2017 YEAR IN REVIEW

Labor Relations Today

laborrelationstoday.com

McGUIREWOODS

1,000 lawyers | 23 offices | www.mcguirewoods.com

Table of Contents

Introduction

As a new administration took the reins for the first time in eight years, employers, employees, unions, labor lawyers and observers alike all wondered what to expect from President Donald J. Trump. Would he govern much like the traditional Republican politicians he so soundly dispatched during his unconventional run through the primaries? Or, would his labor agenda be less doctrinaire and more pragmatic — as his relationships with organized labor often seemed throughout his career as a real estate developer, builder and business operator? In some ways, 2017 brought more questions than answers.

Perhaps because President Obama's Democrat majority remained largely intact on the Board through much of the year, its decisions continued to push the envelope, expanding the scope of the NLRA's protections in favor of unions, and Democrat General Counsel Dick Griffin continued to push a pro-labor agenda. Thus, it fell on the courts, the Congress and the other Executive Branch agencies to rein in and begin to undo much of the Board's recent overreach. But at year's end, with a Board briefly sporting a majority of Trump appointees and a new Republican General Counsel, a quick burst of case decisions overruled some of the previous Board's more radical holdings.

We submit this Year in Review to summarize the most noteworthy developments in 2017 — a year in which disruption, intense partisan struggle and political intrigue was woven through nearly every legal change. Additional information on these topics and more is available at our Labor Relations Today blog (laborrelationstoday.com), where we will continue to chronicle and alert readers to significant changes in the law as they unfold in 2018 and beyond.

The Republican Congress Undertakes Immediate Efforts to Reverse Course

In early January, with the seating of the new Congress, Chairman Lamar Alexander (R-TN) announced the addition of freshman Sen. Todd Young (R-IN) and Sen. Maggie Hassan (D-NH) to the Senate Health, Education, Labor, and Pensions (HELP) Committee.

Likewise, the House Committee on Education and the Workforce welcomed a new chairperson, Rep. Virginia Foxx (R-NC), who, in turn, welcomed its new members:

> We have assembled a strong team to advance the commonsense solutions our nation's workers, students, families, and small businesses urgently need… This committee will play a central role in Congress's broader efforts to grow the economy, advance patient-centered health care, and promote greater prosperity for all Americans. Working closely with our members, subcommittee leaders, and all our colleagues, the committee will do its part to move the country in a better direction.

Rep. Tim Walberg (R-MI) took over as chairman for the Subcommittee on Health, Employment, Labor & Pensions (HELP), while Rep. Gregorio Kilili Camacho Sablan (D-N.M.I.) became Ranking Member.

The Republican majority immediately set out to undo policy enactments and decisions of the previous administration. At year's end, however, none of the legislative efforts to reverse Board caselaw had advanced significantly.

House and Senate Pass Congressional Review Act (CRA) Resolution To Invalidate Enjoined Contractor "Blacklisting" Rule

On February 2, 2017, the House of Representatives passed a resolution of disapproval (H.J. Res. 37) pursuant to the Congressional Review Act, to preclude enforcement of the Federal Acquisition Regulatory (FAR) Council's final rule implementing President Obama's "Fair Pay and Safe Workplaces" Executive Order. A largely party line vote approved the resolution, 236-187. About a month later, on March 6, 2017, by a narrow party-line vote of 49-48, the United States Senate passed a similar resolution of disapproval.

The FAR rule required offerors on contracts or subcontracts estimated to exceed $500,000 to disclose "any administrative merits determination, arbitral award or decision, or civil judgment" against the contractor under fourteen enumerated labor and employment statutes and Executive Orders ("labor law violations"), for the three years preceding the contract bid. These disclosures, and any additional information supplied, would be taken into account by contracting officers in making responsibility determinations and awarding contracts.

The rule exceeded the President's authority, denied statutory due process rights to covered contractors, and expanded statutory penalties beyond those proscribed by Congress. As noted in the *Washington Post*, by Marc Freedman, executive director of labor law policy with the U.S. Chamber of Commerce:

> They define violations to include mere allegations and citations where the contractors haven't had a chance to defend them. We consider this a violation of their constitutional due-process rights.

It was thus entirely unconstitutional, which is why in October 2016, on the eve of its effective date, a federal judge in Texas enjoined most parts of it. But passage of the CRA would ensure that it would never become effective.

Rep. Virginia Foxx (R-NC), chairwoman of the House Committee on Education and the Workforce, said of the passage:

> This flawed and unnecessary blacklisting rule has always been a solution in search of a problem. As we've said repeatedly, the best way to ensure fair pay and safe workplaces is to enforce the existing suspension and debarment system. This rule would make that system simply unworkable, which would hurt workers, taxpayers, small businesses, and our Armed Forces. Congress has a responsibility to put a stop to misguided rules, and today's vote is an important step. Let's reject this flawed rule and encourage the new administration to use the tools it already has to protect workers and hold contractors accountable.

On March 27, 2017, President Trump signed the CRA Resolution into law, killing the rule, and followed up by signing Executive Order 13782, which rescinded the Executive Order by President Obama which directed the promulgation of the FAR rule.

Republican Lawmakers Introduce Three House Bills To Roll Back National Labor Relations Board Quickie Election Rules

In early June, a trio of bills was introduced in the House of Representatives to amend the National Labor Relations Act in an effort to roll back some of the more aggressive changes to the union representation election process implemented by the Obama Board. The Workforce Democracy and Fairness Act (H.R. 2776), Employee Privacy Protection Act (H.R. 2775), and Employee Rights Act (H.R. 2723), were referred to the House Committee on Education and the Workforce.

The Workforce Democracy and Fairness Act, introduced by Rep. Tim Walberg (R-MI), would amend the Act to require that in all representation (RC) elections, within 14 days of the filing of a petition, an "appropriate hearing" would be held. That hearing would be:

> non-adversarial with the hearing officer charged, in collaboration with the parties, with the responsibility of identifying any relevant and material pre-election issues and thereafter making a full record thereon.

This change to the statute would restore the decades-old procedures, pre-dating the December 2014 "Quickie Election" rules, and would have the Board resolve significant legal issues likely to impact the election prior to the conduct of the election. This bill would also require a period of at least 35 days between a petition and the conduct of an election — up from the current median, 23 days, and the prospect under the "Quickie" rules of an election as soon as 13 days after the filing of a petition.

Moreover, the second half of the bill would expressly incorporate the Board's traditional "community of interest" factors for determining the appropriate unit in a representation proceeding. This inclusion would restore the decades-old standards cast aside by the Board in its 2011 *Specialty Healthcare* decision to facilitate "micro-unit" organizing.

The Employee Privacy Protection Act, introduced by Rep. Joe Wilson (R-SC), would "amend the National Labor Relations Act to require that lists of employees eligible to vote in organizing elections be provided to the National Labor Relations Board," among other protections. Prior to 2015, the Board's longstanding *Excelsior Underwear* doctrine required an employer to provide to the Board, within 7 days of the Direction of Election, a list of all employees eligible to vote, including a home address for

each. The Board's "Quickie" rules modified this, so that the employer is required to provide the list within two days, and directly to the petitioning union. Moreover, the alphabetized list must currently include:

> the full names, work locations, shifts, job classifications, and contact information (including home addresses, ***available personal email addresses, and available home and personal cell telephone numbers***) of all eligible voters[.]

This bill would for the first time memorialize the obligation in the statute itself, but would restore the seven day time frame and the Board as recipient of the information. In addition, it would require that only one piece of contact information be provided for each employee, to be chosen by the employee him or herself.

Finally, the Employee Rights Act, introduced by Rep. Phil Roe (R-TN), would amend the National Labor Relations Act, among other things to require secret ballot elections as the exclusive method of union recognition; restore the old Railway Labor Act majority standard; allow periodic re-certification elections in units experiencing significant turnover; and, to provide tougher financial penalties for unions' unfair labor practices.

These bills were previously introduced in the 114th Congress, but went no further after referral to committee. On June 14, 2017, the Health, Education, Labor & Pension Subcommittee of the Education and Workforce Committee held a hearing on the bills, at which McGuireWoods partner Seth H. Borden testified. Following the hearing, and a June 27, 2017 mark-up, the House Committee on Education and the Workforce approved two of the bills — the Workforce Democracy and Fairness Act (H.R. 2776), and the Employee Privacy Protection Act (H.R. 2775) — by a party-line vote of 22-16.

Although similar bills were introduced in the Senate, they went nowhere. As discussed below, near year's end, the Board's decision in *PCC Structurals, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017), overruled *Specialty Healthcare;* and, on December 14, 2017, the Board requested public input on whether or not to discontinue or modify the 2014 election rules. These actions overlap some of these bills, but certainly legislative action to amend the Act would prevent radical departures again by future Boards.

House Committee Approves Amendment to National Labor Relations Act to Expressly Exempt Tribal Employers From Coverage

On June 29, 2017, the House Committee on Education and the Workforce approved the Tribal Labor Sovereignty Act of 2017 (H.R. 986), by a party-line vote of 22-16.

