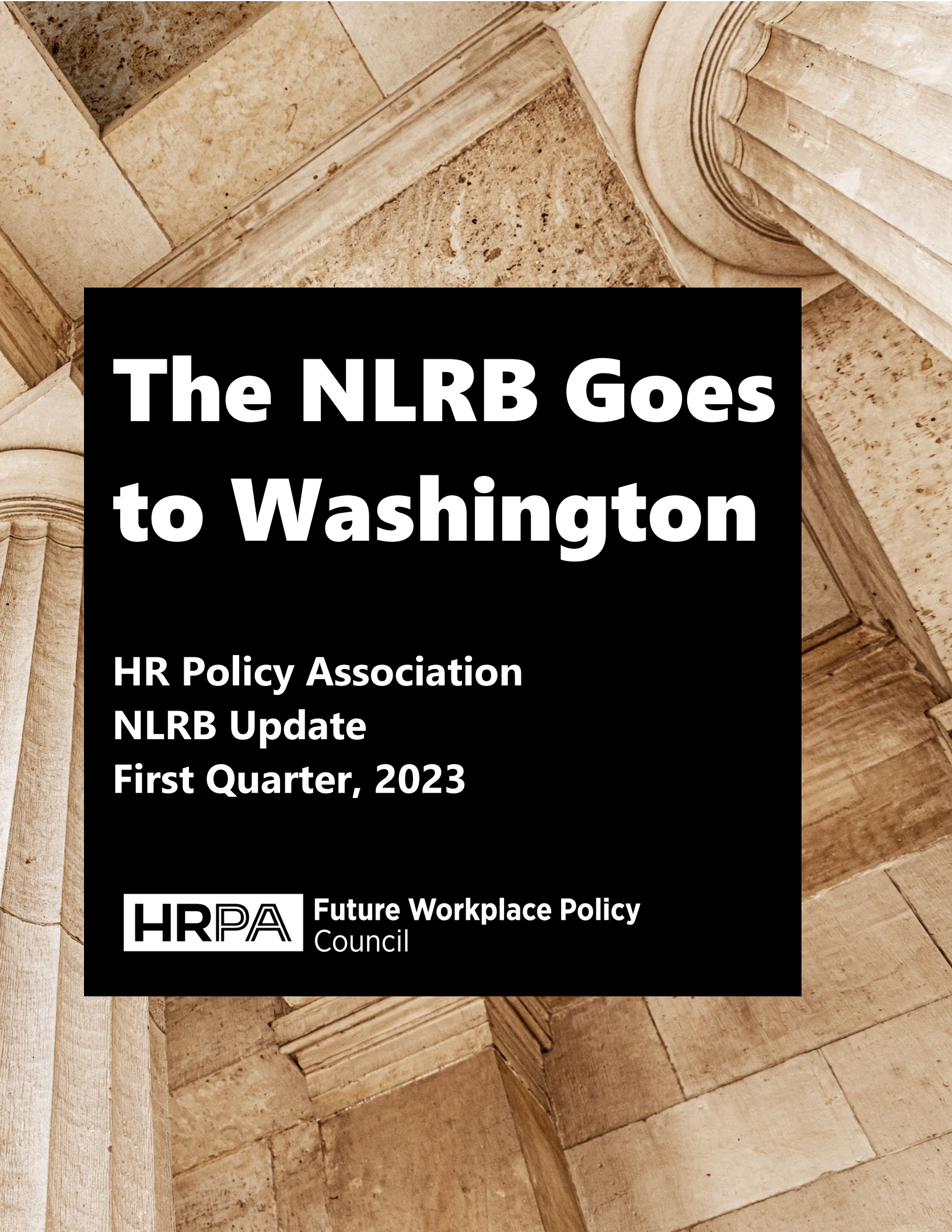

The NLRB Goes to Washington

HR Policy Association
NLRB Update
First Quarter, 2023

HRPA Future Workplace Policy Council

FOREWORD

Welcome to the fifth edition of the HR Policy Association's quarterly NLRB Report. Each report provides a comprehensive update of law and policy developments at the National Labor Relations Board, including significant decisions issued by the Board, cases to watch, Office of General Counsel initiatives, rulemakings, and an overview of HR Policy's engagement with the Board for that quarter. These reports also feature analysis on a specific issue or topic from a rotation of writers.

