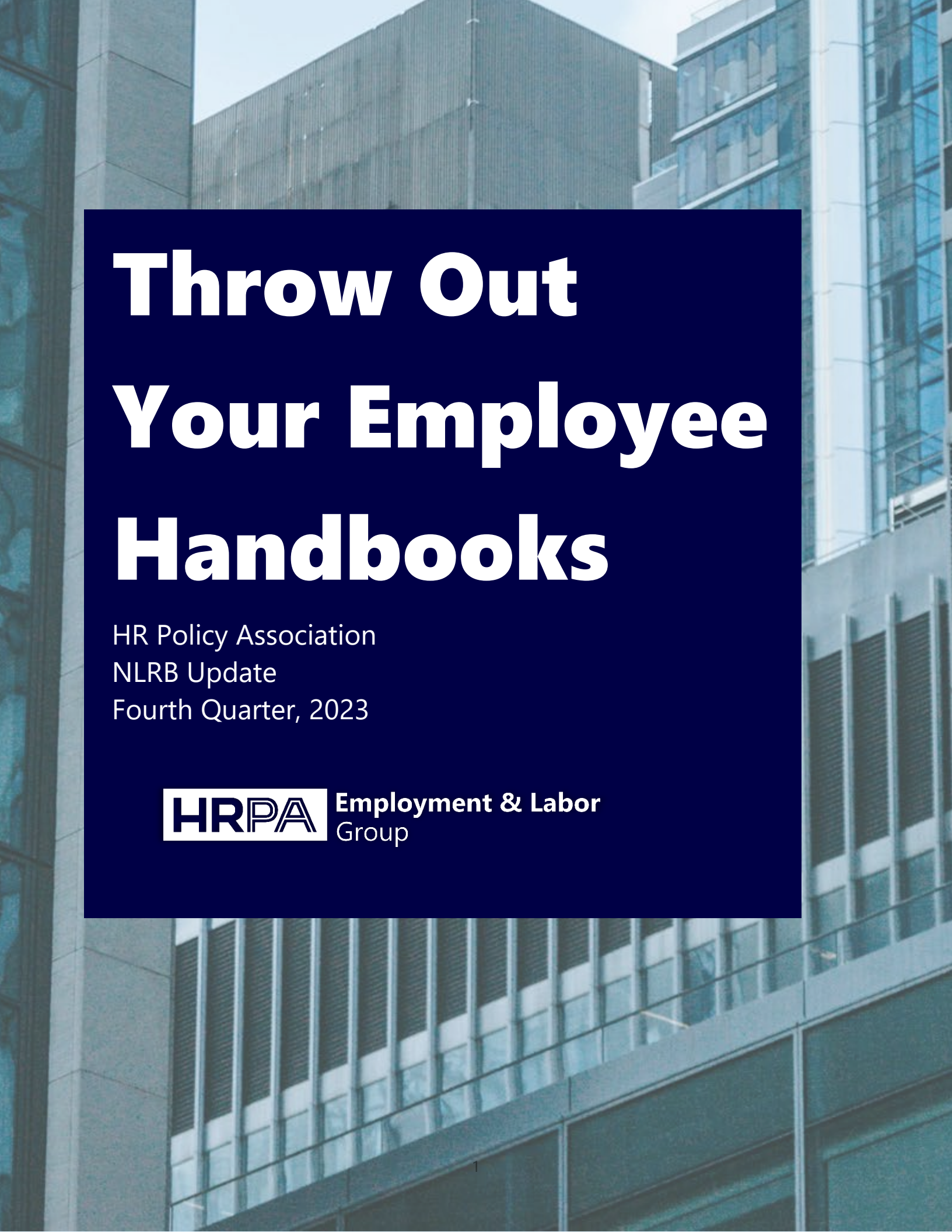

Throw Out Your Employee Handbooks

HR Policy Association
NLRB Update
Fourth Quarter, 2023

HRPA Employment & Labor Group

FOREWORD

Welcome to the eighth edition of the HR Policy Association's quarterly NLRB Report. Each report provides a comprehensive update of law and policy developments at the National Labor Relations Board, including significant decisions issued by the Board, cases to watch, Office of General Counsel initiatives, rulemakings, and an overview of HR Policy's engagement with the Board for that quarter. These reports also feature analysis on a specific issue or topic from a rotation of writers.

