Employment & Labor Section

Increasing NLRB Actions and Enforcement Efforts

Agenda

- The Biden Effect
- Current NLRB Composition
- The GC's Priorities
- State of Unionization Efforts
- Expansion of Protected Concerted Activity
- Handbooks and Workplace Rules
- Independent Contractor Status
- Employee Discipline
- Confidentiality / Nondisparagement
- Return of Micro-Units
- Joint Employer
- Captive Audience Meetings

President Biden pledged to be *“the strongest labor president you’ve ever had.”*

President Biden's Initial Actions

- Fired General Counsel Peter Robb after refusal to resign
- Fired Robb's Second in command, Associate General Counsel Alice Stock
- Rescinded 10 Guidance Memoranda
- Reintroduced the PRO Act
  - Intended to expand right to organize
  - Increased monetary penalties
  - Intent to make it easier for workers to organize at a time of heightened organizing activity
  - Card check enforced

NLRB: Current Makeup

Chair Lauren McFerran (D)
Term ends
December 16, 2024

Member David Prouty (D)
Term ends
August 27, 2026

Gwynne Wilcox (D)
Term ends
August 27, 2028

Member Marvin Kaplan (R)
Term ends
August 27, 2025

The General Counsel

- In January, President Biden fired former General Counsel Peter Robb (R) and named Lauren McFerran (D) Chair of the NLRB
- General Counsel Jennifer A. Abruzzo (four-year term beginning July 22, 2021) – long career at NLRB; most recently Special Counsel for Strategic Initiatives at Communications Workers of America (CWA)
  - Ratified actions of Acting General Counsel Peter Sung Ohr
  - Issued Several Guidance Memoranda outlining a robust agenda

"It is so important that we utilize every possible tool we have to ensure that those wronged by unlawful conduct obtain **true justice**."

- General Counsel Jennifer Abruzzo

GC Abruzzo's Agenda

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 21-07

September 15, 2021

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 22-01

November 8, 2021

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 22-04

April 7, 2022

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: The Right to Refrain from Captive Audience and other Mandatory Meetings

In workplaces across America, employers routinely hold mandatory meetings in which employees are forced to listen to employer speech concerning the exercise of their statutory labor rights, especially during organizing campaigns. As I explain below, those meetings inherently involve an unlawful threat that employees will be disciplined or suffer other reprisals if they exercise their protected right not to listen to such speech. I believe that the NLRB case precedent, which has tolerated such meetings, is at odds with fundamental labor-law principles, our statutory language, and our congressional mandate. Based thereon, I plan to urge the Board to reconsider such precedent and find mandatory meetings of this sort unlawful.