The fourth quarter of 2022 saw the Board engaging in a long-expected series of precedent-erasing decision-making, including radically expanding traditional remedies for unfair labor practices and returning to rubber-stamping union petitioned-for units. While the first quarter of 2023 did not feature the same level of significant decisions, the Board did continue its precedent-reversal campaign with a decision that considerably restricts the lawful scope of severance agreements, both existing and future.

While the Board still did not issue decisions in several significant pending cases this quarter, the public spotlight was nevertheless fixed on the Board, its General Counsel, and federal labor law in general. The ongoing clash between Board prosecutors and Starbucks spilled over into a full hearing conducted by the Senate Health, Education, and Labor Committee, during which Chair Bernie Sanders (I-VT) clashed with Starbucks (now former) CEO Howard Schutlz, who was called to testify under threat of subpoena. This type of political theater is expected to continue as Chair Sanders has promised to continue to turn the heat on large companies over alleged unfair labor practices and their response to union organizing.

Meanwhile, Republican lawmakers have also begun to turn their attention onto the NLRB, albeit for different reasons. In the above-mentioned hearing, Sen. Bill Cassidy (R-LA) questioned the Board's credibility in general and integrity in conducting union elections specifically, while at a previous hearing held by the HELP Committee last month on union organizing, Sen. Cassidy and Sen. Braun (R-IN) similarly chastised the NLRB for unfairly targeting high-profile companies. On the House side, House Education and Workforce Chair Virginia Foxx (R-NC) issued several statements condemning recent NLRB activity. Chair Foxx, along with other House Republicans, have begun to use their oversight authority to investigate NLRB activity, including subpoenaing Board officials regarding their conduction of union elections involving Starbucks.

As the primary implementing tool of the Biden administration's campaign to revitalize the labor movement and, the NLRB will continue to make headlines, even in the absence of many significant Board decisions.

Contact: **Gregory Hoff**
Associate Counsel
HR Policy Association
ghoff@hrpolicy.org

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ISSUE SPOTLIGHT

The Gathering Storm: The NLRB's Accelerating Expansion of NLRA Rights & Remedies

By Brian West Easley

The fundamental purposes of the National Labor Relations Act ("NLRA" or "Act") are to protect the rights of American workers to organize and join unions for mutual aid and protection, and to promote the process of collective bargaining for the resolution of industrial disputes that could negatively impact interstate commerce. However, the current National Labor Relations Board ("NLRB" or "Board") and its activist General Counsel have gone far beyond these statutory purposes to expand the Board's regulatory reach and increase both the compliance burden and potential penalties under the Act to the detriment of employers.

Indeed, after only two years of majority control, the current NLRB regime has achieved significant progress towards an expansive, unapologetically pro-labor agenda—from expanding the scope of employee activities protected by the NLRA to increasing the severity of sanctions that can be imposed on employers who violate the Act. In the process, the Board has discarded longstanding precedent and legislated by administrative fiat new rights and remedies previously unrecognized in labor law, presenting increasingly difficult compliance challenges for employers. And, there is more to come.

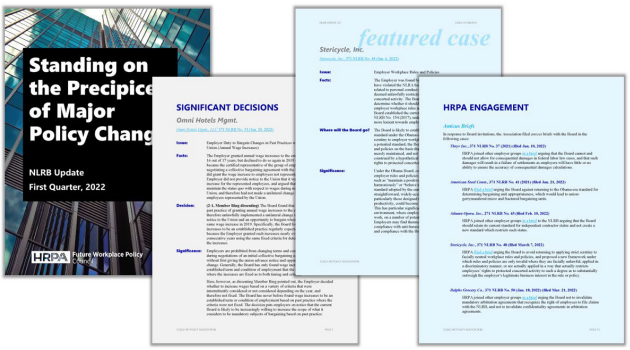
The most recent example of this aggressive regulatory agenda is the recent decision in *McLaren Macomb*, 372 NLRB No. 58 (February 21, 2023). In *McLaren Macomb*, the NLRB held that offering permanently furloughed employees severance agreements that contain confidentiality and non-disparagement provisions is *per se* coercive and unlawful, overruling prior decisions in *Baylor University Medical Center*, 369 NLRB No. 43 (2020) and *International Game Technology*, 370 NLRB No. 50 (2020). While it is difficult to understand how the severance terms offered to discharged employees negatively impacts the rights of other employees to join unions, the decision does have the obvious effect of expanding the regulatory power of the NLRB in the non-union workplace and negating state laws that generally permit enforcement of such provisions. In addition, the *McLaren Macomb* decision offers employees who are impacted by reductions-in-force yet another avenue to bring legal action against their employers – proliferating the seemingly endless stream of claims currently facing employers under federal, state and local employment laws. Further, it provides the Board with an opportunity to nullify manifold state laws governing such contract provisions and effectively occupy the legal space for enforcement of severance agreements.

