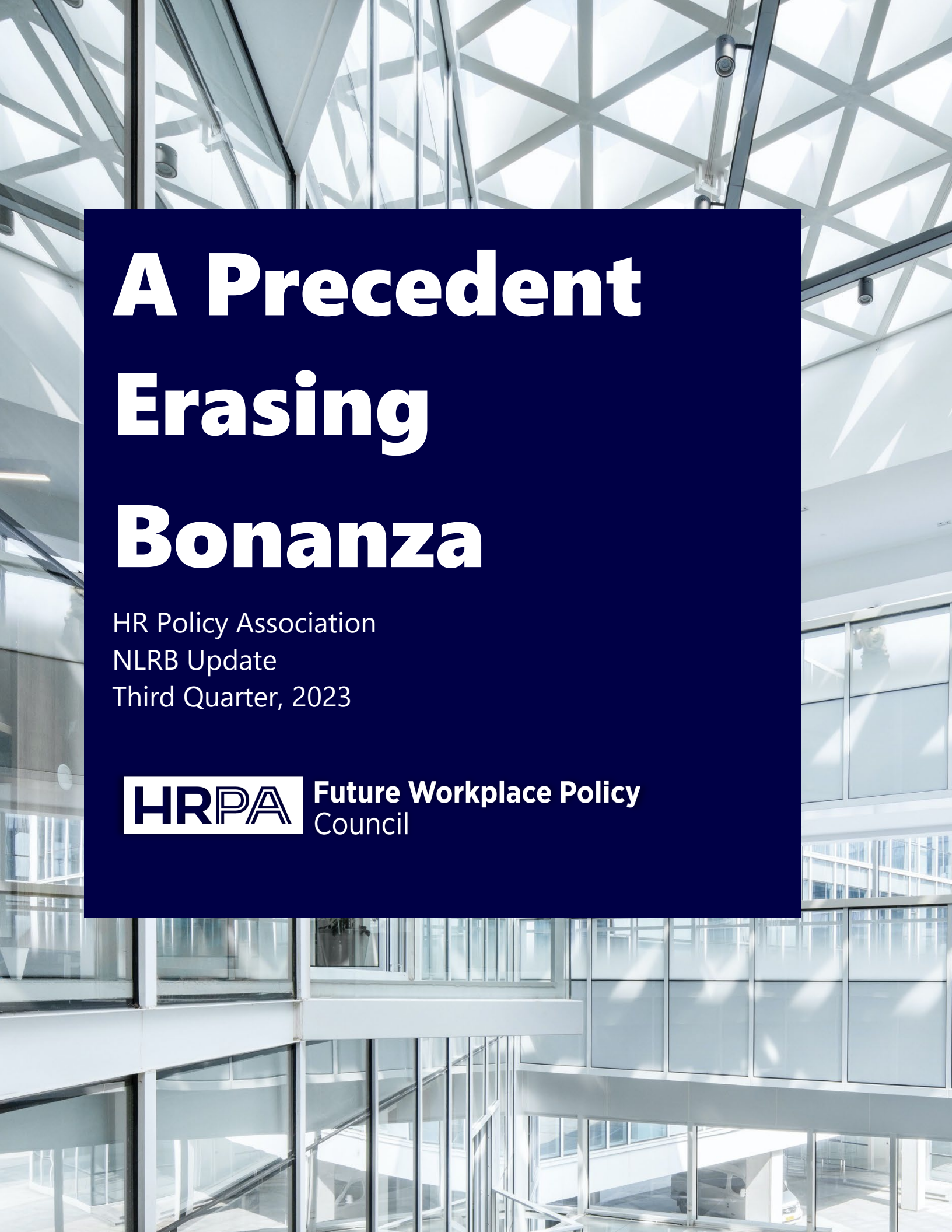

# A Precedent Erasing Bonanza

HR Policy Association
NLRB Update
Third Quarter, 2023

HRPA Future Workplace Policy Council

# FOREWORD

Welcome to the seventh edition of the HR Policy Association's quarterly NLRB Report. Each report provides a comprehensive update of law and policy developments at the National Labor Relations Board, including significant decisions issued by the Board, cases to watch, Office of General Counsel initiatives, rulemakings, and an overview of HR Policy's engagement with the Board for that quarter. These reports also feature analysis on a specific issue or topic from a rotation of guest authors. .

