Labor Law in the Union & Non-Union Workplace

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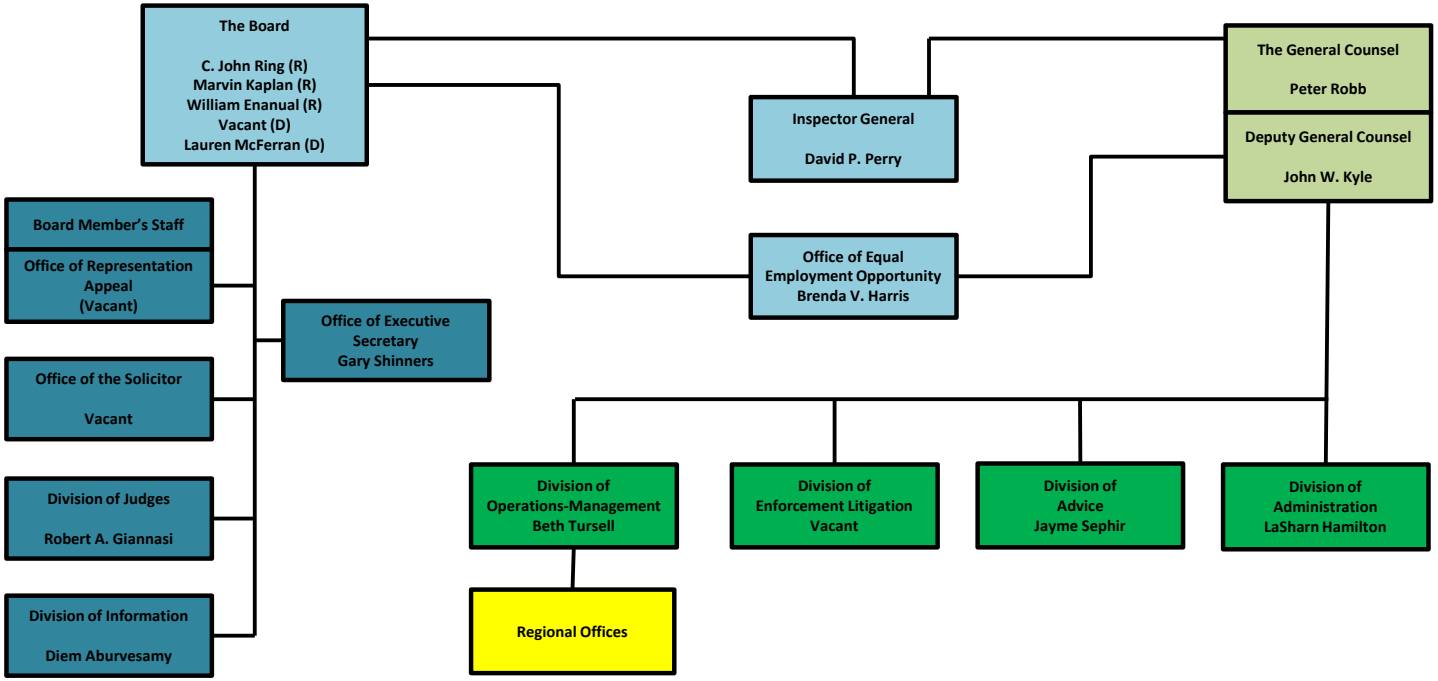
NATIONAL LABOR RELATIONS BOARD ORGANIZATION CHART