The Tribal Labor Sovereignty Act, introduced by Rep. Todd Rokita (R-IN), would amend the National Labor Relations Act to expressly clarify the exclusion of tribal employers from the Act's definition of "employer." Specifically, the bill would add "any enterprise or institution owned and operated by an Indian tribe and located on its Indian lands" to the definition's list of exclusions set forth in Section 2(2) of the Act as follows:

> ...the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof...

Rep. Rokita said of the bill:

> We are leading the way to protect the sovereignty of Native American tribal governments. This bill fights for the inherent right to self-government, free from Washington's interference, just like local governments and states.

For decades, the National Labor Relations Act was generally understood to exclude sovereign tribal government employers, just as it expressly excludes the various other sovereign government employers listed above. In the *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), however, the NLRB changed that, casually casting aside claims of tribal sovereignty to assert federal jurisdiction over the tribal government operating the gaming enterprise in that case.

This bill would expressly reaffirm the exclusion which had been law until then, but no further action has been taken since it was reported to the House on September 25, 2017. A similar bill (S. 63) is pending in the Senate.

The Administrative "Branch" Begins Unwinding The Previous Administration's Efforts

Alexander Acosta Confirmed and Sworn in as Secretary of Labor in Late April

Following the withdrawal of previous nominee Andy Puzder, the President quickly named former National Labor Relations Board Member and FIU Law School Dean Alexander Acosta to serve as Secretary of Labor. On Wednesday, March 22, 2017, the Senate Health, Education, Labor & Pensions (HELP) Committee held a hearing on his nomination. In commencing the hearing, Committee Chairman, Sen. Lamar Alexander (R-TN) stated:

> The issue for workers today is not whether they belong to a union. It is whether they have the skills to adapt to the changing marketplace and to find and keep a job—to be accurate, to create and keep a job. My generation found jobs. This generation is more likely to have to create their own jobs.

All the same, Mr. Acosta's nomination was viewed far more favorably by opponents of the administration. AFL-CIO President Richard Trumka said of the nod:

> Alexander Acosta's nomination deserves serious consideration. In one day, we've gone from a fast-food CEO who routinely violates labor law to a public servant with experience enforcing it.

Mr. Acosta nevertheless faced knee-jerk partisan opposition. Sen. Elizabeth Warren (D-MA), an early opponent of any and all Trump administration action, was fiercely critical of the nomination. Sens. Patty Murray (D-MA) and Tim Kaine (D-VA) similarly raised concerns about his tenure as a United States Attorney during the initial hearing. Notwithstanding the fact that Mr. Acosta had been Senate confirmed unanimously to three previous government positions, the Senate voted only 60-38 to confirm him as Secretary of Labor on April 27, 2017.

U.S. Department of Labor Begins Process To Rescind Obama Administration's "Defective" Persuader Rule Overhaul

Wasting little time, on May 22, 2017, Secretary Acosta formally initiated the process for rescission of the 2016 DOL regulations narrowing the "advice exemption" to the LMRDA's so-called "persuader rule." In a Wall Street Journal opinion piece entitled "Deregulators Must Follow the Law, So Regulators Will Too," Secretary Acosta announced:

> Today there are several regulations enacted by the Obama administration that federal courts have declared unlawful. One is the Persuader Rule, which would make it harder for businesses to obtain legal advice. Even the American Bar Association believes the rule goes too far. Last year a federal judge held that "the rule is defective to its core" and blocked its implementation. Now the Labor Department will engage in a new rule-making process, proposing to rescind the rule.

As noted by the Secretary, on June 27, 2016, the District Court for the Northern District of Texas had issued a nationwide injunction against the Final Rule published on March 24, 2016. This Final Rule would have required extensive and intrusive reporting by employers and their consultants or advisers who provide any sort of advice that might have some persuasive impact on the employees in their exercise of organizing rights – regardless of whether that consultant or adviser ever has any direct contact with the employees. Despite some clearly contradictory references, this would have required reporting about the lawyer-client relationship in violation of long-standing principles of privilege and confidentiality. On November 16, 2016, the Court had made its injunction permanent.

On June 12, 2017, the Department of Labor published a Notice of Proposed Rulemaking to formally rescind the earlier rule. During the two month comment period, over a thousand comments were submitted. The Department's decision — expected largely to be a formality due to the injunction — remained pending at year's end.

OSHA Rescinds Guidance Allowing Non-Union Employees to Select Union Representatives to Participate in OSHA Inspections

On April 25, 2017, the Occupational Safety and Health Administration's Deputy Assistant Secretary released a memo withdrawing a 2013 interpretation that allowed non-union employees to designate a union representative to participate in an OSHA inspection at their work site.

In 2013, despite OSHA's own regulations requiring that the employee representative be an actual employee of the employer being inspected, OSHA issued a guidance memorandum stating that "there may be times when the presence of an employee representative who is not employed by that employer will allow a more effective inspection." Under that interpretation, employees would be permitted to select a union representative to participate in an OSHA inspection despite the fact that that union representative was not an employee.

In withdrawing the 2013 Interpretation, the Deputy Assistant Secretary for OSHA simply stated that the 2013 Interpretation is "unnecessary" given the language of the OSH Act and OSHA's regulations specifying the limited exception when non-employees are allowed to participate. Thus, although the April 25th memorandum was good news for employers, it did not shut the door entirely to union representatives' participation in OSHA inspections. If non-union employees can show good cause and demonstrate that the non-employee union representative is "reasonably necessary" to the inspection, OSHA could still allow the union representative to participate.

Courts Dealt Repeated Blows to Earlier Board's Agendas This Year

Supreme Court Affirms Invalidation of Most of Lafe Solomon's Tenure as Acting General Counsel

In *National Labor Relations Board v. SW General*, Inc., 580 U.S. –, Case Nos. 14-1107, 14-1121 (Mar. 21, 2017), the Supreme Court settled the question surrounding the validity of previous Acting General Counsel Lafe Solomon's official actions. The Court affirmed the D.C. Circuit's opinion that Solomon's

continued service in his acting capacity, after President Obama nominated him to permanent status, violated the Federal Vacancies Reform Act ("FVRA").

The FVRA grants the President limited authority to appoint acting officials to temporarily perform the functions of a vacant office without first obtaining otherwise required Senate approval. In June 2010, General Counsel Ron Meisburg resigned from the position. President Obama directed Solomon to serve temporarily as the NLRB's acting general counsel, citing the FVRA as the basis for the appointment. On January 5, 2011, he nominated Solomon to serve as the NLRB's general counsel on a permanent basis, but the Senate did not act on the nomination during the 112th Congress, and returned the nomination to the President when the legislative session expired. President Obama resubmitted Solomon's name for consideration in the spring of 2013 but the nomination suffered the same fate. The President ultimately withdrew Solomon's nomination and put forward a new candidate, whom the Senate confirmed on October 29, 2013. Throughout this entire period, Solomon served as the NLRB's Acting General Counsel.

Solomon's nomination to permanent status, the Court concluded by a 6-2 margin, rendered him ineligible to serve in acting status. The consequence? While most actions taken in violation of the FVRA are void *ab initio*, a statutory exception for the NLRB General Counsel caused the D.C. Circuit to opine that such actions are void*able*, not void. The Supreme Court recognized the D.C. Circuit's conclusion in this regard, but declined to consider the issue further because the Board did not seek certiorari on the issue. As a practical matter, the subsequent tenure of Senate-confirmed General Counsel Dick Griffin – an ideological ally of Solomon's – likely reinforced much of the rationale of cases prosecuted by Solomon. Nevertheless, this Supreme Court decision further underscored the tumultuous procedural foundations of the very active Obama Board.

Supreme Court to Decide Class Action Waiver Issue

In the earliest days of 2017, the Supreme Court issued an order agreeing to hear three cases involving the National Labor Relations Board's holding that class and collective class action waivers violate Section 8(a)(1). According to the Board's first decision on the matter in *D.R. Horton*, 357 NLRB 2277 (2012), an "individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7 … central to the [NLRA's] purposes."

The first of the three cases is *NLRB v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015), where the Fifth Circuit Court of Appeals held, contrary to the NLRB, that an employer does not commit an unfair labor practice by requiring its employees to sign arbitration agreements with class claim waivers. The Fifth Circuit's decision tracked its prior opinion in the appeal of *D.R. Horton*, where the court rejected the Board's reasoning — based largely on Supreme Court precedent upholding class action waivers in other contexts under the Federal Arbitration Act (FAA).

The other two cases, on the other hand, upheld the Board's determination that collective and class action waivers violate the Act. In *Epic Systems Corp. v. Lewis*, 823 F.3d 1147 (7th Cir. 2016), the Seventh Circuit found that the employer's agreement "runs straight into the teeth of Section 7," and "[c]ontracts that stipulate away employees' Section 7 rights or otherwise require actions unlawful under the NLRA are unenforceable." In so deciding, the Seventh Circuit found no conflict between the NLRA and the FAA. In *Ernst & Young LLP v. Morris*, 834 F.3d 975 (9th Cir. 2016), a split panel of the Ninth Circuit also held that the employer's class action waiver was invalid because Section 7 of the NLRA gives employees the right to file legal claims as a class.