The third quarter of 2023 saw the Board continue its breakneck pace of erasing federal labor law precedent, and includes perhaps the most consequential batch of new decisions adverse to employers to date. In one particular decision, the Board upended decades of precedent and effectively codified union card check recognition in practice – perhaps the most radical departure from traditional federal labor law in recent memory.

Eight of the ten Board decisions from this quarter featured in this report involved changes in precedent, by far the most in any NLRB Report to date. Collectively, those eight decisions alone erased over 80 years of federal labor law precedent. Not stopping there, the Board also issued new union election procedural rules that streamline the process for unions to obtain election dates and reduce the amount of time and the number of avenues employers have to counter a union's campaign.

In the span of a few short months, the labor relations legal landscape has been turned completely on its head with potentially severe consequences for employers. Meanwhile, more radical change awaits on the horizon.

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# ISSUE SPOTLIGHT

## The New Watchtower: The NLRB's Interest in Artificial Intelligence

*By Bradford J. Kelley*

New technologies, including tools driven by artificial intelligence (AI), are being used in the workplace for a wide range of purposes such as measuring employee productivity, preventing theft, and monitoring drivers with GPS tracking devices. These technologies offer potential solutions for many companies that help optimize efficiencies and support operations, reduce human bias, prevent discrimination and harassment, and improve worker health and safety. For example, AI-powered agricultural equipment has been shown to improve safety by reducing how many workers are needed for labor-intensive tasks during hot weather and removing operators from hazardous tasks such as moving a pesticide sprayer.

Despite the benefits of this technology, the use of these tools raises concerns from labor's supporters and some policymakers that the tools could be used to interfere with, impair, or negate employees' ability to engage in protected activity in violation of the National Labor Relations Act (NLRA). These critics argue that employers' engaging in surveillance, or giving the impression of surveillance, can violate the NLRA if it has a chilling effect on protected activities and makes employees fearful of retaliation. For instance, critics point to GPS tracking devices that can give an employer information about the locations and times workers gather. Other concerns focus on keystroke software that could be used to identify workers' use of specific words or phrases such as "union." Similarly, critics allege that AI tools could be used by employers to screen out candidates who are (or were) affiliated with a union.

On October 31, 2022, the General Counsel of the National Labor Relations Board (NLRB) issued General Counsel Memorandum 23-02 titled, "Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights" (GC's Memo). The GC's Memo outlined a prosecutorial initiative aimed at employers that utilize technology to monitor and manage employees in the workplace. More specifically, the General Counsel proposed a burden-shifting framework whereby an employer will be found to have presumptively violated the NLRA where its "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."

However, the proposed framework outlined in the memorandum suffers from several flaws that undermine the approach that she proposes. The GC's Memo does not distinguish lawful from unlawful monitoring and leaves critical terms undefined, thereby proposing a standard that is almost impossible to meet. The GC's Memo also fails to account for the wide diversity of AI tools and the many legitimate business purposes for employee monitoring, including detecting and mitigating cybersecurity threats, ensuring compliance with workplace guidelines, preventing discrimination, harassment, and workplace violence, and enhancing workplace

health and safety. The position outlined in the GC's Memo also fails to recognize that many AI practices at issue are driven by compliance with several employment laws and regulations, particularly in the areas of anti-discrimination, anti-harassment, and occupational health and safety. For instance, AI-driven systems can be used to mitigate work-related violence and harassment risks by detecting patterns and identifying or predicting risks to find the best way to minimize such risks. In addition, because many employers have increased their use of technological tools to effectively manage their increasingly off-site workforces, the GC's Memo will also impair remote work and therefore hurt employee morale, retention, and productivity. Ultimately, this interpretation of the NLRA outlined in the GC's Memo will ultimately harm the workers the General Counsel purportedly seeks to protect.

The GC's Memo also emphasized that other federal agencies are targeting employers for their use of monitoring technologies and the NLRB will use interagency agreements with the other federal agencies to facilitate coordinated enforcement against employers. Fundamentally, the NLRB's interest in AI has been part of the Biden administration's "whole of government" approach to aggressively promote a pro-union agenda across the entire spectrum of the government. This "whole-of-government" approach has relied on executive orders, interagency task forces and councils, interagency agreements, individual agency actions, and a variety of other means to achieve a pro-union agenda.

