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National Labor Relations Board Continues Employer-Friendly Reshaping of Labor Law

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This article discusses several of the major developments under the National Labor Relations Act that have taken place during the past year, and highlights a few significant changes that may be on the horizon.

After a bit of a rocky start following the 2016 election, the National Labor Relations Board (the "Board") is charging headlong into undoing many of the employee-and union-friendly changes to the law under the National Labor Relations Act (the "NLRA") that were implemented during the previous administration. This reshaping continued apace in 2019, with significant impact on both unionized and non-union workplaces. Among the most far-reaching changes are the rejection of the potential new rules concerning the conduct of union elections and the standard for determining whether entities are joint employers, expanding the circumstances in which employers are permitted to make unilateral changes to the terms and conditions of employment of union employees, and new standards for evaluating the permissibility of employer work rules. This article discusses several of the major developments under the NLRA that have taken place during the past year, and highlights a few significant changes that may be on the horizon.

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JOINT EMPLOYER DRAMA CONTINUES

One of the most closely watched issues has been the current Board's efforts to roll back the Obama Board's dramatic expansion of the joint employer doctrine. While most observers expected a quick undoing of the broad "Browning-Ferris" rule adopted by the Board in 2015, the Board has hit a few bumps in the road in its efforts in this regard. However, the Board will soon implement a return to the pre-Browing-Ferris standard through the rulemaking process.

The Board's 2015 decision in *Browning-Ferris Industries of California, Inc.*,[1] was one of the most significant, and highly controversial, decisions in years. In the case, a divided Board cast aside its long-standing joint employer test in favor of a highly union-friendly standard that promised to expand greatly the number of employers subject to collective bargaining and other obligations under the NLRA. Prior to *Browning-Ferris*, the Board's rule was that an entity that did not directly employ workers who provided services to it would only be deemed to be a "joint employer" of those workers if it "share[d] or codetermine[d] those matters governing the essential terms and conditions of employment" and exercised "direct and immediate control" over those terms and conditions.[2] The majority in *Browning-Ferris* rejected this latter requirement, holding that the "right to control" alone, even when unexercised, "is probative of joint employer status." The majority further held that it is not necessary for an employer to exercise control "directly, immediately, and not in a 'limited and routine' manner" to be found to be a joint employer.

In December 2017, the new Trump-appointed Board sought to reject *Browning-Ferris*, ruling in *Hy-Brand Industrial Contractors, Ltd.*,[3] that it would "return . . . to a standard that has served labor law and collective bargaining well, a standard that is understandable and rooted in the real world [and that] recognizes joint-employer status in circumstances that make sense and would foster stable bargaining relationships." Pursuant to this standard, "a finding of joint-employer status shall once again require proof that putative joint employer entities have *exercised* joint control over essential employment terms (rather than merely having 'reserved' the right to exercise control), the control must be 'direct and immediate' (rather than indirect), and joint-employer status will not result from control that is 'limited and routine.'" However, in February 2018, the Board vacated the decision and restored *Browning-Ferris* as the governing legal standard in response to a finding by the Board's Designated Agency Ethics Official that William Emanuel should have been disqualified from participating in the *Hy-Brand* case due to his former law firm's representation of a party in *Browning-Ferris*.[4]

With the fate of the Browning-Ferris in limbo, the Board sought to revise the joint employer standard through rulemaking, rather than adjudication, issuing a Notice of Proposed Rulemaking in September 2018.[5] The proposed rule would return to the "substantial direct and immediate control" standard that governed prior to *Browning-Ferris*. Under

the rule, "an employer may be considered a joint employer of a separate employer's employees only if the two employer's share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine." After a period of comment that ended in January 2019, the Board issued its Final Rule on February 26, 2020.