Oral argument was held before the Court on October 2, 2017.

Court of Appeals Again Rejects Board and Finds FedEx Ground Drivers Are Independent Contractors, Not "Employees" Covered by the Act

In *FedEx Home Delivery v. NLRB*, Nos. 14 1196, et al. (D.C. Cir. Mar. 3, 2017) ("*FedEx II*"), the U.S. Court of Appeals for the D.C. Circuit emphasized to the Board that it means what it says. In 2009, the Court held in *FedEx Home Delivery v. NLRB,* 563 F3d 492 (D.C. Cir. 2009) ("*FedEx I"),* that single-route FedEx drivers in Wilmington, Massachusetts are independent contractors, not employees, and therefore are not entitled to the NLRA's protections. Despite this ruling, in 2014 the Board held "on a materially indistinguishable factual record" that single-route FedEx drivers in Hartford, Connecticut are nevertheless statutorily protected employees. The NLRB acknowledged that *FedEx I* was "virtually identical" but nevertheless "declined to adopt" the Court's 2009 interpretation of the NLRA. The Board principally disagreed with the emphasis the D.C. Circuit placed on "entrepreneurial opportunity" as a factor in determining whether a worker is an employee or an independent contractor. In the Board's view, the D.C. Circuit placed undue weight on that single factor, rather than weighing it as part of a broader consideration.

On review, the D.C. Circuit chastised the Board because the question presented "was already asked and answered in *FedEx I*." The Court explained 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." As the Board chose not to seek Supreme Court review of *FedEx I,* the D.C. Circuit was not going to afford a second bite at the apple because the Board merely later asked a different panel of the appeals court to reconsider its earlier ruling. Accordingly, this decision represented not only a substantive win for FedEx, and reiteration of independent contractor standards, but also a broader rejection of the NLRB's efforts to reverse case law by way of "try, try again" tactics.

En Banc Eighth Circuit Reverses National Labor Relations Board's Jimmy John's "Sick Day" Decision

On July 3, 2017, the U.S. Court of Appeals for the Eighth Circuit, sitting *en banc*, rejected the reasoning of an Administrative Law Judge (ALJ), the Board, *and* a panel of the Eighth Circuit, regarding whether Jimmy John's employees could hang posters at work challenging the company's sick-leave policy. The sandwich-shop franchisor's sick-leave policy prohibited employees from merely "calling in sick." Instead, the company required employees absent from a shift to find a replacement worker.

The union attempting to organize the workers designed and hung posters in the stores implying that as a result of this policy the sandwiches posed a health risk to customers. Managers quickly removed the posters, but union supporters plastered Minneapolis-St. Paul with replicas of the posters. As a result, the company fired six employees who coordinated the attack and issued written warnings to three who assisted.

The Board's ALJ and a divided panel of the Board concluded that the company violated Sections 8(a)(1) and 8(a)(3) of the NLRA because (1) the posters were part of and related to an ongoing labor dispute, and (2) they were not "so disloyal, reckless, or maliciously untrue as to lose the Act's protections." *See MikLin Enterprises, Inc.*, 361 N.L.R.B. No. 27 (Aug. 21, 2014) (citing *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953)). The *Jefferson Standard* principle generally explains that communications lose Section 7 protection when they constitute a "sharp, public, disparaging attack upon the quality of the company's product and its business policies."

The full Eighth Circuit disagreed with the Board, holding that *Jefferson Standard* applies to employees' disparaging communications even when they expressly reference ongoing labor disputes. Moreover, the Court concluded that the Board fundamentally misconstrued *Jefferson Standard*. For example, the Board failed to recognize that the *Jefferson Standard* test includes not only the subjective consideration of

the employee's intent to harm the company through a "sharp, public, disparaging attack," but also an objective component that focuses on the means used to achieve the employee's purpose. Moreover, the Board disregarded the manner in which and the extent to which the communications harmed the company, focusing entirely instead on whether the employees were motivated by a sincere desire to improve their terms and conditions of employment. Ultimately, the Court explained that an employee's disloyal statements can lose Section 7 protection without a showing of actual malice. The Eighth Circuit noted that the poster campaign was designed to inflict harm on the company's reputation and reduce its income. To do so, the employees made materially false and misleading statements, and the harm caused by the employees' actions far outlasted the labor dispute at issue.

The Hold-Over Obama Board Continued Its Aggressive Expansion of the Rights Protected by the Act

Member Miscimarra Finds "Common Sense Is Not So Common" in NLRB's Latest Supervisor Determination

In a 2-1 decision, the National Labor Relations Board elected to deny the employer's request for review of the Regional Director's Decision and Direction of Election in *Chi LakeWood Health*, 365 NLRB No. 10 (Dec. 28, 2016), a case where the employer asserted that its patient care coordinators (PCCs) are supervisors under the National Labor Relations Act. Member Miscimarra dissented as he believed substantial questions existed regarding whether the PCCs possessed authority to assign and responsibly direct other employees, and he took issue with the fact that "many of the Board's supervisor determinations have become increasingly abstract and out of touch with practical realities of the workplace."

The employer in *Chi LakeWood Health* was a small but full-fledged acute care medical facility operating 24 hours a day, 7 days a week with 15 in-patient beds and a nursing staff that included 6 PCCs (who were registered nurses) and their subordinates: 8-9 registered nurses, three licensed practical nurses, and one certified nurse assistant. The employer had created the PCC position because it wanted to ensure that someone was accountable for the shift-by-shift work flow of the department in addition to supervising the employees on their shift. The PCC job description included, among others, the following duties:

- Responsible for Daily Nursing Assignments–assesses, identifies and communicates unit staffing needs for current and oncoming shifts and assigns admissions and/or transfers based on patient activity level, nurse/patient ratio, and nursing skill levels;
- Coordinates daily patient care activities with acute care nursing staff and other related services;
- Communicates with staff to assure assignment made is appropriate to promote team building and cohesiveness; and
- Retains overall accountability for the workflow for their shift, and remains accountable if duties are delegated to another qualified staff member.

In addition, the evidence established that PCCs provided overall supervision of staff and patient care during shifts and serves as the bedside leader for the nursing team during shifts. Moreover, from 7 p.m.

to 8 a.m. Monday through Friday, and every weekend from 5 p.m. Friday through 8 a.m. Monday, the PCC was the only person present most of the time who could give directions and assignments to the nursing staff. Criticizing the Board's affirmation of the Regional Director's finding that the PCCs did not exercise any supervisory functions, Miscimarra asked of the weekends:

> The Regional Director determined that the PCCs are not supervisors, so the question arises, who is in charge in this life-or-death situation? If there are four acute in-patients at the time a critical patient arrives and two nurses on duty, who decides which nurse will take care of which patient? Who decides what treatment to begin? Who evaluates the condition of the patients and the abilities of each nurse? To state the obvious, these are not appropriate judgments to resolve by a coin toss or drawing straws. Someone has to be in charge at this facility at all times, including times when no manager and perhaps no physician is present.
>
> * * *
>
> [T]he notion that nobody exercises 'supervisory' authority in this type of work setting for such extended periods of time fails the 'test of common sense.' The Regional Director and my colleagues endeavor in this case to ensure that the Board's supervisory determinations are consistent with our statute. However, I believe the finding that PCCs are not supervisors under Section 2(11) provides yet another illustration of the principle that 'common sense' is not so common.

Administrative Law Judge Says AT&T No-Recording Rule Goes Too Far

In *AT&T Mobility, LLC*, NLRB Case No. 05-CA-178637 (April 25, 2017), a National Labor Relations Board ALJ ruled that the employer violated Section 8(a)(1) of the National Labor Relations Act by maintaining a rule prohibiting surreptitious recording in the workplace.

