TEAR-DOWNS, FIXER-UPPERS, AND RESTORATIONS

2020 Private Labor Law Update

PRIVATE SECTOR LABOR LAW AND REGULATORS CHANGE WITH ADMINISTRATIONS IN THE OTHER WASHINGTON

Public sector workers, their unions, and their employers are governed by state law and regulators. Airline and railway workers are covered by the Railway Labor Act, administered by the National Mediation Board, headed by three members who are President-nominated and Senate-approved.

But most others private sector employers, workers, and their unions are subject to the federal National Labor Relations Act ("the Act"), which in many situations preempts state regulation of private sector workplaces. There are exceptions to preemption, where state law can apply:

- Examples: trespass, property destruction and assault by unions and strikers

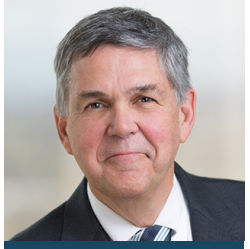
But for the most part, the balance between unions and management is struck in the other Washington by the National Labor Relations Board ("the Board"), a body of President-appointed, Senate-approved members which enforces the Act primarily by deciding cases.

D.C. is also home to the Office of the General Counsel (GC), a Board-independent prosecutor of unfair labor practice complaints, who serves a four-year term and is also President-nominated and Senate-confirmed.

Let's begin with the big news of 2020—the Trump Board and its roll-back of Obama Board labor-leaning rules—and the equally big news that the rebalancing may not long survive a new Biden Board and GC.

The 2020 Trump Board

The the Board has slots for five members, each appointed by the President to a five-year term with Senate consent. Their terms are staggered; one member's term expires each year. Traditionally, three Board seats are held by members from the President's party and two by members of the opposition party.



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On July 29, the Senate confirmed two nominees, Republican member Marvin Kaplan, whose term would have expired this past August and will now expire in August 2025, and Lauren McFerran (an Obama Board member), whose term expired in December 2019 and who is now rejoining the Board as its only Democrat. Two other Republican members—William Emanuel and Chairman John Ring—were appointed by President Trump in 2017 and 2018; their terms will expire in 2021 and 2022. The second "Democrat" seat is open—for now.

It has been no surprise that the Trump Board's case rulings and regulations steered labor law into a U-turn, returning to pre-Obama rules and rulings. But with this fall's election results, expect another about-face, at least back to the Obama years and maybe even more labor-leaning. Subject to Senate confirmation, President-Elect Biden will be able to nominate a new Board General Counsel, fill the existing open Democrat

seat on the Board; and create a Democrat majority after Republican member Republican member Emanuel's term expires in August 2021.

KEY TAKEAWAY: Employers, don't push it. It's not a safe bet to count on pro-employer rulings by the Trump Board. Today's conduct will be judged by an Obama-like Board later.

BOARD RULINGS TAKE A RIGHT TURN

In ***Caesar's Entm't***, 368 N.L.R.B. No. 143 (2019), the Board majority overruled *Purple Communications*, holding that employers generally have the right to impose **nondiscriminatory** restrictions (including outright bans) on the use of employer-owned IT systems for nonwork purposes, reinstating the Board's decision in *Register Guard*, 351 N.L.R.B. 1110 (2007). The ruling allows employers to generally prohibit nonwork use of company e mail, while creating an exception where e-mail is the only reasonable means for employees to communicate with each other during the workday.

KEY TAKEAWAY: If you have such a rule, be sure it applies to **all** nonwork communicating.

Apogee Retail LLC, 368 N.L.R.B. No. 144 (2019) (Member McFerran dissenting), loosened the restrictions on employer-required confidentiality in workplace investigations, concluding that the employer lawfully maintained rules requiring employees to observe confidentiality and prohibiting unauthorized discussions about ongoing workplace investigations into illegal or unethical conduct. But because the confidentiality rule at issue was not on its face limited to the duration of the investigation, the case was remanded to weigh whether continuing confidentiality after an investigation is over would be justified.

