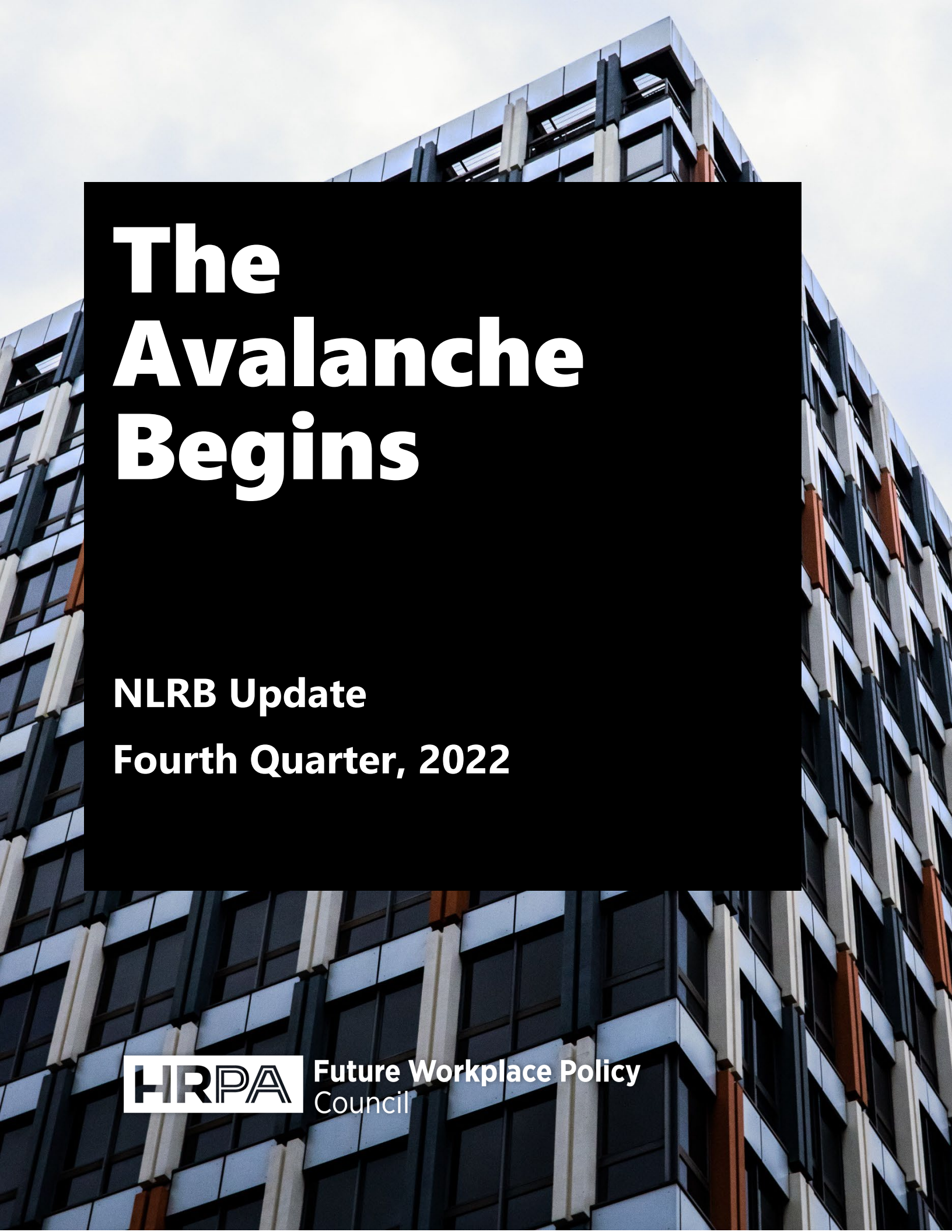

The Avalanche Begins

NLRB Update

Fourth Quarter, 2022

HRPA Future Workplace Policy Council

FOREWORD

Welcome to the fourth 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 analysis on a specific issue or topic from a rotation of writers.

The third quarter of 2022 saw the first drops in the bucket of the long-expected storm of NLRB activity under its Democratic-majority Board. The fourth quarter saw those drops turn into a full-fledged hurricane of precedent-erasing activity, with more to come. In the last weeks of 2022, the Board issued long-awaited decisions in two of five cases in which it solicited amicus briefs and which each involve significant areas of federal labor law.