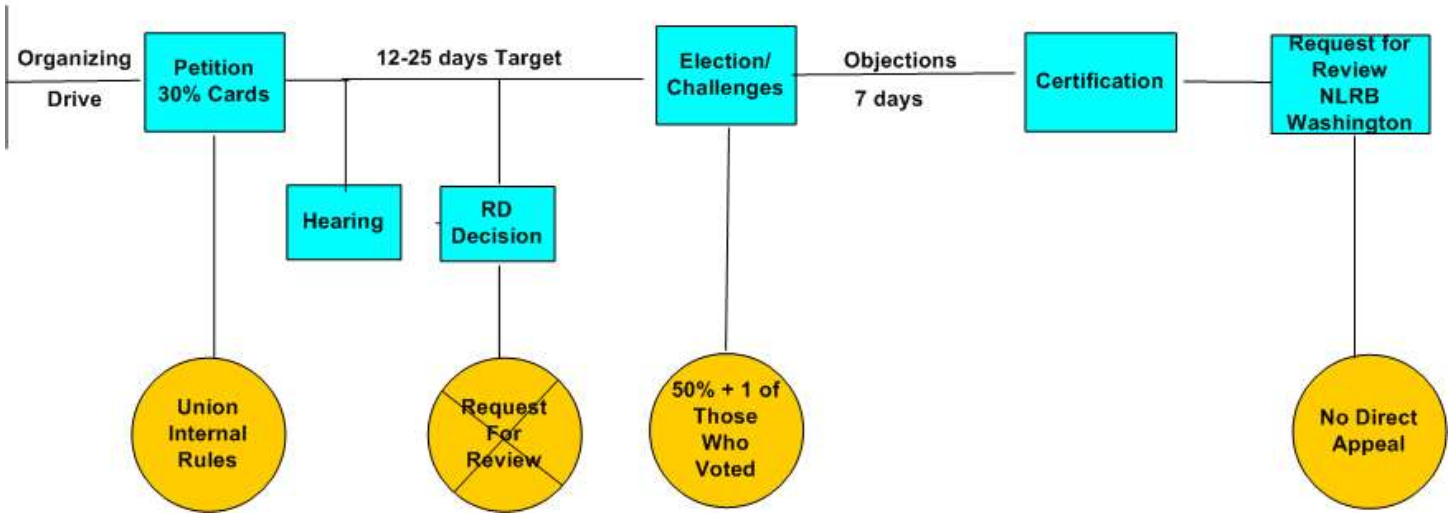


SHERMAN&HOWARD

NLRB PERSONNEL CHANGES

- 1 Democratic Member: Chairman (by Biden) Lauren McFerren (Former Senate HELP Committee), one vacancy
- 3 Republican Members: John Ring (Morgan Lewis); William Emanuel (Littler Mendelson; exp. 27 Aug 2021) and Marvin Kaplan (OSHA counsel, former House Oversight Committee)
- After firing (perhaps illegally) General Counsel Peter Robb whose term expires Nov 2021, President Biden designated Peter Sung Ohr, Regional Director of Region 13 in Chicago, to serve as Acting General Counsel of the NLRB on 25 Jan.
  - Biden nominated Jennifer Abruzzo (CWA Special Counsel) as General Counsel on 17 Feb.