EMPLOYER WORK RULES CONTINUE TO BE UPHELD

In *The Boeing Company*,[6] the Board abandoned its long-standing standard for determining whether an employer's "maintenance" of a work rule impermissibly infringed under employee rights under the NLRA. Under that prior rule, articulated in *Lutheran Heritage Village-Livonia*,[7] an employer's "maintenance" of a work rule will violate the NLRA if it "reasonably tends to chill employees in the exercise of their Section 7 rights." In *Boeing*, the Board explicitly overruled the "reasonably construe" prong of *Lutheran Heritage* on the basis that the standard "prevents the Board from giving meaningful consideration to the real world 'complexities' associated with many employment policies, work rules and handbook provisions." The appropriate standard, the majority wrote, should not involve a "single-minded consideration of NLRA-protected rights," but should instead take into account employers' legitimate justifications for adopting work rules and policies.

Pursuant to the new standard, "when evaluating a facially neutral policies, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule" in order to "strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy." Application of this new test, the majority stated, will result in the creation of three categories of work rules: (1) those that are designated by the Board as "lawful to maintain" because they either do not interfere with protected rights or the "potential adverse impact" is outweighed by an employer's justifications; (2) those that "warrant individual scrutiny;" and (3) those that are unlawful to maintain because they prohibit or limit protected conduct.

Over the past months, the Board has released numerous decisions and memoranda issued by the Division of Advice of the Board's Office of General Counsel ("OGC") applying the *Boeing* framework to various employer work rules. These pronouncements generally reflect an expansion of the circumstances in which employer rules are considered permissible. For instance, in *LA Specialty Produce Company*,[8] the Board upheld

an employer's confidentiality policy prohibiting disclosure of client/vendor lists and its media contact policy, which prohibited providing information when "approached" by the media. As an initial matter, the Board noted that, under *Boeing*, "it is the General Counsel's initial burden in all cases to provide that a facially neutral rule *would* in context be interpreted by a reasonable employee . . . to potentially interfere with the exercise of Section 7 rights." Applying this standard, the Board concluded that the confidentiality rule was permissible since it was reasonably interpreted only to prohibit the disclosure of the employer's "own nonpublic, proprietary records," not the underlying information that an employee might have a right to share with third parties, such as a labor organization. With regard to the media policy, the Board found it to be lawful since, as reasonably construed, it only prohibited employees from speaking "on the [employer's] behalf" and only when employees are "approached" by the media for comment. Member Lauren McFerran dissented from the decision, arguing that the majority's approach failed "to take into account the vulnerability of employees in determining the likely effect of the rules on Section 7 activity."

In *Wal-Mart-Stores, Inc.*,[9] the Board examined the permissibility of an employer's rule limiting employees' wearing of union insignia in the workplace. In a 3-1 decision, the Board held that Wal-Mart's policy limiting employees to wearing "small, non-distracting logos or graphics" in work areas was permissible under the framework established in *Boeing Co.* According to the majority, "limitations on the display of union insignia short of outright prohibitions…warrant individualized scrutiny in each case as *Boeing* category 2 rules." Applying this framework to Wal-Mart's rules, the Board held that the impact of the rules on employees' rights was "relatively minor" and was outweighed by the company's interest in "providing its customers with a satisfactory shopping experience by making store employees readily identifiable to customers and protecting its merchandize from theft and vandalism." Member McFerran dissented, asserting that the Board's application of the standard from the "deeply flawed" *Boeing* decision created a presumption that employers are permitted to restrict the wearing of union insignia based on "any legitimate justification."

The Board has, however, indicated that there remain limits to *Boeing*'s solicitude of employer policies. For instance, in an advice memorandum released in June 2019, the OGC ruled that an employer's policy stating that "all information gathered by, retained or generated by the Company is confidential" and prohibiting disclosure without authorization was overbroad, and that a policy prohibiting posting "derogatory information about the Company" on social media was unlawful.[10] Examining the company information rule, the OGC concluded that, "[w]hile the rule does not explicitly target wages and working conditions, the rule's definition of confidential information is so broad as to easily be interpreted to include such information." The OGC further concluded that a saving clause in the policy, stating that the policy was not intended to infringe

on Section 7 rights, was insufficient to preserve the lawfulness of the policy:

> Although the Board has stated that an express notice to employees advising them of their NLRA rights 'may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule,' the savings clause included here does not in any way indicate that employees have the right to discuss wages or working conditions. Employees do not necessarily know what their rights are under the NLRA, and the only contextual clue provided by this rule is that their NLRA rights may have something to do with confidential information.