In one decision, the Board radically expanded traditional remedies for unfair labor practices, potentially putting employers on the hook for new monetary damages. In another, the Board reverted to an Obama-era standard for determining bargaining size appropriateness, once again opening the door for micro units and fractured workplaces. In addition to these and other high profile cases, a review of this quarter's Board decisions shows a clear theme of continued strict scrutiny of employer conduct in general, creating an especially inhospitable legal environment.

The Board also issued another proposed rule this quarter that would once again allow unions to block decertification votes from proceeding through unfair labor practice charge. The rule would also eliminate certain requirements for voluntarily recognized unions and bar challenges to such unions for up to a year.

Not to be outdone, General Counsel Abruzzo continued her aggressive pursuit of radical changes to federal labor law. Abruzzo urged the Board to adopt a new framework under which employer uses of technology in the workplace are presumptively unlawful if they could potentially in any way infringe upon an employee's protected concerted activity. Abruzzo's framework would also impose notice requirements on employers related to such uses of technology. Abruzzo also urged the Board to require employers to allow employees to use employer communication platforms for nonwork purposes, including union activity.

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

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ISSUE SPOTLIGHT

The Future is Now: Artificial Intelligence, Data Privacy, and New Frontiers of Labor Law

By Greg Hoff

While armies of robots replacing workers on the assembly line remains a popular boogeyman, the increased digitization and automation of the workplace and its legal implications go well beyond simply the replacement of human workers. Predictive analytics, algorithmic decision-making, automated performance tracking, general electronic surveillance, and many other uses of technology in the workplace are being utilized by employers at an accelerating rate.

This increased digitization and automation of the workplace presents a number of difficult and novel legal questions, some of which may be unanswerable under the current federal labor law landscape, which was arguably already outdated well before AI came into the workplace.

At the most basic level, the introduction of new technologies into the workplace can create certain collective bargaining obligations under the NLRA. It is the continued usage of such technologies, however, that implicates a much wider array of legal questions and issues under federal labor law, and ones that organized labor and their allies at the current NLRB are already leveraging for the benefit of the union movement.

A recent memo by NLRB General Counsel Jennifer Abruzzo, for example, proposes a framework for evaluating whether the use of automated management practices and electronic surveillance has an unlawful effect on Section 7 rights. The scope of both the technologies and practices used by employers and their potential unlawful use under the NLRA, as identified and argued in the memo, is breathtaking, and if adopted by the Board promises a new frontier of workplace regulation under the auspices of labor law. Indeed, according to General Counsel Abruzzo, any use of AI or surveillance that the Board determines "would tend to interfere with or prevent" an employee from engaging in protected activity is presumptively unlawful under the NLRA. Such an approach would find employers guilty until proven innocent of unfair labor practices for any number of common uses of technology and automation in the workplace.

Perhaps the most significant facet of the increased digitization of the workplace is the implications employer uses of technology have for employee data privacy. These implications are increasingly becoming legal concerns, as support for comprehensive consumer data privacy legislation continues to heat up at the federal level and state laws already in existence, with unions playing a key role in how the discussion is shaped. The California Consumer Privacy Act, for example, the country's most stringent data privacy law, originally did not apply to HR data – that exclusion expired, however,

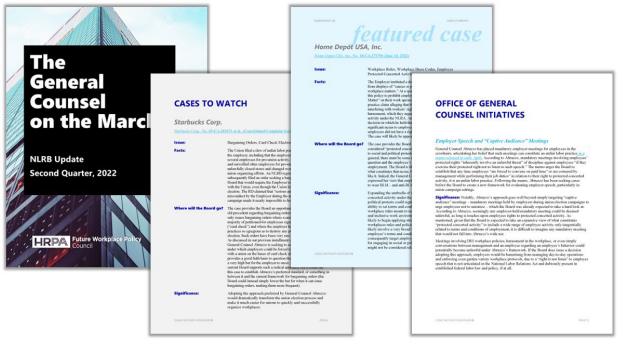
starting January 1, 2023, thanks to significant lobbying from organized labor. Unions are already leveraging the data privacy discussion into new rights for labor and further regulation of the workplace.

Workplace automation and digitization is here to stay, as are the attendant concerns regarding data privacy. In both cases, we are seeing a new frontier of employee relations and labor law and regulation that has the potential to both inhibit an employer's legitimate use of innovative workplace technology and usher in a new generation of unionization.