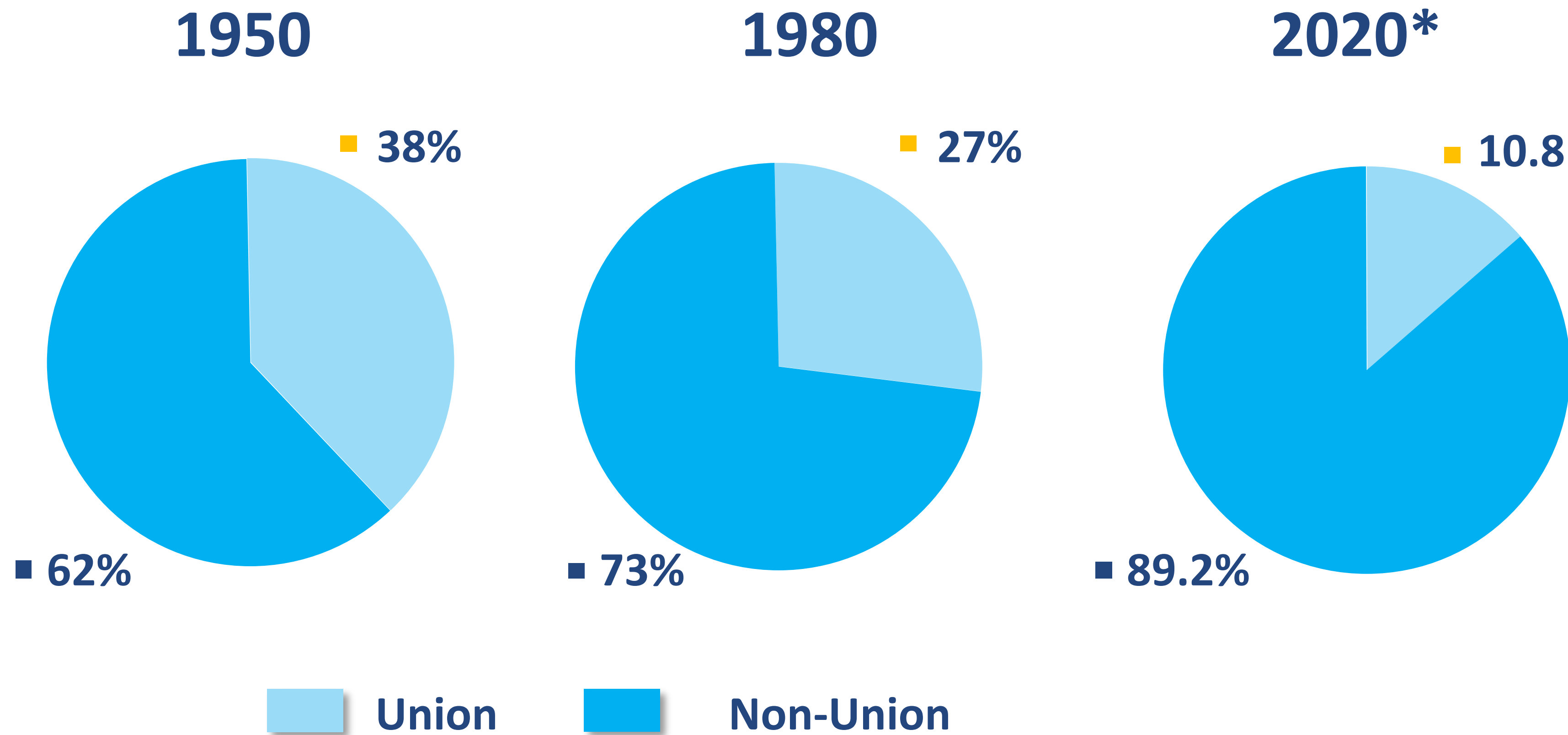
Pause on Reacting to General Counsel's Positions

- GC's positions are just that – advisory positions
- Agency does not have the resources to litigate everything
- NLRB, Courts of Appeal, and Congress are all checks

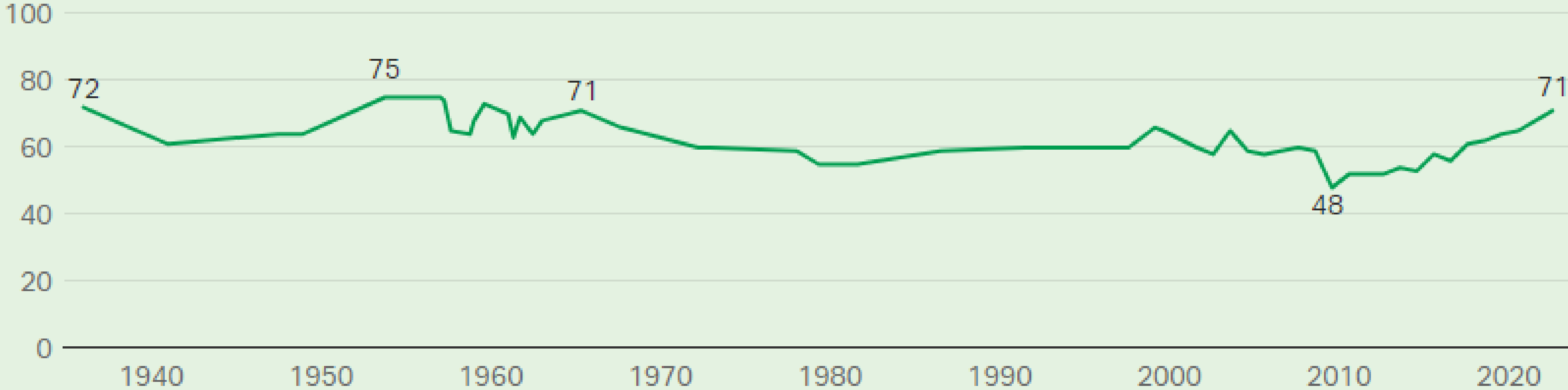
Organizing Trends

2

Rate of Unionization in the U.S.