The OGC reached a similar conclusion with respect to the employer's social media policy, concluding that:

> [a] rule prohibiting disparagement of the employer has a significant impact on NLRA rights. Concerted criticism of an employer's employment and compensation practices is central to rights guaranteed by the NLRA. A general rule against disparaging the company on social media, absent limiting context or language, would cause employees to refrain from publicly criticizing employment problems on social media.

Similarly, in a Memorandum released in August 2019 involving CVS Health, the OGC held that CVS's policies requiring employees to identify themselves by name when posting about CVS on social media and prohibiting the disclosure of "employee information" was unlawful.[11] With respect to the self-identification policy, the OGC noted that "[t]he Board has recognized that requiring employees to self-identify in order to participate in collective action would impose a significant burden on Section 7 rights."

Turning to the employee information policy, the OGC concluded that "'[e]mployee information' would reasonably be read by employees to include employee contact information and other non-confidential employment-related information, in which case prohibiting its disclosure would significantly restrict employees from engaging in core Section 7 activities." Notably, the Board concluded that a "savings clause" in the policy – which stated that "[n]othing in this policy is meant to limit your legal right . . . to speak about your political or religious views, lifestyle and personal issues, working conditions, wages, or union-related topics or activities with others inside or outside the Company, or to restrict any other legal rights" and that it "is not intended to interfere with any rights provided by the National Labor Relations Act" – did not save the policy since "it does not cover all kinds of 'employee information,' including employee contact information" and "[t]he concluding sentence of the savings clause, regarding 'rights provided by the National Labor Relations Act,' also is insufficient to save this paragraph of the rule

because employees, who are laypersons, do not necessarily know the full panoply of their rights under the NLRA."

RIGHT TO USE EMPLOYER EMAIL SYSTEMS FOR UNION ACTIVITY REJECTED

In *Caesars Entertainment d/b/a Rio All-Suites Hotel & Casino*,[12] the Board held that employees have no statutory right to use employer information technology equipment, such as e-mail, for organizing or other purposes protected by Section 7 of the NLRA. In doing so, the Board returned to the standard announced in its 2007 decision in *Guard Publishing Co. d/b/a Register Guard*,[13] and overruled its 2014 decision in *Purple Communications, Inc*.[14] In *Purple Communications*, the Board held that if an employer provides an employee access to the employer's e-mail system, the employee must be permitted to use that e-mail system in furtherance of his or her Section 7 rights during nonworking time, unless the employer could show special circumstances.

The Board's recent pronouncement in *Caesars Entertainment* involved a challenge to several handbook rules maintained by Rio All-Suites Hotel and Casino in Las Vegas. The handbook provided that computer resources may not be used to, among other things, "[s]end chain letters or other forms of non-business information" or "[s]olicit for personal gain or advancement of personal views." The majority of the Board, consisting of Chairman Ring and Members Kaplan and Emanuel, announced its return to the *Register Guard* standard and held that these work rules were permissible under that standard. The majority focused on balancing the employer's property interests against employees' organizational rights, concluding that the standard announced in *Register Guard* reached the proper balance of these potentially competing interests. The majority concluded that the standard announced in *Caesars Entertainment* should be applied on a retroactive basis. Member McFerran dissented, believing that *Purple Communications* articulated the correct standard.