*Bradford J. Kelley is a shareholder at Littler Mendelson*

# SIGNIFICANT DECISIONS

## *Cemex Construction Materials Pacific, LLC*

*Cemex Construction Materials Pacific, LLC* 372 NLRB No. 130 (Aug. 25, 2023)

**Issue:** Bargaining Orders, Card Check Recognition

**Facts:** Employees at a cement company voted against union representation in an election held in 2019. The Union and the Board's General Counsel argued that the Employer engaged in extensive unlawful and coercive conduct that required setting aside the election results and issuing a bargaining order under existing Board law (*Gissel*). An ALJ agreed, finding that the Employer unlawfully threatened employees with job loss and plant closure, engaged in illegal surveillance of employees, and hired security guards to intimidate employees before the election, among other unlawful conduct. The ALJ ordered the election to be rerun but did not issue a *Gissel* bargaining order.

Meanwhile, the Board's General Counsel also asked the Board in this case to overrule *Gissel* and return to a version of the Board's long discarded *Joy Silk* standard for issuing bargaining orders. Specifically, the General Counsel urged the Board to adopt a standard under which the Board could require employers to bargain with a union on the basis of a union showing of majority of employees' signed authorization cards (card check), unless the employer could prove a good faith basis to question the union's majority status.

**Decision:** **(3-1, Member Kaplan dissenting)** The Board agreed with both the ALJ (to the extent that the Employer's conduct was unlawful and merited setting aside the election) and the Board's General Counsel (to the extent that a bargaining order was warranted) and issued a bargaining order to the Employer.

Further, and most importantly, a Board majority established a new bargaining order standard under which employers that commit unfair labor practices during a union election campaign will be required to recognize and bargain with that union if the union has previously showed majority support among employees. Additionally, employers presented with a showing of majority employee support by a union will be responsible for filing a petition for election (unless they choose to voluntarily recognize the union) within two weeks – a failure to do so will result in a bargaining order. The Board majority argued that the new *Cemex* standard more sufficiently protects an employee's right to choose union representation.

Dissenting, Member Kaplan argued against the new bargaining order standard and claimed it had no basis in Board or Supreme Court precedent, and that the *Gissel* standard was sufficient. Member Kaplan also highlighted that, particularly under the Board's new workplace rules standard (discussed further below), it is virtually impossible for employers to avoid unfair labor practice charges during a union election campaign, and thus employers will face bargaining orders for "minor" conduct.

**Significance:** In practice, the Board's decision provides a "road-map" for unions to avoid secret ballot elections and effectively codifies card check under federal labor law. The case is perhaps the most monumental Board decision in decades. As Member Kaplan pointed out, employers are nearly always accused by a union of unfair labor practices during union election campaigns. This is a standard union campaign tactic. Given the current Board's clear disposition towards unions in such cases, as long as a union can get a majority of employees to sign union authorization cards, the chances are extremely high that an employer may be forced to recognize that union shortly thereafter. It is essential that employers communicate the implications of the *Cemex* decision to their front line supervisors and managers so they can minimize the potential for unfair labor practices and are ready to properly respond when presented with a showing of majority support by a union.

# *Stericycle, Inc.*

*Stericycle, Inc.*, 372 NLRB No. 113 (Aug. 2, 2023)

**Issue:** Employee Handbooks, Workplace Rules and Policies

**Facts:** The Employer maintained several work rules governing personal conduct, conflicts of interest, and confidentiality of harassment complaints that the Union and Board's General Counsel argued were overly broad such that they unlawfully chilled employees' rights to protected concerted activity. An ALJ, applying the Board's *Boeing* framework for evaluating workplace rules, found the rules to be unlawful. The Board invited *amicus* briefs in this case to determine whether it should overturn *Boeing* and establish a new standard for evaluating workplace rules. HR Policy submitted a brief arguing for the Board to retain *Boeing*.

**Decision:** **(3-1, Member Kaplan dissenting)** Overruled *Boeing* and returned to a stricter standard (similar to the Obama-era Board) for evaluating employer workplace rules and policies. Specifically, workplace rules and policies are presumed unlawful if an "economically dependent" employee subject to the rule and contemplating protected concerted activity could "reasonably interpret" the rule to interfere with their right to protected concerted activity. The employer can rebut this presumption by showing that the rule is narrowly tailored and advances "a legitimate and substantial business interest."

**Significance:** The Board handbook police are back. Nearly all handbook rules – whether actually enforced or not – could be arguably considered presumptively unlawful moving forward. By viewing challenged rules through the eyes of a hypothetical "economically dependent employee," the Board is essentially (and unsurprisingly) announcing that it will be evaluating such rules with the strictest microscope possible – in other words, if a rule could in *any* possible way be interpreted to chill employee NLRA rights, it is unlawful. Employee handbooks will be the easiest path to an unfair labor practice charge (and finding), which is particularly alarming for employers given the new *Cemex* standard for bargaining orders. Petitioning unions will simply open up an employer's handbook and pick a rule to challenge, with the result more likely than not (assuming they have majority employee support) being a basis for a bargaining order from the Board.