Previously, under *Banner Estrella Med. Ctr.*, 362 N.L.R.B. 1108 (2015), an employer had to make a case-by-case determination whether confidentiality could be required in a specific investigation. Instead, the Board now applies the test for facially neutral workplace rules established in *Boeing Co.*, 365 N.L.R.B. No. 154 (2017), finding such confidentiality rules generally to be lawful. The *Banner* approach is now critcized for improperly placing the burden on the employer to determine, case-by-case, whether its interests in preserving the integrity of an investigation outweigh employee rights; for failing to consider the importance of confidentiality assurances given to employees during an ongoing investigation; and as inconsistent with other federal guidance, including from the U.S. Equal Employment Opportunity Commission regulations requiring an employer to provide confidentiality assurances throughout sensitive discrimination investigations.

KEY TAKEAWAY: Blanket confidentiality rules during ongoing investigations are permissible for now.

Valley Hosp. Med. Ctr., Inc., 368 N.L.R.B. No. 139 (2019), overruling *Lincoln Lutheran* (a 2015 case), returned to the rule of *Bethlehem Steel* that an employer's dues checkoff obligation ends when the collective bargaining agreement (CBA) creating that obligation expires.

Valley Hospital had stopped checking off and remitting employees' union dues after its CBA expired. For over half a century, this unilateral action would have been lawful under Board precedent beginning with *Bethlehem Steel Co.*, 136 N.L.R.B. 1500 (1962), which had held that an employer's statutory obligation to check off union dues ends when its CBA containing the checkoff provision expires. However, an Obama Board majority overruled *Bethlehem Steel* in *Lincoln Lutheran of Racine*, 362 N.L.R.B. 1655 (2015), holding that an employer's statutory obligation to check off union dues would continue to be enforceable after expiration of the CBA that established the checkoff arrangement.

In *Valley Hospital*, the Board overruled *Lincoln Lutheran* and returned to the position that a dues-checkoff provision is one of the few mandatory bargaining subjects that are exclusively created by the contract and are enforceable through Section 8(a)(5) of the National Labor Relations Act (the Act), which prohibits an employer from breaching a CBA, only for the duration of the contractual obligation created by the parties.

KEY TAKEAWAY: While this is good news for employers, expect another U-turn when there is a Democrat majority.

Everglades Coll., Inc., 368 N.L.R.B. No. 123 (2019), holds that whether a mandatory arbitration policy for all workplace disputes is permissible turns on whether the policy would be read by employees to preclude access to the Board. A number of later cases, including *Bloomingdales, Inc.*, 369 N.L.R.B. No. 8 (2020), discuss where the line is

likely to be drawn. In *Bloomingdales*, on remand from the Ninth Circuit, the Board dismissed a complaint alleging that Bloomingdales violated Section 8(a)(1) of the Act by maintaining and enforcing mandatory arbitration agreements that reasonable employees would read as restricting their access to the Board to remedy violations of the Act. Instead, this Board concluded that the clear express exclusion, in the plan document, of claims under the Act from the arbitration policy meant employees could not reasonably interpret the policy to bar or restrict their access to the Board, and that the summary brochure and acknowledgement form in the same packet, although not containing the exclusion itself, were also lawful because they made clear that the exclusion in the plan document controls.

KEY TAKEAWAY: If you have a mandatory arbitration requirement, examine it to be sure it is clear that access to Board processes is outside the mandate.

800 River Rd. Operating Co., LLC, 369 N.L.R.B. No. 109 (2020), overruling *Total Sec. Mgmt. Ill.* 1, LLC, 364 N.L.R.B. No. 106 (2016), holds that in a new collective-bargaining relationship, there is no obligation to notify or bargain with the union before imposing discipline. The Board returned to long-standing law establishing that, upon commencement of a collective-bargaining relationship, employers are not obliged to bargain prior to disciplining bargaining unit employees in accordance with an established disciplinary policy or practice, in this case, a preexisting disciplinary policy that included the use of discretion.

KEY TAKEAWAY: Until there is a CBA, employers can discipline and discharge as they did prior to the union's arrival.

General Motors LLC, 369 N.L.R.B. No. 127 (2020), abandoned the Board's permissive "animal exuberance" concept, which allowed too much leeway for impulsive behavior in evaluating when abusive employee conduct—such as profane ad hominem attacks or racially offensive speech—loses its protection under Section 7 of the Act.