Mr. Gregory Hoff is Associate Counsel at HR Policy Association.

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

SIGNIFICANT DECISIONS

Thryv, Inc.

featured case

Thryv, Inc., 372 NLRB No. 22 (Dec. 13, 2022)

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 invited 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, etc.

Decision: **(3-2, Members Kaplan and Ring dissenting)** The Board majority ruled that it could hold employers financially accountable to workers for "direct and foreseeable" consequences of an unfair labor practice. The majority held that such consequential damages are merely part of making a worker whole, and therefore authorized by the NLRA, which allows for make-whole remedies (such as backpay and reinstatement). The dissent argued that the Board's new "direct and foreseeable" standard opens the door to awards of speculative damages beyond the Board's statutory authority.

Significance: Moving forward, in any case involving employee make whole remedies (i.e., where an employer would be required to provide back pay or job reinstatement to an employee, at minimum), the Board will also "order that the [employer] compensate affected employees for all direct or foreseeable pecuniary harms suffered as a result of the [employer's] unfair labor practice. In short, the Board will potentially hold employers responsible for any direct or foreseeable economic consequences of labor law violations suffered by the employee.

As the dissent in this case notes, this new standard makes it difficult to know exactly where the line may be drawn on what an employer may be required to pay, potentially permitting recovery for any losses indirectly caused by an unfair labor practice. Further, such a standard will undoubtedly invite further litigation regarding whether a loss was actually the direct and foreseeable result of an unfair labor practice.

Valley Hospital Medical Center

Valley Hosp. Med. Ctr., 371 NLRB No. 160 (Sept. 30, 2022)

Issue: Dues Deductions Past Contract Expiration

Facts: Dues check off agreements are provisions in collective bargaining agreements that require employers automatically deduct dues from employee paychecks and remit them to the union. Since 1962, the Board has held that such provisions expire along with the CBA, meaning employers are no longer required to deduct and remit union dues from employee paychecks once a CBA expires. In other words, dues checkoff is not a mandatory subject of bargaining and can be unilaterally ceased by the employer after the CBA expires. In 2015, the Obama Board flipped this precedent and ruled that such provisions are mandatory subjects of bargaining, and therefore employers cannot unilaterally stop deductions even after a CBA expires.

In the present case, the Employer unilaterally ceased dues checkoff more than a year after its CBA with the Union expired without first offering the Union a chance to bargain over the decision. In 2019, the Trump Board issued a decision in the present case reestablishing that dues checkoff provisions were not mandatory subjects of bargaining and that employers were entitled to cease deductions once a CBA expires. On appeal, the Ninth Circuit remanded the case back to the current Board for further clarification.

Decision: **(3-2, Members Kaplan and Ring Dissenting)** The Board majority reversed course once again and ruled that unilaterally stopping dues checkoff when a CBA expires is an unfair labor practice under the NLRA. Per the Board's ruling, employers must continue dues checkoff until either the employer and the union have reached a new CBA or a lawful bargaining impasse permits unilateral action by the employer.

Significance: The decision provides unions increased leverage at the bargaining table, as they can continue to rely on a dues revenue stream even where a CBA is no longer in effect. Previously, unions were incentivized to bargain as efficiently as possible to ensure that any window within which dues were not being paid was as small as possible. Under the Board's new rule, such an incentive no longer exists.

New Concepts for Living, Inc.

New Concepts for Living, Inc., 371 NRLB No. 157 (Sept. 30, 2022)

Issue: Union Decertification

Facts: After a CBA expired between the Employer and the Union, the Union did not request bargaining for a successor contractor for nearly two years, and did not actively engage with the bargaining unit during that period. Eventually, employees filed a decertification petition. In response, the Union filed unfair labor practices charges against the Employer, alleging that it had unlawfully assisted the petition, blocking the petition. The Employer had notified employees that it only had a certain window of time within which to file a decertification petition, and subsequently circulated a memo with an attached form for resigning from the union and revoking dues deductions. The memo itself included language making it clear that it was the employee's choice on both matters. The Employer then circulated a second memo with a form allowing employees who had revoked dues deduction to reauthorize such deductions, but no employees reauthorized. Finally, the Employer held a decertification vote in which 61 of 85 employees voted for decertification, and only 9 against. An administrative law judge dismissed all of the unfair labor practice allegations, and held that it was the Union's absence and failure to engage with employees that led to the decertification, and not any Employer conduct.

