EMPLOYMENT LAWSCENE ALERT: UNION ORGANIZATION IS ON THE RISE

Recently, it seems like the stars have aligned in favor of unions. When President Biden was elected in 2020, a part of his workplace initiatives included the promotion of collective bargaining and the protection of employees' rights to join and form unions. Then, a global pandemic struck, which made many employees reconsider and question their relationships with their workplaces and employers. In February 2022, the White House Task Force on Worker Organization and Empowerment released a report promoting the Biden Administration's support for worker organization and collective bargaining by recommending, among other things, that the federal government use its "authority to support worker empowerment by providing information, improving transparency, and making sure existing pro-worker services are delivered in a timely and helpful manner." Earlier this month, the National Labor Relations Board (NLRB) announced that union representation petitions filed with the Board between October 1, 2021 and March 31, 2022, had increased 57% over the prior six-month period. Additionally, unions have made major headlines recently with successful union elections at an Amazon fulfillment center on Long Island and multiple Starbucks locations.

And more changes are likely on the horizon. For example, on April 7, the NLRB General Counsel issued a memo challenging employers' well-established free speech rights, which are protected pursuant to Section 8(c) of the National Labor Relations Act (NLRA). The General Counsel's memo announced that she will ask the Board to find that mandatory employee meetings, held by employers to express their opinions on union organizing, violate employees' Section 7 rights under the NLRA. If the Board takes this position, it would be a huge blow to employers' ability to effectively and freely communicate with their employees and would also be contrary to U.S. Supreme Court precedent recognizing employers' free speech rights in the workplace.

So, what's an employer to do? Employers cannot threaten employees, cannot interrogate them about their support of a union, cannot promise things to influence the union vote, and cannot surveil employees. However, to lawfully counter a union's organizational activities, employers can help ensure that employees are accurately informed about the effects of unionization to allow employees to make free and clear decisions without coercion about their rights under Section 7. To do so, employers should make sure that their supervisors are properly trained on how to recognize the signs of union organizing activities and how to lawfully respond to employees' questions and concerns about unionization.

As always, the labor and employment law team at O'Neil Cannon is here for employers to answer questions and address labor and employment law concerns. We encourage you to

reach out with any questions, concerns, or legal issues you may have.

EMPLOYMENT LAWSCENE ALERT: BIDEN ADMINISTRATION WILL PROMOTE A SIGNIFICANT SHIFT IN RECENT FEDERAL LABOR LAW

In our series discussing the new workplace initiatives under the Biden Administration, we will next address the Biden Administration's desire to make significant changes in National Labor Relation Board ("NLRB"' or "Board") policy and to roll back the labor law precedent of the Trump Administration's NLRB. The Biden Administration's labor policy through the NLRB will focus on two primary goals: (1) the promotion of collective bargaining and (2) the protection of employees' rights to join and form unions. In pursuing this focused labor policy, the Biden Administration is keeping the promise it made during the Presidential campaign that it will pursue policies and the development of labor law that serves the interests of unions. All employers will need to pay attention for the next four years to the NLRB's development and application of the Biden Administration's labor policies.

Through the former NLRB's General Counsel, Peter Robb, the Trump Administration made significant pro-management policy changes and shepherded pro-management developments in labor law under the National Labor Relations Act (the "NLRA" or the "Act"). Under the Obama Administration, the Democratically–led Board took an expansive view on how the Act should be interpreted and enforced, including a very broad reading of Section 7 of the Act, which provides that employees have the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Trump-era Board then narrowed this expanded reach of Section 7.

During the Trump Administration, many of the Obama-era Board policies and decisions were overturned by the Board or by the federal courts, including: (i) overturning of the Board's *Specialty Healthcare* decision that allowed unions to define their own bargaining units, including the recognition of micro-units; (ii) allowing employers, in the Board's decision of *Johnson Controls*, to withdraw union recognition at the expiration of a collective bargaining agreement if the employer can prove that the union does not continue to have majority support amongst bargaining unit employees; (iii) the U.S. Supreme Court's decision in *Epic Systems* overturning the Board's *Murphy Oil* decision where the Supreme Court held that an employer's requirement that employees agree to class- and collective-action waivers in mandatory arbitration agreements does not violate the NLRA; (iv) the Board's *MV*

Transportation decision that applied a "contract coverage" analysis instead of a "clear and unmistakable waiver" standard in determining whether an employer with a collective bargaining agreement has the duty to bargain over, or has the right to implement, work or safety rules without bargaining that are within the scope and compass of the parties' existing collective bargaining agreement; (v) overturning, in *Caesars Entertainment*, the Board's 2014 controversial *Purple Communications* decision, which had held that employees have the right to use their employers' email systems for non-business purposes, including communicating about union organizing; and (vi) overturning, in *Apogee Retail*, the Board's decision in *Banner Estrella Medical Center* where the Board ruled that employees have a Section 7 right to discuss discipline and ongoing investigations involving themselves and other co-workers despite an employer's confidentiality policy that prohibits such communications during a workplace investigation.