While the Board's decision in *Caesars Entertainment* is certainly welcome news for employers, it does not give employers carte blanche when it comes to its information technology resources. An employer's facially neutral restriction on the use of its information technology resources by employees may be found unlawful in two circumstances. First, the Board recognized that there may be some cases where employees may have the right to use an employer's e-mail system for Section 7-protected communications if e-mail is the only reasonable means for employees to communicate with one another. The Board, however, cautioned that this exception would not apply in a typical workplace, but would be an unusual occurrence that must be decided on a case-by-case basis. The Board stressed that such a circumstance would be "rare" and went further to note that it was not deciding whether this exception would apply to information technology resources other than an e-mail system.

Second, the Board reiterated that even facially neutral rules cannot be applied in a discriminatory manner.

EMPLOYERS MAY INSIST ON CONFIDENTIALITY DURING INTERNAL INVESTIGATIONS

In *Banner Estrella Medical Center*,[15] the Board ruled that because employees have a right under Section 7 of the NLRA to discuss "discipline or ongoing disciplinary investigations," an employer may prohibit employees from discussing such investigations "only where the employer shows that it has a legitimate and substantial business justification that outweighs employees' Section 7 rights." Under this standard, the burden of showing the need for confidentiality was placed on the employer and could be met only by showing that "in any given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up."

In *Apogee Retail LLC d/b/a Unique Thrift Store*,[16] a majority of the Board overruled *Banner Health* and ruled that employer confidentiality rules that by their terms apply only for the term of an internal investigation are presumptively lawful to maintain. According to the majority, the Board in *Banner Health* "abandoned its obligation to balance employee and employer interests." In particular, the majority stated, the standard was one in which "Section 7 rights predominate, and the employer's interests are not even considered unless and until the employer demonstrates [circumstances warranting confidentiality]." Further, "the majority in *Banner Estrella* failed to recognize and weigh the important interests of employers in providing, and their employees in receiving, assurances that reports of incidents of misconduct or other workplace dangers will be held in the strictest confidence by all concerned. . . ."

Given these considerations, the Board held, investigative confidentiality rules, like other employer rules, should be analyzed under the tripartite framework announced in *Boeing Co.*[17] Under this framework, because "the justifications associated with investigative confidentiality rules applicable to open investigations will predictably outweigh the comparatively slight potential of such rules to interfere with Section 7 rights," such rules are properly considered under *Boeing* "Category 1," and are therefore presumptively lawful. The Board did, however, conclude that rules that do not apply only to open investigations are "Category 2" rules under the Board's *Boeing* framework and require "individualized scrutiny in each case as to whether a post-investigation adverse impact on NLRA-protected conduct is outweighed by legitimate justifications."

Turning to the specific rules at issue in *Apogee*, the Board found that because the employer's rules were not facially limited to open investigations, they warranted individual scrutiny. The rules were permissible, however, since they "do not broadly prohibit employees from discussing

either discipline or incidents that could result in discipline." Accordingly, any impact on Section 7 rights was "relatively slight."

Member McFerran dissented from the decision, arguing that the Board's "break with precedent is radical," and effectively holds that "all employer imposed investigative confidentiality rules are 'lawful to maintain,' whether or not the employer offers (much less provides) any justification for them so long as they are limited to the duration of the investigation." This approach, McFerran asserted, was unwarranted since it "largely ignores the chilling effect of confidentiality rules on employees."

CONTINUED REFINEMENT OF THE CONTOURS OF PROTECTED ACTIVITY

Section 7 of the NLRA grants employees the right to engage in "concerted activity . . . for mutual aid and protection." Providing clear guidance concerning the precise scope of this right, however, has proved for decades to be exceedingly challenging, and the Board continues to grapple with this issue.

In *Alstate Maintenance LLC*,[18] the Board addressed whether an employee's complaint to management about customer tipping was protected concerted activity where the issue was raised in front of other employees. In a 3-1 decision, the Board held that the employee's actions were not protected. In reaching this conclusion, the majority noted that, in assessing whether an employee has engaged in protected activity, "the applicable standard should not sanction an all-but-meaningless inquiry in which concertedness hinges on whether a speaker uses the first-person plural pronoun in the presence of fellow employees and a supervisor."

