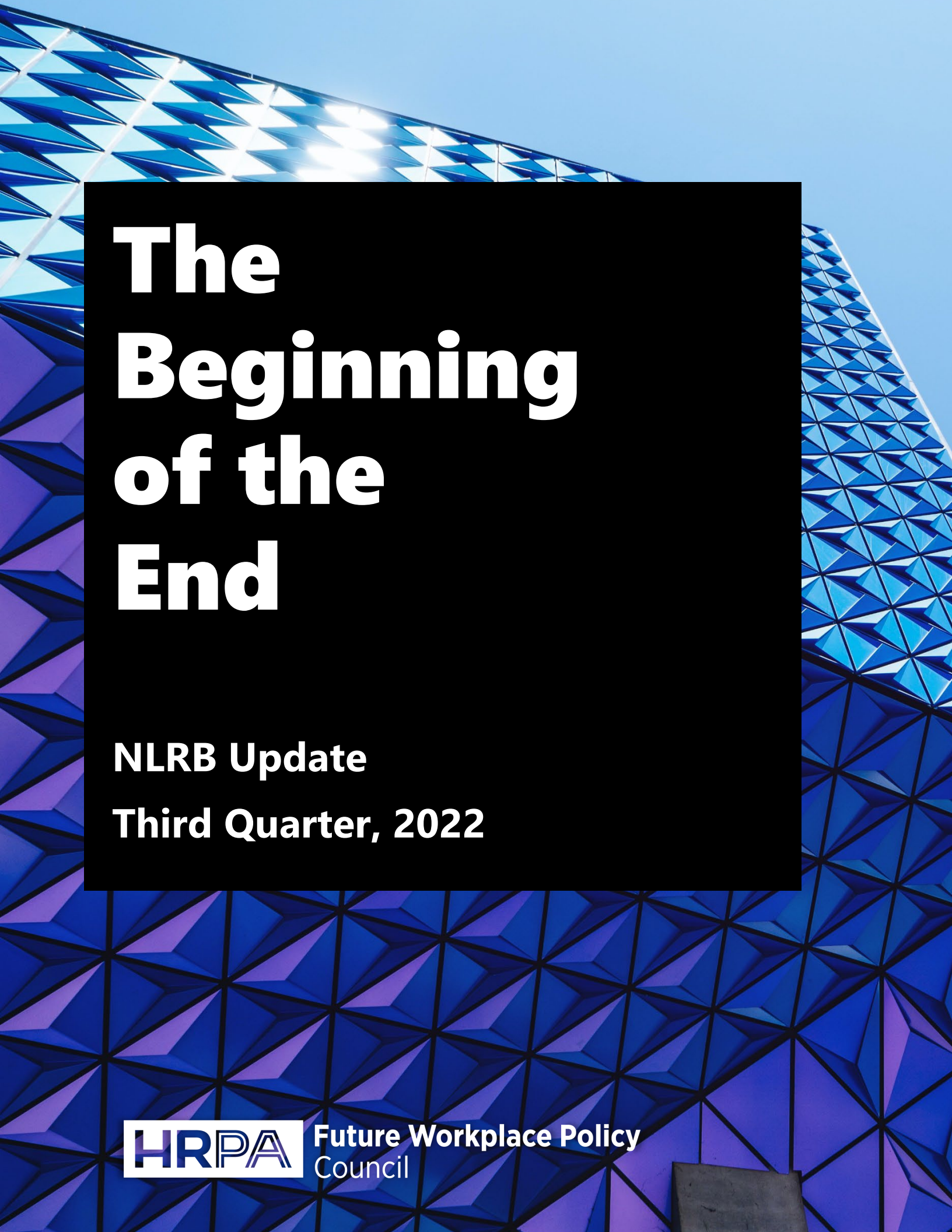

The Beginning of the End

NLRB Update

Third Quarter, 2022

HRPA Future Workplace Policy Council

FOREWORD

Welcome to the third 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.

As we approach the final quarter of the year, the now more than a year period since a new Democratic majority was installed at the Board has been characterized by a surge in public interest in unions, union petitions, and unfair labor practice complaints, bold rhetoric and policy advocacy from the Board's General Counsel who is seeking wholesale change to federal labor law, and to date, very few significant policy and precedent changing decisions from the Board itself.