In addition to extending its regulatory reach, the NLRB has also been expanding its remedial powers. For example, in *Thryv, Inc*., 372 NLRB No. 22 (Dec. 13, 2022), the Board held for the first time that employees negatively impacted by employer unfair labor practices can recover consequential damages in addition to traditional make-whole relief. Under *Thryv*, aggrieved employees can recover monetary damages for any "direct or foreseeable pecuniary harms" that result from an unfair labor practice, regardless of how remote or attenuated those economic harms may be and whether the employer's violation is extraordinary or egregious. The consequential damages authorized by the Board in *Thryv* exceed the scope of the remedial powers granted to the NLRB by statute. The Board's decision therefore constitutes an unprecedented (and potentially unconstitutional) expansion of the NLRB's authority under the Act.

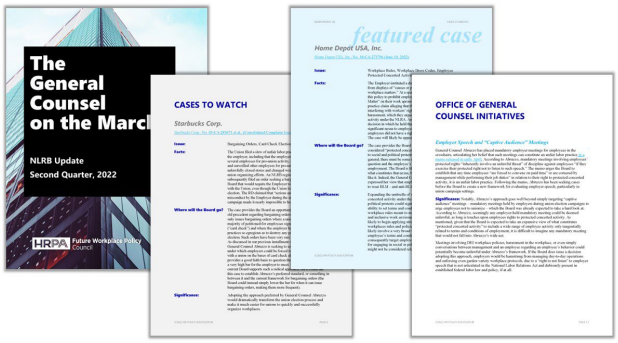
And, the current Board's work in this area appears far from complete. Indeed, the efforts of the NLRB and the General Counsel to expand the agency's regulatory purview and remedial authority are continuing. On March 20, 2023, the NLRB General Counsel issued a *Status Update on Advice Submissions* (GC 23-04) identifying a long list of precedents that she plans to revisit. Among the precedents under consideration for potential reversal include the scope of employee concerted activity (*Hoodview Vending Co.*, 359 NLRB 355 (2012)), application of the NLRB to individuals with disabilities (*Brevard Achievement Center, Inc.*, 342 NLRB 982 (2004), the right to engage in intermittent strikes (*WalMart* Stores, 368 NLRB No. 24 (2019) and the right to a make whole compensatory damages remedy in refusal to bargain cases (*Ex-Cll-O Corp.*, 185 NLRB 107 (1970)), just to name a few. In addition, the General Counsel continues to argue to the Board that mandatory employee meetings where unionization is discussed are inherently coercive. *See CEMEX Construction Materials Pacific LLC*, Case No. 28-CA-230115 *et al*. If successful, the NLRB may apply the ruling to other kinds of mandatory employee meetings, including otherwise lawful job or safety trainings where terms and conditions of employment are discussed. The willingness of the General Counsel to continue to advocate for reversal of existing NLRB precedent and the expansion of available remedies in unfair labor practice cases suggests that employers can expect to find it increasingly difficult to comply with the NLRA and increasingly expensive in those situations when they find themselves out of compliance.

Brian West Easley is a partner at global law firm Jones Day.

NLRB Update: Standing on the Precipice of Major Policy Change, First Quarter 2022



NLRB Update: The General Counsel on the March, Second Quarter 2022



NLRB Update: The Beginning of the End, Third Quarter 2022

NLRB Update: The Avalanche Begins, Fourth Quarter 2022

SIGNIFICANT DECISIONS

McLaren Macomb

featured case

McLaren Macomb, 372 NLRB No. 58 (Feb. 21, 2023)

Issue: Severance Agreements

Facts: The Employer included facially neutral confidentiality, non-disclosure, and non-disparagement clauses in its severance agreements with eleven furloughed employees. The Employer, who was contesting the Union's certification status, declined to give notice to or bargain with the Union regarding its decision to furlough the employees and the terms of the severance agreements. An ALJ found that these failures to provide notice and opportunities to bargain were unlawful.