The rule read:

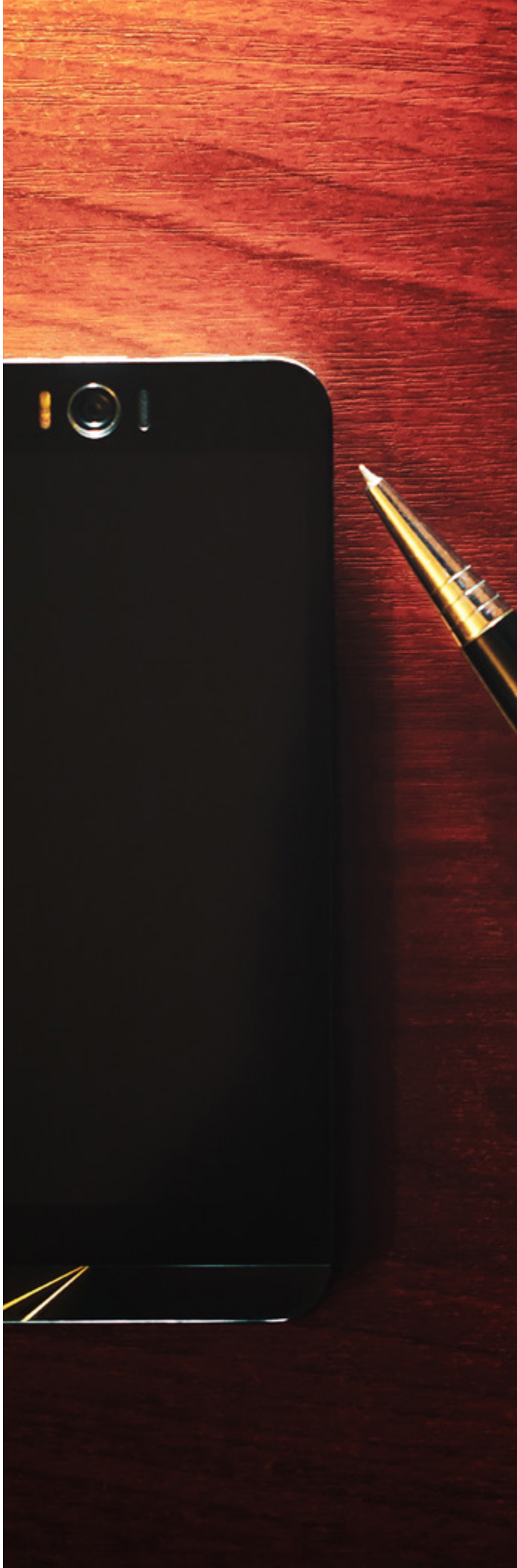
> **Privacy of Communications**
>
> Employees may not record telephone or other conversations they have with their coworkers, managers or third parties unless such recordings are approved in advance by the Legal Department, required by the needs of the business, and fully comply with the law and any applicable company policy.

The rule was questioned by an employee after he attended a termination notice meeting for a co-worker and used a company cell phone to record audio of the meeting without management's prior knowledge. After the meeting, a manager retrieved the phone, deleted the 20 minute recording and counseled the employee on the company policy.

In defense of the rule, AT&T argued that the policy was in place to protect the privacy of customer information. The ALJ found that although AT&T had a pervasive and compelling interest in protecting customer information, when balanced against employees' Section 7 rights, the rule was overbroad and in violation of Section 8(a)(1) of the Act. Specifically, the judge noted recent Board decisions explaining that "protected conduct may include a number of things including recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions." Noting there were narrower ways for the employer to protect its legitimate interests without interfering with these employee rights, the judge also found that the employee was illegally threatened with disciplinary action for violation of the rule.

Second Circuit Upholds NLRB Order Finding Grocer's No Recording Policy Unlawful

On June 1, the Second Circuit issued a summary order in *Whole Foods Market Group, Inc. v. NLRB*, affirming the National Labor Relations Board's holding in another case striking down an



employer's rules prohibiting recording of company meetings or conversations in the workplace. In *Whole Foods*, the employer had two separate policies prohibiting recording. One provided:

> In order to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust, [employer] has adopted the following policy concerning the audio and/or video recording of company meetings:
>
> It is a violation of [employer] policy to record conversations, phone calls, images or company meetings with any recording device (including but not limited to a cellular telephone, PDA, digital recording device, digital camera, etc.) unless prior approval is received from your Store/Facility Team Leader, Regional President, Global Vice President, or a member of the Executive Team, or unless all parties to the conversation give their consent. Violation of this policy will result in corrective action, up to and including discharge.

The other provided:

> It is a violation of [employer] policy to record conversations with a tape recorder or other recording device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership. The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed.

Overruling the administrative law judge, the Board, in a 2-1 decision, reasoned that Section 7 protects photography and audio or video recording if employees are acting in concert for their mutual aid and protection and no overriding employer interest exists:

> Such protected conduct may include, for example, recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions.

In affirming and enforcing the Board's order, the Second Circuit noted:

> The Board's finding that recording, in certain instances, can be a protected Section 7 activity was reasonable....So too was its finding that, because Whole Foods' no-recording policies prohibited all recording without management approval, 'employees would reasonably construe the language to prohibit' recording protected by Section 7.

Like the Board, the Second Circuit found that the employer's policies prohibited all recordings without management approval. The court also dismissed the employer's argument that the stated purpose of the rules–to promote employee communication in the workplace–negated any chilling effect that the rules might have on employees' exercise of Section 7 rights.

General Counsel Declares College Scholarship Football Players Are Employees Under the NLRA

In Memorandum GC 17-01, issued January 31, 2017, General Counsel Richard Griffin, provided a "guide for employers, labor unions, and employees that summarizes Board law regarding NLRA employee status in the university setting and explains how the Office of the General Counsel will apply these representational decisions in the unfair labor practice arena." That memo clarified that the General Counsel considers "scholarship football players at NCAA Division I Football Bowl Subdivision ("FBS") private colleges and universities…employees under the NLRA, and therefore…entitled to the protections of Section 7 of the Act."

Noting that the Board did not reach the question of whether scholarship football players are NLRA employees in its *Northwestern* decision, the General Counsel stated that:

> it is important that [scholarship football players] know whether the Act's protection extends to them, *i.e.*, whether if they engage in concerted activity for mutual aid and protection, such activity is protected by the NLRA.

Relying upon the Board's decisions in *Boston Medical Center* and *Columbia University*, the General Counsel concluded:

> it is clear from the evidentiary record established in *Northwestern University* that scholarship football players at Northwestern and other Division I FBS private colleges and universities are employees under the NLRA because they perform services for their colleges and the NCAA, subject to their control, in return for compensation.

Because General Counsel Griffin believed that "FBS scholarship football players clearly satisfy the broad Section 2(3) definition of employee and the common-law test," he felt they "should be protected by Section 7 when they act concertedly to speak out about aspects of their terms and conditions of employment."

This would include, for example, any actions to: advocate for greater protections against concussive head trauma and unsafe practice methods, reform NCAA rules so that football players can share in the profit derived from their talents, or self-organize, regardless of whether the Board ultimately certifies a bargaining unit.

This major expansion of NLRA jurisdiction will have to wait a few years, however. As discussed in greater detail below, one of the first official acts by incoming General Counsel Peter Robb was to rescind this Memorandum in its entirety. Thus, the Board is unlikely to face the issue in a case prosecuted by the agency in the near future.

Board Rules Casino Violated Act By Barring Former Employee From Socializing In Nightclub

In *MEI-GSR Holdings, LLC dba Grand Sierra Resort & Casino*, 365 NLRB No. 76 (May 16, 2017), the Board ruled that a casino operator violated Section 8(a)(1) of the Act by forbidding a former employee from "socializing" at one of its nightclubs after she joined a Fair Labor Standards Act (FLSA) class action lawsuit against the employer. The Board majority ruled:

> [T]he relevant question under Section 8(a)(1) is not whether the Respondent affected Sargent's wages, hours, or terms and conditions of employment, but whether (in the

> words of the Act) the Respondent has "interfere[d] with, restrain[ed], or coerce[d] employees in the exercise of the rights guaranteed in section 7." As explained, the Respondent's actions, taken in response to Sargent's protected lawsuit, would have reasonably tended to interfere with employees' exercise of their statutory rights.

The former employee at issue worked for the casino for only two weeks. Following the conclusion of this very brief employment, she continued to hang out at one of the casino's nightclubs. Approximately eighteen (18) months later, Ms. Sargent and another employee filed a class and collective FLSA action against the casino on behalf of themselves and similarly situated employees. A year after the filing of the suit, the casino began denying her access to the nightclub and expressly referring to the litigation. The Board held:

> The Respondent's exclusion of [the former employee], in response to her participation in protected concerted activity, would reasonably tend to chill employees from exercising their Section 7 rights. Upon observing or learning of this targeted action against the lead plaintiff in the FLSA lawsuit, the Respondent's employees reasonably would conclude they, too, might be subject to reprisals and reasonably would be deterred from participating in a work-related lawsuit or other protected concerted activity.

Chairman Miscimarra filed a dissent, disagreeing that the ban, motivated by the pendency of non-NLRA litigation, violated the NLRA. The dissent argued that there were other employees pursuing the FLSA action who were not similarly banned from the nightclub, and that the employer had many legitimate business interests which would justify its actions. In sum, the Chairman concluded:

> I do not believe that Congress, when enacting the NLRA, intended to guarantee that every former employee would have a right of access to the private property of his or her former employer whenever he or she joined other employees in a non-NLRA lawsuit against that former employer.

Additional Board Issues of Significant Interest

Fired Google Manifesto Author Files Unfair Labor Practice Charge: Did He Engage In Protected Activity?