Instead, the Board asserted, "the definition of concerted activity 'encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action' or where individual employees bring 'truly group complaints to the attention of management.'" Accordingly, "individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor and includes the use of the first-person plural pronoun. The fact that a statement is made at a meeting, in a group setting or with other employees present will not automatically make the statement concerted activity.

Rather, to be concerted activity, an individual employee's statement to a supervisor or manager must either bring a truly group complaint regarding a workplace issue to management's attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action."

Applying this standard, the Board held that no concerted activity occurred since all that occurred was "a brief encounter between a supervisor and his supervisees, the giving by that supervisor of a work

assignment, and a gripe about the assignment by an employee who subsequently disclaimed any object of initiating or inducing group action by testifying that his remark was 'just a comment.'" The majority further held that, because the employee's comment "was not aimed at changing the Respondent's policies or practices," he was not "seeking to improve terms and conditions of employment," and therefore his actions, whether concerted or not, were not for "mutual aid or protection."

Another issue that has vexed the Board for many years is identification of the circumstances in which an employee's misconduct in the course of engaging in otherwise protected conduct deprives the behavior of the protections of the NLRA.

In September 2019, the Board issued a Notice and Invitation to File Briefs inviting interested parties to provide commentary on this issue.[19] The dispute in *General Motors* arose when an employee was suspended on three occasions for use of profanity and racially and sexually-charged language in communications with management. An administrative law judge found that, under the Board's governing standard, while the employee's use of racially and sexually offensive language was not protected, his repeated use of the f-word with his supervisor was not so "threatening or so opprobrious as to lose the protection of the act" under the Board's decision in *Plaza Auto Center*, *Inc.*[20]

In *Plaza Auto*, the Board held that an employee's "profane and derogatory" outburst directed at his manager did not lose the protection of the NLRA even though they targeted his manager personally, were made face to face, and involved repeated obscenities. In the September 2019 Notice in *General Motors*, the Board noted that *Plaza Auto* and similar decisions have "been criticized as both morally unacceptable and inconsistent with other workplace laws."

Accordingly, the Board has solicited input on several questions, including: (1) "[u]nder what circumstances should profane language or sexually or racially offensive speech lose the protection of the Act; (2) [t]o what extent should [the leeway granted to employees exercising Section 7 rights] remain applicable with respect to profanity or language that is offensive to others on the basis of race or sex; and (3) [w]hat relevance should the Board accord to antidiscrimination laws such as Title VII in determining whether an employee's statements lose the protection of the Act?" The period for submission of briefing has now closed, and the Board's decision may be issued at any time.

NLRA FALLS AS BARRIER TO ARBITRATION FOLLOWING EPIC SYSTEMS

In *D.R. Horton, Inc.*,[21] the Board held that "an employer violates [the NLRA] when it requires employees . . . as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working

conditions against the employer in any forum, arbitral or judicial." In *Epic Systems Corporation v. Lewis*,[22] the Supreme Court resolved a split among the federal courts of appeals and held that the NLRA does not override the strong mandate of the Federal Arbitration Act ("FAA") that arbitration agreements be enforced as written, and that consequently class action waivers are generally enforceable.

In August 2019, the Board had its first opportunity to address the impact of *Epic Systems*, holding in *Cordua Restaurants Inc.*,[23] that an employer may lawfully require employees to sign arbitration agreements containing class action waivers even after a lawsuit has been initiated. The case arose when, in response to the filing of a collective action under the Fair Labor Standards Act, Cordua issued a revised arbitration policy containing a provision prohibiting employees from "opting in" to such a case and threatened employees with discharge if they did not sign it.