This period of relative quiet from the Board is somewhat surprising to the many who expected the new Democratic majority to act quickly to undo many of the Trump Board's policy changes and to revert back to many of the policy positions we saw under the Obama Board. And yet, for much of its first year, the Board (albeit not its General Counsel) declined to become the labor policy lightning rod many expected it would, issuing few, if any major decisions.

The honeymoon period for employers may be coming to a swift end, however. Earlier this month, the Board issued what could be considered its first significant, precedent changing decision, ruling that any employer uniform policies that in any way restrict employees from wearing union insignia are presumptively unlawful. Less than a week later, the Board issued a proposed rule that would drastically increase joint employer liability. Further, it is likely that the Board will issue decisions by the end of the year in five pending cases in which it invited amicus briefs earlier this year, each with the potential to significantly upend federal labor law. Finally, beyond these five cases, there are several more pending in which the General Counsel has argued for the Board to adopt radical changes to federal labor law, including card check elections and prohibitions on employer speech. In short, change is still coming, just perhaps not at the pace we originally expected.

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ISSUE SPOTLIGHT

Capitalize on Affiliation Movement by Defining What Brings People Together

By Bob Long

The Biden administration's pro-labor agenda will likely increase labor unrest as the nation heads into November mid-term elections. On Labor Day, he made stops in key swing states of Pennsylvania and Wisconsin where he touted the power of unions while urging voters to back his party.

Even the U.S. Department of Labor (DOL) is being used to actively support and encourage union organizing with its recently rolled out how-to website on unionizing called the Worker Organizing Resource and Knowledge Center or WORK. The DOL's agency, Office of Labor-Management Standards (OLMS), also posted a pop-up on its site encouraging workers to report persuader and surveillance activity among employers.

The first half of 2022 has shown an uptick in union organizing and a shift in America's views of organized labor. Unions are now winning an average of 77% of representation elections – up 11% since 2013. Support for unions at 71% is at the highest level since 1965, according to a recent Gallup poll.

Despite recent strong public support for unions, many workers are shunning old guard organized labor in favor of homegrown unions that give them a collective voice and affiliation without the corporate structure and political baggage.

The concepts of affiliation and belonging are redefining the workplace as independent union successes grow at companies like Starbucks and Amazon.

Employers can capitalize on these concepts by defining what brings people together at work instead of focusing on the aspects that divide them. Companies can navigate the new labor landscape by offering workers a legitimate alternative to an independent union.

Here are some important questions to consider:

- What are your organizational strengths?
- Are your company's strengths enough to engage your employees?
- Why are you different than your competitors?
- How do you engage your employees and hear their voice?

Define who you are and what you stand for as an organization using the language of workers. Employees don't want to be marketed to. They are suspicious of slick HR communications and will blast corporate

speak as out-of-touch and evidence that you are not listening.

After you define your story, go tell it. Build a communications plan around your story, with the language of workers in mind, and tell it before someone else tells it for you.

Your communication plan is just as important as the other elements of your overall strategic plan.

Leverage all forms of communication – from digital to in-person – to ensure the audience hears you. Train your leaders on communication and don't assume they already have the skills to communicate effectively. If you are facing labor issues, your leaders probably need better communications skills to build both their competence and confidence to have difficult conversations.

Beyond engaging around what makes your company different, develop operational changes that really offer employees a clear and legitimate alternative to a traditional or independent unions.

The political landscape is clear: People want a voice. Find a way to give them one before someone else does.

Mr. Bob Long is CEO at IRI Consultants. Bob has more than 30 years of labor relations experience and has successfully managed large-scale preventive and counter-organizing campaigns for Fortune 100 corporations and multiple healthcare systems..

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

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

SIGNIFICANT DECISIONS

Tesla, Inc.

featured case

Tesla, Inc., 370 NLRB No. 131 (August 29, 2022)

Issue: Employer Uniform Policies

Facts: The Employer operated a manufacturing plant that generally required employees to wear Employer-branded clothing. Two employees were disciplined by the Employer for substituting their Employer-branded black t-shirts with union-branded black t-shirts. The Employer claimed that its dress code was meant to prevent clothing that might "mutilate" car parts manufactured at the facility, and to make it easier to supervise factory employees.