Decision: **(3-1, Member Kaplan dissenting)** The Board affirmed the ALJ's decision and also found that the three clauses in the severance agreements unlawfully restricted employees' rights to protected concerted activity. In its decision, the Board explicitly overturned four Trump-era Board decisions including *Baylor Univ. Med. Ctr.* Under that holding, the Board reviewed not only the terms of the severance agreements in question, but also whether there were extenuating circumstances, including employer unfair labor practices, that tainted such agreements. The current Board's decision in this case goes back to traditional Board precedent under which severance agreements violate federal labor law if their provisions – including NDAs, non-disparagements, and other confidentiality provisions – restrict or interfere with an employees' rights to concerted activity under the NLRA.

Significance: The Board's decision here finds a per se violation of the NLRA if an employer includes overly broad confidentiality, non-disclosure, or non-disparagement clauses in severance agreements. For example, a non-disparagement clause that bans any negative discussion of the employer by the employee would be unlawful. A memo subsequently issued by General Counsel Abruzzo regarding her interpretation of the decision further clarified that the decision applies retroactively, meaning thousands of existing severance agreements could be unlawful if they include such clauses.

Further, per the General Counsel's memo, only "confidentiality clauses that are narrowly-tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications may be considered lawful." Meanwhile, non-disparagement clauses are only lawful when they are specifically limited to malicious or defamatory statements about the company. Finally, disclaimers, or "savings clauses" that state that nothing in a severance agreement should be interpreted as restricting employee rights do not necessarily "cure overly broad [and therefore unlawful] provisions." The decision, therefore, significantly limits the scope of restrictive covenants in severance agreements.

Touch of Class, Inc.

Touch of Class, Inc., 372 NLRB No. 39 (Jan. 10, 2023)

Issue: Consequential Damages

Facts: The Employer terminated an employee after the employee brought safety concerns to management.

Decision: (**3-0)** The Board found that the Employer unlawfully terminated the employee in response to her exercise of protected concerted activity. The Board ordered the Employer to reinstate the employee and provide backpay. Further, in accordance with its decision in *Thryv, Inc*. – in which the Board established that it could require employers to pay for consequential damages – the Board ordered the Employer to compensate the employee for "any direct or foreseeable pecuniary harms incurred as a result of the unlawful discharge, if any, regardless of whether the expenses exceed interim earnings."

Significance: While the facts of this case are otherwise not notable, the decision provides an early example of the Board's application of its new consequential damages remedy as established in *Thryv, Inc*. As here, in unlawful termination cases, the Board will order Employers to pay for "direct or foreseeable pecuniary harms" an employee incurs as a result of the unlawful termination. The Board applied this new remedy in several unlawful termination decisions issued this quarter.

AFL-CIO v. NLRB

AFL-CIO v. NLRB, 57 F.4th 1023 (D.C. Cir. 2023)

Issue: Election Procedure Rulemaking

Facts: The Trump Board issued a rule amending election procedures, mainly to undo Obama-era "quickie election" rules. In 2020, a U.S. District Court enjoined five parts of the rule as unlawful because the Trump Board did not engage in notice-and-comment rulemaking as required for substantive rules. The decision was appealed to the D.C. Circuit Court.

Decision: The D.C. Circuit Court held that three of the five rules were unlawful and permanently enjoined them. However, the Court held that two of the five rules were procedural and not substantive, and therefore lawfully promulgated. The two rules upheld include one giving parties the right to litigate most voter eligibility, unit appropriateness, and supervisory status issues prior to an election, and one requiring in most instances at least 20 days before a regional director schedules an election.

Significance: While the decision undoes many of the changes promulgated by the Trump Board, the two rules upheld will allow parties to properly litigate most outstanding issues before an election is held, rather than the Board proceeding to hold the election and then dealing with such issues in the post-election period. Such a change, in conjunction with the 20-day waiting period, could potentially increase the timeline for union election processes. However, the Board has subsequently delayed implementation of the upheld rules and could rescind or replace them.

Nissan North America, Inc.

