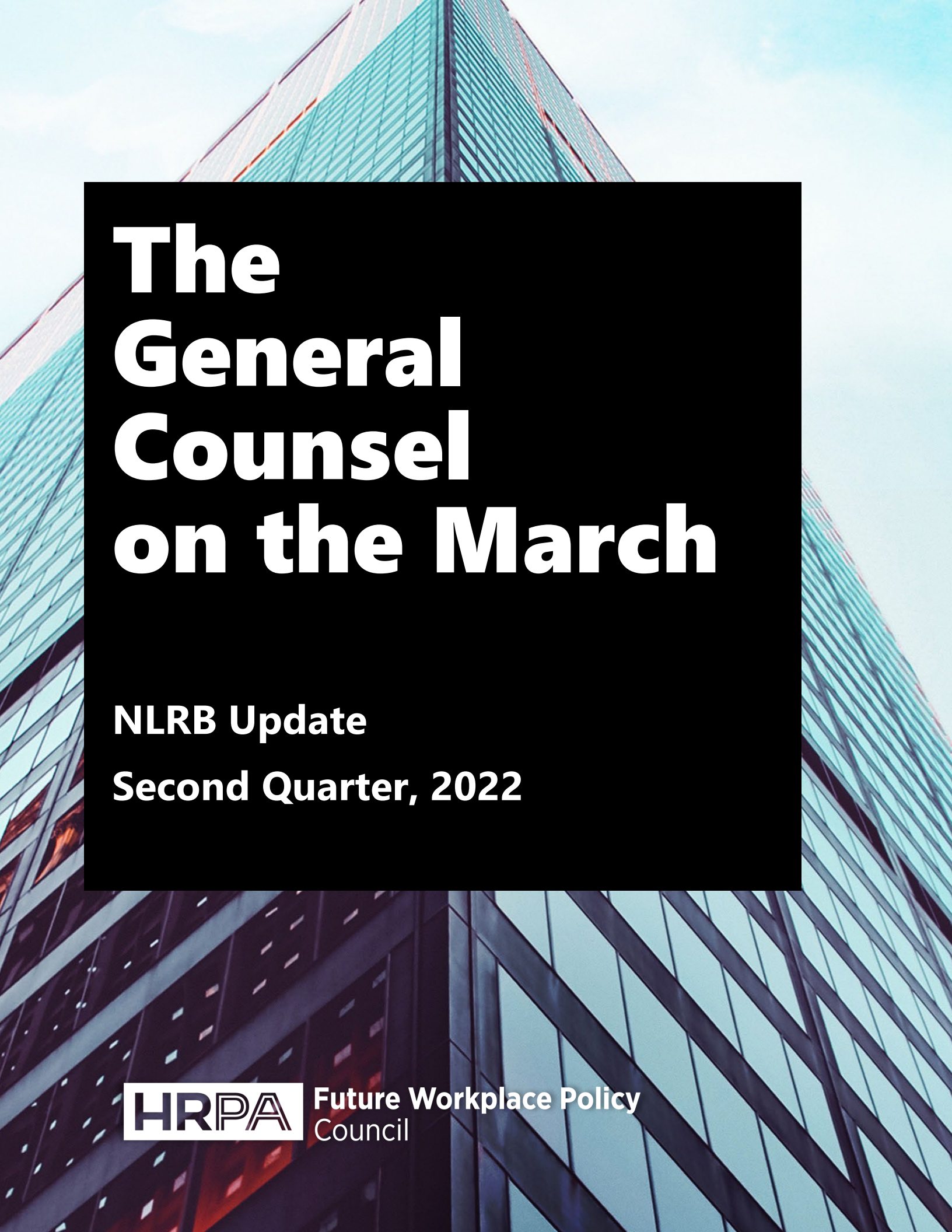

The General Counsel on the March

NLRB Update

Second Quarter, 2022

HRPA Future Workplace Policy Council

FOREWORD

Welcome to the second edition of 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 expert analysis on a specific issue or topic from a guest writer.

While the first quarter saw the Board lay the groundwork for significant and comprehensive labor law and policy change through invitations for *amicus* briefs in five different cases involving critical labor law issues, the second quarter spotlight belonged to Board General Counsel Jennifer Abruzzo. Through a series of public statements, General Counsel memos, and briefs filed in cases before the Board, General Counsel Abruzzo strenuously advocated for a number of major changes to federal labor law that would tilt the pendulum towards organized labor and well away from employers.