According to a majority of the Board, Cordua's revised policy was permissible even though it was issued in response to employees' protected activity: "As the Supreme Court made clear in *Epic Systems*, an agreement requiring that employment-related claims be resolved though individual arbitration, rather than through class or collective litigation, does not restrict Section 7 rights in any way. Because opting in to a collective action is merely a procedural step required in order to participate as a plaintiff in a collective action, it follows that an arbitration agreement that prohibits employees from opting in to a collective action does not restrict the exercise of Section 7 rights and, accordingly, does not violate the Act." The Board further concluded that the employer's statements that employees would be discharged if they did not sign the revised agreements were not unlawful threats: "Because *Epic Systems* permits an employer to condition employment on employees entering into an arbitration agreement that contains a class- or collective-action waiver, we find, contrary to the judge and the dissent, that [a supervisor] did not unlawfully threaten employees with reprisals. Rather, his statements amounted to an explanation of the lawful consequences of failing to sign the agreement. . . ."

A second major arbitration-related decision is also likely on the way. In March 2019, an administrative law judge held in *Pfizer, Inc.*,[24] that an arbitration agreement containing a broad confidentiality clause unlawfully interfered with employees' right to engage in protected activity. In reaching this conclusion, the ALJ held that *Epic Systems* did not compel a different result since that case dealt with procedural, rather than substantive, rights.

According to the judge, "[u]nlike the claimed Section 7 right which the Court considered and rejected in *Epic Systems*, the Section 7 right at issue here does not concern supposed entitlement to use a procedure but rather the right to engage in *activity*. Specifically, employees have the right to discuss with each other *all* their terms and conditions of employment, including arbitrations, to disclose these terms and conditions to

the public and to ask for the public's support in changing them for the better."

Thus, the ALJ wrote, "[b]ecause Section 7 rights are substantive, the Respondent cannot require employees to waive them as a condition of keeping their jobs." Finally, the ALJ held that the policy was unlawful under the *Boeing* framework notwithstanding a "limiting sentence" in the policy stating that "[n]othing in this Confidentiality provision shall prohibit employees from engaging in protected discussion or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment."

According to the ALJ, this disclaimer was insufficient since it does not expressly give employees the right to discuss the arbitration proceeding and an arbitral award, and does inform them of their right "to present information about an arbitration to the public as part of a concerted protest of that condition of employment." The ALJ's decision has been appealed to the Board.

MAJOR EXPANSION OF RIGHT TO MAKE UNILATERAL CHANGES

For decades, the Board has applied a rigorous standard to evaluate the permissibility of an employer's unilateral changes to the terms and conditions of employees covered by a collective bargaining agreement. Pursuant to this standard, an employer may make a change to a mandatory subject of bargaining without bargaining to impasse with a union only if the parties' contract contains a "clear and unmistakable waiver" of the union's right to bargaining concerning the issue.[25] This rule has long been the subject of battles between the Board and the federal Courts of Appeals, some of which have imposed their own, broader, "contract coverage" standard under which an employer may make a unilateral change where the change is "within the compass" or "scope" of a contract provision that grants the employer the right to act unilaterally.[26]

In *M.V. Transportation Inc.*,[27] the Board, in a 3-1 decision, effected a major change in its unilateral change doctrine by rejecting the clear and unmistakable waiver requirement in favor of the contract coverage standard. Under the contract coverage standard, "the Board will examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally."

Further, "if it is determined that the disputed act does *not* come within the compass or scope of a contract provision that grants the employer the right to act unilaterally, the analysis is one of waiver." The general rationale for the majority's decision was that the clear and unmistakable waiver standard impermissibly allows the Board to "sit in judgment upon the substantive terms of collective bargaining agreement." "[A]pplication of the clear and unmistakable waiver standard typically results in

a refusal to give effect to the plain terms of a collective-bargaining agreement," the Board wrote, and therefore "effectively writes out of the contract language the parties agreed to put into it." Under the new standard, the Board "will not require that the agreement specifically mention, refer to or address the employer decision at issue."

Applying the contract coverage standard to the unilateral changes at issue in the case, the majority concluded that the employer permissibly modified its policies in reliance on contractual language granting it "the right to issue, amend and revise policies, rules and regulations."