REPRESENTATION CASE PROCESSING AT NLRB



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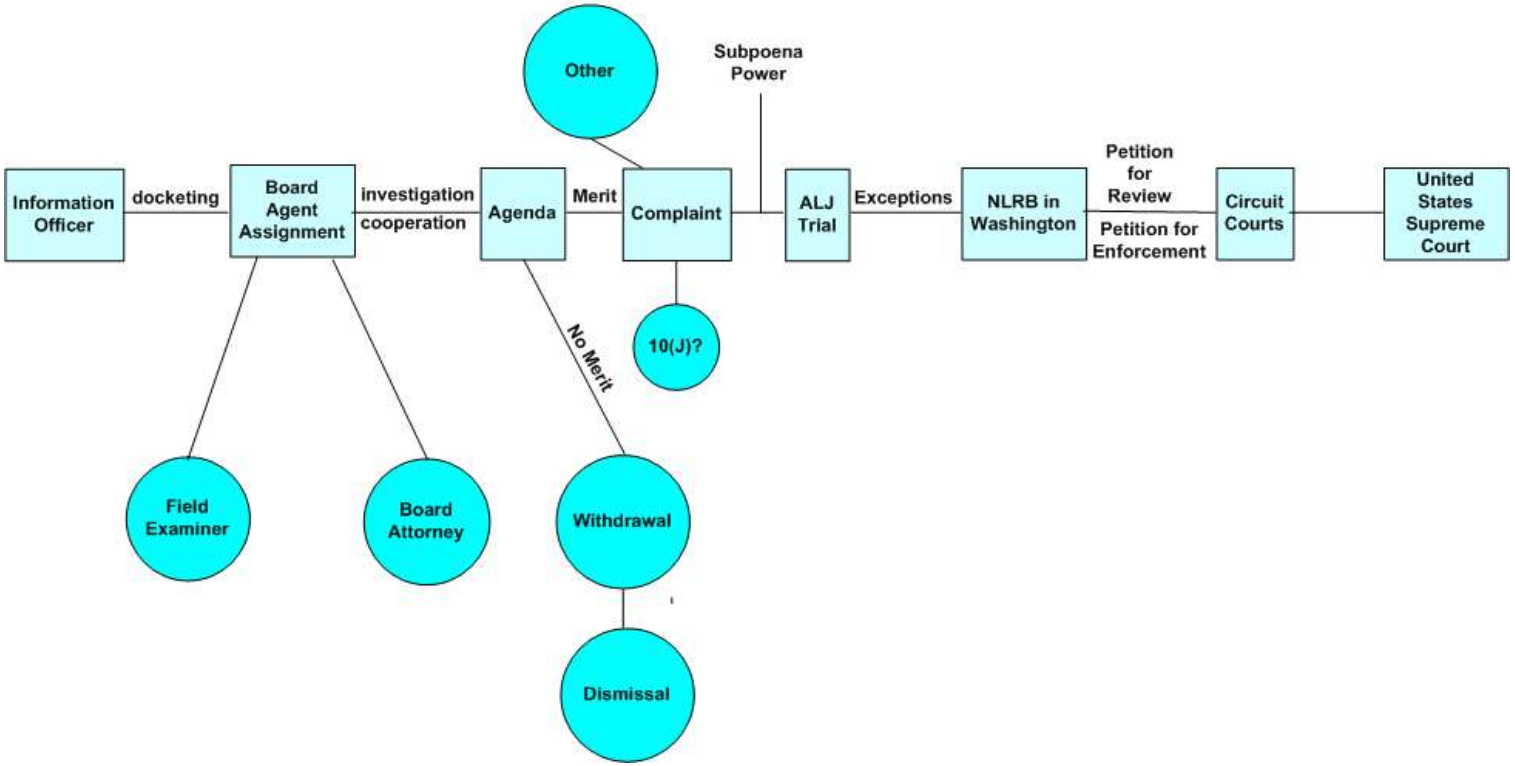
ELECTION RULE CHANGES

- Eliminated Pre-election Eligibility Challenges
- Reduced Pre-election Hearings
- No Pre-election Appeals
- Posting Within 48 Hours
- Requires Position Statement Within 7 days
- First Year Statistics:
  - Median time to election reduced by 14 days (38-24)
  - 34 day median time when no election agreement
  - Slight increase in number of petitions filed by Unions
  - Union win rate static (down to 65% from 66%)