To follow through on his pledge made during his campaign to be "the most pro-union president," President Biden, as part of his first executive actions, took the unprecedented step to fire Mr. Robb as the NLRB's General Counsel. President Biden broke 85 years of tradition by being the first U.S. President to remove an incumbent NLRB general counsel before the end of his term. Mr. Robb's term was set to end in mid-November. President Biden's termination of Mr. Robb signals a shift in NLRB policy objectives under the Biden Administration and sets the stage for a roll back of the Trump-era NLRB policies and precedent.

President Biden quickly replaced Mr. Robb with Peter Ohr as NLRB's acting General Counsel. Mr. Ohr comes from the NLRB's Chicago Regional Office where he was its Regional Director. Mr. Ohr did not waste any time as the NLRB's acting General Counsel when, in a two-day span, he rescinded 10 Trump-era NLRB General Counsel Memoranda and two NLRB Operations-Management Memoranda issued by his predecessor. Mr. Ohr cited that the rescinded memoranda guidances were either not necessary or in conflict with the NLRB's policy objective of encouraging collective bargaining. Those guidances rescinded by Mr. Ohr, among others, included: (i) holding that employers may violate the Act when they enter "neutrality agreements" with unions to assist unions in their organizing efforts; (ii) on handbook rules developed following the Board's decision in *Boeing*; (iii) on a union's duty to properly notify employees subject to a union security clause of their *Beck* rights not to pay dues unrelated to collective bargaining and to provide further notice of the reduced amount of dues and fees for dues objectors in the initial *Beck* notice; (iv) on deferral of NLRB Charges under *Dubo Manufacturing Company* that instructed NLRB Regions to defer under *Dubo* or consider deferral of all Section 8(a)(1), (3), (5) and 8(b)(1)(A), and (3) cases in which a grievance was filed; and (v) on instructing NLRB Regions and Board agents on how to proceed during investigations in connections with securing the testimony of former supervisors and former agents and how audio recordings should be dealt with during investigations.

In the meantime, President Biden has nominated Jennifer Abruzzo to become the next NLRB General Counsel. Ms. Abruzzo was the second-ranking NLRB official under the Obama Administration as the agency's Deputy General Counsel. Most recently, Ms. Abruzzo was special counsel for the Communications Workers of America. The White House referred to Ms. Abruzzo as "[a] tested and experienced leader, [who] will work to enforce U.S. labor laws that safeguard the rights of workers to join together to improve their wages and working conditions and protect against unfair labor practices." Richard Trumpka, president of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) supported Ms. Abruzzo's nomination by stating that "the days of the NLRB actively blocking workers from organizing a union are over." Ms. Abruzzo's nomination will have to be confirmed by consent of the Senate, which is currently evenly divided between Democrats and Republicans. Ms. Abruzzo's road to confirmation could be bumpy given the strong criticism by some Republican Senators of President Biden's unprecedented decision to fire Ms. Abruzzo's predecessor, Mr. Robb, before the end of his term.

Biden Administration Will Push Pro-Union Legislation, Including the PRO Act

Besides the change in the NLRB's General Counsel and the effects that change will have on the development of federal labor policy, the Biden Administration, together with the Democratically controlled Congress, is also planning sweeping legislative changes to the Act with the objective to make union organizing easier for employees. The proposed legislation that employers should pay most attention to is the Protecting the Right to Organize (PRO) Act (H.R.2474 and S.1306).

Specifically, pro-union allies of the Biden Administration are pushing the administration to pass the PRO Act, which would be an overhaul of federal labor law under the NLRA. The PRO Act, which the U.S. House of Representatives passed in February 2020, includes in its current form several controversial and seismic shifts in established federal labor law, including:

- Permitting the NLRB to assess civil penalties against employers, ranging from $50,000 to $100,000, for each unfair labor practice violation, which also includes personal liability for managers of alleged violations;
- Providing employees with a private cause of action against an employer for unfair labor practice violations;
- Permitting secondary strikes by a labor organization to encourage participation of union members in strikes initiated by employees represented by a different labor organization;
- Terminating the right of employers to bring claims against unions that conduct such secondary strikes;
- Superseding state's right-to-work laws, by requiring employees represented by a union to contribute fees to the labor organization for the cost of such representation;
- Expanding unfair labor practices to include prohibitions against replacement of, or discrimination against, workers who participate in strikes;
- Making it an unfair labor practice to require or coerce employees to attend employer