The Board recognized that abusive conduct can be separated from heated but privileged Section 7 activity giving rise to it. In judging whether discipline was motivated by Section 7 activity or by the abusive conduct, causation is at issue, and *Wright Line* is the proper causation test. Under *Wright Line*, 251 N.L.R.B. 1083 (1980),the General Counsel has the initial burden to show that the Section 7 activity was a motivating factor for the discipline, and, only if he does, the burden shifts to the employer to prove it would have imposed the same discipline even in the absence of Section 7 activity. Consequently, as was not always clear under the prior standards, an employer may lawfully discipline an employee for abusive conduct either if it is unmotivated by Section 7 activity or if it would have issued the same discipline even in the absence of Section 7 activity.

KEY TAKEAWAY: While this is good news for employers, expect another U-turn when there is a Democrat majority.

Wal-Mart Stores, Inc., 368 N.L.R.B. No. 146 (2019), is the Board's latest pronouncement on latest pronouncement on wearing union buttons in the workplace. The Board adopted the ALJ's conclusion that Wal-Mart's content-neutral rules allowing employees to wear only "small" and "non-distracting" union logos or graphics violated Section 8(a)(1) of the Act as it was applied to **areas away from the selling floor**; however, a Board majority reversed the ALJ's conclusion that the dress code was unlawful as it applied to wearing union buttons on **the selling floor**. In doing so, the majority applied its test for examining facially neutral employer policies set forth in Boeing. The majority explained that limitations on the display of union insignia short of outright prohibitions will vary in the extent to which they serve legitimate employer interests and the degree to which they interfere with Section 7 rights; thus, they will "warrant individualized scrutiny in each case," balancing the extent of interference against the employer's business justifications.

Applying *Boeing* to the maintenance of the rules **on the selling floor**, the majority found that the policies—when reasonably interpreted—would potentially interfere with employees' Section 7 right to display *some* union insignia, but the interference was deemed relatively minor and outweighed by Wal-Mart's legitimate justification for maintaining the policies—to enhance the customer shopping experience.

Dissenting and citing *Republic Aviation Corp.*, 324 U.S. 793, 65 S. Ct. 982, 89 L. Ed. 1372 (1945), Member McFerran argued that the majority impermissibly applied *Boeing* instead of the Board's long-standing "special circumstances"

test. By applying *Boeing*, she argued, the majority's approach abandoned the traditional presumption that any limitation on the display of union insignia is unlawful, instead, requiring the General Counsel to first prove that Section 7 rights have been adversely affected. She also argued that, as a result, the majority treats the display of union insignia as a privilege to be granted on whatever terms the employer chooses, rather than as an essential Section 7 right that requires accommodation.

KEY TAKEAWAY: Examine your dress code to be sure it complies with this new standard.

In several other rulings this year, the Board likewise has taken a more pro-employer stance. Work rules examples:

- An employer's social media rule requiring civility when workers publicly criticize their employer was upheld. *Bemis Co., Inc.*, 370 N.L.R.B. No. 7 (2020).
- A rule prohibiting employees from disclosing "confidential information" was upheld where employees reading the rule would reasonably understand that it did not prohibit them from exchanging information about their "terms and conditions of employment." The rule could not, however, be lawfully applied to prohibit sharing of information about terms and conditions of employment contained in an employee handbook. *Motor City Pawn Brokers, Inc.*, 369 N.L.R.B. No. 132 (2020).
- Also upheld was *Motor City*'s rule prohibiting employees from disparaging the company "regardless of whether [the statements] may be true," because the rule lawfully prohibited employees from making false, damaging statements about the company.
- In *Argos USA LLC*, 369 N.L.R.B. No. 26 (2020), the Board found that an employer operating ready-mix concrete facilities in Naples, Florida, could lawfully prohibit cell phones in heavy-duty trucks because the safety risks of distracted driving of a 70,000-pound concrete truck outweighed the communication rights of employees with other ways and times to discuss terms and conditions of employment. In this commonsense ruling, the Board reasoned that employees are not guaranteed the right to use every method of communication available to them for such discussions.

The Board also doubled-down in *Argos* on its December 2019 decision in *Caesar's*, discussed above, this Board backed away from more permissive precedent allowing employees to use company e mail to solicit coworkers for union organizing while not on working time. In subsequent cases, including *Argos*, the Board has continued to apply its *Caesar's Entertainment* doctrine that employers can prohibit nonbusiness use of company e mail unless the policy as applied discriminates against union organizing (or other protected employee conversations) or is the only reasonable means for employees to communicate with each other. **But beware:** these new employer- friendly rules have been applied retroactively to conduct occurring long before the change in Board policy. So what's to stop a Biden Board from doing the same thing, reverting to prior doctrine?