Decision: **(2-1, Member Ring dissenting)** The Board majority rejected the ALJ's findings and held that the Employer committed unfair labor practices by circulating both memos. The Board found these unfair labor practices to have unlawfully tainted the decertification campaign and subsequent withdrawal of recognition of the Union. Member Ring dissented, arguing that both memos were lawful and clearly not coercive, that employees had consistently expressed dissatisfaction with the Union unrelated to any Employer conduct, and that it was the Union's absence that caused such dissatisfaction.

Significance: This case and decision demonstrates the uphill battle facing decertification petitions, particularly given the current composition of the Board. Here, the Union was shown to be essentially an absentee representative of the employees for a period of at least two years, leading to employees circulating and signing a decertification petition. Employees then overwhelmingly voted the Union out. Nevertheless, the Board – overruling its own ALJ who recommended the case be dismissed in its entirety – blocked the decertification on the basis of two memos circulated by the employer providing forms allowing for employees to revoke dues authorization AND to reauthorize the same, while making it clear that it was the employee's decision alone to do so in either case. The case demonstrates the ability for unions to avoid being voted out by filing unfair labor practice charges, as well as the current Board's inclination to find merit in such charges.

T-Mobile USA, Inc.

T-Mobile USA, Inc., 372 NLRB No. 4 (Nov. 18, 2022)

Issue: Employer-Sponsored Employee Groups

Facts: Under the NLRA, Employers are prohibited from dominating or interfering with the formation or administration of any labor organizations. Specifically, if Employer-created employee groups have a pattern or practice of making proposals to management regarding conditions of work and management responds to such proposals, then such a group is generally unlawful. The Employer created a group or forum within the company through which its customer representatives could bring work-related issues to the attention of the Employer. The forum was generally used to identify customer-related elated issues, which were then reviewed by a manager, without involvement of administrators of the forum. A 2019 Trump Board decision found the group to be lawful. On appeal to the D.C. Circuit, the case was later remanded back to the Board.

Decision: **(2-1, Member Ring dissenting)** The Board majority overturned the 2019 decision and found that the employee group was a labor organization unlawfully dominated by the Employer. Specifically, the Board majority found that the group was engaged with "dealing with" the Employer as a representative of employees, and concerning conditions of work. Member Ring dissented, arguing that there were only isolated incidences of complaints related to working conditions raised through the employee group, amongst thousands of customer-related issues, and that such isolated incidents did not rise to the level of rendering the employee group a labor organization under the NLRA.

Significance: The case highlights the balancing act needed to maintain organized lines of communication between employees and management without such organization constituting an illegal labor organization under the NLRA. Even in cases where such forums are largely dedicated to external, customer-facing issues, as was the case here, the Board may be inclined to err on the side of an unfair labor practice. The limitations on employer-sponsored employee groups created by the NLRA have become an increasingly popular subject amongst Republican lawmakers, who have put forth proposed legislation that would loosen such restrictions, such as the TEAM Act recently proposed by Sen. Rubio (R-FL).

New York Presbyterian Hudson Valley Hospital

New York Presbyterian Hudson Valley Hosp., 372 NLRB No. 15 (Dec. 5, 2022)

Issue: Unlawful Termination, Protected Concerted Activity

Facts: The Employer and Union were negotiating a CBA, and the employee nurse at issue in the case was selected to be a representative member of the Union's negotiating team. The nurse was participating in a surgery, during which she was training a newer nurse pursuant to normal protocol, when she was notified that union agents were onsite at the hospital to engage in discussions with the Employer's Chief Nursing Officer, who was hosting her own town hall meeting with employees. The nurse subsequently left the operating room to meet with the Chief Nursing Officer. During that interaction, the Chief Nursing Officer became visibly angry with the nurse and other union representatives, including calling their actions "disrespectful" and "unacceptable." The Employer subsequently conducted a disciplinary meeting with the nurse and her union representative and let her know that she was being investigated for leaving the operating room during a surgery. The Employer then terminated the nurse for "patient abandonment."