In August, a Google engineer was fired rather publicly after circulating a 3,000 word "manifesto," criticizing the tech giant's approach to diversity issues and questioning the root causes of the industry's gender gaps. He promptly filed an unfair labor practice charge with the National Labor Relations Board alleging that the company violated Section 8(a)(1) of the National Labor Relations Act:

> ...by threatening employees because of their protected concerted activities and by making threats of unspecified reprisals against employees because of their protected concerted activities.

Presumably, his termination for drafting and circulating the memo among his co-workers was central to his proffer of evidence.

Former Board Chairman Wilma Liebman expressed some skepticism in a media interview:

> Damore could argue to the labor board that by firing him for his memo, Google violated the federal law that protects collective action by employees, said Wilma Liebman, who chaired the National Labor Relations Board under President Barack Obama.
>
> To prevail, he'd have to show that his letter was related to workplace conditions, that it was designed to instigate collective action among his co-workers, and that it wasn't so defamatory or offensive as to forfeit legal protection. "I think it's an open question," Liebman said. "It's not a slam dunk either way."

Yet it was the extreme expansion of NLRA Section 7's protections by former Chair Liebman and her philosophical disciples on President Obama's Board that paved the way for this case. While much of the manifesto may well be characterized as political, philosophical and/or scientific debate, there are clearly portions where the author sought to make common cause with his co-workers regarding working conditions. For example, in

an effort to address the various pay and promotion issues identified by the memo, the section labeled "Suggestions" recommended, among other things, that the employer:

- "[s]top restricting programs and classes to certain genders or races";
- discontinue "microaggression training";
- make "Unconscious Bias" training mandatory for promotion committee members; and
- implement other adjustments to surveys used in pursuit of diversity within certain "org levels."

It is hard to argue that these specific recommendations did not pertain at all to the working conditions of the memo author and his co-workers at the company. It may be slightly more complicated to question whether his circulation of this memo to numerous co-workers, including, by some reports, via internal employee bulletin board postings, was "designed to instigate collective action."

We will never know how the previous or current Board would approach the issue, however. After much publicized media hype, on September 1, 2017, the Board approved withdrawal of the charge.

NLRB Denies Petition to Use Its Rulemaking Power to Extend Weingarten Rights to Nonunion Employees

On May 3, 2017, the National Labor Relations Board unanimously denied a petition filed by a former NLRB attorney asking the Board to grant non-union employees the right to have a representative present during investigatory interviews that could reasonably result in discipline. The petition stemmed from a November 15, 2016 letter by Charles S. Strickler, Jr. requesting that the Board use its rulemaking power to reverse the decision in *IBM Corp*., 341 NLRB 1288 (2004), and extend *Weingarten* representation rights to non-union employees.

Weingarten rights stem from a Supreme Court decision in which the court held that union-represented employees have the right to a union representative, upon request, during investigatory interviews which may reasonably be expected to lead to discipline. In 2000, a Democratic-controlled Board extended those same rights in a 3-2 decision to non-union employees in *Epilepsy Foundation of Northeast Ohio,* 331 NLRB 676 (2000). In *IBM Corp*., a Republican-controlled Board overruled *Epilepsy Foundation* in another 3-2 decision. Despite expectations that the law would once again change under President Obama, the Board was never presented the issue, and thus *IBM Corp*. survived the administration. Dismissal of the petition ensures that holding will endure for the near future.

The Board Continued to Wrestle With Protection of Profane, Vulgar and Racist Conduct

In August, the Circuit Court of Appeals for the Eighth Circuit issued its decision in *Cooper Tire & Rubber Co. v. NLRB,* No. 16-2721 (8th Cir., Aug. 8, 2017), upholding an earlier decision of the Board protecting the "right" of a striker to yell vile, racist epithets at African-American workers from the picket line. Following expiration of a collective bargaining agreement, the employer locked out its employees and began using temporary replacements. Many of those temporary replacements were African-American. When several vans of replacement workers drove past a union picket line, a locked-out employee yelled several racist statements at the vans, including references to "fried chicken and watermelon."

The employer terminated the employee for those statements, and the union grieved and arbitrated the termination. Although an arbitrator upheld the termination, a Board ALJ found that the harassment policy did not justify the termination:

> [The employee's] "KFC" and "fried chicken and watermelon" statements most certainly were racist, offensive, and reprehensible, but they were not violent in character, and they did not contain any overt or implied threats to replacement workers or their property. The statements were also unaccompanied by any threatening behavior or physical acts of intimidation by [the employee] towards the replacement workers in the vans.

The Board agreed and adopted the recommended order, and the Court of Appeals — while noting that "Board decisions' repeated forbearance of … racially degrading conduct … goes too far" — nevertheless enforced it.

At the same time, in a rare win for an employer, the Board unanimously affirmed an ALJ decision that the termination of a union bargaining-committee representative for a profanity-laden rant did not violate the National Labor Relations Act. *Brooke Glen Behavioral Hospital*, 365 NLRB No. 79 (May 15, 2017).

The employer, a hospital treatment center for patients with severe emotional and mental problems, was engaged in collective bargaining with a nurses' union. During a bargaining session, the employee, a registered nurse, brought several mental health technicians (who were represented by a different union) to "observe." The employer objected to their presence and left the meeting. Several days later, the employer was conducting a tour of its hospital for managers and staff from an affiliated facility. When the tour group approached the registered nurse's work area, she began screaming and demanding to know "who the visitors were and why they were there." Receiving no response, the registered nurse "again asked what the visitors were doing at the hospital, asked one particular visitor how many orientations he needed, and pointed out,

sarcastically, 'here's the hallway, here's the window.'" At the conclusion of the tour, while the tour group was in the parking lot, the registered nurse again approached the group and, pointing at her supervisor, stated, "this one don't do sh*t, she ain't sh*t … I'm going to get you the f*ck out of here." The employer terminated the registered nurse for her unprofessional conduct.

The General Counsel challenged the termination arguing that (1) the registered nurse's protected activity during the bargaining session was the motivating factor for the termination and (2) the registered nurse's conduct during the tour constituted protected activity for which she was unlawfully terminated. The ALJ rejected both arguments, and the Board agreed.

First, the ALJ found no link, other than timing, between the bargaining session and the employee's termination. Instead, the "real motivating factor for the discharge was an independent set of circumstances completely divorced from any union or other protected activity-[the registered nurse's] unprovoked misconduct that interfered with a legitimate tour group."

Next, the ALJ rejected the argument that the nurse's confrontations with the tour group constituted protected activity. As the ALJ explained:

> [The registered nurse] was at work during two of the confrontations; and the third took place after work in [the employer's] parking lot. The tour and its aftermath were not an invitation for her to interfere with the tour so as to turn those acts of interference into protected activity. At best, [the registered nurse's] testimony shows that in her mind, she perceived the tour as somehow related to her union activity. But protected activity must be based on objective fact, not subjective perceptions of the party or witness making the claim.

As described in *Cooper Tire*, the Board long has recognized that employees are permitted some leeway for impulsive behavior while engaged in protected activity. This case, however, demonstrated that an employer does not have to tolerate profane and abusive misconduct unconnected to any workplace dispute or grievance.

Labor Movement Makes Headway in Smaller Elections, But Suffers Huge Failures at Large Manufacturing Facilities

The 2014 changes in the Board's Representation Election Procedures seem to have had much of the intended effect, making it easier for unions to successfully organize non-union workplaces by increasing uncertainty for employers and limiting the time in which they can communicate with employees about the issues. In FY 2017, the median time from petition to election was 23 days overall, 22 days with an election agreement. That's down from 38 days and 37 days respectively in FY 2014 – the last full year in which the old rules were in effect. In the cases where the terms of the election are contested, the median was down to 36 days, from 59 days in FY 2014. While the number of petitions filed was down slightly, from 2,053 in FY 2014 to 1,854 as of press time in FY 2017, the percentage of elections being held – a sign of union confidence in the outcome — is up over 5%. The actual union win rate too is up, 68.8% this year, compared to 67.6% before the changes — although the rate was as high as 72.6% last year.

But it hasn't all been good news for the unions under the "Quickie Rules." In 2017, the labor movement suffered three high profile losses in organizing efforts, likely to have lasting implications.

In February 2017, Machinists Fail to Organize 3,000 Boeing Airplane Mechanics in Charleston, South Carolina

On February 15, 2017, Boeing workers at the 787 Dreamliner assembly plant in Charleston, South Carolina voted in the largest representation election in the manufacturing sector under the Board's new rules. Of the approximately 3,000 eligible voters, 2,828 cast ballots throughout the day. When the ballots were tallied, 2,097 votes cast — or 74% — opted against union representation.

South Carolina has the lowest union density in the nation — approximately only 1.6 percent of the workforce belongs to a union. The local business community and political leadership, including then Gov. Nikki Haley (R-SC), were highly critical of the IAM's efforts to organize. The IAM, which represents most of Boeing's workforce in the Pacific Northwest, had been trying to organize the South Carolina workforce since the union failed to shut the plant down via NLRB litigation in 2011. This was the second election scheduled in two years, with the prior petition being withdrawn by the union in 2015 shortly before the election was to take place.