Support for Labor Unions at Highest Level in Half a Century



Election Petitions Up 53%, Board Continues to Reduce Case Processing Time in FY22

Office of Public Affairs
202-273-1991
publicinfo@nlrb.gov
www.nlrb.gov

October 06, 2022

In Fiscal Year 2022 (October 1, 2021-September 30, 2022), 2,510 union representation petitions were filed with NLRB's 48 Field Offices—a 53% increase from the 1,638 petitions field in FY2021. This is the highest number of union representation petitions filed since FY2016.

Unfair labor practice (ULP) charges filed with NLRB Field Offices also increased 19%, from 15,082 charges in FY2021 to 17,988 charges in FY2022.

Accounting for both ULP and representation petitions, total case intake at the Field Offices increased 23%—from 16,720 cases in FY2021 to 20,498 cases in FY2022. This increase of 3,778 cases is the largest single-year increase since FY1976 and the largest percentage increase since FY1959.

Election Statistics

NLRB Fiscal Year 2022

1,363 Elections Held

76% Union Win Rate

Median Unit Size 23

Average Unit Size 55

Fertile Environment for Union Organizing

Many factors contribute to the flurry of union organizing

- Pandemic-related fears and uncertainty Safety concerns for front-line workers
- The Great Resignation
- Union alignment with social justice issues
- Younger generations' affiliation for movements and causes
- Inflation
- Biden Administration's pro-union stance
- Mail ballot election option