UNFAIR LABOR PRACTICE
CASE PROCESSING AT NLRB



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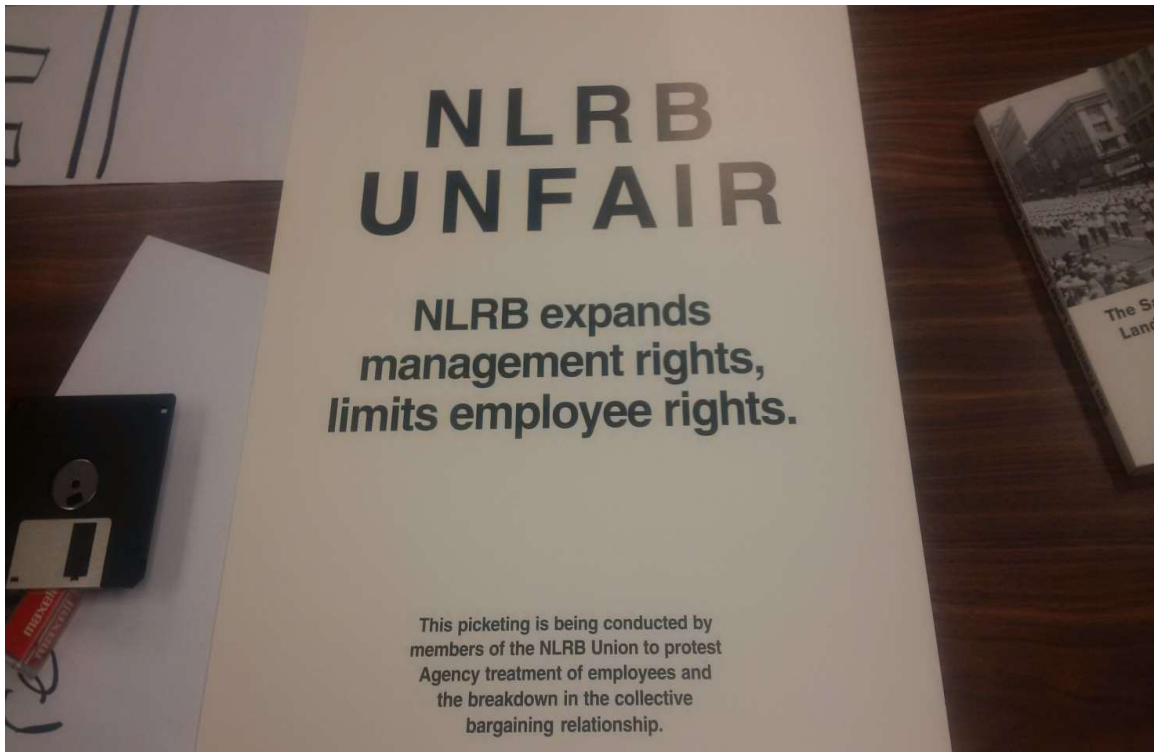
NLRB
UNFAIR
NLRB expands
management rights,
limits employee rights.
This picketing is being conducted by
members of the NLRB Union to protest
Agency treatment of employees and
the breakdown in the collective
bargaining relationship.

A SHRINKING MANDATE

- The NLRB was created to protect the right of employees to unionize and engage in other "protected concerted" activities as defined in Section 7 in the NLRA
- Case load falling
- Union density below 7%
- Consolidation of offices
- Was looking to expand jurisdiction
- Effect of Supreme Court Decision in Epic Systems Corp. v. Lewis
- Enforcement efforts in non-union environment to continue?

Arbitration Agreements Are Not Overruled by NLRA

- In 2012, the Board—for the first time in the 77 years since the NLRA's adoption—asserted that the NLRA effectively nullifies the Arbitration Act. *D. R. Horton, Inc.*, 357 N. L. R. B. 2277.
- US Supreme Court overruled D.R. Horton in *Epic Systems Corp. v. Lewis* (2018): "As a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. Nor can we agree with the employees' suggestion that the National Labor Relations Act (NLRA) offers a conflicting command."

Joint Employer Rollercoaster

- Browning-Ferris Industries of California, Inc. ("BFI"), 362 NLRB No. 186 (August 27, 2015)
  - Redefined standard for joint employer
  - No active exercise of control necessary to find joint employer status
  - Use of indirect sources of "control"
  - "Right to control" considered
  - D.C. Circuit affirmed test, but remanded for Board to distinguish between "indirect control" and normal business contract provisions