After decades of NLRB precedent were erased in a matter of weeks last quarter, the fourth quarter of 2023 appears rather tame by comparison. And while it is true that this quarter did not feature any major changes to the law like we saw last quarter, we did see several decisions providing us insight into how many of the Board's new policies will be applied moving forward. In other words, the chickens of Q3 2023 have come home to roost in Q4.

This was particularly true for workplace rules. Last quarter, the Board established a new framework for evaluating workplace rules (Stericycle), under which we predicted that the Board would return to being the employee handbook police. Sure enough, and as detailed below, this quarter was littered with decisions applying the new framework to invalidate countless employer workplace rules. Meanwhile, the Board finalized its controversially broad joint employer liability rule and began applying some of its other new policies as well.

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ISSUE SPOTLIGHT

Whiplash: Employers Face Yet Another New Joint Employment Standard

By Steven M. Bernstein, Todd A. Lyon, and Marilyn Higdon

By the time you're reading this, employers will be subject to a new joint employer rule that makes it easier for workers to be considered employees of more than one entity for labor relations purposes – or maybe not. And if the rule is once again delayed by a court order or an agency postponement, you'll still eventually be subject to the new rule at some point in the near future – unless you won't be. Confused? Join the club. Employers across the country are suffering from a severe case of whiplash when it comes to this shifting standard.

New Rule in a Nutshell

The National Labor Relations Board released a rule in October that establishes joint employment not only when one company has the right to exert control over terms and conditions of employment of another company's employees, but also when evidence exists of reserved, unexercised, or indirect control over any working conditions. This includes obvious situations like hiring and firing but also such other conditions as wages, benefits, scheduling, supervising, directing, and disciplining.

There is no mathematical precision when it comes to applying the new rule. Joint employer status will be determined on the totality of relevant facts in each particular employment setting. This means you will find it difficult to predict the outcome of any examination of such status. What is predictable, however: The new rule will no doubt result in increased union organizing and collective bargaining efforts across the country.

How Did We Get Here?

- For over 30 years, the NLRB had held that two companies would only be considered "joint employers" — equally responsible for certain labor and employment matters — if they shared or codetermined those matters governing the essential terms and conditions of employment, and actually exercised the right to control.
- In 2015, the Board renounced this decades-old test in the controversial Browning-Ferris decision, eliminating any requirement that the employer actually exercise direct control. Instead, the NLRB decided that businesses need only retain the contractual right to potentially control to be considered a joint employer — even if they had never exercised it. The decision stated that indirect control or the unexercised right to control was probative of joint-employer status, but, in application, led to these factors being considered determinative, without any evidence of actual, exercised control.
- In 2020, the NLRB switched things up again by issuing a rule saying an employer must possess and actually exercise substantial direct and immediate control

over the employees' essential terms and conditions of employment in a manner that is not sporadic and isolated in order to be found to be a joint employer. In the 2020 rule, the NLRB still considered indirect control or a reserved right to control relevant, but only to the extent they supplemented and reinforced evidence of the employers actual possession or exercise of direct and immediate control.

- The new rule once again returns us to a place where the standard will be broad, unwieldy, and difficult to manage.
- The rule had been slated to take effect in late February, but a federal court judge in Texas postponed the effective date until March 11 while he considers a request by business groups to block the rule entirely.
- As of the date of this article, the Texas lawsuit remained pending, which means that by the time you read this, the new rule may now be in effect. Or it may be delayed by a court order or a voluntary postponement from the agency facing pressure from lawmakers and business advocacy groups.

Where Do You Stand?