In August 2017, a Proposed Unit of 3,800 Auto Technicians at Nissan's Canton, Mississippi Plant Reject the United Auto Workers

Months later, an even larger NLRB election was held in another manufacturing plant in the Southeast. Production workers at the Nissan Motors assembly plant in Canton, Mississippi also voted to reject representation by the UAW. With over 3,500 of the roughly 3,700 eligible voters casting valid ballots, the workers voted 2,244 to 1,307 against union representation.

The UAW had made clear that organizing the non-American auto manufacturers — or "transplants" as they call them — throughout the American South was critical to its leverage in future negotiations with the "Big Three" in Detroit. The union's high profile campaign relied on intense appeals for public support, with celebrity participation by Sen. Bernie Sanders and actor Danny Glover. In the end, however, the employees voted nearly two to one to remain union-free.

Fuyao Glass Employees Reject UAW Representation at Moraine, Ohio Facility

On the heels of a big loss at a foreign auto manufacturer in the American South, the UAW redoubled its efforts at a facility much closer to its home. The Fuyao Glass America manufacturing plant is located in a former GM plant in Moraine, Ohio. The Chinese-owned company makes automotive and safety glass for cars and trucks, and supplies many of the vehicle manufacturers in the United States.

After a prolonged organizing effort, the union filed a petition and an election was held on November 9, 2017. By a tally of 886 to 441, these workers too voted against union representation. A labor historian and activist told the *Dayton Daily News* the loss would be "devastating" for the UAW: "When the UAW can't organize an auto parts plant in Ohio … then what does the future hold for an auto union?"

President Trump's National Labor Relations Board – Slow to Take Shape

Despite anticipation of a robust agenda, set on reversing many of the more aggressive initiatives of the Obama Board, the process of filling vacancies on the Board took far longer than expected. A less than expeditious nomination and confirmation process, coupled with the hold-over term of General Counsel Richard Griffin, resulted in only four weeks late in the year with a Republican General Counsel and majority.

Philip Miscimarra Takes the Reins, First as Acting Chair, Then as Chairman

On January 26, 2017, President Trump named then sole Republican Member Philip A. Miscimarra to serve as Acting Chairman of the National Labor Relations Board. Acting Chairman Miscimarra nevertheless presided over a Board with a 2-1 Democrat majority, and two Republican vacancies. Moreover, the term of Democrat General Counsel Richard Griffin — the former head lawyer for the International Union of Operating Engineers — would not expire until November 2017.

In April, the President formally named Miscimarra to the Chairman position. In a Board press release, Miscimarra said of his appointment:

> It is a great honor to be named NLRB Chairman by the President… The Board has the important responsibility of applying the National Labor Relations Act in an even-handed manner that serves the interests of employees, employers and unions throughout the country. I remain committed to these efforts.

Miscimarra served as Chairman until his term expired at year's end.

Government Counsel Marvin Kaplan Assumes Fourth Board Seat

On August 10, 2017, Marvin Kaplan was sworn in to his seat on the National Labor Relations Board. Following a June nomination, Kaplan was confirmed by the Senate on August 2, 2017, and will serve a term which lasts until August of 2020.

Immediately preceding his nomination, Mr. Kaplan served as Chief Counsel of the Occupational Safety and Health Review Commission. Prior to that he spent almost seven years as Counsel, first to the House Oversight and Government Reform Committee and then the House Education and the Workforce Committee. Mr. Kaplan received a B.S. from Cornell University and a J.D. from Washington University in St. Louis.

Management-Side Labor Lawyer William Emanuel Takes Fifth and Final Board Seat

William J. Emanuel was sworn in on September 27, 2017, to his seat on the National Labor Relations Board, days after his confirmation by the Senate. Member Emanuel succeeded outgoing Member Kent Y. Hirozawa, who served for three years, and temporarily shifted the balance of the Board in favor of Republican appointees.

Prior to his appointment to the NLRB, Mr. Emanuel served as a shareholder with the law firm Littler Mendelson, P.C. Before that, he was at several other prominent law firms and served as the former Chairman of the Labor Relations Advisory Committee. Emanuel received his J.D. from Georgetown University, and his B.A. from Marquette University.

During his confirmation hearing, Sen. Elizabeth Warren (D-MA) led Democrats in particularly combative grilling of Mr. Emanuel on account of his representation of large American employers. Mr. Emanuel assured the panel that consistent with his view of the applicable rules and the White House's specific ethics pledge, that he would recuse himself from any of his recent clients for a period of two years. In late November, some members of that Senate panel sought and obtained from him a list of those clients.

In the same letter, Emanuel recused himself from 98 cases currently before the Board. But political opponents and labor unions are not likely to let it go at that. At least one union firm in a case involving none of Mr. Emanuel's former clients has moved for his recusal because the issues under consideration in the matter are similar to issues in cases involving some of those clients.

Moreover, a staffer for Sen. Warren has told the Washington Examiner:

> "Sen. Warren believes that due to recusal requirements, Mr. Emanuel will hinder the NLRB's ability to function smoothly. Sen. Warren will closely monitor future NLRB cases to ensure Mr. Emanuel recuses himself from decisions involving his former clients and parties represented by his former employer."

Late in the Year, President Trump's General Counsel Takes the Reins

Peter Robb Confirmed as National Labor Relations Board General Counsel

By a party-line 49-46 vote, on November 9, 2017, the Senate voted to confirm the nomination of Vermont labor lawyer Peter Robb to serve as the General Counsel of the National Labor Relations Board. Former union lawyer Richard Griffin's term ran from November 2013 until October 31, 2017, at which point longtime Board official Jennifer Abruzzo stepped in as Acting General Counsel.

The hyper-partisan confirmation tally is consistent with the 2013 confirmation of Mr. Griffin by a 55-44 party-line vote, following a negotiated compromise in the Senate to preserve the filibuster. Mr. Griffin served following a prolonged period during which there was no properly authorized General Counsel. As noted above, earlier this year, the U.S. Supreme Court invalidated the tenure of Lafe Solomon, who for years acted as General Counsel without Senate confirmation. Prior to Mr. Solomon, General Counsel appointments — like many presidential appointments — were generally less controversial.

Ron Meisburg, for example, who served 2006-2010, was confirmed by a voice vote.

Mr. Robb was sworn in on November 17, 2017 to serve a four year term. Prior to his service, he was the director of labor and employment at the Vermont law firm Downs Rachlin and Marin. Prior to that, Mr. Robb practiced at Proskauer Rose from 1985-1995, and served as chief counsel to Board Member Robert Hunter. Mr. Robb earned his B.A. in economics from Georgetown University and his J.D. from the University of Maryland School of Law.

New General Counsel Peter Robb Immediately Issues Memorandum Outlining Agenda and Approach

On December 1, 2017, General Counsel Robb issued Memorandum GC 18-02, regarding "Mandatory Submissions to Advice." The memo provides a broad overview of the Office of the General Counsel's intended new agenda and outlines a clear shift from the goals and direction given by Richard Griffin and Lafe Solomon, Robb's predecessors under the Obama Administration. The Memorandum highlights a number of issues where complaint issuance is appropriate under current Board law, but where the new General Counsel "might want to provide the Board with an alternative analysis...." These include: the scope of "concerted activity"; loss of protection for vulgar or obscene conduct; common handbook provisions; union access to employer e-mail; in-plant work stoppages; off-duty access to property; statutory conflicts; Weingarten rights in non-union workplaces; successorship; and, joint employer status, among others.

In addition, GC 18-02 specifically rescinds seven memos previously issued by Griffin or Solomon, namely:

- GC 17-01 (General Counsel's Report on the Statutory Rights of University Faculty And Students in the Unfair Labor Practice Context)
- GC 16-03 (Seeking Board Reconsideration of the Levitz Framework)
- GC 15-04 (Report of the General Counsel Concerning Employer Rules)
- GC 13-02 (Inclusion of Front Pay in Board Settlements)
- GC 12-01 (Guideline Memorandum Concerning Collyer Deferral)
- GC 11-04 (Default Language)
- OM 17-02 (Model Brief Regarding Intermittent and Partial Strikes) (Regions should submit cases involving intermittent strikes to Advice)

To the extent that these rescinded memoranda catalogued, summarized or explained recent Board decisions, it should be noted that GC 18-02 does not overturn any of those cases or their holdings. It does, however, provide a compelling sense of the new General Counsel's desire to revisit and change course on those case holdings going forward.

2017 and Miscimarra's Term Ends with a Bang

And once fully constituted, the new Board wasted little time undertaking this agenda. In the last couple of days before Chairman Miscimarra's term expired on December 15, 2017, the Board issued a number of decisions overruling cases handed down by the Obama Board.

