 105, 112 (1956).
[65] *Wal-Mart Stores, Inc.* 364 NLRB 118 (2016) and *Capital Medical Center*, 364 NLRB 69 (2016).
[66] *Id.*
[67] *Walmart Stores, Inc. v. National Labor Relations Board*, Docket No. 16-72963 (9th Cir. 2018).
[68] *Capital Medical Center*, Note 65, *supra*; *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945).
[69] *Capital Medical Center*, Note 65, *supra.*
[70] *Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts*, 368 NLRB 46 (2019); *Kroger Limited Partnership*, 368 NLRB 64 (2019); *UPMC*, 368 NLRB 2 (2019).
[71] *New York New York Hotel & Casino*, 356 NLRB 907 (2011), and *Simon DeBartolo Group*, 357 NLRB 1887 (2011).
[72] *Tobin Center for the Performing Arts*, Note 70 *supra*, [quoting *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992) at 534 (quoting *Babcock*, 351 U.S. at 112)].
[73] *Kroger Limited Partnership*, Note 70, *supra* and *Babcock & Wilcox, Inc.*, Note 65, *supra*.
[74] *Sandusky Mall Co*., 329 NLRB 618 (1999), enf. denied in relevant part 242 F.3d 682 (6th Cir. 2001).

[75] *Kroger Limited Partnership*, Note 70, *supra.*
[76] *UPMC*, Note 70, *supra*.
[77] *Id.*
[78] *D.R. Horton*, 357 NLRB 2277 (2012).
[79] *AT&T Mobility LLC v. Concepcion Et Ux*, 563 U.S. 333, 131 S. Ct. 1740 (2011).
[80] *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 113 P.3d 1100.
[81] *D.R. Horton, Inc. v. NLRB,* 737 F.3d 344, 362 (5th Cir. 2013).
[82] *Murphy Oil USA, Inc. v. NLRB,* 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, (U.S. Jan. 13, 2017)*; Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, (U.S. Jan. 13, 2017); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, (U.S. Jan. 13, 2017).
[83] *Epic Systems Corporation v. Jacob Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018).
[84] *See Consolidated Aircraft Corp*., 47 NLRB 694, 706 (1943), enf'd. in pertinent part 141 F.2d 785 (9th Cir. 1944).
[85] *Spielberg Manufacturing Company and Harold Gruenberg*, 112 NLRB 1080 (1955).
[86] *Collyer Industrial Wire*, 192 NLRB 837 (1971), *Raytheon Co.*, 140 NLRB 883 (1963), and *Olin Corp*., 268 NLRB 573 (1984).
[87] *Babcock & Wilcox Construction Company, Inc.*, 361 NLRB 132 (2014).
[88] *Id.*
[89] *United Parcel Service, Inc.,* 369 NLRB 1 (2019).
[90] *Id.*
[91] I*d.*
[92] *Graymont PA, Inc.*, 364 NLRB 37 (2016).
[93] *E.I. Du Pont de Nemours, Louisville Works* and *E.I. du Pont de Nemours and Company*, 364 NLRB 113 (2016).
[94] *E.I. Du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012).
[95] *E.I. Du Pont de Nemours*, Note 93, *supra*.
[96] *Raytheon Company*, 365 NLRB 161 (2017).
[97] *Id.*
[98] *E.I. DuPont De Nemours (Edge Moor Plant)*, 367 NLRB 12 (2018).
[99] *MV Transportation, Inc.*, 368 NLRB 66 (2019).
[100] *Id.*
[101] *Id*., quoting *Postal Service*, 306 NLRB 640, 643 (1992).
[102] *Id.*, quoting *NLRB v. Postal Service*, 8 F.3d 832, 838 (D.C. Cir. 1993) and *Department of Justice v. FLRA*, 875 F.3d. 667, 674 (D.C. Cir. 2017).
[103] *Id.*
[104] *American Baptist Homes d/b/a Piedmont Gardens*, 359 NLRB 499 (2012).
[105] *Anheuser-Busch, Inc*., 237 NLRB 982 (1978).
[106] *American Baptist Homes d/b/a Piedmont Gardens*, Note 104, *supra.*
[107] *Banner Estrella Medical Center*, 362 NLRB 1108 (2015).
[108] *Hyundai America Shipping Agency*, 357 NLRB 860, 874 (2011).
[109] *American Medical Response West*, 366 NLRB 146, n. 4 (2018).
[110] *Apogee Retail d/b/a Unique Thrift Store*, 368 NLRB 144.
[111] *Id.*
[112] *The Boeing Co.*, Note 34, *supra.*
[113] *Apogee Retail*, Note 110, *supra.*
[114] *Id.* at 3, 4, 6.
[115] *California Commerce Club, Inc.*, 369 NLRB 106.
[116] *Murphy Oil USA, Inc. v. NLRB,* Note 82 *supra*.
[117] *California Commerce Club*, Note 115, *supra.*
[118] *Id.*