Protected Concerted Activity

3

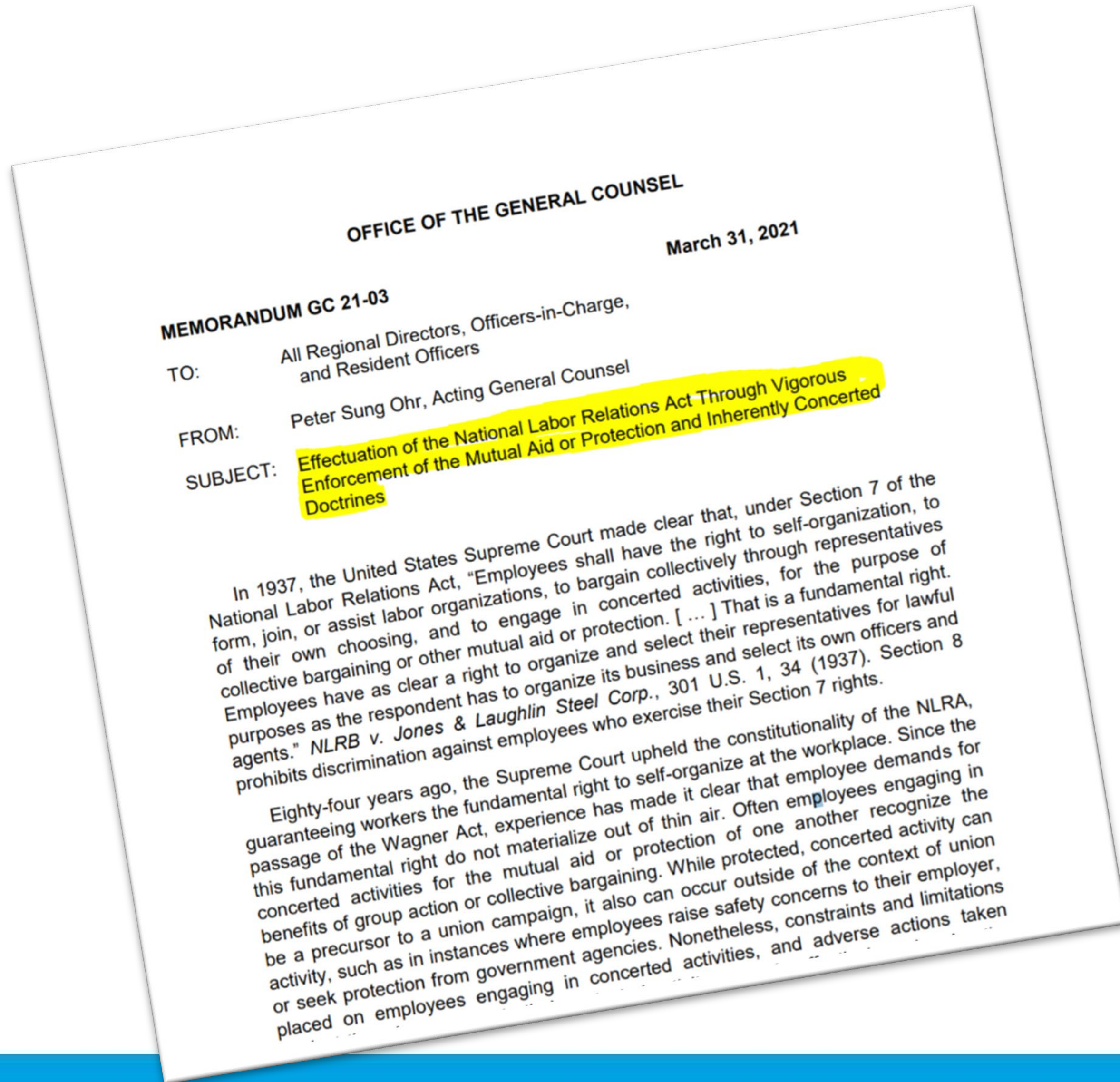
Review of Concerted Activity

- When two or more employees representing a group join together for common objectives; for example:
  - Wearing a button advocating a cause
  - Handing out union leaflets in the parking lot off the clock
  - Complaining about work policies
  - Making a statement that appears to attack the employer's reputation
  - Discussing salaries and pay rates, annual merit increases, bonuses and commissions, performance evaluation ratings, benefits, safety concerns, and other terms and conditions of employment

Protected Concerted Activity Does Not Include:

- Disparaging company products
- Sabotaging company equipment
- Threats of violence or harassment
- Revealing trade secrets
- Illegal activity
- Maliciously spreading lies or false information

Ohr Memo on “Vigorous Enforcement” of PCA



OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 21-03 — March 31, 2021

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Peter Sung Ohr, Acting General Counsel

SUBJECT: Effectuation of the National Labor Relations Act Through Vigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines

In 1937, the United States Supreme Court made clear that, under Section 7 of the National Labor Relations Act, “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection. […] That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents.” *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34 (1937). Section 8 prohibits discrimination against employees who exercise their Section 7 rights.

Eighty-four years ago, the Supreme Court upheld the constitutionality of the NLRA, guaranteeing workers the fundamental right to self-organize at the workplace. Since the passage of the Wagner Act, experience has made it clear that employee demands for this fundamental right do not materialize out of thin air. Often employees engaging in concerted activities for the mutual aid or protection of one another recognize the benefits of group action or collective bargaining. While protected, concerted activity can be a precursor to a union campaign, it also can occur outside of the context of union activity, such as in instances where employees raise safety concerns to their employer, or seek protection from government agencies. Nonetheless, constraints and limitations placed on employees engaging in concerted activities, and adverse actions taken

- Takes very expansive view of protected concerted activities
- Includes “political and social justice advocacy” even when activity is not explicitly connected to the workplace
- Example: “Solo” strike by a pizza shop employee to attend a “fight for $15” demonstration
- This memo and Ohr’s rescission of Boeing GC Memo signal return to Obama-era war on handbooks – preview for the *Stericycle* case slide.

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Notable NLRB Decisions 2023-2024

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Employers: Review your handbooks/workplace rules (and lower your employee-behavior expectations!)

Stericycle, Inc. (August 2023): Evaluating whether workplace rules infringe on Section 7 rights

- Rules must be narrowly tailored so they can't (arguably) infringe on any Section 7 rights
- Overturns a Trump Board 2-factor test that sought to balance an employer's legitimate interests in maintaining workplace rules with employee rights
- New standard: Work rule is "**presumptively unlawful" if it could be reasonably interpreted to have a coercive meaning** even if a non-coercive, reasonable interpretation also exists.
  - Will be evaluated from the "perspective of an employee who is subject to the rule and economically dependent on the employer." If the burden is met – the rule is presumptively unlawful
  - Employer can rebut the presumption by demonstrating that **the rule advances a legitimate business interest** and **that interest cannot be advanced with a more narrowly tailored rule.**

Independent Contractors: Do they really exist?