Decision: **(3-2, Members Kaplan and Ring dissenting)** The Board found that the Employer's reasons for its uniform policy did not justify its ban on union-branded clothing, and that the dress code was therefore unlawful under the NLRA. In 2019, the Trump Board ruled in *Wal-Mart Stores* that employer uniform policies that limited union insignia displays but did not outright prohibit them (for example, requiring employees to wear company-branded shirts but allowing the wearing of union pins on such shirts) were lawful, provided such policies were enforced consistently and in a nondiscriminatory manner. The Board's decision here overruled *Wal-Mart* and holds that a uniform policy or dress code that in *any* way restricts an employee's ability to wear union apparel is presumptively unlawful – a presumption that can only be overcome if the employer can show "special circumstances" justifying such restrictions. What constitutes "special circumstances," is an open-ended question, fact-specific, and determined on a case-by-case basis, according to the Board.

Significance: As the dissent notes, the standard established by the majority in *Tesla* could be interpreted and enforced by the current Board such that employers would effectively be prevented from maintaining any meaningful clothing policy or dress code whatsoever. Requiring employees to wear collared shirts, for example, could be considered unlawful because such a policy technically prevents an employee from wearing a t-shirt with union insignia on it. Employers should therefore be aware that disciplining employees for noncompliance with a uniform policy could result in unfair labor practice charges – charges that will be exceedingly difficult to beat under the Board's approach established in *Tesla*.

Time Warner Cable, LLC

Time Warner Cable, LLC, 371 NLRB No. 16 (July 15, 2022)

Issue: Employer Investigations into Unprotected Activity

Facts: Under Board precedent, employers are prohibited from coercively questioning employees about union activities or other protected activity. However, also under Board precedent, such prohibitions do not extend to questioning that is limited to unprotected activities. Such questioning is lawful provided if it is closely focused on unprotected conduct and only touches upon any intertwined protected activity in an incidental or limited manner. In this case, the Employer questioned employees about their involvement in an unprotected (i.e., not covered by the NLRA) work stoppage that blocked traffic front of one of the Employer's facilities. The work stoppage was unprotected because it violated a no-strike agreement between the Employer and the Union. An earlier Board decision found that the Employer's questioning was unlawful because it failed to "minimize intrusion into" protected activity. The case was appealed to the Second Circuit Court of Appeals, which held that the decision conflicted with Board precedent and accordingly vacated the decision. The case was remanded to the Board for a further vacating order.

Decision: **Decision: (2-1, Member Ring, dissenting).** The Board majority vacated its previous order as part of an affirmation of a settlement agreement between the Employer and the Union. However, the Board's decision declined to explicitly vacate its prior decision to the extent that it can no longer be considered controlling precedent. Member Ring dissented, arguing that the Board should not leave the prior decision intact as controlling precedent. Member Ring argued that the previous decision was clearly at odds with Board precedent, as recognized by the Second Circuit, and that such a decision unduly restricts an employer's right to investing unprotected employee activity.

Significance: **Significance:** As noted by Member Ring in his dissent, by leaving the underlying decision intact, the Board's precedent on this issue is "left in an incoherent state, and employers unions, and employees are deprived of clear guidance concerning the permissible limits of investigations into unprotected activity." The limited decision issued by the Board here preserves its position that questioning that even only slightly touches upon protected activity can be unlawful. Such a position hamstrings an employer's ability to thoroughly investigate employee activities that are clearly not protected under the NLRA.

Dynamic Concepts, Inc.

Dynamic Concepts, Inc., 371 NLRB No. 117 (July 22, 2022)

Issue: Union Election Re-runs

Facts: The Union objected to the results of a representation election alleging that the Employer had engaged in misconduct. The Employer agreed to forgo litigation of the objections and instead hold a rerun election, but the Union disagreed. Nevertheless, the Regional Director in the case ordered rerun election and issued a Notice of Election that established that the first election was being set aside "by agreement based upon alleged objectionable conduct" of the Employer.

Decision: **(2-1, Member Kaplan dissenting)** The Board affirmed the decision to rerun the election, but also held that the Notice of Election inadequately informed employees of the reasons for the rerun election. According to the Board, the language of the notice did not make it clear enough that the Union had not agreed to the rerun election. Additionally, the Board clarified that in general, in order to determine when a rerun election should be scheduled, the Regional Director should consider whether enough time has passed since the alleged objectionable conduct to permit "the free choice of a bargaining representative." In his dissent, Member Kaplan argued that the language of the Notice was sufficient as is, and that the timing of such should be up to the discretion of the Regional Director.