The seemingly perpetual pendulum swing we've endured has subjected employers to a great deal of uncertainty when it comes to engaging in long-term strategic planning. You probably feel on shaky ground when it comes to your exposure related to organizing activity, bargaining obligations, unfair labor practices, and general staffing decisions.

Regardless of whether the rule is in effect or on ice by the time you read this, you should follow some basic steps to best position yourself for the tumultuous times ahead:

- Scrutinize your written service agreements for any reservation of the right to control (both indirect and direct) and underlying practices for any exercise of indirect control and evaluate the risks of retaining that language or practice.
- Review your staffing company arrangements, independent contractor models, and franchise agreements with this new standard in mind.
- Train your managers so they understand the new standard and minimize the chances of inadvertent exposure through their exercise of indirect control over working conditions.
- Work closely with your labor counsel to develop a proactive strategy in light of the changes.

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SIGNIFICANT DECISIONS

Sun Holdings, Inc. and Florida Pop, LLC

Sun Holdings, Inc. and Florida Pop, LLC, 372 NLRB No. 150 (Oct. 3, 2023)

Issue: Restrictive Covenants, Confidentiality Agreements, Workplace Rules

Facts: The Employer, a food franchise, maintained two confidential information and nondisclosure rules in its employee handbook, as well as a rule prohibiting the use of personal electronic devices.

Specifically, the confidentiality rules defined "confidential information" as information gained by employees through working for the company that is not generally known to the public and is related to the business operations of the company. The rules required such information to be kept confidential during and after employment, and prohibited divulging the information to not only the public but co-workers as well. The Union filed a complaint with the Board alleging that all three rules were overly broad and unlawfully restricted employees' rights to protected concerted activity.

Decision: The Union and Employer subsequently entered into a settlement agreement through which the Employer admitted the three rules to be unlawful.

Significance: This case provides insight into the post-Stericycle, post-McLaren Macomb decisions landscape. In both of those decisions, the Board introduced new frameworks to more closely scrutinize confidentiality agreements and workplace rules/employee handbooks in general. As expected, in many cases since, the Board has in nearly every instance found a rule or provision to be unlawfully broad or restrictive, with the present case providing just one example. Under the Board's new approaches, it appears nearly impossible to craft confidentiality provisions or other workplace rules without incurring an unfair labor practice charge, and unions are responding accordingly. The only guidance the Board provides in this area is that employer rules, to be lawful, must advance a legitimate business interest and narrowly tailored towards that interest.

Starbucks Corp.

Starbucks Corp., 372 NLRB No. 159 (Nov. 28, 2023)

Issue: Captive Audience Meetings

Facts: A store manager of the Employer held a series of performance review meetings with individual employees. During some of these one-on-one meetings, the manager discussed a pending union campaign at the store, including describing potential consequences of unionization for employees (but not threats). In complaints before the Board regarding these meetings, the General Counsel alleged that they unlawfully restricted employees' rights because they forced employees to listen to anti-union presentations. The General Counsel also urged the Board to overrule prior precedent and hold that mandatory meetings regarding unionization issues ("captive audience" meetings) are unlawful per se. An ALJ dismissed the complaints, finding that the manager asked employees whether he could discuss the union campaign first before doing so, and so there were no "captive audience" meetings.

Decision: **(3-0)** The Board unanimously affirmed the ALJ's decision dismissing the complaints. The Board declined to rule on whether "captive audience" meetings are per se unlawful, instead finding that the meetings in question were not "captive audience" meetings. Further, Member Kaplan emphasized that because there were no allegations of unlawful statements being made during the meetings, even if such meetings were "captive audience," there was no basis for a violation.