meetings designed to discourage union membership;
- Prohibiting employers from entering into agreements with employees under which employees waive the right to pursue or join collective or class-action litigation;
- Requiring the NLRB to promulgate rules requiring employers to post notices of employees' labor rights and protections and establishing penalties for failing to comply with such requirement;
- Prohibiting employers from participating in any NLRB representation proceedings;
- Requiring employers to provide a list of voters to the labor organization seeking to represent the bargaining unit in an NLRB-directed election;
- In initial contract negotiations for a first contract, compelling employers and unions to mediation with the Federal Mediation and Conciliation Service in the event the parties do not reach an agreement within 90 days after commencing negotiations;
- Compelling employers to bargain with a labor organization that has received a majority of valid votes for representation in an NLRB-directed election; and
- Providing statutory authority for the requirement that the NLRB must set preelection hearings to begin not later than 8 days after notifying the labor organization of such a petition and set postelection hearings to begin not later than 14 days after an objection to a decision has been filed.

President Biden promised during his campaign to sign the PRO Act. This legislation, however, is currently stalled in the U.S. Senate and may face an uphill battle given the Senate's current cloture rule to end a filibuster—which requires 60 votes to cut off debate on most matters. Consequently, to the extent that the PRO Act is subject to a filibuster in the Senate, it is unlikely that the PRO Act will become law in its current form. Nonetheless, all employers should pay careful attention to the PRO Act and its movement through the U.S. Congress.

What Employers Should and Can Do

Given the Biden Administration's priority of encouraging employees to unionize, and with the pro-labor individuals that President Biden has placed in top leadership positions in the U.S. Department of Labor, including the nomination of Marty Walsh, the former two-term mayor of Boston and former union leader, to become the next Secretary of Labor, union organizing activity is likely to increase. To lawfully counter those activities, employers can help ensure that employees are accurately informed about unionization to allow employees to make free and clear decisions without coercion about their rights under Section 7. To do so, employers should make sure that their supervisors are properly trained on how to recognize the signs of union organizing activities and how to lawfully respond to employees' questions about unionization.

As always, the labor and employment law team at O'Neil Cannon is here for employers to answer your questions and address your concerns about the changes to federal labor policy and law under the Biden Administration. We encourage you to reach out with any questions, concerns, or legal issues you may have.

EMPLOYMENT LAWSCENE ALERT: WHAT'S A BIDEN PRESIDENCY GOING TO MEAN FOR EMPLOYERS? AN OVERVIEW

The labor and employment law policies and enforcement goals of the federal government rely largely on which party's administration occupies the White House. When inaugurated in January, President Joseph R. Biden made some immediate and significant changes that will affect employers. Also, based on President Biden's statements made during his campaign and the stated goals of others in the Democratic Party, decidedly pro-employee policies, enforcement goals, and legislation are very likely on the way. These changes are all but certain, now, with a Democratically controlled Congress. Over the next five weeks, the OCHDL employment law team will examine five labor and employment areas that employers should know and understand in order to navigate through the new and significant changes that the Biden Administration will likely make in the coming months and years. In the following weeks, we will cover:

- **OSHA**: On January 21, 2021, President Biden signed an Executive Order requiring OSHA to provide guidance to employers on workplace safety during the COVID-19 pandemic. In response, on January 29, 2021, OSHA issued guidance related to COVID-19. This guidance, as well as OSHA's enforcement policies regarding COVID-19, will likely continue to evolve under the new administration.
- **Wage and Hour**: This blog series will also cover potential wage and hour changes such as an updated federal minimum wage and the proposed Paycheck Fairness Act, which would expand the equal pay provisions contained in the FLSA and require that any pay differential between sexes be passed on "a bona fide factor other than sex, such as education, training, or experience."
- **Labor Law**: We'll discuss the future of the NLRB and labor law under a Biden Administration. Significant changes, including the roll back of certain enforcement guidance and the ousting of the General Counsel, have already occurred, and if campaign promises are to be believed, we could have significant additional changes, including the passing of the Protecting the Right to Organize (PRO) Act, which would be a sweeping overhaul of federal labor law including prohibiting the use of class action waivers in arbitration agreements, making it easier for workers to form unions, limiting the impact of right-to-work laws, and codifying an expanded definition of what constitutes a joint employer.
- **Discrimination**: Then, we'll cover the Biden Administration's potential impact on issues of discrimination, including the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace (BE HEARD) Act, which would require most businesses to provide anti-harassment policies and training and would codify the prohibition of discrimination on the basis of sexual orientation, gender identity, pregnancy, childbirth, a medical condition related to pregnancy or childbirth,

and a sex stereotype under Title VII.
- **DOL**: Finally, this blog series will wrap up with potential changes that could come through the Department of Labor, including changes to the independent contractor test, changes to the joint employer test, and expansions of the FMLA.

As always, O'Neil Cannon is here for you. We look forward to expounding on these topics over the next five weeks and providing you with timely and relevant information over the years to come. We encourage you to reach out with any questions, concerns, or legal issues you may have regarding the anticipated labor and employment law changes under the new Biden Administration.