Board Seeks Public Input, Signals Intent to Revisit and Reconsider Expedited Union Representation Elections

In December 2014, the National Labor Relations Board announced a Final Rule, effective April 2015, effecting a sweeping overhaul of its longstanding representation election procedures. The 2014 Rule provides for electronic filing of election petitions and other documents; requires the employer to provide employee names and information to the petitioning union immediately; requires the employer to declare all legal positions within days of the petition filing, under threat of waiver; virtually eliminates preliminary litigation of issues relevant to the election; requires the employer to turn over extensive employee contact information (personal telephone numbers, cell numbers, email addresses, etc.) to the union. These changes were designed purely to facilitate private sector union organizing, and had the effect of cutting in half the time for employers to communicate information and employees to consider their vote leading up to a union representation election.

On December 14, 2017, the National Labor Relations Board published a Request for Information in the Federal Register, seeking public comment on these general questions:

1. Should the 2014 Election Rule be retained without change?

2. Should the 2014 Election Rule be retained with modifications? If so, what should be modified?

3. Should the 2014 Election Rule be rescinded? If so, should the Board revert to the Representation Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the Board make changes to the prior Representation Election Regulations? If the Board should make changes to the prior Representation Election Regulations, what should be changed?

Members Pearce and McFerran filed lengthy, sharp-edged dissents to the Board's invitation. Member Pearce begins his:

> I dissent from the Notice and Request for Information, which should more aptly be titled a "Notice and Quest for Alternative Facts." It ignores the Final Rule's success in improving the Board's representation-case procedures and judicial rejection of dissenting Members Miscimarra and Johnson's legal pronouncements about the Final Rule.

Chairman Miscimarra dismissed the dissents as much ado about nothing, while swiping at the implementation of the "Quickie" rules at the same time:

> One thing is clear: issuing the above request for information is unlike the process followed by the Board majority that adopted the 2014 Election Rule. The rulemaking process that culminated in the 2014 Election Rule (like the process followed prior to issuance of the election rule adopted by Members Pearce and Becker in 2011) started with a lengthy proposed rule that outlined dozens of changes in the Board's election procedures, without any prior request for information from the public regarding the Board's election procedures. By contrast, the above request does not suggest even a single specific change in current representation-election procedures. Again, the Board merely poses three questions, two of which contemplate the possible retention of the 2014 Election Rule.

Comments are due filed with the Board by February 12, 2018.

Busy Board Overrules Specialty Healthcare; Restores Traditional Community of Interest Standards Disfavoring Micro-Units

In *PCC Structurals, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017), the Board reversed the radical 2011 *Specialty Healthcare* decision which announced new standards for determining whether the bargaining unit proposed by a petitioning union is appropriate. In *PCC,* the Board held:

> Today, we clarify the correct standard for determining whether a proposed bargaining unit constitutes an appropriate unit for collective bargaining when the employer contends that the smallest appropriate unit must include additional employees. In so doing, and for the reasons explained below, we overrule the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) (Specialty Healthcare), *enfd. sub nom. Kindred Nursing Centers East, LLC v. NLRB,* 727 F.3d 552 (6th Cir. 2013), and we reinstate the traditional community-of interest standard as articulated in, *e.g., United Operations, Inc.*, 338 NLRB 123 (2002).

For decades prior to 2011, the Board made these unit determinations by analyzing a number of factors to determine whether the employees in a petitioned-for unit shared a sufficient "community of interest" to make their representation in a single bargaining unit reasonable and effective. The factors that the Board generally considered in unit determinations included:

> whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

United Operations, Inc., 338 NLRB 123 (2002). *Specialty Healthcare* cast aside these factors and presumptions which were the result of decades of practical experience and case law development, and opened the door to so-called "micro-unit" organizing, whereby unions could gerrymander a larger workforce and cherry-pick smaller units best suited to organizing success. Despite the very narrow and industry-specific focus of the rule at issue, the Board subsequently expanded the holding in *Specialty Healthcare* and applied the micro-unit standard in a wide variety of industrial settings well beyond non-acute healthcare facilities — including private aviation services, beverage manufacturing, telecommunications, wine production, military equipment manufacturing, and retail sales.

In *PCC Structurals*, the Board announced a return to the traditional standards, and remanded the case to the Regional Director to apply those standards to determine whether the petitioned for unit of 102 welders — and excluding some 2,463 other production and maintenance employees — was appropriate. As with the other significant reversal cases this week, Members Pearce and McFerran filed a vigorous dissent, defending *Specialty Healthcare*:

> As reflected by its favorable reception in the federal courts, the *Specialty Healthcare* framework — itself based on an earlier decision of the U.S. Court of Appeals for the District of Columbia Circuit — represented

> a major improvement to the Board's approach in this area. It brought greater clarity and predictability to unit determinations, while vindicating the goals of federal labor law. There is simply no justifiable reason — certainly not a change in the Board's membership alone — to reverse course and abandon a doctrine that has been so widely accepted and praised.

In any event, return to the traditional standards should prevent the balkanization and proliferation of multiple small bargaining units within a single employer's operation.

National Labor Relations Board Overrules Browning-Ferris, Restores Longstanding Standards for Determining Joint Employment

In *Hy-Brand Industrial Contractors, Ltd.,* 365 NLRB No. 156 (Dec. 14, 2017), the Board restored the longstanding rules for finding joint employment that were cast aside by the Obama Board in *Browning-Ferris Industries of California, Inc., dba BFI Newby Island Recyclery,* 362 NLRB No. 186 (2015). The decision overrules Browning-Ferris and restates the standard applied for decades prior to that decision:

> Thus, a finding of joint-employer status shall once again require proof that putative joint employer entities have exercised joint control over essential employment terms (rather than merely having "reserved" the right to exercise control), the control must be "direct and immediate" (rather than indirect), and joint-employer status will not result from control that is "limited and routine."

As a result, companies which employ a variety of business models potentially targeted by Browning-Ferris may rely upon a clearer, more objective standard in determining whether they might have some responsibility for each other's conduct or shared bargaining obligations.

For at least thirty years prior to 2015, the Board found a joint employer relationship if two or more separate entities "share[d] or codetermine[d] the essential terms and conditions of employment" of a group of employees. *TLI, Inc.,* 271 NLRB 798, 798 (1984); *Laerco Transportation,* 269 NLRB 324, 325 (1984). Under this standard, the Board appropriately required "a showing that [each] employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction" and analyzed both "form" (i.e., the contractual relationship between the putative joint employers) and "substance" (i.e., the actual practice of the putative joint employers). *Id.; AM Property Holding Corp.*, 350 NLRB 998, 1000 (2007) ("In assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties."). As provided by common law, the "essential element" of joint employer status required "a putative joint employer's control over employment matters [to be] direct and immediate." *Airborne Freight Co.*, 338 NLRB at 597 (emphasis supplied); *see also AM Property Holding Corp.*, 350 NLRB at 1000-02.

In *Browning-Ferris*, the NLRB drastically expanded the standard for joint employment holding that the Board may find that two or more entities are joint employers of a single work force if they (1) are both employers within the meaning of the common law, and (2) "share or codetermine those matters governing the essential terms and conditions of employment." The second factor tracked the language of the traditional test, but unlike the Board's traditional joint employer test, the Board no longer required that the putative joint employer exercise control over the putative joint employees directly and immediately. As criticized by the Board in *Hy-Brand*:

> In *Browning-Ferris*, the Board majority held that, even when two entities have never exercised joint control over essential terms and conditions of employment, and even when any joint control is not "direct and immediate," the two entities will still be joint employers based on the mere existence of "reserved" joint control, or based on indirect control or control that is "limited and routine."

The majority decision in *Hy-Brand* expands in significant length upon the *Browning-Ferris* dissent filed by then Member Miscimarra and Member Harry Johnson. Applying the restored standard, however, the Board still found the employers at issue in the case to be joint employers because of the exercise of direct control by both entities.

National Labor Relations Board Overrules Lutheran Heritage; Sets New Standard For Reviewing Work Rules Unrelated to Protected Activity

With the decision in *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017), the Board reined in the increasingly abused *Lutheran Heritage Village-Livonia* standard for determining whether the mere maintenance of a facially neutral work rule might still be found to violate the National Labor Relations Act because "employees would reasonably construe the language to prohibit Section 7 activity." 343 NLRB 646 (2004). In recent years, the Board has repeatedly ignored context, and completely disregarded employer explanations unrelated to union activity, to cite *Lutheran Heritage* as support to outlaw historically common work rules such as rules:

- prohibiting profanity or abusive behavior toward co-workers ("workplace civility" rules);
- requiring employees to behave in a "positive and professional manner";
- against disclosure of Confidential information;
- prohibiting photography, and surreptitious audio or video recording in the workplace;
- prohibiting employees from conducting "personal business" while on the employer's premises;
- prohibiting employees from making "false, disparaging [or] misleading" statements about the employer online; and
- forbidding unauthorized employee use of the employer's logos, insignia, and other trademarks.