- NLRB overturned a 2019 test that focused on whether a worker had "entrepreneurial opportunity" and went to a common law multi-factor test that will inevitably lead to more workers being improperly classified as independent contractors.
- *Atlanta Opera (June 2023)* – overturned a Trump Board test and returned to a 2014 Obama Board test that focuses on whether the workers in question work **for separate, independent businesses.**
- Atlanta Opera wig artists, make-up artists and hair stylists sought to form a union. The Opera contested, claiming that those workers were independent contractors (and not employees) that were excluded from NLRA coverage.
- Applying the **Independent Business** test factors, the workers were deemed employees who were entitled to organize.
  - Extent of control by the employee
  - Whether the individual is engaged in a distinct occupation or business
  - Is the work usually done under the direction of the employer or a specialist without supervision
  - Skills required in the occupation
  - Whether the employer or individual supplies instrumentalities, supplies, tools, place of work
  - Length of assignment or employment
  - Method of payment
  - Is the work part of the business of the employer
  - What type of relationship do the parties believe to be creating
  - Does the evidence tend to show that the individual is, in fact, rendering services as an independent business

Employers: Be careful when you issue discipline!

- May 2023: *Lion Elastomers, LLC II* decision changed the standards relating to discipline or discharge of **workers who cross the line with offensive or abusive conduct while engaging in activity protected by the NLRA.**
- Reversed Trump Board's *General Motors LLC* decision and returned to **"various setting-specific"** standards for determining when discipline or discharge is lawful for employee misconduct that takes place **during otherwise protected concerted activity.**

Conduct must be evaluated in the context of that "important activity" and not as it it occurred in an average workday context

Employers: Be careful when you issue discipline!

Lion Elastomers LLC II revives a (confusing) older test to determine whether a relevant disciplinary action is a violation of the NLRA:

- **Employee conduct toward management in the workplace:**
  - The place of discussion
  - The subject matter of the discussion
  - Nature of the employee outburst
  - Whether the outburst was in any way provoked by an employer's unfair labor practice
- **Employee posts on social media and most workplace conversations**
  - Consider "totality of the circumstances" in light of all of the relevant surrounding conduct

Employers: Be prepared for “Quickie Elections”

- August 2023, Board issues new election rules and a decision overhauling the unionizing process.
- “Quickie election” rules (establishing tight timelines on hearing dates and elections) were first adopted during the Obama administration and rescinded during Trump administration.
- Board also adopted a new framework for when employers must recognize a union without an election.
  - Unions no longer be required to file for an election with the Board if they claim a majority of employees in the proposed bargaining unit want to be represented.
  - Employer failure to recognize a union, the NLRA would be violated unless the employer “promptly” files an RM petition with the Board requestion an election to test the union’s majority status or the appropriateness of the unit.
  - If the employer commits certain ULPs during that process, the Board will dismiss the petition without election and order the employer to recognize and bargain with the union.

Employers: No unilateral changes during bargaining (even with an expired contract)

- *Wendt Corporation* (August 2023) – overruled precedent that allowed employers leeway to make unilateral changes during contract negotiations if such changes were based on past practice.
- Board's decision: Restricts an employer's ability to use past practice as a defense to a ULP charge over such discretionary unilateral changes unless they are consistent with a long-standing practice and do not require significant discretion.
- **Employers can no longer rely on past practice for implementing unilateral changes to conduct authorized under an expired managements rights clause.**

Unlawful Provisions in Separation Agreements

- In *McLaren Macomb*, (February 2023) the NLRB overturned two decisions that had permitted employers to include confidentiality and non-disparagement provisions in severance agreements for non-management employees
- "Mere proffer" of a severance agreement that conditions receipt of benefits on the "forfeiture of statutory rights" violates NLRA
- Severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights
- Interpretive guidance issued in GC 23-05

Takeaways from *McLaren*

- Does not apply to agreements with executives, managers, supervisors, or independent contractors
- Will not void entire separation agreements, just the improper sections plus penalties
- Not all confidentiality and non-disparagement provisions violate the NLRA
- Revised approach to severance agreements depends on the employer's business objectives, culture, brand sensitivity, legal risk tolerance

Joint Employer Final Rule

STATUS TBD

73946 **Federal Register** / Vol. 88, No. 207 / Friday, October 27, 2023 / Rules and Regulations

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 103

RIN 3142–AA21

Standard for Determining Joint Employer Status

AGENCY: National Labor Relations Board.