EMPLOYMENT LAWSCENE ALERT: NEW YEAR – NEW LABOR AND EMPLOYMENT LAW DEVELOPMENTS EVERY EMPLOYER SHOULD KNOW

In 2019, several federal agencies, including the U.S. Department of Labor, Equal Employment Opportunity Commission, and the National Labor Relations Board have either issued new regulations, new guidelines, or employer-friendly decisions that every employer should be aware of as we begin our journey into this 2020 election year. Most of the changes coming at the federal level are the result of the Trump administration's agenda to level the playing field for employers by tilting back for employers the shift that occurred in the legal landscape during the Obama administration. Here are the latest labor and employment law developments every employer should know as we venture into 2020.

U.S. Department of Labor (DOL)

New Overtime Regulations Go into Effect January 1, 2020

Effective January 1, 2020, the salary threshold necessary to exempt executive, administrative and professional employees from the Fair Labor Standard Act's minimum wage and overtime pay requirements increases from $23,660 (or $455 per week) to $35,568 (or $684 per week). The DOL's new rule is the product of the Trump administration's efforts to reset the Obama administration's 2016 final rule that established the salary threshold at $47,476 per year or $913 per week. Now is the perfect time for employers to audit their payroll data to make sure that every employee who is being treated as an exempt executive, administrative or professional employee is being paid at least the salary threshold amount of $35,568 (or $684 per week). Employees who do not meet this new minimum salary threshold should be treated

as non-exempt and employers should begin to pay these newly minted non-exempt employees overtime compensation (1.5 times their regular rate) if they work over 40 hours in a workweek.

DOL Issues Final Rule Clarifying the Regular Rate of Pay

In December, the DOL announced a final rule clarifying for employers what "perks" and benefits must be included in the regular rate of pay when calculating overtime compensation. The "regular rate" is the hourly rate that is paid to employees and must not only include an employee's hourly wage rate, but it must also include in its calculation other forms of compensation received in a workweek, including bonuses, commissions, and other forms of compensation, subject to eight specified exclusions. Perplexing to employers, and exposing employers to additional risk for overtime liability, was the uncertainty as to whether certain kinds of "perks," benefits, or other miscellaneous payments must be included in the regular rate. The DOL attempted to eliminate this uncertainty in its final rule by confirming what employers may offer to employees through the following non-exhaustive list of "perks" and benefits without the risk of additional overtime liability:

- The cost of providing certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits (whether paid to an employee, an education provider, or a student-loan program), and adoption assistance;
- Payments for unused paid leave, including paid sick leave or paid time off;EEOC, EE
- Payments of certain penalties required under state and local scheduling laws;
- Reimbursed expenses including cellphone plans, credentialing exam fees, organization membership dues, and travel, even if not incurred solely for the employer's benefit; the DOL also clarified that reimbursements that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System or the optional IRS substantiation amounts for travel expenses are per se "reasonable payments";
- Certain sign-on bonuses and certain longevity bonuses;
- The cost of office coffee and snacks to employees as gifts;
- Discretionary bonuses, by clarifying that the label given a bonus does not determine whether it is discretionary and providing additional examples; and
- Contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense.

The DOL's final rule becomes effective on January 15, 2020.

National Labor Relations Board (NLRB)

Employers Can Cut-Off Union Dues Upon CBA Expiration

In a 3-1 ruling, the NLRB overturned an Obama-era decision (*Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015)) requiring employers to continue to honor the dues checkoff provision in

an expired labor contract. In *Lincoln Lutheran of Racine*, the NLRB held that an employer's statutory obligation to check off union dues continues to be enforceable under Section 8(a)(5) of the National Labor Relation Act after expiration of a collective bargaining agreement that establishes the checkoff arrangement. The Obama-era Board reasoned that the "dues checkoff" provision could not just dissipate once a contract expired, but instead could be ignored only if all parties to the contract agreed. On December 16, 2019, the NLRB reversed course in *Valley Hospital Medical Center*, 368 NLRB No. 39 (2019), holding that while dues checkoff provisions are mandatory subjects of bargaining, they also fall into a special "limited category" of unique union rights that are contractual in nature and do not necessarily relate to wages, pensions, welfare benefits, and other terms and conditions of employment. Given its special category, a dues-checkoff provision remains enforceable only during the term of the agreement in which those contractual obligations were created by the parties. Consequently, the Board held that there is no independent statutory obligation to check off and remit dues after expiration of a collective-bargaining agreement containing a checkoff provision, just as no such statutory obligation exists before parties enter into such an agreement. The Board's ruling brings more balance to the bargaining table and provides the employer some leverage when contract negotiations may extend beyond the expiration of the labor agreement. It also incentivizes the union to reach an agreement before expiration of the labor agreement to avoid loss of union dues. Of course, the right to cut-off union dues under the Board's *Valley Hospital* decision does not exist when the employer and the union agree to extend the labor agreement during the pendency of negotiations.

