LABOR PAINS: NAVIGATING THE NLRB'S SHIFTING STANDARDS

By Jonathan M. Sollish, Esq.

I. OVERVIEW OF NATIONAL LABOR RELATIONS ACT ("NLRA") AND NATIONAL LABOR RELATIONS BOARD ("NLRB")

A. NLRA governs relations between employees and their employers.

1. Employee rights under the NLRA

a. Under Section 7 of the NLRA, employees have "the right to self-organize, to form, or assist labor organizations, to bargain collectively through representatives of their own choosing, and engage in other concerted activity for the purpose of collection bargaining or other mutual aid or protection."

b. Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the NLRA.

c. These rights apply even if employees are not represented by a labor union.

2. Employer rights under the NLRA

a. Section 8(d) and 8(b)(3) of the NLRA imposes a duty on labor unions to bargain in good faith with employers. It is unlawful for a labor union to refuse to bargain with an employer. The NLRA also imposes a duty on employers to bargain in good faith with unions.

B. Structure of the NLRB

1. The NLRB is an independent federal agency that has an adjudicatory arm and prosecutorial arm.

a. The Board

i. The adjudicatory arm of the NLRB.

ii. Made up of a five-member panel.

iii. Members of the Board are appointed by the President to staggered five (5) years terms.

iv. Oversees the NLRB's division of administrative law judges, who hear and adjudicate unfair labor practice cases.

v. Decisions by administrative law judges can be appealed to the Board.

vi. Much like the courts, the Board sets precedent by reviewing ALJ decisions.

b. The General Counsel

i. Independent from the Board.

ii. Oversees the investigation and prosecution of unfair labor practice charges.

(A) The investigation and prosecution of unfair labor practice charges occurs in regional offices.

iii. The General Counsel is appointed by the President to four (4) year term.

iv. Responsible for setting enforcement policy.

C. Current composition of NLRB

1. The Board

a. At the moment there are only three members of the Board: Republican Chairman Marvin Kaplan, Democrat David Prouty, and Democrat Gwynne Wilcox.

b. On January 27, 2025, President Trump attempted to fire Member Gwynne Wilcox, temporarily leaving the Board without a quorum.

i. Wilcox has been reinstated by a federal judge, but the Trump Administration is appealing that decision.

c. Wilcox's firing left the Board unable to hear appeals, seek injunctions from the federal courts, promulgate regulations through rulemaking, and enforce subpoenas for six weeks.

d. During periods when the Board lacks a quorum, regional offices can still investigate and prosecute unfair labor practice charges and hold representation elections.

e. While some uncertainty remains about President Trump's plan for the NLRB, it is largely expected that he will appoint republican members to fill the vacant seats.

2. The General Counsel

a. President Trump appointed William Cowen as Acting General Counsel.

b. Prior to his appointment, Cowen had been the Regional Director of NLRB's Los Angeles office since 2016. Cowen has also worked in private practice and served as a Board member for a short period of time after a recess appointment by President George W. Bush.

II. STANDARDS ARE EXPECTED TO SHIFT UNDER THE NEW COMPOSITION OF THE NLRB

A. Policy and precedent

1. Current employee-friendly standards are expected to shift to more employer-friendly standards.

a. During the Biden Administration, the Board and the General Counsel implemented standards that were very employee friendly.

b. While precedent set by the Board during the Biden Administration will likely be overturned in the coming months and years, those decisions remain in effect.

c. Actions taken by the NLRB during the first Trump Administration offer a glimpse into types of policy shifts that are expected to take place.

d. The General Counsel can shift policy by issuing memorandums that direct regional offices on how they should investigate and prosecute unfair labor practice charges. Cowen has already rescinded the memorandums issued by the former general counsel.

e. The Board shifts policy by issuing opinions to appeals. The Board can also shift policy through administrative rule making, although this is somewhat rare for the Board.

B. General Counsel memorandums

1. General Counsel issues memorandums to provide policy guidance to regional offices.

a. The following memorandums have been rescinded. It is expected that the permanent General Counsel will issue guidance implementing employer friendly enforcement policy.

i. Memorandum directing regional offices to seek wide breadth of consequential damages, including costs related to job searches such as gas, ride share payments, and daycare expenses; lost contributions into retirement funds; and expenses related to evictions. (GC 21-06).

ii. Memorandum directing regional offices to seek wide breadth consequential damages in settlement agreements and discouraging the use of non-admission clauses. (GC 21-07).

iii. Memorandum directing regional offices to seek make-whole remedies for all employees harmed as result of an unlawful work rule of contract term. (24-04).

iv. Memorandum expressing it is the General Counsel's opinion that non-compete agreements violate the NLRA and directing regional offices to submit

cases involving non-compete agreements to the General Counsel's office for analysis. (GC 23-08).

v. Memorandum to regional offices reiterating the importance of seeking injunctive relief under the appropriate circumstances. (GC 24-05).

vi. Memorandum urging the Board to find certain types of "stay or pay" provisions unlawful under the NLRA, including stay or pay provisions tied to mandatory training that the employer requires the employee to attend or obtain; repayment of fees that are higher than the costs of the training provided to the employee; relocation or sign-on bonus payments that fail to include an option between the employee taking an up-front payment or deferring the receipt of the bonus until the end of the stay or pay time period; and a repayment provision where the employee is terminated for "any reason whatsoever." (GC 25-05).

vii. Memorandum encouraging "the Board to find that an employer has presumptively violated Section 8(a)(1) [of the NLRA] where the employer's surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act." (GC 23-02).