Significance: The decision clarifies procedural rules for rerun elections. Specifically, in instances like the present case – which the Board itself acknowledged are rare – where one party does not agree to a rerun, the Regional Director must explicitly explain in a Notice of Election why the election is being re-held. Further, the Board's requirement that a Regional Director ensure adequate time has passed before a new election is held could provide unions more time to secure additional votes that could change the results from the first election. Such a potential result further incentivizes unions to file objections to elections, even without merit.

Nexstar Broadcasting, Inc.

Nexstar Broadcasting, Inc., 371 NLRB No. 118 (July 27, 2022)

Issue: Remedies, Backpay

Facts: The Employer was accused of multiple unfair labor practices, including unlawfully withdrawing recognition from the Union, making unilateral changes to employees' terms and conditions of employment, coercion, interference with protected concerted activity, and unlawfully denigrating the Union. In 2021, the Board obtained an injunction from a federal judge ordering the Employer to recognize and negotiate with the union prior to full Board adjudication of the numerous unfair labor practice charges.

Decision: **(2-1, Kaplan dissenting in part)** The Board affirmed the findings of the ALJ that the Employer had committed numerous unfair labor practices over a five-year period of time, including withdrawal and refusal to bargain. The Board unanimously ordered the Employer to reimburse the union for its bargaining expenses. A Board majority ordered the Employer to reimburse employees for earnings lost while attending bargaining sessions with the company, holding that they were justified given the Employer's bad-faith bargaining, its repeat violations of the NLRA, and because the Board had previously warned the Employer that such remedies might be imposed if it continued to engage in unlawful conduct. Member Kaplan dissented from this portion of the ruling, arguing that such a remedy was extraordinary and almost never utilized by the Board.

Significance: The Board has not ordered an employer to provide backpay for time spent negotiating a collective bargaining agreement since 1989, and has only done so a handful of times in its nearly 90 years of existence. Whether or not the multiple unfair labor practices committed by the employer here justified such a remedy, it is undoubtedly an extreme step for the Board to take, and one that comes as the Board is currently considering whether to expand the scope and severity of its remedies in general. The decision taken here indicates that the Board will indeed take an expansive approach towards remedies in future cases.

North Texas Investment Group

North Texas Investment Group, 370 NLRB No. 122 (August 11, 2022)

Issue: Bargaining Orders

Facts: During a union representation campaign, in which 20 of 24 employees signed union authorization cards, the Employer allegedly committed several unfair labor practices, including disciplining and constructively discharging employees for union activities. The Regional Director subsequently blocked the representation election because of the unfair labor practice charges, and the Employer was alleged to have committed further unfair labor practices subsequent to that decision. Board General Counsel Abruzzo then requested a bargaining order against the employer due to the "serious and substantial allegations" against the Employer.

Decision: **(2-1, Member Ring dissenting in part)** The Board granted General Counsel Abruzzo's request an issued an order requiring the Employer to recognize and bargain with the Union. The Board found that the Employer had committed "pervasive and serious" violations and that its reaction to its employees' organizing campaign was "immediate, swift, and retributive." Member Ring dissented from the Board's decision to issue a bargaining order, arguing that it was an extraordinary remedy not warranted by the facts of the case.

Significance: The case shows the Board's willingness to issue bargaining orders, which have generally been sparingly used over the last few decades. The increased use of bargaining orders has been a priority of both the current Board majority and its General Counsel, the latter of whom is pressing the Board to go a step further, and issue bargaining orders even where there are no allegations of unfair labor practices. It remains to be seen whether the Board will do so – there are several cases currently pending that provide the Board opportunities to issue bargaining orders and/or change its standard for doing so, including a high-profile case involving Starbucks.

ExxonMobil Research & Engineering Co., Inc.

ExxonMobil Research & Engineering Co., Inc., 371, NLRB No. 128 (August 19, 2022)

Issue: Board Member Recusal

Facts: This case involves the potential vacation of a 2020 Board decision on the alleged grounds that then-Member Emanuel improperly participated in the disposition of the case. Subsequent to the decision, an Inspector General investigation found that at the time of his participation in that decision, Member Emanuel owned shares of a company that itself owned stock in the company at issue in the case, as part of a sector mutual fund acquired by Member Emanuel's financial broker. Member Emanuel denied having any knowledge of the fund's individual holdings at the time he participated in the case.

