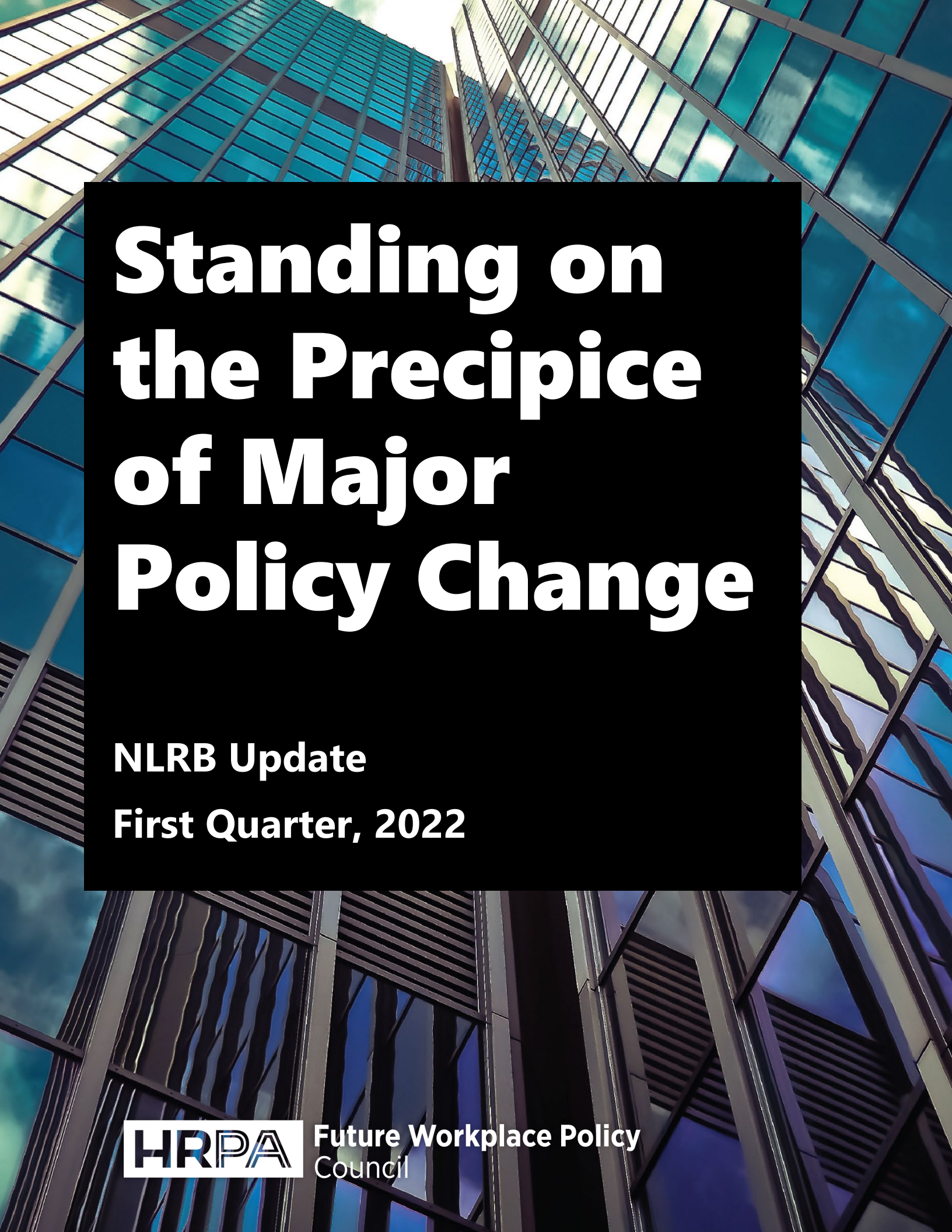

Standing on the Precipice of Major Policy Change

NLRB Update

First Quarter, 2022

HRPA Future Workplace Policy Council

FOREWORD

Welcome to the inaugural edition of HR Policy Association's quarterly NLRB Report. Each report will provide 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 will also feature expert analysis on a specific issue or topic from a guest writer.

The first quarter of 2022 saw the Board, with a newly minted Democratic-majority, wasting no time in laying the groundwork for significant and comprehensive labor law and policy change. The Board decisions issued since the beginning of the year, though offering few significant changes by themselves, serve as markers of how the Board may view important labor law issues, including mandatory subjects of bargaining, bargaining units, employer communications during union campaigns, and mail ballot elections.

Most importantly, the Board signaled a potential massive sea change of law and policy soon to come through invitations for *amicus* briefs in five different cases involving critical and wide-encompassing issues, such as independent contractor status, employer workplace rules and policies, and bargaining unit size appropriateness. In short, the Board is already off and running with major changes on the very near horizon.