# *American Federation for Children, Inc.*

*American Federation for Children, Inc.*, 372 NLRB No. 137 (Aug. 26, 2023)

**Issue:** Scope of Protected Concerted Activity, Advocacy for Nonemployees

**Facts:** An employee of the Employer lost their work eligibility status due to changed circumstances in her immigration status. The Employer attempted to resolve the immigration status issue and was facilitating the employees' rehire at the time of the circumstances of the present case. A coworker of the employee (and the complainant in the present case) vigorously advocated for the employee's situation to be resolved by the Employer and for her to be rehired, and took issue with the manner in which her supervisor was handling the situation.

The coworker was eventually terminated for continuously speaking out and levying allegations against the supervisor, and filed a complaint alleging that the Employer unlawfully terminated her for protected concerted activity (advocating on behalf of the employee, who at the time did not work for the Employer). An ALJ, relying on a Trump Board decision in *Amnesty International*, found that the activity was not protected by the NLRA because it was for the benefit of someone who was a nonemployee at the time.

**Decision:** **(3-1, Member Kaplan dissenting)** The Board reversed the decision of the ALJ and overruled *Amnesty International*, holding that the coworker's activity was in fact protected by the Act. The Board established that as long as the activity was for the benefit of employees – improving their own work conditions – then employee activity on behalf of a nonemployee is protected by the Act. The Board claimed that this standard is well established by Board and Supreme Court precedent, and that *Amnesty International* was a departure from the same.

**Significance:** The Board's decision significantly expands the scope of protected concerted activity. Employers may have their hands tied when it comes to disciplining employees that protest working conditions or social issues seemingly unrelated to their own workplaces (i.e., things within the employers' actual control). As long as the protest can in any way be linked back to the employees' own working conditions (which the Board will no doubt search for), the current Board is likely to find discipline of such protests unlawful.

# *Miller Plastic Products, Inc.*

*Miller Plastic Products, Inc.*, 372 NLRB No. 134 (Aug. 25, 2023)

**Issue:** Scope of Protected Concerted Activity, Individual Actions as Protected Concerted Activity

**Facts:** An employee, by himself, raised concerns to management over COVID-19 safety protocols. Such concerns were raised both during a group meeting with other coworkers present and during individual meetings with supervisors. The employee was eventually terminated, which he alleged was due to his complaints regarding COVID-19 safety protocols, which he alleged constituted protected concerted activity.

**Decision:** **(3-1, Member Kaplan dissenting in part)** The Board found that the employee's conduct was concerted protected activity, and that he was unlawfully terminated for the same. In doing so, the Board overruled a Trump Board decision in *Alstate Maintenance* which established a five factor test for determining whether an individual compliant constitutes concerted protected activity. The current Board found the five factor test too restrictive and purported to return to a long-standing test that evaluates actions based on the "totality of the circumstances." Under such a standard, the Board emphasized that individual actions, including individual statements made during a group meeting, can constitute concerted activity protected by the Act, rather than mere "personal griping."

**Significance:** Like the above decision, the Board's decision here significantly expands the scope of protected concerted activity. As long as an individual complaint or action was undertaken with an intent to initiate group action (which is determined by the "totality of circumstances"), then such individual activity is considered concerted under the Act and therefore protected from employer retaliation. Employers must therefore be careful when considering discipline of employees for individual complaints or actions.

# *Intertape Polymer Corp.*

*Intertape Polymer Corp.*, 372 NLRB No. 133 (Aug. 25, 2023)

**Issue:** Burden of Proof in Mixed Motive Cases (*Wright Line*)

**Facts:** Two employees were disciplined for two separate incidents – for behavior during a confrontation on the production floor, and for failing to clean up production materials on the floor. The employees were a union steward and union committee member, respectively. The employees filed unfair labor practice complaints against the employer, alleging that the Employer disciplined them for their union activity. An ALJ subsequently dismissed the charge for the second disciplinary action, holding that there was no evidence of animus motivating the discipline.