Notably, many of Abruzzo's articulated positions on issues including employer speech and card check elections do not simply amount to returns to previous Democratic Board precedents, but would instead constitute a completely new and radical frontier in federal labor law. It remains to be seen the extent to which the Board will embrace Abruzzo's efforts as employers continue wait for a potential avalanche of precedent-shattering Board decisions by the end of the year.

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

TABLE OF CONTENTS

ISSUE SPOTLIGHT

With Change Coming, Employers Must Act Now

By G. Roger King

President Biden has made it clear that he intends to be the most union-friendly President ever to occupy the White House. The legislative deadlock in Congress, however, has required the President to pursue his labor policy agenda through various executive agency actions. Central to this executive action strategy is labor law policy change through decisions of the National Labor Relations Board. The Board is currently constituted with three Democrat and two Republican members and a Democrat General Counsel. This political and ideological makeup provides and excellent regulatory environment for the initiation of labor law changes that may result in increased union density in the country. Indeed, this regulatory-friendly environment of the Board will even be further enhanced this December when NLRB Member (and former Board Chair) John Ring's term expires. The President, pursuant to past practice established in the Obama administration, is not expected to quickly, if at all, fill this Republican vacancy. With Member Ring's departure in the December, the Board will then be constituted on a 3-1 Democrat to Republican membership basis. This enhanced Democratic labor-friendly majority of Board members, with the continued activist agenda being pursued by NLRB General Counsel Jennifer Abruzzo, will provide one of the greatest opportunities in decades for the NLRA to be interpreted in a union-friendly manner. Accordingly, employers should start planning for such changes today and consider taking the following actions.

First, employers should consider undertaking comprehensive and constructive actions to ensure that they are hearing the voices of their employees and to get ahead of needed of workplace changes, if at all possible. Some of these "conversations" with their employer workforce may be difficult at times and involve discussion of issues traditionally not tied to terms and conditions of employment. For example, these discussions may involve DE&I, ESG, or other corporate responsibility and political matters. These conversations are, however, increasingly necessary for employers to undertake given the expectation of their workforces to be more involved in the many political and challenging social issues facing our country. Failure of employers to do so may result in recruitment and retention problems and also lead to intervention by third parties, including initiatives undertaken by unions to organize the employer's workforce.

Second, additional training and attention must be given to a company's supervisors. There individuals are the voice and image, on a daily basis, of the employer, and the success of an employer's business hinges on the effectiveness of these supervisors. Failure to properly train, communicate with, and support frontline supervisors will ultimately result in an employer having difficulty meeting its business objectives and also invite intervention by third parties, including the potential for union organizing campaigns.

Finally, employers need to be prepared to defend online attacks on their reputation and related interference from third parties regarding their operations. The speed and scope of potential online attacks on a company's business, products, and services cannot be underestimated. Additionally, such attacks could include the filling of unfair labor practice charges with the NLRB against employers as an integral part of third-party strategies to undermine a company's business. Accordingly, employers need to be prepared, more than ever, to defend their business interests, including particularly their overall reputation in the marketplace.

The next two years of the Biden administration are going to be a great challenge for all employers, especially with respect to NLRB issues – will they be ready for such challenges?

Mr. King is Senior Labor and Employment Counsel at HR Policy Association. Mr. King was previously a Partner at Jones Day and has practiced labor and employment law for more than three decades.

SIGNIFICANT DECISIONS

J.G. Kern Enterprises, Inc.

J.G. Kern Enterprises, Inc., 371 NLRB No. 91 (April 20, 2022)

Issue: Union Decertification, Unlawful Delay in Bargaining

Facts: The Employer withdrew recognition of the Union one year and seven weeks after the Union's certification following a failure to come together on a collective bargaining agreement and a subsequent petition signed by a majority of employees expressing dissatisfaction with the Union. Following the Union's initial certification, the Employer had delayed bargaining with the union for three months.

Decision: **(2-1, Member Ring dissenting)** The Board found that the employer unlawfully withdrew recognition of the Union. Specifically, the Board found that the Employer had unlawfully delayed bargaining with the Union for three months, and therefore the Employer could not lawfully withdraw recognition until one year plus three months after initial certification (in general, employers cannot withdraw recognition within one calendar year from the date of certification, even if the union has lost majority support during that period).

Member Ring dissented, asserting that the Board applied an improper framework, and instead should have examined whether the Employer's unlawful three-month delay to bargaining or any other unfair labor practices had a causal relationship with the union's loss of majority support. Ring asserted that there was no relationship in this case, and therefore would have found the Employer's withdrawal of recognition to be lawful despite the unlawful delay in bargaining.