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ISSUE SPOTLIGHT

How "Mission Creep" Could Create a New World for Labor Lawyers

By Daniel V. Yager

With a Democratic Board majority fully ensconced, management lawyers are anticipating a reinterpretation of the labor laws making unfair labor practice complaints much more plentiful. An expansive view of "protected concerted activity" alone, combined with the current uptick in employee activism, could bring this to bear. Meanwhile, there are two other factors that could raise the stakes for an unfair labor practice case.

First, the Biden administration may revive the Obama administration's infamous "blacklisting" rule. Among other things, that rule required all federal agencies to consider adjudicated and alleged labor law violations by their federal contractors. An initial step is being taken in this direction by the Department of Agriculture, which has proposed a rule requiring all USDA contractors to certify compliance with the National Labor Relations Act and 13 other federal labor laws. (Fortunately, the proposed rule is limited to adjudicated violations.) A violation of this requirement could lead to a private lawsuit under the False Claims Act, which can include treble damages and debarment.

It remains to be seen whether other agencies follow suit, but a similar rule is already in the works in the White House. The recent White House Task Force on Worker Organizing and Empowerment recommended the development by the Domestic Policy Council of the "characteristics defining a good-quality job and a list of job quality metrics that agencies can use to assess the effectiveness of their programs in advancing job quality." It is highly likely that a company's labor law compliance record will be one of the factors considered in awarding contracts.

This leads to the second factor. Notably, the aforementioned Task Force included every single Cabinet Member. This fact alone demonstrates the commitment of the entire Biden administration to the goal of growing unions, even if it results in "mission creep" in federal agencies. We are already seeing this expansion of core objectives in a number of agencies. For example, the Justice Department's Antitrust Division filed comments with the NLRB on its independent contractor rules. The SEC is expected to propose requiring public companies to report very specific "human capital metrics," including workforce diversity, employee turnover, and the "total cost" of employees.

Despite organized labor's inability to enact severe new penalties for labor law violations, an unfair labor practice case may have a whole new dimension going forward

Mr. Yager is Senior Advisor, Workplace Policy, at HR Policy Association, and CEO Emeritus of the Association.

SIGNIFICANT DECISIONS

Omni Hotels Mgmt.

Omni Hotels Mgmt., LLC 371 NLRB No. 53 (Jan. 20, 2022)

Issue: Employer Duty to Bargain Changes in Past Practices with a Newly Certified Union (Annual Wage Increases)

Facts: The Employer granted annual wage increases to the employees in question for 16 out of 17 years, but declined to do so again in 2019 shortly after the Union became the certified representative of the group of employees, and while negotiating a collective bargaining agreement with the Union. The Employer did grant the wage increase to employees not represented by the Union. The Employer did not provide notice to the Union that it was not issuing the wage increase for the represented employees, and argued that it was required to maintain the status quo with respect to wages during negotiations with the Union, and therefore had not made a unilateral change in wages for the employees represented by the Union.

Decision: **(2-1, Member Ring dissenting)** The Board found that the Employer had a past practice of granting annual wage increases to the employees at issue and therefore unlawfully implemented a unilateral change without giving advance notice to the Union and an opportunity to bargain when it decided to forgo the same wage increase in 2019. Specifically, the Board found the annual wage increases to be an established practice regularly expected by the employees because the Employer granted such increases nearly every year for 17 consecutive years using the same fixed criteria for determining the amount of the increases.

Significance: Employers are prohibited from changing terms and conditions of employment during negotiations of an initial collective bargaining agreement with a union without first giving the union advance notice and opportunity to bargain the change. Generally, the Board has only found wage increases to be an established term and condition of employment that the employer must bargain where the increases are fixed as to both timing and criteria.

Here, however, as dissenting Member Ring pointed out, the Employer decided whether to increase wages based on a variety of criteria that were intermittently considered or not considered depending on the year, and therefore not fixed. The Board has never before found wage increases to be an established term or condition of employment based on past practice where the criteria were not fixed. The decision puts employers on notice that the current Board is likely to be increasingly willing to increase the scope of what it considers to be mandatory subjects of bargaining based on past practice.

KMS Commercial Painting

KMS Commercial Painting, LLC, 371 NLRB No. 69 (Feb. 16, 2022)

Issue: Mail Ballot Elections Involving Departing Employees

Facts: A representation election was held via mail ballots, rather than via the traditional onsite secret ballot election process. The employer challenged the ballots of two employees who voted via mail ballot but subsequently voluntarily left their jobs before votes were actually counted.