Nissan North America, Inc., 372 NLRB No. 48 (Feb. 2, 2023)

Issue: Craft bargaining units

Facts: A Union petitioned to represent 86 tool and die maintenance technicians at the Employer's plant as a craft unit. Craft units are those that consist of distinct groups of skilled craftsmen that engage in work not performed by other employees and which requires specialized skills, tools, and equipment – craft units have a different standard for determining unit appropriateness. The Employer argued that the only appropriate unit must include all 4300 production and maintenance employees at the plant. A Regional Director found that the technicians were not a craft unit because they did not undergo formal apprenticeship, and even if they were, the petitioned for unit was still inappropriate as the technicians still shared interests with employees the Union did not include in the petitioned for unit. The Regional Director sided with the Employer and found that the only appropriate unit was plantwide. The Union requested a review of the Regional Director's decision.

Decision: **(3-0)** The Board overruled the Regional Director and found that the petitioned for 86-employee unit was an appropriate craft unit. The Board found that the lack of apprenticeship was only one factor to be considered. Further, the Board "clarified" that when a petitioned for unit is an appropriate craft unit, "no further inquiry is required" – i.e., it does not matter if the petitioned for employees share a community of interest with employees excluded from the petitioned for unit.

Significance: The Board's decision reaffirms that the community of interest standard does not apply for craft units, and that the inquiry merely starts and stops with whether the group of employees constitute an appropriate craft unit. Further, the Board's decision highlights that the current Board will almost always side with the Union in bargaining unit cases, acting as a rubber stamp for petitioned for units. The consequences of such an approach are evident in the instant case – as a result of the Board's decision, the union could potentially get its foot in the door of a major, 4300 employee manufacturing facility on the basis of only 44 employees voting for unionization.

NLRB v. Aakash, Inc.

NLRB v. Aakash, Inc., 58 F.4th 1099 (9th Cir. 2023)

Issue: Presidential Authority to Terminate NLRB General Counsel

Facts: President Biden terminated then-General Counsel Peter Robb (a Trump appointee) on Inauguration Day. The termination was challenged by several employers with pending NLRB proceedings – including in the present case – as unconstitutional, with such challenges arguing that the Board's General Counsel can only be terminated for cause. A Board decision rejected the Employer's such challenge in the present case, and the Employer appealed to the Ninth Circuit.

Decision: The Ninth Circuit also rejected the employer's challenge, holding that the text of the NLRA does not provide for-cause protections for the General Counsel as it does for Board Members, and that the fact that the General Counsel has a statutory four-year term does not provide such protections either.

Significance: The Ninth Circuit became the second court of appeals, along with the Fifth Circuit, to uphold President Biden's termination of General Counsel Robb as lawful. While such decisions could be appealed to the Supreme Court, a contrary decision by that body is unlikely in any case, and legal objections to Robb's firing appear to be foreclosed.

United Parcel Service, Inc.

United Parcel Service, Inc., 372 NLRB No. 70 (Mar. 28, 2023)

Issue: Union Requests for Information

Facts: The Union requested from the Employer the phone numbers and email addresses for all seasonal employees (approximately 10,000) hired over a three-month period, as well as all documents showing report times for each employee. The Employer responded that it did not have such documents for the employees in question, and that it would have to manually go through each of the roughly 10,000 seasonal employees' employment applications to obtain the phone numbers and email addresses requested. The Employer never furnished such information.

Decision: **(3-0)** The Board found that the Employer's refusal to provide the Union with the requested information was unlawful. The Board rejected the Employer's contention that producing the information would be unduly burdensome, and that even if it was, the Employer failed to satisfy its duty to bargain in good faith with the Union to reach a mutually acceptable accommodation. Specifically, the Board found that the Employer failed to provide an estimate of how long or expensive it would be to provide the information requested as well as failed to provide alternative suggestions.

Significance: The Board's decision here emphasizes the difficulties employers face in showing that a union's request for information is burdensome and excessive, and that the current Board in particular will require employers to comply with such requests. Furnishing the requested information here for roughly 10,000 seasonal employees would undoubtedly require significant time and expense, and all on the basis of a "suspicion" of a union leader that the employees were not being paid "properly." Nevertheless, the current Board will be more often than not inclined to support union fishing expeditions, regardless of the scope of the information requested. In a similar decision issued this quarter, *Hilton Hotel Employer LLC*, involving a similarly expansive request for information, the Board reached the same result.

CASES TO WATCH

Starbucks Corp.