Decision: **(2-1, Member Ring dissenting)** The Board vacated the decision, holding that Member Emanuel improperly participated in the case despite having a disqualifying financial interest. Member Ring dissented, arguing that any ethical violation was the result only of inadvertent error, as Member Emanuel had no knowledge that he had a financial interest in the company involved in the case at the time he participated in its adjudication. Further, Member Ring argued that the General Counsel nor the charging party could provide any evidence of risk of injustice if the decision is not vacated. Finally, Member Ring highlighted the consequences of vacating the case, including delaying final adjudication of the complaint.

Significance: Recusal issues, historically a non-divisive occurrence at the Board, became more politically charged during the Trump Board's tenure and are likely to continue with the current Board. Each of the Republican Members of the Trump Board faced several recusal requests, with several decisions becoming vacated on such grounds. The current Democratic majority is likely to face a similar onslaught, with the possibility of such already being raised during their respective Senate confirmation hearings. Such request could prevent the Board from having a quorum to hear certain cases, which could delay Board adjudication of such cases.

Crozer Chester Medical Center

Crozer Chester Medical Center, 371 NLRB No. 129 (Aug. 23, 2022)

Issue: Board Member Recusal

Facts: This case involves the potential vacation of a 2020 Board decision on the alleged grounds that then-Member Emanuel improperly participated in the disposition of the case. Subsequent to the decision, an Inspector General investigation found that at the time of his participation in that decision, Member Emanuel owned shares of a company that itself owned stock in the company at issue in the case, as part of a sector mutual fund acquired by Member Emanuel's financial broker. Member Emanuel denied having any knowledge of the fund's individual holdings at the time he participated in the case.

Decision: **(2-1, Member Ring dissenting)** The Board vacated the decision, holding that Member Emanuel improperly participated in the case despite having a disqualifying financial interest. Member Ring dissented, arguing that any ethical violation was the result only of inadvertent error, as Member Emanuel had no knowledge that he had a financial interest in the company involved in the case at the time he participated in its adjudication. Further, Member Ring argued that the General Counsel nor the charging party could provide any evidence of risk of injustice if the decision is not vacated. Finally, Member Ring highlighted the consequences of vacating the case, including delaying final adjudication of the complaint.

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Xcel Protective Services, Inc.

Xcel Protective Services, Inc., 371 NLRB No. 134 (Sept. 8, 2022)

Issue: Unlawful Termination, Protected Concerted Activity, Employee Complaints to Third Parties

Facts: An employee at a security company complained to management that its firearm training certification had safety issues and did not comply with naval regulations. The employee subsequently raised the issues with the commander of the naval base at which the Employer operated. An investigation by the Navy found no merit to the employee's complaints. Upon recommendation from Naval leadership, the Employer then terminated the employee, citing his alleged dishonesty and violation of the Navy chain of command. Under Board precedent, an employee that disparages their employer to a third party is still protected under the NLRA if they employee notifies the third party that their communication is related to an ongoing labor dispute with the employer and its employees, and if the communication itself is not particularly disloyal, reckless, or maliciously untrue.

Decision: **(2-1, Member Ring dissenting)** The Board held that the Employer unlawfully terminated the Employee for engaging in protected concerted activity, because the employee was engaged in protected concerted activity when he raised his complaints to the Navy base leadership. Member Ring dissented, arguing that the employee was not engaging in protected concerted activity when it complained to Naval leadership, and that the employee had failed to adequately notify Naval leadership that he was engaged in a labor dispute with the Employer.

Significance: The case highlights the current Board's view of the extent to which employees who disparage their employer to third parties retain protection of the Act. Employers should be on notice that they may be limited in their ability to discipline employees for disparaging the employer to a third party, provided the disparagement at least somewhat touches upon protected concerted activity.

NRT Bus, Inc.

NRT Bus, Inc., 371 NLRB No. 136 (Sept. 13, 2022)

Issue: Mail Ballot Elections

Facts: The case involves a union representation election that was held via mail ballots as opposed to an onsite manual election. The Employer requested review of the election results and specifically challenged certain ballots as ineligible.