Decision: **(3-0, Member Ring concurring)** The Board held that the ballots were valid because, in accordance with longstanding Board precedent, the ballots were mailed while the employees were still employed within the bargaining unit.

Significance: Despite the straightforward facts and decision in this case, it is nevertheless important as it raises the ongoing question of how long the Board will continue the use of mail ballot elections, traditionally disfavored by the Board in favor of manual, onsite secret ballot elections. The Board turned to mail ballot elections out of safety precautions related to the COVID-19 pandemic. However, as federal, state, and local governments loosen safety restrictions and employers fully reopen their facilities, it remains to be seen how long the Board will continue to order mail ballot elections. In this case, Member Ring identified the various issues related to mail ballot elections and specifically called upon the Board to review the further use of mail ballot elections. Assuming the pandemic continues to subside in severity within the United States, the Board may soon review its continued use of mail ballot elections as opposed to onsite secret ballot elections.

NBC Universal Media

NBC Universal Media, LLC, 371 NLRB No. 72 (Mar. 8, 2022)

Issue: Bargaining Units

Facts: This case goes back all the way to 2008, when NBC created new a class of employees: content producers. Since that time, both NBC and the Unions have been in a litigation battle over which bargaining unit the content producers should be placed in, including whether they should be their own bargaining unit. The case has spanned three regional director decisions, three prior Board decisions, and a ruling by the D.C. Circuit Court of Appeals.

Decision: **(2-1, Member Ring dissenting)** The Board affirmed a decision of the Regional Director that the content producers belong in a single, separate nationwide bargaining unit because they perform the same duties that have been the work of the nationwide unit. Member Ring dissented, asserting that the content producers perform the same basic work of both technical employees and news writers, who are in different bargaining units.

Significance: This case shows how contentious and time-consuming bargaining unit determinations can become. The employer here has faced 14 years of litigation both with the NLRB and with federal courts of appeal, all over the determination of a single class of workers. The case also provides insight into this Board's approach to bargaining units, discussed further in *American Steel Construction* in the next section. The Board is likely to be more willing, as it is in this case, to sign off on separate units for groups of employees that arguably perform the same or similar duties, rather than on larger units encompassing these same employees.

Gavilon Grain. LLC

Gavilon Grain, LLC, 371 NLRB No. 79 (Mar. 15, 2022)

Issue: Notice Reading Remedies

Facts: After the Union requested recognition from the Employer based on signed authorization cards from all six of the Employer's grain pit employees, managers of the Employer engaged in retaliatory practices against the employees, including prohibiting storage of employee items in the Employer's warehouse, adopting new timekeeping procedures that prohibited employees from clocking in before a certain time, removing the employees' smoking area, ordering the employees to perform extra cleaning duties outside the scope of their usual employment, and firing one of the employees.

Decision: **(3-0, Member Ring concurring)** The Board affirmed the findings of the Administrative Law Judge that the Employer's actions constituted unfair labor practices because they unlawfully discriminated against employees for engaging in union and protected concerted activities. Further, the Board found that the conduct was sufficiently severe as to require an additional remedy beyond the standard remedies: the Board ordered the Employer to read a remedial notice aloud to employees notifying the employees of the Employer's unlawful conduct and their rights. The Board found the notice reading remedy to be particularly appropriate because although all six employees signed authorization cards, after the Employer's conduct, only one of the employees subsequently actually voted in favor of the union in the election.

Significance: Notice reading remedies are not common but the extent of their usage depends on the Board. The Trump Board virtually never ordered notice reading remedies, while the current Board, in its first twenty cases, has already ordered notice reading remedies multiple times. Further, in this case, Member Prouty noted in a footnote that the Board should consider lowering the bar for when notice reading remedies are appropriate. Thus, employers should be prepared for a significant increase in the use of such remedies, which, it should be noted, has been criticized by three different federal circuit courts of appeal as being inappropriate and bordering on unlawful compelled speech.

Bardon, Inc.

Bardon, Inc., 371 NLRB No. 78 (Mar. 17, 2022)

Issue: Threats as Unlawful Restrictions on Protected Concerted Activity

Facts: A supervisor of the Employer told a group of employees seeking unionization that the Employer knew they were the "troublemakers" behind the union campaign, and that he "only had to be nice for one more week" during a conversation about the union one week before the election.

Decision: **(3-0)** The Board found that the employees would have reasonably understood these statements to be "threatening unspecified reprisals if the union were voted in," and therefore unlawful restrictions on the employees' rights to protected concerted activity. Member Kaplan disagreed, finding the statements to be too vague and ambiguous to rise to the level of a violation, while also noting that it was understood by both the supervisor and the employees that the supervisor would be demoted if the union campaign was successful, and therefore the statements were instead in relation to that knowledge.