ACTION: Final rule.

SUMMARY: The National Labor Relations Board has decided to issue this final rule for the purpose of carrying out the National Labor Relations Act (NLRA or Act) by rescinding and replacing the final rule entitled "Joint Employer Status Under the National Labor Relations Act," which was published on February 26, 2020, and took effect on April 27, 2020. The final rule establishes a new standard for determining whether two employers, as defined in the Act, are joint employers of particular employees within the meaning of the Act. The Board believes that this rule will more explicitly ground the joint-employer standard in established common-law agency principles and provide guidance to parties covered by the Act regarding their rights and responsibilities when more than one statutory employer possesses the authority to control or exercises the power to control particular employees' essential terms and conditions of employment. Under the

of an employer, *directly or indirectly*." 29 U.S.C. 152(2) (emphasis added). In turn, the Act provides that the "term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise . . . ." Id. 152(3). Section 7 of the Act provides that employees shall have the right

> to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and to refrain from any or all such activities.

Id. 157. Section 9(c) of the Act authorizes the Board to process a representation petition when employees wish to be represented for collective bargaining. Id. 159(c). And Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of its employees. Id. 158(a)(5).

The Act does not specifically address situations in which statutory employees are employed jointly by two or more statutory employers (*i.e.*, it is silent as to the definition of "joint employer"), but, as discussed below, the Board, with court approval, has long applied common-law agency principles to determine when one or more entities share or codetermine the essential terms and conditions of employment of a particular group of employees.

B. The Development of Joint

in *Greyhound*, the Board regarded the right to control employees' work and their terms and conditions of employment as determinative in analyzing whether entities were joint employers of particular employees. Board precedent from this time period generally did not require a showing that both putative joint employers actually or directly exercised control.[2] The

[2] See, e.g., *Globe Discount City*, 209 NLRB 213, 213–214 & fn. 3 (1974) (finding joint employer based on license agreements, without reference to any exercise of authority); *Lowery Trucking Co.*, 177 NLRB 13, 15 (1969) (finding joint employer based in part on unexercised right to reject other employer's employee), enfd. sub nom. *Ace-Alkire Freight Lines* v. *NLRB*, 431 F.2d 280 (8th Cir. 1970) (observing that "[w]hile [putative joint employer] never rejected a driver hired by [supplier], it had the right to do so"); *United Mercantile, Inc.*, 171 NLRB 830, 831–832 (1968) (finding joint employer based on license agreements, without reference to any exercise of authority); *Floyd Epperson*, 202 NLRB 23, 23 (1973) (finding joint employer based in part on indirect control over wages and discipline), enfd. 491 F.2d 1390 (6th Cir. 1974); *Buckeye Mart*, 165 NLRB 87, 88 (1967) (finding Buckeye joint employer of employees of Fir Shoe based solely on contractually reserved authority over, inter alia, discharge decisions and rules and regulations governing employee conduct), enfd. 405 F.2d 1211 (6th Cir. 1969); *Jewel Tea Co.*, 162 NLRB 508, 510 (1966) (finding joint employer based on contractually reserved, unexercised power to effectively control hire, discharge, wages, hours, terms, "and other conditions of employment" and observing: "That the licensor has not exercised such power is not material, for an operative legal predicated for establishing a joint-employer relationship is a reserved right in the licensor to exercise such control"); *Value Village*, 161 NLRB 603, 607 (1966) (finding joint employer based on operating agreement and observing "[s]ince the power to control is present by virtue of the

Joint Employer Final Rule – STATUS TBD

- The Board issued a Final Rule providing that an employer would be deemed a joint employer based on “indirect or reserved control” over at least one essential term of employment, even if it was never exercised.
- This Final Rule was in place until earlier this month, when a federal Court in Texas struck down the Final Rule on March 8, 2024. The Court held the Final Rule was beyond the common-law definition of “employment”.
- By doing so, the Final Rule enacted in 2020 goes back into effect – with the standard of joint employment requiring exercise of “substantial direct and immediate control”.