Significance: The majority's decision arguably creates a new framework for determining whether a withdrawal of recognition is unlawful. Specifically, under the Board majority's reasoning in this case, any unlawful period of delay to bargain after certification is tacked on to the one-year period following certification during which an employer may not withdraw recognition. Employers may not withdraw recognition (even when presented with evidence of loss of majority support) during this extended period, even where there is no evidence that the unlawful delay contributed to the loss of majority employee support.

CenTrio Energy South LLC

CenTrio Energy South LLC, 371 NLRB No. 94 (April 28, 2022)

Issue: Mail Ballot Elections, Late Mail Ballots

Facts: A representation election was held via mail ballot rather than the traditional onsite secret ballot election process. Of the 14 employees in the petitioned-for unit, only three ballots arrived in time for the date of the ballot count. It was later shown that seven employees timely mailed their ballots well ahead of the deadline, but that such ballots were subject to delivery delays at no fault of the employees, the Employer, or the Union, but presumably due to delay by the United States Postal Service. The late ballots were received in the days following the ballot count deadline. The Regional Director did not consider any of the late-arriving ballots and instead certified the election of the Union on the basis of only the three ballots received by the deadline.

Decision: **(2-1, Member Ring dissenting in part)** The Board agreed with the Regional Director's decision to certify the election and that the late-arriving ballots should not have been counted. Specifically, the Board noted that under established precedent the Board does not count mail ballots that arrive after the date they are to be counted, even if those votes are determinative. The Board noted that it already provides a grace period to count ballots received after the initial deadline but before the date they are to be counted, and that while the delivery delay was unfortunate, it was not caused by the conduct of the Board or either of the parties. Accordingly, the Board found that its interest in the finality of elections outweighs any other issues presented by the facts of the case.

Member Ring dissented, arguing that special consideration should have been made for the late ballots in this case given the USPS delay that was not attributable to the employees, and the fact that only three votes were to be counted otherwise – far from a representative majority and a tally that serves to disenfranchise the other employees who did in fact vote. Member Ring noted that these circumstances were another example of why mail balloting is disfavored over manual onsite secret ballot elections.

Significance: The case highlights the Board's continued commitment to mail ballot elections, which began out of understandable safety precautions related to the COVID-19 pandemic, but which has continued despite widespread loosening of pandemic-related safety restrictions around the country. The case further highlights the many issues related to mail ballot elections, including low voter turnout and potential disenfranchisement due to circumstances beyond the voter's control. It remains to be seen how long the Board will continue to order mail ballot elections in spite of the Board's traditional favoring of manual onsite secret ballot elections.

Rieth-Riley Construction Co., Inc.

Rieth-Riley Construction Co., Inc. 317 NLRB No. 109 (June 16, 2022)

Issue: Union Decertification Following Settlement of Unfair Labor Practice Charges

Facts: An employee filed a decertification petition seeking an end to the Union's representation. At the time of the filing, the Union had several pending unfair labor practice charges filed against the Employer for various alleged unlawful activities. Prior to 2020, under Board "block charge" precedent, Regional Directors could suspend any decertification campaigns until all pending unfair labor practice charges had been resolved. Further, Regional Directors could issue a "merit-determination dismissal" to fully dismiss a decertification petition (subject to reinstatement) where the Regional Director found merit in an unfair labor practice involving misconduct that would irrevocably taint the petition and any subsequent vote. In 2020, the Trump Board issued a new rule under which decertification votes could still move forward despite pending unfair labor practice charges, with Regional Directors instead impounding vote results until resolution of such charges. The 2020 rule arguably did not address merit-determination dismissals, however. In the present case, the Regional Director originally ordered a decertification election in line with the 2020 rule, but eventually issued a merit-determination dismissal of the petition.

Decision: **(3-2, Members Ring and Kaplan dissenting)** The Board held that the 2020 Trump Board's rule does not preclude merit-determination dismissals of decertification petitions, and held that such a dismissal was appropriate in the present case. Specifically, the Board held that the language of the 2020 rule made no mention of such dismissals, and that in the present case, there was a sufficient connection between the unfair labor practices and the employee disaffection with the union underlying the decertification petition.