Significance: General Counsel Abruzzo has been very outspoken to convince the Board to prohibit "captive audience" meetings since April 2022. The General Counsel has urged the Board in several pending cases to make it a per se unfair labor practice to hold mandatory meetings with employees that involve their workplace rights. The outcome here highlights a trend with the current Board: stopping short of embracing the General Counsel's more radical theories. Here, the Board simply punted on the issue entirely and found an outcome under existing law. Regardless, the Board could address the issue in a future case. Further, even where the Board has failed to fully embrace General Counsel Abruzzo's proposed changes, the more "moderate" approach eventually adopted by the Board could, in practice, prove just as radical *(see, e.g., Cemex)*.

Phillips 66 Co.

Phillips 66 Co., 373 NLRB No. 1 (Dec. 6 2023)

Issue: Workplace Rules

Facts: The Employer maintained a rule in its employee handbook that restricted the use of electronic devices to certain areas and for certain activities, as well as prohibited the use of cameras in most areas on the property. Employees could obtain a waiver from management for use of cameras/camera equipment for certain purposes. The employer maintained the rules for security purposes and to prevent dissemination of proprietary information. Two employees, without prior permission, took several photos through a cell phone in the Employer's parking lot over a dispute over improperly parked vehicles. The employees were disciplined for their actions and subsequently the Union filed unfair labor practice charges on their behalf.

The coworker was eventually terminated for continuously speaking out and levying allegations against the supervisor, and filed a complaint alleging that the Employer unlawfully terminated her for protected concerted activity (advocating on behalf of the employee, who at the time did not work for the Employer). An ALJ, relying on a Trump Board decision in *Amnesty International*, found that the activity was not protected by the NLRA because it was for the benefit of someone who was a nonemployee at the time.

Decision: **(3-0)** The Board affirmed the decision of the ALJ that the Employer unlawfully enforced the camera policies in a manner that restricted the employees' rights to protected concerted activity. The ALJ had also found that the Employer's maintenance of the rule itself was lawful under the Board's previous framework for evaluating workplace rules (Boeing). The Board declined to affirm this holding, instead remanding the case on this issue to be decided under the Board's new framework for evaluating workplace rules *(Stericycle).*

Significance: This decision provides an example (of which there have been many) of the Board applying *Stericylce* retroactively such that an employer's policy that was once lawful is reevaluated and later found unlawful (or likely to be, in this case). This scenario highlights two issues for employers with the NLRB: (1) the Board's penchant for policy flip-flopping, which results in the same employer actions being found lawful one year and unlawful the next, and (2) more specifically, the current Board's willingness to reopen old workplace rules cases to potentially find new violations under *Stericycle*.

Harbor Freight Tools USA, Inc.

Harbor Freight Tools USA, Inc., 373 NLRB No. 2 (Dec. 15, 2023)

Issue: Workplace Rules, Solicitation/Distribution on Employer Property

Facts: The Employer maintained a solicitation/distribution rule under which any and all solicitation activities were prohibited in work areas during working time. The rule explicitly allowed for such activities to be performed during non-working time and in non-work areas, but did not specify whether such activities were permitted during non-working time in work areas. The Employer also maintained a rule restricting the use of proprietary and confidential information. An ALJ found the solicitation/distribution rule to be unlawful because it failed to clarify that the ban did not extend to work areas during non-working time, but found the confidential information rule to be lawful under *Boeing* (the Board's old framework for evaluating workplace rules.

Decision: **(3-0)** The Board affirmed the ALJ's holding that the solicitation rule was unlawful, again because the rule failed to clarify that the ban did not extend to work areas during non-working time. Under current Board precedent, rules that do not allow for solicitation in work areas during non-work time are presumptively unlawful. The Board overturned the ALJ regarding the confidentiality rule, and instead remanded it back to the judge for evaluation under the Board's new *Stericylce* framework for evaluating workplace rules.

Significance: This decision highlights the need for employers to review all of their workplace policies, and especially their solicitation/distribution policies, with the objective of being as explicit as possible that such policies do not also prohibit such activities in work areas during non-working time. Although the policy in question here did not explicitly prohibit such activity, the Board still found it unlawful because it did not explicitly *permit* such activity (in their reading). Finally, the decision provides yet another example of the Board reopening consideration of workplace policies that were already found lawful under *Boeing*.