Significance: The case highlights the very fine line between lawful and unlawful statements made during a union campaign, and how quickly statements by supervisors and management can become violations of federal labor law, particularly under the current Board. Employers should exercise extra care to ensure that their communications during a union campaign cannot be construed in any way as threatening employees who support unionization or otherwise restrict employees' right to unionization.

AT&T Services, Inc.

AT&T Services, Inc., 371 NLRB No. 76

Issue: Withdrawal of Union Dues Authorizations

Facts: In the original case, an employee filed charges against the Employer and the Union for rejecting her request to withdraw her dues-withdrawal authorization. The Employer and Union's collective bargaining agreement had expired and the two parties were in the middle of negotiating a new deal. Under Board precedent, unions can limit when employees revoke dues-withdrawal authorizations to once per year and before the expiration of a collective bargaining agreement. The employee later settled with the Union and the Employer and asked the Board to end her original case.

Decision: **(2-1, Member Kaplan dissenting)** The Board granted the employee's request to dismiss the case. Member Kaplan dissented and urged the Board to reconsider its standard for when an employee may revoke a dues-withdrawal authorization.

Significance: The Board's previous General Counsel, Peter Robb, sought to use this case to overturn Board precedent regarding when employees can revoke dues-withdrawal authorizations. Specifically, Robb urged the Board to adopt a new standard that would permit employees to revoke such authorizations during periods where no collective bargaining agreement is in effect, as was the case here. The current Board's dismissal of the case puts an official end to such efforts.

CASES TO WATCH

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, etc.

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 on the hook 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 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 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" 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 or micro units which can mean greater chances of successful unionization. Further, fracturing workplaces into multiple 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.

featured case

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 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.

Deco Logistics

Deco Logistics, Case No. 21-CA-272323 (Complaint issued Mar. 17, 2022)

Issue: Worker Misclassification as an Unfair Labor Practice Per Se

Facts: Five trucking, warehousing, and logistics companies, operating as a single integrated enterprise, allegedly misclassified drivers as independent contractors, according to a complaint issued by NLRB prosecutors. The complaint alleges that the misclassification prevents the workers from engaging in protected concerted activity and gave them the impression that they are not covered by the NLRA, in violation of the Act. Under current Board precedent, established in *Velox Express* in 2019, misclassification alone is not a violation of the NLRA.

Where will the Board go? Although the case is only at the complaint stage at this point, the Board could use it as a vehicle to reexamine the *Velox* precedent and ultimately overturn it and make misclassification a per se violation of the NLRA. General Counsel Abruzzo identified misclassification as one of her enforcement priorities and signaled that the Board should overturn *Velox* and establish that misclassification by itself is an unfair labor practice.

Significance: In conjunction with the Board potentially narrowing its standard for determining independent contractor status under the NLRA, making misclassification by itself an unfair labor practice could become extremely problematic for employers who make wide use of contractors. A narrow independent contractor standard and misclassification as a violation of the NLRA together could be a potent weapon for the Board in levying unfair labor practice charges on employers.

OFFICE OF GENERAL COUNSEL INITIATIVES

Increased Use of Injunctive Relief

As outlined in a memo released in February 2022, General Counsel Abruzzo has launched an initiative placing a renewed emphasis on the use of injunctive relief against employers. Under Section 10(j) of the NLRA, the Board and its General Counsel are empowered to obtain court orders against employers to put a halt to alleged unfair labor practices as they are happening, rather than waiting for a filed complain and a formal adjudication by the Board, a process which often takes months or years. 10(j) injunctive relief has been used increasingly sparingly by the Board in recent years – in the last three years combined, the Trump Board sought injunctive relief less often than the Obama Board did during a single year (2012).

Significance: General Counsel Abruzzo's memo serves as notice that Abruzzo and the Board will be particularly aggressive in seeking court orders against employers for conduct they deem to have infringed upon employees' rights to protected concerted activity during union organizing campaigns. Employers will need to tread carefully in communications with employees during such campaigns or risk being dragged into federal court by the Board, where historically it has been successful in obtaining injunctive relief and/or a settlement to a similar effect.

Interagency Collaboration and Enforcement

General Counsel Abruzzo issued a memo in February 2022 (separate from the memo mentioned above) detailing the General Counsel's emphasis on strengthening coordination between her office, the Board, the EEOC, the Department of Labor's Wage and Hour Division, OSHA, OFCCP, and other agencies for the purposes of more comprehensive enforcement and regulation of employers. According to the memo, "Stronger collaboration and networked enforcement will particularly assist those most vulnerable and will help secure…union representation." Retaliation, discrimination, and misclassification were identified as particular targets of the collaborative enforcement efforts.