Boeing is a prominent government contractor and manufacturer of military and commercial aircraft at numerous production facilities throughout the United States. Because it is a prime target for unfair competition, industrial and national security espionage, and other security and safety risks, the company has maintained a blanket ban on use of camera-enabled devices such as smart-phones on its premises. That rule [PRO 2783] read, in part:

> Possession of the following camera-enabled devices is permitted on all company property and locations except as restricted by government regulation, contract requirements or by increased local security requirements. However, *use* of these devices to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security: [list of devices omitted]. Id. [Emphasis in original.]

The Administrative Law Judge, relying primarily on *Lutheran Heritage*, placed the burden entirely on the employer and discounted all justifications and context, declaring the rule unlawful. The Board majority, however, set forth a detailed critique of the historical application of *Lutheran Heritage*, asserting that it has disregarded legitimate employer interests, elevated the need for impossible linguistic precision, ignored varying industrial realities, and ultimately failed to provide predictable results. In explaining

these findings, the decision highlights one of the most serious traps the expanding standard had set for employers:

> The *Lutheran Heritage* standard, especially as applied in recent years, reflects several false premises that are contrary to our statute, the most important of which is a misguided belief that unless employers correctly anticipate and carve out every possible overlap with NLRA coverage, employees are best served by not having employment policies, rules and handbooks.

Accordingly, the Board announced a new standard thus:

> In cases in which one or more facially neutral policies, rules, or handbook provisions are at issue that, when reasonably interpreted, would potentially interfere with Section 7 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 requirement(s). Again, we emphasize that the Board will conduct this evaluation, consistent with the Board's "duty to strike the proper balance between…asserted business justifications and the invasion of employee rights in light of the Act and its policy."

In this case, the Board considered the employer's justifications — the rule's role in maintaining federal contractor accreditation and compliance with federal "export control" information disclosure regulations; protection of proprietary information; and other security and privacy concerns — and weighed them against the lack of evidence that the rule had actually interfered with any Section 7 activity. On balance, the Board held the "no-camera" rule is lawful.

Members Pearce and McFerran each filed a dissent, criticizing the majority for overturning precedent without seeking input from a broader universe of "stakeholders in industry and labor"; asserting that the newly announced standard is actually more complex than *Lutheran Heritage*; and, expressly defending the old standard's protection of vulgar and disrespectful conduct by employees.

Going forward, employers should ensure that policy statements and work rules remain facially neutral and that they may assure employees that they do not interfere with their Section 7 rights. Moreover, in drafting policy language, employers should still attempt to narrowly tailor prohibitions to well-defined legitimate employer interests. Finally, they should follow the Board's application of this new standard to varying facts and circumstances, to try to discern the emerging patterns, as the Board itself indicates in the *Boeing* decision that it will categorize its future decisions into three categories: (1) rules which are lawful to maintain because they are not reasonably read to interfere with Section 7 rights, or potential impact is so slight as to be outweighed; (2) rules which require individualized scrutiny to determine if they would interfere, or whether such interference might be outweighed by the justification; and (3) rules which are unlawful because interference is not outweighed by justifications.

WHAT TO WATCH IN 2018?

To What Extent Will President Trump's Administrative Agenda Succeed in the Reversal of the Obama Administration's Labor Law Legacy

President Trump made roll-back of Obama administration regulations a central part of his campaign and issued early Executive Orders directing action. The Unified Agenda of Regulatory and Deregulatory Actions issued on December 14, 2017, provides an ongoing blueprint. Overtime, occupational safety and health, healthcare and immigration regulations are identified targets.

Additionally, in Memorandum GC 18-02, new NLRB General Counsel Peter Robb has identified a number of issues on which he wants "alternative analysis" presented to Advice. It is all but certain that he will look to reverse course on many of these — assuming the Board has an active, confirmed majority of three Members willing.

These include: the Board's direction on D.R. Horton class waivers; the Purple Communications decision's creation of an employee right to use company email for union activity; the protection of profane, racist and vulgar conduct under the Act; Weingarten rights in non-union workplaces; and, the scope of access to the employer's premises and property for union activity — including strikes and in-plant demonstrations.

For How Much of 2018 Will the National Labor Relations Board Be Fully Staffed and Confirmed?

As Chairman Miscimarra stepped down from the Board at year's end, the White House had still not formally nominated his replacement. It has been a frequent criticism of the Trump administration that nominations have not been fully vetted, announced, and steered through the confirmation process in the most expeditious manner. It took until well into the President's first year in office to have Members Kaplan and Emanuel confirmed and sworn in.

At year's end, Member Kaplan was named Chairman, but the nominee for the fifth seat on the Board remained in question.

While management attorney John Ring is rumored to be the President's choice to become the third Republican Board Member, his nomination has not yet been sent to the Senate. Under the best of circumstances, it is unlikely the confirmation process will result in a fully seated Board before sometime in February 2018. That opens the door to a number of procedural headaches for Republicans — namely, the lack of a third vote to pursue the agenda outlined above; the possibility of 2-2 deadlocks looming in certain cases; and, the prospect of 2-1 Democrat Member majorities in cases impacted by the recusal rules, even with a Republican in the White House.

Some of these challenges may be short-lived, however, as Democrat Member Pearce's term expires in August.

What Does the Future Hold For Labor Organizing Strategy?

Comments are due by February 12, 2018, in response to the Board's request for feedback on the 2014 Election Rules. As noted in the majority's request, there is a broad range of action that the Board might take in response — from discarding the rules in their entirety, doing absolutely nothing, or an almost infinite variety of modifications in between. It is safe to assume, however, that any changes forthcoming are not likely to make union organizing any easier than the Obama Board's efforts had made it.

Going forward, it will be interesting to see what impact these changes will have on union organizing in 2018 and beyond. Organized labor has suffered a string of troubling developments recently — announcing cutbacks in staffing, wrestling with some significant public scandals, and losing a number of large, high-profile organizing efforts this year. If the Board moves back toward the long-time election rules, it will be interesting to see organized labor's reaction — whether they stay the course, or whether they increase reliance on alternative top-down methods of organizing, including globalized pressure on multi-national employers, and/or corporate campaigns.

Will National Labor Relations Board Twitter Be the Best Twitter or the Worst Twitter?

During the most recent electoral campaign season, political partisans utilized Twitter and social media use in previously unimaginable ways. As the curtain fell on 2017, it appeared that Members of the National Labor Relations Board may see this development as a useful tool in their communications strategies as well. Chairman Miscimarra and Member Pearce maintained Twitter accounts for years — but they laid relatively inactive for weeks or months, save for the occasional bland announcement (e.g., "Welcome our newest Board Member", "Happy Veterans Day," "Check out our FAQ," etc). But during the last week of Chairman Miscimarra's term, he used Twitter to announce each of the Board's big decisions outlined in the last section, above. Member Pearce and Member McFerran — who until then had tweeted just four times to congratulate colleagues — both posted tough messages, critical of the decisions. It will be interesting to watch whether this method of outreach serves the beneficial purpose of raising knowledge and awareness of the agency's work, or the medium's worst aspects — the confrontational public coarsening we have seen in so many other areas.

Labor and Employment Attorneys

Richard B. Hankins
PARTNER
+1 404 443 5727
rhankins@mcguirewoods.com

Seth H. Borden
PARTNER
+1 212 548 2180
sborden@mcguirewoods.com

Brennan W. Bolt
PARTNER
+1 404 443 5725
bbolt@mcguirewoods.com

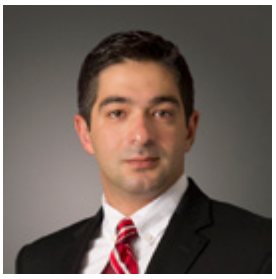
Gary S. Marshall
PARTNER
+1 804 775 1013
gmarshall@mcguirewoods.com

Dana Rust
PARTNER
+1 804 775 1082
drust@mcguirewoods.com

Christopher M. Michalik
PARTNER
+1 804 775 4343
cmichalik@mcguirewoods.com

Sabrina A. Beldner
PARTNER
+1 310 956 3419
sbeldner@mcguirewoods.com

Michael J. DiMattia
PARTNER
+1 212 548 7009
mdimattia@mcguirewoods.com



Igor Babichenko
ASSOCIATE
+1 804 775 7617
ibabichenko@mcguirewoods.com

Summer L. Speight
ASSOCIATE
+1 804 775 1839
sspeight@mcguirewoods.com

Adrienne H. Paterson
ASSOCIATE
+1 804 775 1096
apaterson@mcguirewoods.com

John E. Thomas Jr.
ASSOCIATE
+1 703 712 5407
jethomas@mcguirewoods.com

Deven S. Gray
ASSOCIATE
+1 704 343 2170
dgray@mcguirewoods.com

About Labor Relations Today

Labor Relations Today (LRT) is a blog maintained by attorneys from McGuireWoods Labor and Employment Practice group. LRT provides up-to-date analysis, resources and commentary on developments in traditional labor law.

Subscribe to Labor Relations Today at:

LaborRelationsToday.com

or follow us on Twitter: @LRToday

McGUIREWOODS

laborrelationstoday.com