Members Ring and Kaplan agreed with the majority that the 2020 rule does not preclude merit-determination dismissals, but disagreed with the majority's conclusion that such a dismissal was warranted in the present case. Members Ring and Kaplan argued that before a Regional Director may make such a dismissal, a hearing must be held to establish that there was in fact a causal relationship between the alleged unfair labor practices and employee disaffection with the union causing the decertification petition.

Significance: The Board's decision here significantly undercuts the 2020 Trump Board election rule that was meant to reduce the circumstances under which decertification petitions could be blocked on the basis of unfair labor practice charges only. Under the Board's ruling, Regional Directors can unilaterally determine whether a full dismissal of a decertification petition is warranted, eliminating or significantly delaying an employee's ability to exercise their rights to choose their own representation. The current Board is also likely to reexamine the 2020 rule and issue its own amendments.

Geodis Logistics, LLC

Geodis Logistics, LLC, 371 NLRB No. 102 (May 24, 2022)

Issue: Union Decertification Following Settlement of Unfair Labor Practice Charges

Facts: Employees filed a decertification petition seeking to rescind the Unions' status as their exclusive bargaining representative. The petition was dismissed on the basis of unresolved unfair labor practice charges against the Employer, including, among other charges, that the Employer had provided an improper level of assistance to the employees filing the decertification petition. After the Employer certified compliance with an informal agreement that settled and resolved the unfair labor practice charges, the Employer requested that the decertification petition be reinstated.

Decision: **(3-0, Member Ring concurring)** The Board held that the decertification petition should not be reinstated, concluding that an employer may not restart the decertification process by its own request, and that the right to seek reinstatement of a decertification petition lies exclusively with employees.

Significance: The Board clarifies here that only employees may actually file for reinstatement of a decertification petition in the wake of settlement of associated unfair labor practice charges. Employers should exercise care to ensure that they only provide "ministerial" assistance to employees seeking to file or re-file such petitions. This case also underscores the problems associated with the Board's former "blocking-charge" policy – which was still in effect when the petitions in this case were originally filed – under which decertification petitions and elections were suspended until full resolution of any pending unfair labor practice charges. Unions often used this policy to tie up decertification campaigns by filing unfair labor practices that automatically halted the process. Under the Board's new election rules, promulgated under the previous Board, such elections are now allowed to proceed, with the votes impounded until resolution of the charges.

11 West Realty, LLC

11 West Realty, LLC, 371 NLRB no. 83 (May 27, 2022)

Issue: Mandatory Subjects of Bargaining

Facts: The Employer, a hotel, bought new king-size pillows for use at the hotel. Employees subsequently complained to management that the new pillows were "puffier" than the previous pillows and that accordingly it was difficult to the place the new pillows inside the old pillowcases, and took more time to do so. One employee also informed management that she injured her arm while trying to place one of the new pillows inside of one of the old pillowcases. The Union was also notified of the pillow issues. Upon notification, the union did not request to bargain with the Employer over the pillow issues, but instead filed an unfair labor practice charge against the employer alleging that the Employer unlawfully unliterally changed employees' terms and conditions of employment without notice and opportunity to bargain.

Decision: **(3-0)** The Board held that the Employer in this instance was not obligated to bargain with the Union over both the *decision* to change the pillows and the *effects* of that decision (*i.e.*, the problems associated with the new pillows). Specifically, the Board found that the Employer had no obligation to bargain with the Union over the decision to use new pillows because it had no reason to believe that it would have any more than an indirect or minor impact on the employment relationship. Further, the Board found that because the arguable effects of that decision on employees' working conditions were not reasonably foreseeable, the Employer was not obligated to notify and offer to bargain the effects of the new pillows before they were put into use. Finally, the Board noted that Union still had an opportunity to initiate effects bargaining after being notified of the issues associated with the pillows, but instead chose to file an unfair labor practice.

Significance: The above case highlights the absurdity often associated with mandatory subjects of bargaining under the NLRA. Thankfully, the Board took a more thoughtful and commonsense approach here. However, it is worth noting that this case turned on the Union's failure to request bargaining before filing an unfair labor practice – the Board noted that it was not ruling on whether effects of the new pillows on the employees' work were sufficiently significant and material to create a bargaining obligation in the first place. Thus, employers should take note that even something as seemingly insignificant as a change in pillows could create an obligation to bargain.

Amerinox Processing, Inc.