KEY TAKEAWAY: Expect a Biden Board to more aggressively protect workers' rights to use company e mail to communicate with each other. So, employers, before enforcing business-only email rules, it's best to take the then-current Board's temperature first, and confirm your business-only rules are not otherwise ignored, enforced only for Section 7 protected communications.

WHERE'S THE FIRE? A TEAR-DOWN OR REMODEL OF THE OBAMA-ERA QUICKIE ELECTION RULES?

At the end of last year, the Board announced its new rules—to take effect May 31, 2020—slowing down the race to union election day that the Obama Board started with its 2014 "quickie election" rules. The Obama Board's rocket schedule had been highly criticized by employers as a rush that would keep workers who vote yay or nay from getting enough input from their employers to make an informed, cool-headed decision for or against a union, and for preventing employers from litigating important determinations—like who are eligible voters and what is the scope of the bargaining unit—before the vote is taken.

The Trump Board's changes are not a total tear-down of the fast-track rules, but they do slow down the rush in important ways, extending the time between when a union files a petition seeking an election and when the vote is taken, plus restoring the opportunity to determine issues like voter eligibility before the vote, not just in post-election challenges.

But an order from a federal court on May 30, 2020—the day before the new what's-the-rush rules were to take effect—threw out some of the important changes, namely, the reinstitution of pre-election hearings on voter eligibility and the timing of the election. A day later—June 1—the Board announced that it would implement, effective immediately, the parts of its new rules that were not vacated by the judge.

A copy of the Board's June 1, 2020, announcement, identifying the rules that were and were not vacated by the court, and stating that it intended to appeal the court's ruling, is appended to these materials. **Stayed tuned.**

KEY TAKEAWAY: For now, more time is allowed for employers to respond to union organizing campaigns.

EMPLOYEE "FREE CHOICE" UNION ELECTIONS

The Board has finalized a series of amendments to Part 103 of its Rules and Regulations to better protect employees' right of free choice on questions concerning union representation. The amendments went into effect on July 31, 2020. Here are two that don't apply just to the construction industry.

- **Blocking charge policy.** This amendment replaces the current blocking charge policy with either a vote-and-count or a vote-and-impound procedure. Elections (importantly, employees' decertification elections to oust an unwanted union) would no longer be blocked by pending unfair labor practice charges. The election would go ahead, but the ballots would be impounded until the charges are resolved. The certification of results will not issue until there is a final disposition of the charge and its effect, if any, on the election petition.
- **Voluntary recognition bar.** This amendment restores the rule of *Dana Corp.*, 351 N.L.R.B. 434 (2007). For voluntary recognition under Section 9(a) of the Act to bar a subsequent representation petition—and for a post-recognition CBA to have contract-bar effect—unit employees must receive notice that voluntary recognition has been granted and be given a 45-day period within which to file an election petition. The amendment applies to a voluntary recognition on or after the effective date of the rule.

KEY TAKEAWAY: Be sure that employees are made aware when voluntary recognition has been granted and the 45-day filing opportunity starts running.

"JOINT EMPLOYMENT" STANDARDS UNDER THE ACT: *BROWNING-FERRIS* REVERSED

In *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. 1599 (2015), the Board's three Democrat members overturned 30 years of precedent to create more permissive standards for determining when two entities are "joint employers" of a single workforce for purposes of the Act. Under the 2015 rule, if the owner of a plant or office building hires a cleaning and maintenance contractor to do the janitorial work instead of using its own employees, the owner-customer and the janitorial company are "joint employers" of the janitors if the customer has a right under its contract with the maintenance company to control their work, even though it never exercises that control.

As a result, the customer would face potential liability for unfair labor practices and breaches by a maintenance contractor of that contractor's CBA, without the customer ever supervising or directing the outsourced work or the maintenance workers, or controlling how they were treated by their own employer, and could be subjected to what had traditionally been unlawful secondary strikes, boycotts, and picketing.

With the addition of two new Trump-appointed members, the Board reversed the *Browning-Ferris* rule in February of this year, reinstating the long-standing rule that two separate entities are joint employers only if they in fact share meaningfully in hiring, firing, disciplining, supervising, and/or directing the contractor's employees.