On Remand: BFI Not Covered by New Standard

- ***Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery and FPR-II, LLC d/b/a Leadpoint Business Services*** (32-CA-160759 and 32-RC-109684; 369 NLRB No. 139) Milpitas, CA, July 29, 2020.
- In this test-of-certification case on remand from the D.C. Circuit Court, the Board reversed in part its prior determination in *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599 (2015) (*Browning-Ferris*), to find that the Respondent, Browning-Ferris, is not a joint employer of employees in the petitioned-for unit, and, thus, did not violate Section 8(a)(5) and (1) by refusing to bargain with the Union. In *Browning-Ferris*, the Board announced a new joint-employer standard and retroactively applied it to conclude that Browning-Ferris and Leadpoint Business Services were joint employers of the Leadpoint employees in the petitioned-for unit. The Court affirmed in part and reversed in part the Board's decision and remanded the case with directions to clarify the new standard and how it should be applied to the facts of this case. The Court also suggested that the Board keep in mind that retroactive application of a rearticulated standard might be inappropriate in the circumstances of this case.
- In light of the Court's instructions, the Board found that retroactive application of any clarified variant of the new joint-employer standard in this case would be manifestly unjust. The Board explained that, in the three decades prior to *Browning-Ferris*, the Board held that an entity must exercise direct and immediate control over essential terms and conditions of employment of another entity's employees to be a joint employer under the Act. The Board further explained that the new standard, articulated in *Browning-Ferris*, expressly overruled this longstanding, clear rule of law by holding that an entity's indirect or unexercised contractually reserved control could, alone, warrant finding a joint-employer relationship. Consistent with the Court's expressed concerns, the Board found that *Browning-Ferris* substituted new law for old law that was reasonably clear, and, in turn, substantially affected reasonable, settled expectations for relationships established on the basis of the prior standard. This outcome would thrust upon entities like Browning-Ferris unanticipated and unintended duties and liabilities under the Act. Accordingly, the Board concluded that the new joint-employer standard should not have been applied to Browning-Ferris and reinstated the Regional Director's initial determination that Browning-Ferris, under the longstanding standard, was not a joint employer of Leadpoint's employees. Based on that determination, the Board dismissed the Section 8(a)(5) and (1) failure-to-bargain allegation and amended the Certification of Representative to remove Browning-Ferris as a joint employer.

BFI Reversed, Then, Not

- Hy-Brand Industrial Contractors, 365 NLRB No. 156 (December 14, 2017).
  - Overturned Browning-Ferris Industries of California, Inc. ("BFI"), 362 NLRB No. 186 (August 27, 2015)
  - BFI had suggested that business contracts and other documents could be used to show "indirect" control sufficient to impose liability on employers
  - Hy-Brand reset the standard, requiring evidence of direct and immediate control
  - BFI example of decision driven by perception of inequity
  - Hy-Brand decision rescinded due to Board Member Emanuel's participation

NLRB Issues New Joint Employer Rule, April 2020

- 29,000+ comments received.
- On February 26, 2020, the National Labor Relations Board (NLRB) issued its final rule on the standard for determining joint-employer status under the National Labor Relations Act (NLRA). The final rule will guide the NLRB and those covered by the NLRA in determining whether a business is a joint employer of employees directly employed by another employer.
- IMPACT OF THE FINAL RULE: A joint employer finding has significant implications for rights and obligations under the NLRA relative to collective bargaining, strike activity, and unfair labor practice liability:
  - If the employees are represented by a union, the joint employer must participate incollective bargaining over their terms and conditions of employment.
  - Picketing directed at a joint employer that would otherwise be secondary and unlawful is primary and lawful.
  - Each business comprising the joint employer may be found jointly and severally liablefor the other's unfair labor practices.
- Because of these important consequences, the purposes of the NLRA are not furthered by drawing into a collective-bargaining relationship, or exposing to secondary coercion and joint-and-several liability, a direct employer's business partner that does not actively participate in decisions setting employees' wages, benefits, and other essential terms and conditions of employment.

JOINT-EMPLOYER STANDARD OVERVIEW

https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-joint-employer-final-rule

- Specifies that a business is a joint employer of another employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment;
- Clarifies the list of essential terms and conditions: wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction;
- Provides that to be a joint employer, a business must possess and exercise such substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees as would warrant a finding that the business meaningfully affects matters relating to the employment relationship;

JOINT-EMPLOYER STANDARD OVERVIEW

- Specifies that evidence of indirect and contractually reserved but never exercised control over essential terms and conditions, and of control over mandatory subjects of bargaining other than essential terms and conditions, is probative of joint-employer status, but only to the extent that it supplements and reinforces evidence of direct and immediate control;
- Defines the key terms used in the final rule, including what does and does not constitute "substantial direct and immediate control" of each essential employment term;
- Makes clear that joint-employer status cannot be based solely on indirect influence or a contractual reservation of a right to control that has never been exercised.