Decision: **(2-1, Member Ring dissenting):** The Board affirmed the results of the election, and reaffirmed a Board rule that individuals are eligible to vote so long as they are in the unit on both the payroll eligibility cutoff date and on the date they mail in their ballots. Member Ring dissented, arguing that the Board should overrule mail ballot procedural rules that allows workers' votes to be counted even if they have stopped working for the Employer before the ballots are counted.

Significance: Member Ring's dissent highlights a puzzling aspect of the Board's current mail ballot procedural rules – namely, that the votes of employees who no longer work for the employer by the time ballots are tallied are still counted. Thus, an individual who no longer works for an employer, and is therefore unaffected by whether the employer's employees unionize or not, could potentially determine the results of an election on that very issue.

Troy Grove, Inc.

Troy Grove, Inc., 371 NLRB No. 138 (Sept. 14, 2022)

Issue: *Weingarten* Rights

Facts: Unionized employees of the Employer went on strike after the Union and the Employer failed to come to a collective bargaining agreement. During the strike, the Employer hired replacement workers. One replacement worker was suspended for being repeatedly late to work. During a meeting between the replacement worker and management regarding potential disciplinary action for the lateness, the replacement worker asked for a union representative to be present. Under Board precedent, unionized employees are entitled to have a union representative present during an investigatory meeting that may lead to discipline – such rights are known as *Weingarten* rights. The Employer rejected the replacement worker's request, arguing that as a replacement worker, he had no *Weingarten* rights, because unions do not represent the interests of strike replacements, and because strike replacements are the same as non-union employees, who do not have *Weingarten* rights.

Decision: **(3-0)** The Board disagreed with the Employer's argument, and held that the replacement worker was entitled to *Weingarten* rights. Accordingly, the Board found that the Employer's refusal to grant the replacement worker's request for a union representative during the meeting was unlawful. The Board noted that "it is well established that" a bargaining unit also includes strike replacements, and therefore in the present case, the replacement worker was a "unionized" employee for purposes of *Weingarten* rights.

Significance: The Board's decision clarifies that strike replacement workers can be entitled to *Weingarten* rights, a relatively significant expansion of such protections. Employers should take care to acquiesce to *Weingarten* requests from strike replacements, and should keep an eye out for further expansions of *Weingarten* rights to nonunion employees, as the Board has further indicated that it is considering.

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 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.

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.

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.

OFFICE OF GENERAL COUNSEL INITIATIVES

Interagency Enforcement Collaboration

We previously saw the Office of General Counsel announce an effort to strengthen interagency enforcement coordination between the Board, the EEOC, the Department of Labor's Wage and Hour Division, OSHA, OFCCP and other agencies, as reported on in our Q1 Report. This quarter, General Counsel Abruzzo has continued to establish new partnerships with agencies for the purposes of enhanced enforcement coordination and information sharing, with the Board announcing new partnerships with the Federal Trade Commission and Department of Justice, respectively.

Significance: The growing partnerships between the Board and other agencies – including those that have not traditionally been involved in labor and employment regulation and policymaking, such as the FTC and the DOJ – represent General Counsel Abruzzo's commitment to the Biden administration's "all of government" approach to labor and employment regulation. In theory, these efforts represent a coordinated effort to maximize regulation and enforcement of the employer community. In practice, such partnerships and information sharing could mean that employers could face several different enforcement proceedings from several different agencies for the same alleged unlawful practice.

RULEMAKING

Joint Employer Status and Liability

On September 6, the Board issued a notice of proposed rulemaking addressing the standard for determining joint employer status under the NLRA. The proposed rule would create joint employer status based only on "reserved control" and/or "indirect exercises of control" over another employer's employees' terms and conditions of employment. The proposed rule would replace the Trump Board's former rule that the current Board rescinded, and would represent the Board's fourth attempt at a joint employer standard in the last seven years. The Association will be submitting comments, either in its own capacity or in partnership with others in the business community, arguing against the proposed rule.

Significance: While it was expected that the current Board would rescind and replace the Trump Board's rule, the proposed rule in fact goes beyond even what we saw under the Obama Board, in that it explicitly makes evidence of reserved and/or indirect control alone indicative of joint employer status. Under such a framework, employers could become responsible for the labor law violations of their suppliers, contractors, franchisees, or other third-party relationships, as long as they have some potential authority over such entities' employees, and/or have exercised indirect authority over the same. Further, employers in such contexts could be forced to engage in collective bargaining negotiations with such entities' employees as well.