NLRB Provides Employers, Once Again, the Power to Control Company-Owned Email

On December 17, 2019, in *Caesars Entertainment* (368 NLRB No. 143) the NLRB overturned its 2014 controversial *Purple Communications* decision (361 NLRB No. 126) which had held that employees have the right to use their employers' email systems for non-business purposes, including communicating about union organizing. The NLRB's *Purple Communications'* decision overturned its 2007 *Register Guard* decision (351 NLRB No. 70) where the Board recognized the long-standing precedent that the NLRA generally does not restrict an employer's right to control the use of its equipment, which applies to company-owned email systems, and held that while union-related communications cannot be banned because they are union-related, facially neutral policies regarding the permissible use of employers' email systems are not rendered unlawful simply because they have the "incidental" effect of limiting the use of those systems for union-related communications. The *Purple Communications* decision upset this precedent and held, for the first time in the history of the Board, that employees do have the right to use company-owned equipment for non-work purposes. The Board's decision in *Caesars Entertainment* basically restored the standard set forth in the *Register Guard* decision before the *Purple Communications* decision stripped employers of an important property right with the only exception being those rare cases where an employer's email system provides the only reasonable means for employees

to communicate with one another. Now, under the *Caesars Entertainment* decision, employers may prohibit employees from using company-owned email systems for non-work-related purposes, including communications concerning union organizing activities. Employers, however, are permitted to implement such a prohibition only if the employer's rules or policies are not applied discriminatorily by singling out union-related activities or communications.

NLRB Restores Employers' Right to Impose Confidentiality in Workplace Investigations

On December 16,2019, in a 3-1 decision, the NLRB overruled a 2015 NLRB precedent (*Banner Estrella Medical Center*, 362 NLRB 1108) that required a case-by-case determination of whether an employer may lawfully require confidentiality in specific workplace investigations. The Board had ruled that employees have a Section 7 right to discuss discipline and ongoing investigations involving themselves and other co-workers. In *Apogee Retail*, 368 NLRB No. 144 (2019), however, the NLRB returned to its previous standard, and now allows employers to implement blanket nondisclosure rules requiring confidentiality in all workplace investigations. The NLRB's ruling aligns itself with the EEOC's position against the backdrop of the #MeToo movement where confidentiality rules imposed during a workplace sexual harassment investigation encourage victims and witnesses to come forward. The standard set forth by the Board in *Apogee Retail* only applies to open and-on-going investigations and only to those employees directly involved in the investigation. Obviously, on the other hand, any confidentiality order or rule imposed by the employer cannot be imposed on employees not involved in the investigation or to an investigation that has concluded. The Board's decision in *Apogee Retail* provides employers an important tool to maintain the integrity of its internal investigations without fear that imposing the safeguards of confidentiality requirements during the pendency of an investigation violates Section 7 rights.

Equal Employment Opportunity Commission (EEOC)

EEOC Rescinds Policy Against Binding Arbitration

The EEOC voted 2-1 to rescind its 1997 *Policy Statement on Mandatory Binding* Arbitration where the EEOC had stated its position that mandatory arbitration agreements that keep workers' discrimination claims out of court clash with the civil rights laws the agency enforces.

The EEOC based its decision to rescind its policy regarding binding arbitration based on the fact that its policy statement did not reflect current law, especially given the Supreme Court's numerous and consistent decisions since 1997 that favor agreements to arbitrate employment-related disputes as being enforceable under the Federal Arbitration Act (FAA). The EEOC found that its 1997 policy conflicted with the arbitration-related decisions of the

Supreme Court where the Court rejected the EEOC's previously enunciated concerns with using the arbitral forum – both within and outside the context of employment discrimination claims. It should be noted by employers, however, that the EEOC's decision to rescind its 1997 policy statement on mandatory arbitration should not be construed to mean that employees cannot file charges of discrimination with the agency if they signed an agreement to arbitrate or that the EEOC is prohibited from investigating such charges. Moreover, the EEOC makes clear that its rescission of its 1997 policy should not be interpreted as limiting the EEOC's ability, or that of the employee, to challenge the enforceability of any agreement to arbitrate. This change in the EEOC's policy position regarding mandatory arbitration of employment disputes is not surprising given the long-line of Supreme Court decisions favoring arbitration in employment disputes. Given the positive change in the EEOC's position on mandatory arbitration agreements in employment, along with strong precedent-setting federal court decisions favoring arbitration, employers should consider revisiting whether they should be utilizing agreements with their employees for mandatory arbitration of employment disputes.