Significance: This collaborative approach is part of the Biden administration's overall strategy of maximizing all executive branch and agency resources towards increasing union density and comprehensive regulation of employers. As articulated by Dan Yager in the article preceding this report, as a practical matter, this means that unfair labor practice charges against employers could result in more than just a slap on the wrist by the Board. Instead, an employer could find itself facing enforcement actions from several different agencies for the same alleged conduct.

Union Card Check Authorization

General Counsel Abruzzo has indicated a desire to revive and expand a long-abandoned Board standard for compelling employers to recognize and bargain with a union based solely on signed authorization cards from a majority of workers (card check) rather than through a traditional secret ballot election.

In *Joy Silk Mills, Inc.* 85 NLRB 1263 (1949), the Board established that a union could obtain a bargaining order (i.e., a Board order requiring an employer to recognize and bargain with a union) from the Board if it had (1) authorization cards from a majority of employees and (2) the employer, after refusing recognition, had committed unfair labor practices before the election had begun. The Board abandoned the *Joy Silk* standard soon after, and under current Board precedent, the Board will only issue bargaining orders where (1) authorization cards are obtained from a majority of employees and (2) the employer has committed unfair labor practices *so egregious as to thoroughly destroy any possibility of a fair election*. The Board rarely issues such bargaining orders.

General Counsel Abruzzo has indicated that she will seek to bring cases before the Board to give it an opportunity to return to the *Joy Silk* standard. Even further, General Counsel Abruzzo has indicated that she would expand *Joy Silk* beyond its original meaning. Specifically, while *Joy Silk*, as mentioned above, is traditionally understood to allow Board bargaining orders where an employer presented with card check has engaged in unfair labor practices *and* is unable to explain its reason for doubting majority status, Abruzzo would apparently allow for bargaining orders in *either* of these circumstances. In essence, according to General Counsel Abruzzo, the Board could compel an employer to recognize and bargain with a union on the basis of card check alone, unless an employer can provide a good faith basis to question the union's majority status – an extraordinarily difficult burden for an employer to meet.

Significance: It remains to be seen whether the Board will jump on a *Joy Silk*-type case and revive the *Joy Silk* standard, and particularly to the extent that General Counsel Abruzzo envisions. If the Board does take such action, it would represent a monumental change to federal labor law and greatly empower unions to achieve greater worker organizing success. Organized labor has spent years attempting to legalize card check authorization under the NLRA, with legislative efforts such as the Employee Free Choice Act and the PRO Act both failing to make it through Congress. General Counsel Abruzzo's approach here would allow the Board to circumvent the legislative route and backdoor card check authorization through Board decision-making.

HRPA ENGAGEMENT

Amicus Briefs

In response to Board invitations, the Association filed *amicus* briefs with the Board in the following cases:

***Thryv Inc.*, 371 NLRB No. 37 (2021) (filed Jan. 10, 2022)**

HRPA joined other employer groups in a brief arguing that the Board cannot and should not allow for consequential damages in federal labor law cases, and that such damages will result in a failure of settlements as employers will have little or no ability to ensure the accuracy of consequential damages calculations.

***American Steel Const.*, 371 NLRB No. 41 (2021) (filed Jan. 21, 2022)**

HRPA filed a brief urging the Board against returning to the Obama-era standard for determining bargaining unit appropriateness, which would lead to union-gerrymandered micro and fractured bargaining units.

***Atlanta Opera, Inc.*, 271 NLRB No. 45 (filed Feb. 10, 2022)**

HRPA joined other employer groups in a brief to the NLRB arguing that the Board should retain its current standard for independent contractor status and not create a new standard which restricts such status.

***Stericycle, Inc.*, 371 NLRB No. 48 (filed March 7, 2022)**

HRPA filed a brief urging the Board to avoid returning to applying strict scrutiny to facially neutral workplace rules and policies, and proposed a new framework under which rules and policies are only invalid where they are facially unlawful, applied in a discriminatory manner, or are actually applied in a way that actually restricts employees' rights to protected concerted activity to such a degree as to substantially outweigh the employer's legitimate business interest in the rule or policy.

***Ralphs Grocery Co.*, 371 NLRB No. 50 (Jan. 18, 2022) (filed Mar. 21, 2022)**

HRPA joined other employer groups in a brief urging the Board not to invalidate mandatory arbitration agreements that recognize the right of employees to file claims with the NLRB, and not to invalidate confidentiality agreements in arbitration agreements.