Flow Service Partners OP-CO, LLC

Flow Service Partners OP-CO, LLC, 373 NLRB No. 4 (Dec. 19, 2023)

Issue: Uniform Policies

Facts: Two employees wore union t-shirts instead of company t-shirts provided by the Employer at a job site. The Employer asked the employees to wear the company-branded clothing instead, although the Employer had no employee handbook with a written rule regarding uniform policy.

Decision: **(3-0)** The Board affirmed the decision of the ALJ and found that the Employer unlawfully instructed the employees to wear only company-branded clothing. The Board and ALJ noted Board precedent that gives employees the right to display union insignia in the workplace.

Significance: Simply put, under the current Board, employers are essentially prevented from maintaining and enforcing any sort of meaningful uniform policy absent establishing "special circumstances" for such policies. More specifically, employers are almost certain to be dinged by the current Board for making any attempt to restrict or prohibit the use of union clothing or insignia in the workplace. Courts of appeals, however, may not be inclined to agree with the Board on this issue, as evidenced by the recent Fifth Circuit decision in *Tesla*.

ExxonMobil Global Services Co.

ExxonMobil Global Services Co., 373 NLRB No. 5 (Dec. 22, 2023)

Issue: Workplace Rules, Confidentiality Rules

Facts: The Employer maintained a confidentiality policy that restricted the use or dissemination of certain company information. Specifically, the rule allegedly prevented employees from sharing information we each other regarding pension plans and other benefits. An administrative law judge found the policy to be unlawful under Boeing because it was overly broad and unjustifiably restricted employees' ability to discuss terms and conditions of employment with each other.

Decision: **(2-1, Member Kaplan dissenting)** A Board majority remanded the case back to the ALJ for evaluation under the Board's new *Stericycle* framework. Dissenting, Member Kaplan would not have remanded the case back, which he felt was unnecessary given that the rule was already found to be unlawful under *Boeing* and that there was no evidence to be presented.

Significance: Once again, the Board shows its eagerness to reopen already settled charges to find new violations – even here, where the employer's policy was already found to be unlawful under the more employer-friendly framework (*Boeing*).

MV Transportation, Inc.

MV Transportation, Inc., 373 NLRB No. 8 (Dec. 27, 2023)

Issue: Bargaining Unit Appropriateness

Facts: The Union filed a petition for certification of a unit of employees working at one of the Employer's facilities. The two parties eventually stipulated to a unit of all non-represented, hourly wage-earning employees in the operations and maintenance departments. The Union sought to include 6 more employees (maintenance supervisors) who were salaried and worked in positions not included in the unit. The Regional Director found that the 6 employees did not share enough of a community of interest with the unit employees to be included in the unit. Specifically, the RD found that the 6 employees only shared two community of interest factors (under the Board's community of interest test).

Decision: **(2-1, Member Kaplan dissenting)** A Board majority overturned the Regional Director and found that the 6 employees did share enough of a community of interest and should be included in the bargaining unit. Specifically, the Board found that the 6 employees shared multiple community of interest factors, including functional integration, contact, and departmental organization/supervision. The 6 employees shared a department with a small number of employees already in the unit (although not with the vast majority of unit employees). The Board majority, although acknowledging that many factors did not support a finding of a community of interest, such factors carried less weight. Dissenting, Member Kaplan would have affirmed the RD's decision, and expressed concern that the Board majority's formulation of the community of interest test would result in union petitioned-for units being nearly always approved.

Significance: After the Board announced a new (old Obama-era) test for determining bargaining unit appropriateness in 2022, the concern was that such test would amount to no more than rubber stamping units petitioned for by unions. That concern is a reality in this case, as in several other similar cases that have applied the Board's new test.

CASES TO WATCH

Starbucks Corp.