Decision: **(2-1, Member Ring dissenting)** The Board majority found the nurse's termination to be motivated by her union activity and therefore unlawful. The Board specifically found the Chief Nursing Officer's conduct during the meeting with the nurse and union representatives as constituting an "animus" against the nurse for her union activity. The Board found that the Employer had not similarly disciplined or terminated other nurses for conduct similar to the nurse leaving the operating room, and thus concluded that the nurse was instead terminated for leaving the operating room to engage in union activity. Member Ring dissented, arguing that the nurse clearly engaged in conduct warranting termination when she left the operating room without her supervisor's knowledge and without securing alternative coverage.

Significance: This again highlights the Board's inclination to find employer discipline of employees unlawful where union activity is arguably present, even in circumstances where the employee conduct in question could be considered particularly egregious.

Absolute Healthcare

Absolute Healthcare, 372 NLRB No. 16 (Dec. 8, 2022)

Issue: Unlawful Termination, Protected Concerted Activity

Facts: The Employer, a medical marijuana dispensary, fired an employee for a cash drawer shortage, which was the employee's third "write-up." The Employer had an employee handbook signed by the employee that articulated a 4-strike policy for termination, although leaving it to the discretion of the Employer to terminate employees who have accrued more or less than 4 strikes. Another employee was not terminated until committing 7 strikes. Meanwhile, prior to termination, the employee at issue in the case had been involved in organizing employees at the Employer's facility in conjunction with a union.

Decision: **(2-1, Member Ring dissenting)** The Board majority found that the termination was motivated by the Employer's animus towards the employee's union activity and was therefore unlawful. The Board dismissed the Employer's defense that it terminated the employee on the basis of 4 "write-ups," citing the Employer's failure to terminate another employee until they had accrued 7 strikes. The Board also dismissed the Employer's argument that the employee's repeated misconduct presented a compliance risk regarding state laws governing the sale of medical marijuana for the same reason. Member Ring dissented, arguing that the employee's misconduct amounted to repeated violations of such state law, therefore clearly warranting termination unrelated to the employee's union activity.

Significance: This decision once again showcases the Board's inclination to render employer discipline unlawful provided there is any union activity present, and even in the face of clear misconduct unrelated to union activity. In this case, the employee in question was arguably exposing the Employer to violations of state law. Nevertheless, the Board found terminating the employee unlawful – such a result also highlights a common reality in which employers find themselves subject to violations of the NLRA for compliance or attempted compliance with other legal requirements.

American Steel Construction

American Steel Const., 372 NLRB No. 23 (Dec. 14, 2022)

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 invited amicus briefs in this case to determine whether it should adopt a new standard for determining bargaining unit appropriateness.

Decision: **(3-2, Members Kaplan and Ring dissenting)** The Board majority reinstated the Obama-era *Specialty Healthcare* standard for determining bargaining unit size appropriateness, under which challenging parties must show that employees excluded from a proposed unit share an "overwhelming community of interest" with unit employees in order for them to be included in the proposed unit. The Trump Board had replaced the *Specialty Healthcare* standard in 2017 with its own standard under which unions had the burden of proving that employees in a proposed bargaining unit had "sufficiently distinct" interests from those outside of the proposed unit. The Board's decision here and its new (old) standard applies retroactively to all pending cases.

Significance: The *Specialty Healthcare* standard makes it much easier for smaller bargaining units to get certified, and smaller bargaining units make it much easier for unions to win representation elections. Employers can expect to see unions carving out smaller groups of employees within the same workplace for organizing and consequently a proliferation of micro units and fractured workplaces. In other words, employers may be faced with multiple bargaining units within one plant, floor, store, or production line, and consequently, may be forced to engage in multiple different collective bargaining negotiations for a single location, at significant expense.

Sunbelt Rentals, Inc.

Sunbelt Rentals, Inc., 372 NLRB No. 24 (Dec. 15, 2022)

Issue: Employer Investigations of Unfair Labor Practice Allegations

Facts: Under longstanding Board precedent established in *Johnnie's Poultry*, employers must observe certain safeguards when interrogating employees regarding alleged unfair labor practices in preparation for defense of such allegations. Such safeguards include notifying employees of the purpose of the questioning, providing assurance of no retaliatory action, conducting the questioning in an environment "free from employer hostility to union organization," and limiting questions to the necessities of the investigation itself. Under the standard, failure to observe any one of the safeguards can make such interrogations unlawfully coercive.