Board Member McFerran dissented in the case, arguing that the Board's decision improperly makes it "easier for employers to unilaterally change employees' terms and conditions of employment – wages, hours, benefits, job duties, safety practices, disciplinary rules, and more – in a manner that will frustrate the bargaining process, inject uncertainty into labor-management relationships, and ultimately increase the prospect for labor unrest."

BOARD ISSUES FINAL RULE REVISING ELECTION PROCEDURES

Among the changes that many practitioners have anticipated from the current Board is the abandonment of the so-called "ambush election" rules adopted by the Board during the Obama administration. On December 13, 2019, the Board issued regulations revising several significant provisions of the rules governing union elections. These changes will become effective in early April 2020.

While the changes do not revise the regulations wholesale, they restore several employer-friendly aspects of the rules. These changes include:

- Extension of the period during which a pre-election hearing must be held from eight calendar days to 14 business days;

- Extension of the period during which nonpetitioning parties may file statements of position from seven calendar days to eight business days;

- Requiring petitioners, in addition to respondents, to file a statement of position identifying issues to be addressed at the pre-election hearing;

- Allowing disputes concerning unit scope and voter eligibility, including supervisor status, to be addressed at the pre-election hearing. Under the prior rules, the only issues that could be addressed at the pre-election hearing were those concerning whether a valid question concerning representation existed. Issues concerning the scope of the unit could

only be raised by challenging an individual employee's vote during the election;

- Post-hearing briefing is permitted with respect to both pre- and post-election hearings;

- Elections will not be conducted prior to the 20th business day following the issuance of a direction of election;

- A request for review of the direction of election may be filed within 10 days of the direction and, if the request is not decided prior to the election, disputed ballots will be impounded; and

- Regional directors may not certify the results of an election while a request for review is pending or before the time for requesting review has expired.

In addition to the new rules, the Board is expected to finalize proposed rules relating to a number of significant aspects of the Board's election procedures, including the handling of so-called blocking charges and the application of the voluntary recognition bar doctrine.

NOTES

1. 362 NLRB No. 186 (Aug. 27, 2015).
2. *See, e.g.*, *TLI, Inc.*, 271 NLRB 798 (1984); *Laerco Transportation*, 269 NLRB 324 (1984).
3. 365 NLRB No. 156 (Dec. 14, 2017).
4. *Hy-Brand*, 366 NLRB No. 26 (Feb. 26, 2018).
5. *See* 83 Fed. Reg. 46681 (Sept. 14, 2018).
6. 365 NLRB No. 154 (Dec. 14, 2017).
7. 343 NLRB 646 (2004).
8. 369 NLRB No. 93 (Oct. 10, 2019).
9. 368 NLRB No. 146 (Dec. 16, 2019).
10. *Coastal Industries, Inc.*, Case 12-CA-194162 (Aug. 30. 2018).
11. *CVS Health*, Case 31-CA-210099 (Sept. 5, 2018).
12. 368 NLRB No. 143 (Dec. 16, 2019).
13. 351 NLRB 1110 (2007).
14. 361 NLRB 1050 (2014).
15. 362 NLRB 1108 (2015).
16. 368 NLRB No. 144 (Dec. 17, 2019).

17. 365 NLRB No. 154 (2017).
18. 367 NLRB No. 68 (Jan. 10, 2019).
19. *General Motors LLC*, 368 NLRB No. 68 (Sept. 5, 2019).
20. 360 NLRB 972 (2014).
21. 357 N.L.R.B. 2277 (2012).
22. 138 S.Ct. 1612 (2018).
23. 368 NLRB No. 43 (Aug. 14, 2019).
24. Case NO. 10-CA-175850.
25. *See Provena St. Joseph Medical Center*, 350 NLRB 808 (2007).
26. *See, e.g., Department of Justice v. FLRA*, 875 F.3d 667 (D.C. Cir. 2017).
27. 368 NLRB No. 66 (Sept. 10, 2019).