Starbucks Corp., No. 13-CA-306406 (Nov. 2, 2022)

Issue: Virtual Bargaining, Refusal to Bargain

Facts: The Employer and the Union scheduled and attended bargaining sessions in-person, but no substantive bargaining occurred because the Employer objected to the Union's insistence that additional members of the bargaining team observe the meetings virtually. Board prosecutors dismissed complaints filed by the Employer alleging the Union was refusing to bargain by insisting on some members being able to participate virtually, ruling that the Union's request was not unreasonable. If the Employer does not settle the case in light of the dismissal, Board prosecutors will file suit against the Employer for refusing to bargain by refusing the Union's request for some members to bargain virtually.

Where will the Board go? Board precedent holds that unions and employers fail in their duty to bargain if they fail to meet with either party at reasonable times and places. The question of how this precedent applies to so-called "hybrid" bargaining, or bargaining in which some members of a party are present while others participate virtually, and whether a party can refuse such arrangements, is novel – the Board to date has not ruled directly on this issue. Should the Employer refuse to settle and the case goes before the Board, given its current composition, it is more likely than not that that the Board would establish that refusing to bargain virtually is an unlawful refusal to bargain.

Significance: A Board decision on this issue could establish the right for either a Union or Employer to insist on bargaining virtually, either in whole or part. Such a decision could significantly impact the way negotiations are conducted, and could potentially be made public more easily.

ArrMaz Products, Inc.

ArrMaz Products, Inc., 372 NLRB No. 12 (Dec. 6, 2022)

Issue: Remedies for Refusal to Bargain

Facts: The Employer unlawfully refused to bargain with the Union. The Board's General Counsel asked the Board to impose monetary damages on the Employer and require the Employer to pay employees the wages and benefits they could have earned if the Employer had not unlawfully refused to bargain. In issuing its decision finding the Employer to have unlawfully refused to bargain, the Board severed consideration of the General Counsel's suggested remedy for a future decision.

The Board has traditionally refused to award monetary relief in refusal to bargain cases, as established in 1970 in Ex-Cell-O Corp., which held that such damages would be too speculative and would amount to a compelling contractual agreement in contravention of Section 8(d) of the NRLA. Accordingly, in refusal to bargain cases, remedies have been limited to orders to bargain in good faith and notice posting.

Where will the Board go? The present case, along with several others the Board has teed up for similar consideration, provides the Board with the opportunity to overturn Ex-Cell-O Corp. and impose monetary damages on employers who have unlawfully refused to bargain. The Board's recent decision in Thryv, Inc. (discussed in detail above) already expands the available remedies the Board can impose and seemingly indicates that it would be open to doing so again for refusal to bargain cases.

Significance: Should the Board go the route desired by General Counsel Abruzzo, employers could potentially be on the hook for significant monetary damages in refusal to bargain cases. Further, determining where such damages begin and end will itself often result in separate litigation.

Starbucks Corp.

Starbucks Corp. *No. 03-CA-285671 et al., (Consolidated Complaint Issued May 6, 2022)*

Issue: Bargaining Orders, Card Check Elections

Facts: The Union filed a considerable number of unfair labor practice allegations against the employer, including that the employer unlawfully terminated several employees for pro-union activity, unlawfully disciplined and surveilled other employees for pro-union activity, as well as unlawfully closed stores and changed work policies in response to union organizing efforts. An NLRB regional director subsequently filed an order seeking a bargaining order from the Board that would require the Employer to recognize and bargain with the Union, even though the Union lost the representation election. The RD claimed that "serious and substantial" misconduct by the Employer during the union's representation campaign made it nearly impossible to hold a fair election.

Where will the Board go? The case provides the Board an opportunity to reexamine decades-old precedent regarding bargaining orders. Currently, the Board only issues bargaining orders where a union has obtained a majority of petitioned-for employees signed authorization cards ("card check") and where the employer has committed unfair labor practices so egregious as to destroy any possibility of a fair election – *Gissel* bargaining orders. Such orders have been very rare over the last six decades. As discussed in our previous installment of the NLRB Report, General Counsel Abruzzo is seeking to establish a new standard under which employers could be forced to bargain and recognize with a union on the bases of card check alone, unless the employer provide a good faith basis to question the union's majority status – a very high bar for the employer to meet. It is unclear whether the current Board supports such a radical approach, but it could use this case to establish Abruzzo's preferred standard, or something in between it and the current framework for bargaining orders (the Board could instead simply lower the bar for when it can issue bargaining orders, making them more frequent).

Significance: Adopting the approach preferred by General Counsel Abruzzo would radically transform the union election process and make it much easier for unions to quickly and successfully organize workplaces.

Home Depot USA, Inc.