In the present case, the Employer was alleged to have committed several unfair labor practices over the course of two years. In preparation for a defense of such allegations, the Employer's attorney met with two employees the Employer planned to call as witnesses. In one meeting with one employee, the attorney explained her purpose and assured that the employee did not have to speak with her, but did not tell the employee that his answers to her questions would not affect his job. In the other meeting with the other employee, the attorney again explained her purpose and told him that his answers would not affect his job, but did not tell him that his participation was voluntary. In 2021, the then Republican-majority Board invited amicus briefs in the case to address whether the Board should maintain the per se *Johnnie's Poultry* standard or adopt a new, totality of the circumstances standard under which failures to abide by the safeguards are considered along with other factors to determine if the questioning was unlawfully coercive.

Decision: **(3-2, Members Kaplan and Ring dissenting)** The Board majority upheld the *Johnnie's Poultry* standard and applying it to the present case, found the Employer engaged in unlawfully coercive questioning of employees. The Board majority claimed that such a standard was appropriate and provides a "sturdy barrier" against coercive employer interrogation of employees. The dissent argued that the standard exceeds the Board's authority and that employers should have an opportunity to prove questioning isn't coercive under the totality of circumstances.

Significance: The decision puts an end to prior attempts to reconsider the *Johnnie's Poultry* standard and confirms employer requirements regarding questioning employees during investigations of alleged unfair labor practices. Employers must be extremely careful to abide by each of the established safeguards or else risk unfair labor practice charges.

Cintas Corporation

Cintas Corp., 372 NLRB No. 34 (Dec. 16, 2022)

Issue: Unlawful Termination, Protected Concerted Activity

Facts: The Employer declined to offer an employee a promotion to management. The employee was considered by his colleagues to be abrasive and argumentative, who referred to him as a "tyrant" and a "bully." The employee had had internal complaints filed against him for his behavior. The Employer cited the employee's temperament as a reason for denying him the promotion, along with the comment "you talk to too many people." The employee had also previously raised workplace concerns during regularly scheduled "coffee chats" with HR. The employee subsequently indicated his desire to resign multiple times before eventually walking back such assertions. The Employer accepted his resignation anyway.

Decision: **(2-1, Member Ring dissenting)** The Board found that the Employer committed unfair labor practices both by threatening the employee with the loss of promotional opportunities and by refusing to rescind the employee's perceived resignation. Specifically, the Board found that the Employer unlawfully threatened the employee with the loss of promotional opportunities with the comment " you talk to too many people," which it held amounted to a coercive threat. Further, the Board held that the employee's participation in the "coffee chats" amounted to protected concerted activity, and that the Employer's termination of the employee was because of such activity and therefore unlawful.

Significance: Once again the Board majority is seemingly bending over backward to characterize any employer discipline of an employee as the result of animus towards an employee's protected concerted activity, even where such activity barely exists and has tenuous, if any, links to the termination in question.

Bexar County Performing Arts Center

Bexar County Performing Arts Ctr., 372 NLRB No. 28 (Dec. 16, 2022)

Issue: Access to Employer Property

Facts: The Employer operated a performing arts center at which employees of a contractor operating at the center picketed and leafleted. The Employer subsequently informed the contractor employees that they were prohibited from picketing and leafleting on the Employer's property. In 2019, the Trump Board ruled that employers are generally entitled to bar employees of the employer's contractors from picketing or leafleting on an employer's property, unless such workers "regularly and exclusively" worked at the property. The decision was later invalidated by the D.C. Circuit Court of Appeals and sent back to the Board.

Decision: **(3-2, Members Kaplan and Ring dissenting)** The Board majority overturned the Trump Board and reverted to a standard issued by the Obama Board in 2011 in *New York Hotel & Casino*. Under that standard, non-employees (employees of the employer's contractors) are entitled to protest at an employer's property provided they do not "significantly interfere" with the employer's use of the property, or in the absence of an employer's "legitimate business reason" to remove them. The Board held that contractor employees should enjoy an opportunity to exercise their statutory rights at the place where they regularly work, and that it should not matter whether their employer owns the property. The dissent would have upheld the Trump standard.

Significance: The Board majority's decision invalidates another Trump Board precedent while also reinstating another Obama Board precedent. The decision places the burden on employers to prove that protesting contractors "significantly interfere" with the use of their property, or that they have some other "legitimate business reason" to remove them. In practice, employers are unlikely to find the current 3-1 Democratic-majority Board sympathetic to their efforts to boot workers off of their property, and are now increasingly likely to be found in violation of the NLRA for the same.