Also Notable: The Return of “Micro-Units”

- In *American Steel Construction* (December 2022) the NLRB Board modified the test used to determine **whether additional employees must be included in a petitioned-for unit to render it an appropriate bargaining unit**. (Returning to a 2011 unit determination standard of *Specialty Healthcare).*
- If a union’s petitioned-for bargaining unit consists of a **clearly identifiable group of employees who share a community of interest,** the Board will presume the unit is appropriate.
- **Burden is on the employer to show unit is *in*appropriate** by demonstrating that the excluded workers share an “**overwhelming community of interest”** with workers in the proposed unit
- Decision could lead to a rapid increase in micro-units – (gets a union in the door)

Notable - OSHA Issues Final Rule Allowing Employee Third-Party Representatives to Enter Workplace – Including Labor Unions

- March 29, 2024 DOL – OSHA released a final rule amending the OSH Act, clarifying who can serve as an employee representative to accompany the OSHA Officer during physical workplace inspections. The final rule broadens employees' rights to allow outside representatives – including labor union representatives – to join them during safety inspections.
- Rule is set to take effect May 31, 2024. Challenge are already filed in Federal Court – stay tuned.
- Concerns:
  - Nonunion facility
  - Confidential information
  - Others?

What's Next for the NLRB?

5

Supreme Court’s review of Chevron Deference

- Chevron: 1984 case, essentially states that where a statute’s language is vague, or its delegation of authority implicit, a reviewing court should defer to the relevant administrative agency’s interpretation of its governing statute as long as that interpretation is “reasonable”, and even if the court itself may take a different view.

Issues:

- Have administrative agencies taken advantage of their Congressionally intended roles?
- Agency experience is necessary for legislative “gap filling” – but at what point is it overreaching?
- Are Agencies legislating? Are courts “rubber stamping” because an Agency’s interpretation is reasonable?
- Some believe that the eventual decisions in Loper Bright and Relentless, Inc. (argued earlier this year) will constrain the application of *Chevron,* if not overrule it entirely.

Non-Compete Division among the NLRB

- General Counsel Abruzzo issued a Guidance Memo related to non-compete agreements and noted their reasonable tendency to "chill" employees' exercise of protective rights.
- The NLRB's Division of Advice issued a memo analyzing General Counsel's Abruzzo's interpretation of non-compete agreements and applied it to a recent Unfair Labor Practices charge involving a non-compete agreement. Ultimately, they found the non-compete agreement **did not** violation the NLRA.
- However, one Region at the same time announced a settlement with a medical spa in Ohio for $27,000 related to non-compete provisions alleged to be a violation of the NLRA.

Captive Audience Meetings

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 22-04

April 7, 2022

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: The Right to Refrain from Captive Audience and other Mandatory Meetings

In workplaces across America, employers routinely hold mandatory meetings in which employees are forced to listen to employer speech concerning the exercise of their statutory labor rights, especially during organizing campaigns. As I explain below, those meetings inherently involve an unlawful threat that employees will be disciplined or suffer other reprisals if they exercise their protected right not to listen to such speech. I believe that the NLRB case precedent, which has tolerated such meetings, is at odds with fundamental labor-law principles, our statutory language, and our congressional mandate. Based thereon, I plan to urge the Board to reconsider such precedent and find mandatory meetings of this sort unlawful.

Section 7 of the National Labor Relations Act promises employees the right to engage in—and to refrain from engaging in—a wide range of protected activities at work.[1] Section 8(a)(1) of the Act bars employers from interfering with employees' choice of whether and how to exercise those rights.[2] In carrying out its duty to ensure that employers do not unlawfully impair employee choice in that regard, the Board must keep in mind the basic "inequality of bargaining power" between individual employees and their employers, as well as employees' economic dependence on their employers.[3]

Abruzzo and Captive Audience Meetings

- Upon the start of her GC tenure, Abruzzo declared her intent to overturn Trump-era precedent, reassess long-standing agency doctrine, and actively enforce the NLRA based on her own experience and views.
- Issued a series of Memos – mandatory captive audience meetings violate Section 7. Such meetings must be voluntary.
- Associated Builders and Contractors of Michigan (ABC) sued the GC seeking declaratory and injunctive relief.
- August 1, 2023 – Federal Court ruled it had no jurisdiction over how the NLRB's GC investigated employers or decides whether to issue complaints against them.

MORE TO COME