EMPLOYMENT LAWSCENE ALERT: NLRB'S GENERAL COUNSEL ISSUES GUIDANCE ON HANDBOOK RULES POST-BOEING

On June 6, 2018, the NLRB's General Counsel issued a memorandum (GC 18-04) to all NLRB Regional Directors providing regional offices general guidance on the new standard regarding the lawfulness of handbook rules under Section 7 as established by the NLRB in *The Boeing Co.*, 365 NLRB No. 154 (2017). In *Boeing*, the NLRB overturned the onerous "reasonably construe" standard that was previously established by the NLRB in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

In *Lutheran Heritage*, the NLRB held that employers can't maintain workplace policies that workers could "reasonably construe" as barring them from exercising their Section 7 rights. Section 7 provides that "[e]mployees 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 shall also have the right to refrain from any or all of such activities…"

The *Lutheran Heritage* standard was criticized as rendering unlawful every policy, rule and handbook provision—such as rules governing workplace civility, open door policies,

fraternization, use of recording devices, use of cameras, confidentiality, use of social media, interactions with media, and use of logos and trademarks—that an employee might "reasonably construe" to prohibit any type of Section 7 activity. Simply, the *Lutheran Heritage* standard was unworkable for employers in drafting legitimate and effective workplace policies.

Under the new *Boeing* standard, however, the NLRB will apply a balancing test (balancing employees' Section 7 rights with employer's legitimate business interests) in evaluating whether an employer's facially neutral policy interferes with employees' Section 7 rights by considering two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.

In applying this new balancing test, the NLRB will delineate three categories of facially neutral employment policies, rules and handbook provisions:

- Category 1 includes rules that the NLRB will designate as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.
- Category 2 includes rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- Category 3 includes rules that the NLRB will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

The above three categories will represent a classification of results from application of the new *Boeing* balancing test. The categories are not part of the test itself.

The NLRB's June 6th memorandum will assist NLRB regional offices in assessing on how to handle or process unfair labor charges alleging that a particular employer's policy or handbook rule violates employees' Section 7 rights. In addition, the NLRB's General Counsel's memorandum will guide regional offices regarding the placement of various types of rules into the three categories set out in *Boeing* providing the regional offices a balanced common sense approach in evaluating and processing such unfair labor practice charges against the new standard set forth in *Boeing*.

EMPLOYMENT LAWSCENE ALERT: SUPREME

COURT DECIDES CLASS-ACTION WAIVERS ARE ENFORCEABLE FOR EMPLOYEES

For the last several years, employers have been operating under a cloud of confusion regarding whether provisions in employment agreements that require employees to engage in individual arbitration proceedings, as opposed to class proceedings, are enforceable. Finally, the Supreme Court, in a 5-4 decision, has given us an answer, and the answer is yes, such provisions are enforceable!

In 2012, the National Labor Relations Board (NLRB) took the stance that class waivers violated workers' rights to engage in concerted activity under Section 7 of the National Labor Relations Act (NLRA). Although the Fifth Circuit rejected that stance in *D.R. Horton and Murphy Oil* and held that such provisions were valid and enforceable, the NLRB continued to litigate the issue, claiming that such provisions were not legal. In the intervening years, the Second and Eighth Circuits have agreed with the Fifth Circuit, while the Sixth, Seventh, and Ninth Circuits have agreed with the NLRB.

On Monday, in *Epic Systems Corp. v. Lewis*, the Supreme Court finally settled the dispute. In examining the issue, the Court considered two issues: (1) whether the "savings clause" of the Federal Arbitration Act (FAA) required enforcement of the arbitration agreements as written if the agreement violated another federal law, and (2) whether the arbitration agreements that waived collective rights violated the NLRA.

In looking at the first issue, the majority found that the FAA required courts to enforce arbitration agreements and, therefore, favored arbitration agreements. Although it acknowledged the general FAA "savings clause," such clause only applies when certain *contract* defenses apply. In examining the case at hand, the majority found that no such contract defenses were applicable and that it could not override the established policy of enforcing arbitration agreements.

The Court also considered whether the NLRA's protection of employees' collective rights displaced the FAA's favored enforcement of arbitration agreement. The majority held that, although the NLRA guarantees employees the right to *bargain* collectively, it neither guarantees the right to *collective action* nor manifests intent to displace the FAA. Because the NLRA was enacted after the FAA, if Congress had intended the NLRA to override the FAA's protections for arbitration agreements, such intent would have needed to be clear. Because it was not clear, the Court found that there was no such intent and that the NLRA's protection of collective rights could not override the FAA's policy of enforcing arbitration agreements as written.

Based on the Supreme Court's ruling in *Epic*, employers are now free to include arbitration

agreements that include a waiver of class and collective actions in their employment contracts. Although Congress could amend the law to clearly state that the NLRA, or some other federal law, does not allow for waiver of class or collective actions by employees, such legislative action is unlikely at this point in time. Employers may find arbitration agreements useful as arbitration may be less expensive, faster, and more flexible than traditional litigation.