Starbucks Corp., No. 13-CA-306406 (Nov. 2, 2022)

Issue: Virtual Bargaining, Refusal to Bargain

Facts: The Employer and the Union scheduled and attended bargaining sessions in-person, but no substantive bargaining occurred because the Employer objected to the Union's insistence that additional members of the bargaining team observe the meetings virtually. Board prosecutors dismissed complaints filed by the Employer alleging the Union was refusing to bargain by insisting on some members being able to participate virtually, ruling that the Union's request was not unreasonable. If the Employer does not settle the case in light of the dismissal, Board prosecutors will file suit against the Employer for refusing to bargain by refusing the Union's request for some members to bargain virtually.

Where will the Board go? Board precedent holds that unions and employers fail in their duty to bargain if they fail to meet with either party at reasonable times and places. It also held that parties generally have wide latitude to choose who they wish to bring to the bargaining table. The question of how this precedent applies to so-called "hybrid" bargaining, or bargaining in which some members of a party are present while others participate virtually, and whether a party can refuse such arrangements, is novel – the Board to date has not ruled directly on this issue. Should the Employer refuse to settle and the case goes before the Board, given its current composition, it is more likely than not that that the Board would establish that refusing to bargain virtually is an unlawful refusal to bargain.

Significance: A Board decision on this issue could establish the right for either a Union or Employer to insist on bargaining virtually, either in whole or part and thus permit virtually any employee or third party to attend bargaining sessions. Such a decision could significantly impact the way negotiations are conducted, and could potentially be more easily made public.

ArrMaz Products, Inc.

ArrMaz Products, Inc., 372 NLRB No. 12 (Dec. 6, 2022)

Issue: Remedies for Refusal to Bargain

Facts: The Employer unlawfully refused to bargain with the Union. The Board's General Counsel asked the Board to impose monetary damages on the Employer and require the Employer to pay employees the wages and benefits they could have earned if the Employer had not unlawfully refused to bargain. In issuing its decision finding the Employer to have unlawfully refused to bargain, the Board severed consideration of the General Counsel's suggested remedy for a future decision.

The Board has traditionally refused to award monetary relief in refusal to bargain cases, as established in 1970 in Ex-Cell-O Corp., which held that such damages would be too speculative and would amount to a compelling contractual agreement in contravention of Section 8(d) of the NRLA. Accordingly, in refusal to bargain cases, remedies have been limited to orders to bargain in good faith and notice posting.

Where will the Board go? The present case, along with several others the Board has teed up for similar consideration, provides the Board with the opportunity to overturn *Ex-Cell-O Corp*. and impose monetary damages on employers who have unlawfully refused to bargain, and essentially write the terms of the collective bargaining agreement. The Board's recent decision in *Thryv, Inc*. (discussed in detail above) already expands the available remedies the Board can impose and seemingly indicates that it would be open to doing so again for refusal to bargain cases.

Significance: Should the Board go the route desired by General Counsel Abruzzo, employers could potentially be liable for significant monetary damages in refusal to bargain cases. Further, determining where such damages begin and end, and imposing certain contractual terms on the parties, is often likely to be fairly speculative, and will itself often result in separate litigation.

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.

Preferred Building Services

Preferred Building Services, No. 20-CA-149353 (April 1, 2015)

Issue: Secondary Boycotts/Picketing

Facts: The Employer provided janitorial services to various commercial buildings. Employees of the employer were tasked with cleaning an office building. After disputes regarding their terms and conditions of employment arose, the employees picketed in front of the office building. The Employer subsequently fired the employees, which the Union alleged was an unfair labor practice. The Board held that the terminations were lawful because the employees were engaged in secondary picketing which is prohibited by the NLRA. The Ninth Circuit court disagreed, finding that the employees made it clear that they were protesting the Employer and not the office building at which they were picketing. On remand to the Board, General Counsel Abruzzo is asking the Board to overrule precedent and establish that secondary boycotts and picketing is presumptively lawful, shifting the burden of proof to employers to show that they are unlawful.