CASES TO WATCH

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 is often likely to be fairly speculative, and 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 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 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, 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 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 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.

Ralphs Grocery Company

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.

OFFICE OF GENERAL COUNSEL INITIATIVES

Targeting Employer Use of AI in the Workplace

As discussed briefly in the issue spotlight, General Counsel Abruzzo issued a memo in October 2022 concerning employer uses of electronic monitoring and algorithmic management in the workplace. In the memo, Abruzzo proposes a new framework for evaluating employer uses of technology in the workplace under which any such usage is presumptively unlawful if it "would tend to interfere with or prevent a reasonable employee" from engaging in protected concerted activity.

The burden would be on the employer to prove that its usage at issue is "narrowly tailored to address a legitimate business need." If this burden is met, the Board would then balance the employer's and employee's interests to determine whether the usage in question is lawful. Even if the Board were to find that the employer's practice was lawful, the employer would then still be required to disclose to employees the technologies it is using, its reasons for doing so, and how it is using information that it obtains through such usage.

Significance: General Abruzzo's proposed framework would make it extremely difficult, especially under the current Board, for employers to use common workplace monitoring and management tools without being found guilty of an unfair labor practice. And even in cases where an employer wins, they would still be subjected to burdensome notice requirements similar to robust data privacy laws.

Expanding Access to Employer Email Systems for Union Activity

In an advice memo made public in December 2022, the General Counsel urged the Board to expand employee access to employer email systems for purposes of union organizing. In 2019, the Trump Board overturned an earlier Obama-era decision and ruled that employers have broad authority to restrict the use of their email systems to work purposes only.

In the memo, General Counsel Abruzzo argues that the Board should return to the Obama-era standard under which conferred a right upon employees to use employer email systems and any other electronic communication platforms for nonbusiness purposes, including union organizing.

Significance: The case in question has since been closed, but the advice memo indicates that General Counsel Abruzzo will continue to press the issue in any related case put forth before the Board, providing it an opportunity to expand access to employer communication platforms. A more expansive standard along the lines of the Obama-era standard would prevent employers from confining use of company IT to work purposes, which could inhibit an employer's ability to maintain discipline and productivity.

RULEMAKING

Election Blocking Charges and Voluntary Recognition

On November 3, 2022, the Board issued a Notice of Proposed Rulemaking that would rescind a Trump-era Board rule allowing votes to decertify a union to proceed despite pending unfair labor practice charges. The recission would revive so-called "block charges" through which employee efforts to rescind their union representation are delayed or denied by pending unfair labor practice charges.

Prior to the Trump Board rule, Board officials could suspend employee efforts to rescind their union representation on the basis of pending unfair labor practice charges against the employer, until all such charges were fully resolved. As a result, unions faced with a decertification campaign would often file numerous unfair labor practice charges against the employer to prevent employees from voting them out. In 2020, the Trump Board issued a rule under which such votes could still move forward despite pending unfair labor practice charges – Board officials would instead impound vote results until such charges were resolved.

The proposed rulemaking would rescind the 2020 rule in its entirety. In addition to eliminating block charges, the 2020 rule also placed limits on the bar on challenges to voluntarily recognized unions, including separate limits for voluntary recognized unions in the construction industry. The current proposed rule would rescind these parts of the 2020 rule as well. In sum, the proposed rule would:

- Revive block charges, allowing unions to stall or deny employee efforts to rescind their representation by filing unfair labor practice charges against the employer;
- Eliminate notice-and-election procedural requirements for voluntarily recognized unions (installed by the 2020 rule), and, where there is a voluntarily recognized union, prohibit other election petitions for period at least 6 months and up to 1 year after the first bargaining session.
- Prohibit election petitions challenging a construction employer's voluntary recognition of a union for a period of 6 months, and allow "sufficiently detailed language" in a CBA to serve as sufficient evidence of voluntary recognition.

Significance: In reviving "block charges," the proposed rule would once again invest Board officials with significant authority to forestall or prevent employees' right to decide upon representation. Employers can expect unions to resume using the popular tactic of filing unfair labor practices -with merit or not – upon notice of an employee decertification petition. Should the proposed rule go into effect, unions will have free rein to block employees from voting them out through unfair labor practice charges.