YOUR LEASED EMPLOYEES MAY NOW JOIN A UNION WITH YOUR REGULAR EMPLOYEES – AND THEY DON'T NEED TO ASK YOUR PERMISSION

Today, in *Miller and Anderson, Inc. v. Tradesmen International and Sheet Metal Works International Association, Local Union No. 19, AFL-CIO*, the NLRB decided that, pursuant to the NLRA, temporary or leased employees who work for an employer as joint employees under an agreement with a staffing agency or similar entity do not have to have the employer's consent to join the union that covers that employer's regular employees. The full opinion can be found here. This decision overturns a 2004 NRLB decision, *Oakwood Care Center*, which held that employees who were jointly employed by an employer and a staffing agency could not be in the same bargaining unit without the employer's consent. Today's decision revives a 2000 NLRB decision, *M.B. Sturgis*, which held that both temporary and regular workers could be represented by the same union without the joint consent of the employer and the staffing agency. Under *M.B. Sturgis*, temporary staffing employees could be included in a single bargaining unit with regular employees when: (1) the staffing agency and the employer were determined to be joint employers and (2) the temporary staffing employees shared a "community of interest" with the regular employees. The *M.B. Sturgis* decision by a Clinton-appointed Board upended a 1973 NLRB decision that found that a single bargaining unit of regular employees and leased employees to be inappropriate without the consent of both employers.

The political-weighted pendulum of the Obama-appointed Board continues to swing in favor of the unions by continuing to expand the scope of the NLRA to cover additional employees and additional actions, particularly in the area of joint-employers. This inclusion of leased employees in an employer's bargaining unit is just another step down that road. Employers must be aware of this decision in any situation where they have leased employees in the same or similar positions as regular employees who are represented by a union or wish to be represented by a union.

EMPLOYMENT LAWSCENE ALERT: YOUR ARBITRATION AGREEMENTS WITH EMPLOYEES MAY BE INVALID

Last week, the Seventh Circuit Court of Appeals issued a decision stating that class waivers in arbitration agreements for employees are invalid. The Court in *Lewis v. Epic Systems Corp.* adopted the controversial position of the National Labor Relations Board (NLRB) and found that a collective and class action waiver in an employer's contract violated Section 7 of the National Labor Relations Act (NLRA) by prohibiting employees from engaging in collective activity and forcing them into individual arbitration for their wage and hour claims.

The Seventh Circuit based its decision on the concept that the NLRA prohibits an employer from barring workers from engaging in concerted activity. The Court's reasoning followed that, because class and collective actions could be considered concerted activity, an agreement that prohibited such activity was a violation of the NLRA. The Court found that individual arbitration was not bargained for by the employees and could not be rejected without penalty to the employees. Because it found that the provision was illegal under the NLRA, the Court held that the Federal Arbitration Act (FAA) did not mandate enforcement because, under the FAA, an arbitration agreement is not valid where grounds exist for the revocation of the agreement. The Seventh Circuit determined that violation of the NLRA constituted such ground for revocation. Use of arbitration agreements with class and collective prohibitions has long been a point of contention with the NLRB, but until now, it had been an issue that the NLRB was finding little success with in the circuit courts. However, the Seventh Circuit's decision gives the NLRB additional standing for its position, particularly in Wisconsin, Illinois, and Indiana, where the decision applies.

This decision creates a circuit split because the Fifth Circuit has ruled in two separate cases (*Murphy Oil and D.R. Horton*) that mandatory individual arbitration clauses in employment agreements are enforceable. The Fifth Circuit found that the NLRB, in determining that collective and class waivers were illegal under the NLRA, did not give proper deference to the FAA because the NLRA does not contain any specific language that prevents arbitration agreements from being enforced pursuant to their terms. The Fifth Circuit found that the NLRB's interpretation that such clauses violated the NLRA by prohibiting concerted activity was not entitled to the level of deference that the Seventh Circuit found it was. The Second and Eighth Circuits have issued rulings similar to those of the Fifth Circuit. Now with a split in the federal circuits, the issue is ripe for consideration by the U.S. Supreme Court. However, with Justice Scalia's recent death, the Court's precarious 4-4 split, and the political balance of the Court dependent upon the outcome of the Presidential election, the outcome on this issue

before the U.S. Supreme is anything but certain, even taking into consideration the Supreme Court's recent strong support for the enforceability of arbitration provisions.

Therefore, until this decision is overruled by the Supreme Court, employers in Wisconsin, Illinois, and Indiana should not limit their employees to individual arbitration or should, at the least, allow employees to opt out of mandatory individual arbitration without penalty.