Where will the Board go? Prohibitions on secondary boycotting are clearly spelled out in the NLRA, and Board precedent established under Moore Dry Dock has long held that the burden of proof rests on unions or employees to prove that activity is not unlawfully secondary in nature. It would therefore be a substantial change to federal labor law should the Board go in the direction asked for by General Abruzzo.

Significance: Should the Board go with General Counsel Abruzzo's preferred approach, employers may be drawn in to labor disputes of which they have no direct part. Employers may face boycotts of their own business based on their third party business relationships, or picketing and protests on their own property regarding disputes that they have no part of.

Garten Trucking LC

Garten Trucking LC, No. 10-CA-279843 (Jul. 14, 2021)

Issue: Union Access to Employer Property

Facts: The Employer terminated three employees for violating the Employer's solicitation and distribution policy by soliciting for support for the Union while on working time. An ALJ found both the terminations and the Employer's policy unlawful. On appeal to the Board, the General Counsel is arguing for the Board to overrule Trump Board decisions in UPMC and Kroger which collectively limited union access to employer property. Specifically, the decisions allowed employers to restrict solicitation and distribution on company property provided any such policy is enforced in a nondiscriminatory fashion. The General Counsel is urging the Board to establish a new standard under which union organizers may access employer property that is open to the public provided they are not disruptive.

Where will the Board go? The Board is likely to overrule UPMC and Kroger and expand third party access to employer public property. Current Board Chair McFerran dissented in both of the above cases. The Board will likely restore prior precedent that allowed union organizers access to employer public property provided they did not disrupt employer operations.

Significance: UPMC and Kroger had empowered employers to limit union access to their property. Should the Board move to erase both precedents, employers will have their hands tied when it comes to dealing with union access to their public spaces.

RULEMAKINGS

Joint Employer Status and Liability

As outlined earlier in our guest article, in October, the Board issued its final rule on the standard for determining joint employer status under the NLRA. The final rule establishes that a company may be a joint employer if it shares or codetermines one or more essential terms and conditions of employment of the employees of a third party with which it does business. Such terms are defined exclusively as:

- Wages, benefits, and other compensation;
- Hours of work and scheduling;
- The assignment of duties to be performed;
- The supervision of the performance of duties;
- Work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
- The tenure of employment, including hiring and discharge; and
- Working conditions related to the safety and health of employees.

Notably, per the rule, a company does not need to exercise control over any of the above terms and conditions, nor does such control need to be direct, for a joint employment relationship to exist. Essentially, as long as a company could have some semblance of control over one or more of the above conditions, they could be considered a joint employer under the new rule. A federal judge stayed the effective date of the rule to March 11, 2024.

Significance: The rule would create an unprecedently broad standard for joint employer liability. 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.

OFFICE OF GENERAL COUNSEL INITIATIVES

Interagency Enforcement Collaboration

We previously saw the Office of the General Counsel announce efforts to strengthen interagency enforcement coordination between the Board, the EEOC, the Department of Labor's Wage and Hour Division, OSHA, OFCCP, the FTC, the DOJ, and the CFPB, as reported in previous installments of our NLRB Quarterly Report. This quarter, General Counsel Abruzzo established yet another new interagency partnership, this time with the Occupational Safety and Health Administration. Like the others, the partnership is centered on enhanced enforcement coordination and information sharing, and will be focused on the intersection between workplace safety and employee rights under the NLRA. One specific facet of the collaboration will involve the NLRB training OSHA inspectors to spot potential unfair labor practices.

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, represent General Counsel Abruzzo's commitment to the Biden administration's "all of government" approach to labor and employment regulation. This particular relationship is made more concerning given a recently proposed rule from OSHA that would allow unlimited union representatives to accompany OSHA inspectors on site visits – the OSHA "walkaround" rule. Given this official collaboration between the NLRB and OSHA, that proposed rule is clearly an effort to increase union access to employer property in the guise of workplace safety and no doubt will increase union organizing opportunities and workplace safety unfair labor practice allegations.