Amerinox Processing, Inc., 371 NLRB No. 105 (June 3, 2022)

Issue: President Biden's Removal of Former General Counsel Robb

Facts: Almost immediately after taking office, President Biden terminated then-Board General Counsel Peter Robb. The termination marked the first time a President has terminated a Board General Counsel before the end his/her statutory term, and presented the legal question of whether a President has the authority to terminate a Board General Counsel other than for cause. The underlying case involved allegations that the Employer unlawfully terminated multiple employees for engaging in union activity. In responding to the charges, the Employer argued that former General Counsel Robb was unconstitutionally terminated and accordingly that Acting General Counsel Peter Sung Ohr had no authority to bring the charges against the Employer.

Decision: **(3-0)** The Board dismissed the Employer's arguments regarding Robb's termination as meritless. The Board noted that the Supreme Court's decision in *Collins v. Yellen* (regarding for-cause termination protections for the Federal Housing Finance Agency) and the Fifth Circuit's decision in *Exela Enterprise Solutions* (directly addressing the issue) foreclosed any argument that the NLRA could be interpreted to limit the President's authority to remove a Board General Counsel. Further, the Board noted that Jennifer Abruzzo has subsequently been nominated and confirmed as General Counsel, that Robb's original term ended in November of 2021, and that upon taking office General Counsel Abruzzo ratified all orders issued by Acting General Counsel Ohr.

Significance: This decision provides another nail in the coffin for employer efforts to have charges issued by Acting General Counsel Ohr dismissed on the basis that General Counsel Robb was unlawfully terminated by President Biden. While there is an argument to be made that such a termination was unconstitutional, a court has yet to agree and, as mentioned, the Fifth Circuit came to the opposition conclusion in the only case to reach the appellate level on the issue. It remains to be seen whether the Supreme Court will take up the Fifth Circuit's decision, and it is unclear how the current Court would decide the issue if it does.

CASES TO WATCH

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 slew 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. 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 provides 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 dramatically transform the union election process and make it much easier for unions to quickly and successfully organize workplaces.

featured case

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 will likely be appealed up to the Board.

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 must be some 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 discipline employees for engaging in social or political activity that traditionally might not be considered related to their job.

Thryv Inc.

Thryv Inc., 371 NLRB No. 37 (Nov. 11, 2021)

Issue: Expansion of Board Remedies to Include Consequential Damages

Facts: The Employer was alleged to have unlawfully laid off six employees without first bargaining to impasse with the Union. Traditionally, if the Board found that the layoffs were an unfair labor practice, the Employer would be required to reinstate the employees and provide them back pay. The Board decided to invite *amicus* briefs in this case on whether the Board should expand its available remedies to include consequential damages, *i.e*. in this case, economic losses the employees incurred because they were unlawfully laid off, such as missed rent or mortgage payments, additional medical expenses, among other expenses.

Where will the Board go? Board General Counsel Jennifer Abruzzo has made it a policy priority to expand available remedies to include consequential damages, and the current Board is likely to issue a decision in this case that will establish a new precedent under which the Board can levy consequential damages on top of the already existing make whole remedies.

Significance: If consequential damages become available, employers could be liable for a variety of expenses, including housing payments and medical expenses. The Board has indicated that these damages could be assessed on the employer where they are "a direct and foreseeable result of the [employer's] unfair labor practice." It is easy to see how this somewhat vague link could be used to cover a number of expenses that employers may be forced to pay.

American Steel Const.

American Steel Const., 371 NLRB No. 41 (Dec. 7, 2021)

Issue: Bargaining Unit Size Determinations

Facts: The Union petitioned to represent a unit of the Employer's full-time and regular part-time journeyman and apprentice field ironworkers. The Employer asserted that the petitioned-for unit was inappropriate and should also include a larger group of other employees – essentially a plant-wide unit. The Board has invited *amicus* briefs in this case to determine whether it should adopt new standard for determining bargaining unit appropriateness.

Where will the Board go? The Board will likely return to some form of the bargaining unit appropriateness standard created under the Obama Board in *Specialty Healthcare*, under which the Board readily approved smaller and fractured bargaining units. The Trump Board overturned *Specialty Healthcare* in 2017 in *PCC Structurals* and created a "new" standard based on traditional Board precedent.

Significance: Smaller bargaining units make it easier for unions to win representation elections, and unions therefore often attempt to carve out smaller and fractured groups of employees within an employer's workforce to give them the best chance of winning an election. Under *Specialty Healthcare*, the Board regularly approved "micro" and fractured units, including a famous instance in which the Board approved a unit of cosmetics and fragrances employees within a single department store. If the current Board returns to a similar standard, employers can again expect a proliferation of smaller, micro and/or fractured units which can mean greater chances of successful unionization. Further, such units can have detrimental effects on employer operations, particularly in factory settings, and require an employer to negotiate several collective bargaining agreements for a single workplace.