C. Recent Board Decisions likely to be overturned.

1. In the coming months and years, it is likely that Republicans will hold a majority of seats on the Board and will overturn many of Board's recent decisions.

a. The following are cases that remain good law and demonstrate Board's recent shift towards employee-friendly standards.

i. *Lion Elsatomers LLC II*, 372 NLRB No. 83 (2023)

(A) The Board overturned *General Motors LLC*, 369 NLRB No. 127 (2020), and reinstated the four-factor test from *Atlantic Steel*, 245 NLRB 814 (1979), for determining whether an employee loses the protection of the Act for conduct towards management in the work place. Under *Atlantic Steel*, in determining whether "an employee's conduct during Sec. 7 activity loses the protection of the Act, the Board considers: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." *Id.* at 1, fn 3.

(B) Under the Trump administration, this standard is expected to shift back to the test under *General Motors LLC,* in which the General

Counsel must first prove that the employee's protected concerted activity played a role in adverse action, and then the employer bears the burden of proving it would have taken the adverse action despite the employee's protected concerted activity.

(C) At the moment employees have more latitude to act out and be disruptive while engaging in protected concerted activity.

ii. *McLaren Macomb*, 372 NLRB No. 58 (2023)

(A) The Board found that severance agreements that include non-disparagement clauses that require employees to waive their rights under the NLRA are unlawful.

(B) The Board's decision overturned the 2020 decision of *Baylor University Medical Center and IGT d/b/a International Game Technology* that held similar non-disparagement clauses were lawful. It is likely that this precedent will be reinstated.

(C) As of right now, non-disparagement clauses in severance agreements, employee handbooks, and employment agreements must be carefully tailored to ensure employees are still permitted to engage in protected concerted activity.

iii. *Amazon.com Services LLC*, 373 NLRB No. 136 (2024)

(A) The decision overturned precedent from 1948, so it is likely this decision will be reversed during the Trump Administration.

(B) If employers want to hold meetings to express their views on unionization, the following conditions must be met: (1) The employer intends to express its views on unionization at a meeting at which attendance is voluntary; (2) Employees will not be subject to discipline, discharge, or other adverse consequences for failing to attend the meeting or for leaving the meeting; and (3) The employer will not keep records of which employees attend, fail to attend, or leave the meeting.

iv. *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141 (2024)

(A) The Board reinstated the clear and unmistakable waiver standard for determining whether a union has waived its right to bargain over mandatory subjects. This standard, which had been in place for nearly 70 years before it was overturned in 2019.

(B) This decision "requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term."

v. *The Atlanta Opera, Inc.*, 372 NLRB No. 95 (2023)

(A) The Board overturned *SuperShuttle* (2019) and returned to the use of common-law factors for determining whether a worker is classified as an employee or independent contractor.

(B) The 2019 standard of analyzing a worker's entrepreneurial opportunity will likely be reinstated in the coming years.

(C) As of right now, the common law test remains in place, meaning that more workers are covered by the NLRA.

vi. *Thryv, Inc.*, 372 NLRB No. 22 (2022)

(A) Board held that make-whole remedies include "all direct and foreseeable pecuniary harms suffered" as a result of unfair labor practices.

(B) It is likely that in the near future, the Board will return to limiting damages to back pay.

(C) Right now, employers may be liable for more extensive damages.

III. LABOR LAW LEGISLATIVE OUTLOOK

A. Richard L. Trumka Protecting the Right to Organize Act (The PRO Act)

1. The PRO Act would greatly expand employees' rights under the NLRA.

a. If passed, the PRO Act would do the following:

i. Revise definitions of employee, supervisor, and employer;

ii. Weaken right-to-work laws;

iii. Expressly outlaw captive audience meetings;

iv. Increase the NLRB's injunctive relief power;

v. Hold corporate officials personally liable for unfair labor practices; and

vi. Prohibit employers from replacing striking employees.

b. Despite the inroads President Trump made with organized labor at the ballot box, it is very unlikely that the PRO Act will get passed.

One Towne Square, Fifth Floor, Southfield, MI 48076
p (248) 354-4030 | f (248) 354-1422 | maddinhauser.com