Home Depot USA, Inc., No. 18-CA-273796 (June 10, 2022)

Issue: Workplace Rules, Workplace Dress Codes, Employee Protected Concerted Activity

Facts: The Employer instituted a dress code that prohibited employees from displays of "causes or political messages unrelated to workplace matters." At a specific store, management enforced this policy to prohibit employees from wearing "Black Lives Matter" on their work aprons. An employee filed an unfair labor practice claim alleging that the Employer was unlawfully interfering with workers' rights to protest against racial harassment, which they argued was a form of protected concerted activity under the NLRA. An administrative law judge issued a decision in which he held that the BLM messaging lacked a significant nexus to employees' job conditions, and that employees did not have a right to wear BLM clothing at work. The case is now pending before the Board, and the Board's Office of General Counsel is vigorously advocating for the Board to overturn the decision of the ALJ and take an expansive view of what is considered protected concerted activity under the NLRA.

Where will the Board go? The case provides the Board a vehicle for expanding what is considered "protected concerted activity" under federal labor law to social and political protests, among other employee activity. In general, there has to be some sort of nexus between the activity and question and the employee's terms and conditions of employment. The Board is likely to take an expansive view of what constitutes that nexus, both in this specific case and others like it. Indeed, the General Counsel has already repeatedly expressed her view that employees have a right under the NLRA to wear BLM – and anti-BLM – insignia at work.

Significance: Expanding the umbrella of what is considered to be protected concerted activity under the NLRA to include social and political protests could significantly impact an employer's ability to set terms and conditions of employment, including workplace rules meant to maintain productivity and positive and inclusive work environments. Given that the Board is likely to begin applying stricter scrutiny to employer workplaces rules and policies in general, such scrutiny will likely involve a very broad view of what is connected to an employee's terms and conditions of employment, and consequently target employers who retaliate against employees for engaging in social or political activity that traditionally might not be considered related to their job.

Atlanta Opera, Inc.

Atlanta Opera, Inc., 371 NLRB No. 45 (Dec. 27, 2021)

Issue: Independent Contractor Standard

Facts: The Union petitioned to represent a group of workers – makeup artists, wig artists, and hairstylists – that it claimed were employees. The Employer claimed the workers were independent contractors, but the Regional Director ruled that the workers were employees and ordered a representation election. The Board has invited amicus briefs in this case to determine whether it should change its standard for determining independent contractor status under the NLRA.

Where will the Board go? The Board will likely adopt a new standard significantly narrowing the scope of independent contractor status under the NLRA and making it much harder for employers to classify workers as contractors.

Significance: Only employees, and not independent contractors, are covered by the NLRA, meaning only employees have the right to collectively bargain and unionize, among the other rights afforded under the Act. Thus, if the Board adopts a stricter standard for independent contractors, thousands of contractors could be converted into employees, significantly increasing the pool of workers eligible for unionization among other rights. Notably, they could be deemed employees for purposes of the NLRA while still being independent contractors under other federal laws.

Stericycle, Inc.

Stericycle, Inc., 371 NLRB No. 48 (Jan. 6, 2022)

Issue: Employer Workplace Rules and Policies

Facts: The Employer was found by an Administrative Law Judge to have violated the NLRA because it maintained work rules related to personal conduct and confidentiality that the ALJ deemed unlawfully restricted employees' rights to protected concerted activity. The Board invited amicus briefs in this case to determine whether it should change its standard for evaluating employer workplace rules and policies. In 2017, the Trump Board established the current standard in *Boeing Co.*, 365 NLRB No. 154 (2017), under which the Trump Board was more lenient towards employer workplace rules and policies.

Where will the Board go? The Board is likely to establish a new standard, similar to the standard under the Obama-era Board, and apply much stricter scrutiny to employer workplace rules and policies. Under such a potential standard, the Board would invalidate employer rules and policies on the basis that the rule or policy – even as merely maintained, and not applied – could be reasonably construed by a hypothetical "reasonable" employee to infringe upon their rights to protected concerted activity.

Significance: Under the Obama Board, countless innocuous-seeming employer rules and policies were invalidated, including rules such as "maintain a positive work environment" or "work harmoniously" or "behave in a professional manner." A similar standard adopted by the current Board would mean that many straightforward, widely-accepted workplace rules and policies, particularly those designed to maintain civility and productivity, could become targeted for unfair labor practices. This has particular significance in the current often-divisive workplace environment, where employees often wish to speak out, at work, on a number of potentially controversial topics. Employers may find themselves forced to choose between compliance with anti-harassment and anti-discrimination laws and compliance with the Board's handbook police.