Atlanta Opera, Inc.

Atlanta Opera, Inc., 371 NLRB No. 45 (Dec. 27, 2022)

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* 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 gave greater deference to employer workplace rules and policies that had a nexus to legitimate employer objectives.

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 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 divisive 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 approach.

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. Notably, the Department of Labor filed an *amicus* brief in this case arguing that confidentiality clauses, such as found in this case, hamper its ability to enforce labor laws under its jurisdiction.

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 and class action waivers. Additionally, if confidentiality provisions are held to be unlawful under the NLRA, employers could face unwanted disclosure of arbitration proceedings and settlements.

OFFICE OF GENERAL COUNSEL INITIATIVES

Employer Speech and "Captive Audience" Meetings

General Counsel Abruzzo has placed mandatory employer meetings for employees in the crosshairs, articulating her belief that such meetings can constitute an unfair labor practice in a memo released in early April. According to Abruzzo, mandatory meetings involving employees' protected rights "inherently involve an unlawful threat" of discipline against employees "if they exercise their protected right not to listen to such speech." The memo urges the Board to establish that any time employees "are forced to convene on paid time" or are cornered by management while performing their job duties" in relation to their right to protected concerted activity, it is an unfair labor practice. Further, Abruzzo argues that before an employer can require an employee to attend a meeting, a voluntary waiver of some type would have to be obtained from the employee. Following the memo, Abruzzo has been seeking cases before the Board to create a new framework for evaluating employer speech, particularly in union campaign settings.

Significance: Notably, Abruzzo's approach goes well beyond simply targeting "captive audience" meetings – mandatory meetings held by employers during union election campaigns to urge employees not to unionize – which the Board was already expected to take a hard look at. According to Abruzzo, seemingly any employer-held mandatory meeting could be deemed unlawful, as long is touches upon employees rights to protected concerted activity. As mentioned, given that the Board is expected to take an expansive view of what constitutes "protected concerted activity" to include a wide range of employee activity only tangentially related to terms and conditions of employment, there could be many mandatory meetings that would fall into Abruzzo's wide net.

Meetings involving DEI workplace policies, harassment in the workplace, or even simply conversations between management and an employee regarding an employee's behavior could potentially become unlawful under Abruzzo's framework. If the Board does issue a decision adopting this approach, employers would be hamstrung from managing day-to-day operations and enforcing even garden variety workplace protocols, due to a "right to not listen" to employer speech that is not articulated in the National Labor Relations Act nor present in established federal labor law and policy.

Union Access to Employer Property

The Office of General Counsel recently released an advice memo it filed in a case earlier this year advocating for scrapping a pair of Trump Board precedents regarding an employer's authority to restrict union access to its property. The memo specifically advocated for overturning prior rulings in *UPMC*, which allows employers to bar union reps from engaging in organizing activities in public spaces in their facilities, and in *Kroger*, which gave employers more latitude to prohibit union activity in their workplaces. The memo argued that the decisions improperly eliminated union access to public spaces in employer private property and overly limited the discrimination exception (*i.e.*, where an employer allows other groups to access its facilities for promotional purposes but not unions).

Significance: The Office of General Counsel did not end up pursuing the case in which it filed this advice memo. Nevertheless, it highlights the General Counsel's emphasis on increasing union access to employer private property – both physical property and technological property – and gives a preview of the arguments it will make in future cases before the Board to persuade the Board to change precedent on this issue.

Card Check Elections

As discussed previously, General Counsel Abruzzo has consistently advocated, both publicly and in General Counsel memoranda, for the Board to overturn 70 years of precedent and establish a new framework under which employers could be forced to recognize and bargain with a union solely on the basis of unions presenting evidence of majority employee support through signed authorization cards. Now, Abruzzo has taken the additional deliberate step of filing a brief in a recent case specifically advocating for this approach directly before the Board. The case, *Cemex Construction Materials Pacific, LLC,* could provide the Board an opportunity, along with the Starbucks case discussed above, to institute Abruzzo's preferred framework and establish card check elections as part of federal labor law.

Significance: As discussed previously, enshrining card check elections into federal labor law would be a radical transformation of the current system and significantly empower unions to much more easily and much more quickly organize workplaces. Employers would be left without the option of insisting on a secret ballot election and accordingly a sufficient timeframe within which to educate their workforce on their rights under the NLRA.