FAIR LABOR STANDARDS ACT "JOINT EMPLOYMENT" STANDARDS: U.S. DEPARTMENT OF LABOR (THE DOL) NAILS IT, BUT A FEDERAL JUDGE HAS THE HAMMER

Like the Board did as a quasi-judicial body in reversing *Browning-Ferris*, earlier this year, the DOL published regulations retreating from the permissive standards under prior administrations that had made it easier to find "joint employment" where one company (for example, the owner of a manufacturing plant who outsourced the janitorial work to a contractor) has some authority

under its contract to supervise and control the employees of the contractor.

The new regulations dispense with reliance on unexercised contractual authority to hire or fire the contractor's employees or supervise their work, instead relying now on whether these controls were actually exercised to any substantial degree.

The new regulations make sense, don't they? But not to a federal judge in New York who vacated the new standards in September, finding that the DOL did not adequately justify departure from the existing broad definitions of who is an "employer."

PUBLIC SECTOR COLLECTIVE BARGAINING

Public-sector bargaining is governed by state statutes, including Washington State, the Public Employers' Collective Bargaining Act, and by decisions of the Public Employment Relations Committee (PERC), which functions like the Board in regulating private-sector employers governed by the Act. *Lincoln Cty. v. PERC and Teamsters Local 690*, No. 37054-2-III (Wash. Ct. App. 2020) recently considered a county resolution requiring collective bargaining to be conducted in public, on the stated grounds that by making collective bargaining transparent, voters would be more likely to pass a tax increase. The Teamsters disagreed with holding bargaining sessions in public. This disagreement was deemed to be over a "permissive" subject of bargaining about negotiation ground rules. Each party in this case refused to bargain on mandatory subjects of bargaining, unless the other acquiesced on the permissive subject of bargaining in public or private. PERC concluded that both parties committed unfair labor practices by refusing to negotiate mandatory subjects of bargaining unless they first agreed on whether the sessions would be private or public, because while parties can negotiate about permissive subjects, they don't have to.

KEY TAKEAWAY: Private-sector employers at the bargaining table should expect the same rules to apply to negotiations governed by the Act.

NLRB to Implement All Election Rule Changes Unaffected by Court Ruling

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WASHINGTON, DC – The National Labor Relations Board today announced that it will implement in full all of the rule changes unaffected by the recent U.S. District Court order. The order was issued on May 30, 2020 regarding implementation of certain provisions of the Board's December 2019 Representation Procedures amendments.

While the Court's order prevents the Board from implementing five provisions of the December 2019 amendments, the Court did not vacate the majority of the rule. Accordingly, pursuant to the Court's order, the Board has directed the amendments unaffected by the Court's order to remain in place as of yesterday's effective date, consistent with the National Labor Relations Act and the Administrative Procedure Act.

The Court's Order granted summary judgment as to Count One of the complaint, which challenged the following five provisions contained in the December 2019 amendments:

- Reinstitution of pre-election hearings for litigating eligibility issues;
- Timing of the date of election;
- Voter list timing;
- Election observer eligibility; and
- Timing of Regional Director certification of representatives.

The remaining provisions are effective immediately, pursuant to the rule's May 31 effective date. These include:

- Scheduling the hearing at least 14 days from issuance of the notice of hearing;
- Posting the notice of election within 5 days instead of 2 days;
- Changes in timeline for serving the non-petitioning party's statement of position;
- Requiring petitioner to serve a responsive statement of position;
- Reinstatement of Post-Hearing Briefs;
- Reinstating Regional Director discretion on the timing of a notice of election after the direction of an election;
- Ballot impoundment procedures when a request for review is pending;
- Prohibition on bifurcated requests for review;
- Certain changes in formatting for pleadings and other documents; and
- Terminology changes and defining days as "business" days.

The General Counsel has issued a guidance memorandum regarding implementation of the rule. GC 20-07.

The Board continues to believe that it followed all legal requirements in issuing the December 2019 amendments to its procedural rules. The Board intends to appeal the Court's order to the court of appeals once the Court issues its memorandum opinion, which it promised to issue soon.

Established in 1935, the National Labor Relations Board is an independent federal agency that protects employees, employers, and unions from unfair labor practices and protects the right of private sector employees to join together, with or without a union, to improve wages, benefits and working conditions. The NLRB conducts hundreds of workplace elections and investigates thousands of unfair labor practice charges each year.

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