Ralphs Grocery Co.

Ralphs Grocery Co., 371 NLRB No. 50 (Jan. 18, 2022)

Issue: Arbitration Agreements, Confidentiality Provisions in Arbitration Agreements

Facts: In a 2016 decision, the Board found that the Employer violated the NLRA by maintaining and enforcing mandatory arbitration policies that included class action waivers and confidentiality provisions. A subsequent Supreme Court decision regarding arbitration agreements under the NLRA, *Epic Systems Corp v. Lewis*, invalidated the Board's decision. The Board has now called for amicus briefs in this case to determine whether arbitration clauses that require employees to arbitrate all employment-related claims, but with savings clauses that preserve the right to pursue charges with the Board, unlawfully interfere with employees' rights under the Act. The Board also asked for briefs to determine whether confidentiality provisions in arbitration agreements unlawfully interfere with employees' rights under the Act.

Where will the Board go? The Board is likely to adopt an approach of much stricter scrutiny of mandatory arbitration agreements, despite the Supreme Court's decision in Epic Systems. A decision in this case could establish that arbitration agreements that require the use of arbitration for employment claims unlawfully interfere with employees' right to file charges with the Board, and that confidentiality requirements in arbitration agreements are always unlawful under the NLRA.

Significance: Employers could be forced to discard or rewrite countless employment contracts that contain arbitration clauses or agreements. Additionally, if confidentiality provisions are held to be unlawful under the NLRA, employers could face unwanted disclosure of arbitration proceedings and settlements. Any such decision by the Board is likely to be subjected to legal challenge.

OFFICE OF GENERAL COUNSEL INITIATIVES

Interagency Enforcement Collaboration

We previously saw the Office of the General Counsel announce efforts to strengthen interagency enforcement coordination between the Board, the EEOC, the Department of Labor's Wage and Hour Division, OSHA, OFCCP, the FTC, and the DOJ, as reported in previous installments of our NLRB Quarterly Report. This quarter, General Counsel Abruzzo established yet another new interagency partnership, this time with the Consumer Finance Protection Bureau. Like the others, the partnership is centered on enhanced enforcement coordination and information sharing, and will be focused on employer surveillance, use of AI, and employee data privacy.

Significance: The growing partnerships between the Board and other agencies – including those that have not traditionally been involved in labor and employment regulation and policymaking, represent General Counsel Abruzzo's commitment to the Biden administration's "all of government" approach to labor and employment regulation.

Severance Agreements

In the wake of the Board's decision in *McLaren Macomb* regarding unlawful severance agreements, as discussed in detail earlier in this report, General Counsel Abruzzo issued a memo providing her own guidance to the Board's decision. Besides confirming that the case applies retroactively to existing severance agreements, the memo asserts a broad application of the Board's decision, and conversely, provides for very limited circumstances under which confidentiality provisions, non-disparagement clauses, and non-disclosure provisions could be considered lawful under the NLRA.

Significance: The memo makes it clear that the Board and its General Counsel believe that only those confidentiality provisions, non-disparagement clauses, and non-disclosure provisions that are very limited in scope are lawful.

HR POLICY ENGAGEMENT

Representation Case Procedures Rulemaking Comments

The Association filed comments with the Board in response to its proposed rule that would reinstitute the "blocking charge" policy, under which unions can delay and ultimately nix employee efforts to remove them in a decertification proceeding by simply filing unfair labor practice charges against the employer. Such allegations, under the old blocking charge policy, did not have to be proven to suspend employee petitions to vote out the union. The Board's proposed rule would also prohibit union election petitions for up to a year after a union gains voluntary recognition from an employer.

The Association urged the NLRB to rethink its rule and argued that reviving the blocking charge policy inhibits employee choice and effectively disenfranchises employees who are guaranteed under the National Labor Relations Act to decide on representation. Under the proposed rule, a majority of employees who wish to vote out an incumbent union can be delayed – and effectively prevented – by that same union simply filing unfair labor practices against the employer, regardless of the merit of such charges. The Association further argued that such a policy accordingly incentivizes unions to file frivolous charges. Finally, the Association argued that reinstituting the voluntary recognition bar restricts employee choice.