Bargaining Unit: Specialty Healthcare

- Specialty Healthcare & Rehabilitation of Mobile, 357 NLRB 934 (2011)
  - Presumption petitioned-for unit appropriate
    - If readily identifiable, have a community of interest
  - Rebuttable only by showing other employees had an "overwhelming community of interest" with petitioned-for unit
  - Departmental/other smaller units commonly approved

Bargaining Unit: PCC Structurals

- PCC Structurals, Inc., 365 NLRB No. 160 (December 15, 2017)
  - Overruled Specialty Healthcare
  - Board's role (in unit determination) is to effectuate employees' fullest freedom in exercising Section 7 rights
  - Board should avoid arbitrary or fractured units
  - Board should not base unit on extent of organizing
  - Specialty Healthcare improperly excluded employees who shared a community of interest with petitioned-for employees
  - Like BFI-prior decision driven by result, goals of petitioner

Significant Decisions 2019

- SuperShuttle DFW, Inc.,367 NLRB No. 75 (January 25, 2019).
  - Re-established independent contractor test
  - Entrepreneurial opportunity matters
  - Regulation not "control"
- Alstate Maintenance, 367 NLRB No. 68 (January 11, 2019).
  - Gripe about tips not protected/concerted activity.
  - Statement not part of group activity or designed to induce group activity.
  - Dialed back decisions where employees appeared protected by merely referencing group ("we")

Is Filing a Lawsuit Protected Concerted Activity?

- The Board has long held that the filing of a lawsuit by a *group* of employees is protected activity. See *D. R. Horton*, 357 NLRB 2277 (2012)
- 200 East 81st Street Restaurant Corp., 362 NLRB No. 139 (2015) held that the filing of an FLSA retaliation lawsuit by a single employee:
  - "Although the complaint filed in the FLSA lawsuit alleges that it was filed on behalf of a class of similarly situated employees who work or have worked for the Respondent over a 3-year period of time, the judge found that Arsovski filed the lawsuit without the consent of any other employees. But in light of the wording of the complaint, the judge also found that, whether or not Arsovski's filing was concerted activity, it was reasonable to conclude that the Respondent believed or at least suspected that Arsovski was engaged in concerted group action."

What Is A "Change"

- Raytheon Network Centric Systems, 365 NLRB No. 161 (December 15, 2017)
  - NLRB v. Katz, 369 U.S. 736 (1962) defines "change"
  - Only a substantial departure from past practice constitutes a change
  - Past practice still relevant in contractual hiatus
    - DuPont focused on existence of negotiations
  - DuPont created a situation where union could always argue some discretion involved and thus a modification consistent with status quo/past practice was an unlawful change solely because of a the existence of a CBA.

Use of Company E-Mail Systems

On December 17, 2019, in a 3-1 decision split along party lines, the National Labor Relations Board (NLRB) restored to employers the right to restrict employees from using company email systems for nonbusiness purposes. The decision, issued in *Caesars Entertainment Corp.*, reverses the NLRB's 2014 ruling in *Purple Communications*, which held that workplace rules prohibiting employee email use for union activity were presumptively invalid under Section 7 of the National Labor Relations Act (Section 7). Because Section 7 applies to all employers, not just unionized ones, this NLRB ruling affects almost every U.S. employer that provides a corporate email system. [Source: Littler]

NEW STANDARD FOR RULES!

- The Boeing Company, 365 NLRB No. 154 (December 14, 2017)
  - No longer find rules unlawful based on a single inquiry—the "legal" question of whether a reasonable employee could construe a rule to infringe on Section 7 rights.
  - Zeal of prosecution has revealed that almost no rules can escape scrutiny
  - No consideration of legitimate justification for rule, extent of alleged infringement, no clear guidance for employers
  - Boeing Categories: 1) lawful rules (civility rules, supported by strong business justification); 2) rules requiring case by case analysis; 3) unlawful rules- adverse impact on S7 rights not outweighed by business justification (no discussion of wages)
  - Any of the 3 categories of rules can be unlawfully applied

GC Robb Guidance

- June 6, 2018 General Counsel Robb provided guidance on new standard for lawful work rules
  - Just addresses facially validity
  - No longer construed against the drafter
- Category I examples (lawful):
  - Civility rules (no disparaging employees, conduct impeding harmonious interactions, rude and discourteous conduct)
  - No photography and no recording rules
  - Rules against insubordination, non-cooperation
  - Certain confidentiality rules (customer or proprietary information)
  - Rules against use of logos or intellectual property
  - Rules requiring permission to speak on behalf of the Company