EMPLOYMENT LAWSCENE ALERT: NLRB HOLDS THAT POLICY PROHIBITING RECORDING DEVICES IN THE WORKPLACE VIOLATES EMPLOYEES' SECTION 7 RIGHTS

In a recent decision, the National Labor Relations Board (NLRB) struck down an employer's work rule that prohibited employees from recording workplace meetings and conversations without management approval, finding that such a policy could prevent employees from engaging in protected activity, which is protected by Section 7 of the National Labor Relations Act (NLRA).

In this case, the employee handbook had, like many employee handbooks, a policy prohibiting employees from recording company meetings and other aspects of the workplace. These policies are typically put in place to protect employees' privacy and to protect employers' confidential information and trade secrets. However, a 2–1 majority of the NLRB found that employees could reasonably understand such a rule to prohibit unionization efforts or engagement in other collective or concerted activities to advance their job-related interests. The NLRB held that photo, audio, and video recording at the workplace could be a protected activity under certain circumstances, such as documenting picketing activities, unsafe working conditions, discussions regarding terms and conditions of employment, or an employer inconsistently applying workplace rules. Because the rule in question was simply a blanket rule prohibiting recording, the NLRB ordered the company to remove the policy.

The NLRB is showing no signs of slowing down in its quest to expand the reach of Section 7 far beyond the traditional view of "protected, concerted activity." Employers should carefully review and consider their workplace policies in light of this ruling and other NLRB decisions that have found other workplace rules infringing upon employees' Section 7 rights. Employers' rules restricting use of recording devices need to either be tied to particular employer interests, such as maintaining a customer's privacy or an employer's trade secrets, or be narrow enough to only prohibit recording in limited circumstances. Otherwise,

employers, even non-union employers, could be subject to an NLRB unfair labor charge challenging their workplace recording policies.

EMPLOYMENT LAWSCENE ALERT: NLRB ADOPTS NEW TEST FOR JOINT EMPLOYER STATUS

On Thursday, August 27, 2015, the National Labor Relations Board (NLRB) announced an updated test for determining joint-employer status under the National Labor Relations Act (NLRA), changing decades of precedent and significantly expanding the definition of who can be considered a joint-employer. A split Board decided it was necessary to "revisit and revise" the standard in order to keep up with "changing workplace conditions" in the current economic climate.

In the case at issue, Leadpoint Business Services, Inc. (Leadpoint), a staffing agency, provided workers to Browning-Ferris Industries of California (BFI) at a recycling plant owned by BFI to perform a variety of tasks. The temporary services agreement between the companies stated that Leadpoint was the sole employer and denied any joint-employer relationship. It also gave each company-specific aspects of the employment relationship that each was to control. The union wanted to include the Leadpoint employees in a bargaining unit it represented. A regional director determined that the staffing firm was their sole employer and that BFI, therefore, had no obligation to collectively bargain with Leadpoint employees. The union challenged that decision, and the NLRB deemed the two companies joint-employers under its new standard.

Under the previous standard, an entity needed not only to possess the authority to control the terms and conditions of an employee's employment but had to actually exercise direct, immediate control to be considered an employer. The NLRB claimed that the requirement of direct, immediate control had been added to the joint-employer test over the past thirty years and was not based on prior case law, in common law, or in the text of the NLRA, and unnecessarily narrowed the definition of joint-employer under the NLRA.

The new standard states that two or more entities will be deemed joint-employers if they are both employers within the meaning of common law and "share or codetermine matters governing essential terms and conditions of employment." It is no longer necessary that joint-employers actually exercise authority and control over the terms and conditions of employment or that the control be exercised directly and immediately. Under the new standard, the fact that an entity simply has the ability, even if unused, to control the terms and conditions of employment or possesses indirect control through an intermediary will

suffice to establish a joint-employer relationship. The NLRB will consider the existence, extent, and object of the control. The NLRB will broadly define ‘essential terms and conditions of employment’ and include such things as hiring, firing, discipline, supervision, direction, wages, hours, scheduling, seniority, assignment of work, and determination of the manner and method of work performance.

This decision will have a major impact on employers, particularly those who use staffing or subcontracting agreements or contingent employee arrangements. Employers who had previously worked under the impression that their lack of direct control meant that they were not joint-employers could now be subjected to joint bargaining obligations and joint liability for unfair labor practices and breaches of collective bargaining agreements. If found to be a joint-employer, companies will need to collectively bargain with respect to the terms and conditions which it possesses the authority to control. The new standard also takes away much of the certainty with which businesses had interacted with each other.

Companies need to look at their business relationships and see who they could be considered joint-employers with, including vendors, service providers, and other entities with which the company may have indirect control over employees. This decision could also have an impact on how other federal agencies, such as OSHA and the EEOC, look at their joint-employer standards. Employers must keep an eye on any changes in order to avoid unexpected legal pitfalls.