GC Robb Guidance

- Category II (require balancing):
  - Broad confidentiality rules
  - Rules prohibiting disparagement of EMPLOYER
  - Rules prohibiting use of employer's name (as opposed to logo/trademark)
  - Rules prohibiting media contact
  - Rules prohibiting off-duty conduct harmful to employer
- Category III (always unlawful):
  - Rules prohibiting the discussion of salary/wages
  - Rules prohibiting the discussion of other working conditions
  - Rules against joining outside organizations

Robert Schwartz, retired union lawyer, wrote: *Will Biden Resuscitate the NLRB?*

- "If Biden's appointees are as labor-friendly as Obama's picks, they will have an opportunity to reexamine many of the most harmful Trump-era rulings. The following cases should be at the top of their undo list:
- *Boeing Companies* (2017), which gave employers unprecedented rights to enact work rules restricting union and other concerted activity.
- *PCC Structurals* (2017), which changed the definition of appropriate bargaining units to make it far more difficult for unions to petition for representation rights.
- *Supershuttle* (2019), which eased the way for employers to classify workers as independent contractors exempt from union bargaining rights.
- *Valley Hospital* (2019), which allowed employers to cease deducting union dues when a collective bargaining agreement expires.
- *United Parcel Service* (2019), which limited Board review of arbitration awards that violate NLRA rights.
- *Kroger Limited* (2019), which allowed employers to bar union organizers from distributing literature on employer property even if groups such as the Girl Scouts were allowed to solicit.
- *MV Transportation* (2019), which elevated management-rights clauses in union contracts to levels of unilateral privilege not even dreamed of by HR specialists.
- *General Motors* (2020), which ended the special protections long enjoyed by union representatives."

The NLRB Bargains In Bad Faith

- *NLRB and NLRB Union*, FLRA Case No. WA-CA-14-0534 (February 11, 2016)
- NLRB announced the move of its office and the NLRBU demanded bargaining
- Proposals included "number of stalls in men's and women's bathrooms" "frost or no frost" on internal windows, furniture, coat hooks….
- NLRB's spokesperson said "today and tomorrow, that's it" (for bargaining), "we are not going to continue meeting", "the negotiations are concluded"….
- NLRB also regressed on its own proposals

The NLRB Bargains In Bad Faith

- The NLRB refused mediation
- The NLRB unilaterally implemented its new office plan
- What was the NLRB's defense?
  - Impasse? Really?
  - Unique circumstances????
  - It negotiated regarding the furniture 6 months later
  - What if we asserted such defenses
- What does this tell us about the Agency?

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Weingarten Rule & Drug Testing

- ***Manhattan Beer Distributors, LLC*** (29-CA-115694; 362 NLRB No. 192) Wyandanch, NY, August 27, 2015.
- A Board majority consisting of Members Hirozawa and McFerran adopted the Administrative Law Judge's finding that the Respondent violated Section 8(a)(1) by denying its employee the right to have union representation at an investigatory interview that he reasonably believed could result in discipline.*NLRB v. Weingarten*, 420 U.S. 251, 252-253 (1975). The Board majority reasoned that the employee had the right to union representation before consenting to take a drug test that was requested by the Respondent. *Safeway Stores*, 303 NLRB 989 (1991);*System 99*, 289 NLRB 723, 727 (1988). The Board majority further explained that the employee had the right to union representation even though it would have caused some delay in the administration of the drug test. *Ralphs Grocery Co.*, 361 NLRB No. 9 (2014);*Super Valu Stores*, 236 NLRB 1581, 1591 (1978), enf. denied on other grounds 627 F.2d 13 (6th Cir. 1980). The Board majority found that the Respondent violated the employee's*Weingarten*rights because it failed to afford him a reasonable period of time to obtain union representation. Member Johnson dissented, finding that the employee's phone conversation with his union representative satisfied his right to union representation under*Weingarten,*reasoning that, in his view, the role of a union representative is more limited in a drug- or alcohol-testing situation.