In mixed motive cases such as the present case (in which an employer may have lawful and unlawful reasons for disciplining an employee), the Board has traditionally applied the *Wright Line* burden shifting framework. The General Counsel must show that the employee was engaged in protected activity, the employer was aware of the same, and that there was animus on the part of the employer. The burden then shifts to the employer to prove that it would have taken the same action in the absence of protected activity. In *Tschiggfrie Properties*, the Trump-era Board (purportedly) clarified that the General Counsel must establish some nexus between the protected activity and the employer's disciplinary action, either through direct or circumstantial evidence. In appealing the ALJ's dismissal of the second charge, General Counsel Abruzzo asked the Board to overturn *Tschiggfrie* and clarify that there need not be any nexus between the union activity and the disciplinary action and/or animus.

**Decision:** **(3-0, Member Kaplan concurring)** The Board overturned the ALJ's decision and found that the second disciplinary action was also unlawful, in part because there was no evidence that the Employer had disciplined other employees for the same actions. In doing so, the Board "clarified" that *Tschiggfrie* does not alter *Wright Line* such that the General Counsel does not necessarily need to show a direct connection between employer animus/disciplinary action and the employee's protected activity. Evidence that permits an inference that the protected activity was a motivating factor in the disciplinary action is sufficient – in other words, general union animus may be sufficient. The Board technically did not overturn *Tschiggfrie* as sought by General Counsel Abruzzo – but its "clarification" of the same could be seen as having the same effect.

**Significance:** The Board technically did not overturn *Tschiggfrie* as sought by General Counsel Abruzzo – but its "clarification" of the same could be seen as having the same effect. In theory, this case may not change much – the General Counsel's burden has not necessarily changed from what it has been historically. However, in practice, General Counsel Abruzzo may see the decision as a green light to push the limits of "general union animus" to try and tag out employers for disciplinary actions that may be lawfully motivated.

# *Wendt Corp.*

*Wendt Corp.*, 372 NLRB No. 135 (Aug. 26, 2023)

**Issue:** Employer Unilateral Changes to Terms and Conditions of Employment Based on Past Practice

**Facts:** The Employer laid off several employees while bargaining with the Union for their first collective bargaining agreement. In a previous decision, the Board found the layoffs and other Employer conduct to be unfair labor practices. On appeal from the Employer, the D.C. Circuit Court of Appeals upheld the Board's decision but remanded back to the Board for further consideration of whether the layoffs were privileged as in line with the Employer's past practice (the Employer argued that it could unilaterally lay off the employees because it had a past practice of doing so during downturns in business).

**Decision:** **(3-1, Member Kaplan dissenting)** A Board majority held once again that the layoffs were an unfair labor practice, because the Board found that the Employer had failed to establish that it had a longstanding past practice of layoffs which occurred regularly and frequently enough to unilaterally implement the layoffs at issue in the present case. In doing so, the Board overruled a Trump Board decision in *Raytheon*, which held that an employer may make unilateral changes so long as the changes are similar in kind and degree to changes made in connection with the employer's past practice of such changes.

**Significance:** The decision considerably limits employers' ability to lawfully make unilateral changes to terms and conditions of employment, and therefore correspondingly significantly increases employers' bargaining obligations during the pendency of negotiations for an initial contract. The Board's new standard will also make it much more difficult for employers to establish "past practice" defenses as a basis for privileging unilateral actions in other instances.

# *Tecnocap LLC*

*Tecnocap LLC*, 372 NLRB No. 136 (Aug. 26, 2023)

**Issue:** Employer Unilateral Changes to Terms and Conditions of Employment, Management Rights Clauses

**Facts:** After a collective bargaining agreement had expired, and during negotiations for a successor agreement, the Employer unilaterally implemented work schedule changes. In doing so, the Employer relied on a management rights clause in the expired CBA that permitted the Employer to make unilateral changes to work schedules, therefore making it a "past practice." The Union alleged that the unilateral changes were unlawful. An ALJ held that the unilateral changes were based on past practice and therefore lawful.

**Decision:** **(3-1, Member Kaplan dissenting)** A Board majority overruled the ALJ and held that the unilateral changes were not based on practice and therefore unlawful. In doing so, the Board once again overturned *Raytheon* to the extent that it allowed employers to make unliteral changes based on management rights clauses in expired CBAs. The current Board established that employers may not make unilateral changes based on management rights clauses in CBAs that have since expired while negotiating for a successor CBA.

**Significance:** Like the prior decision, the Board here limits employers' ability to make unilateral changes. Employers may not rely on previous CBAs that afforded the employer authority to make unilateral changes to make such changes while negotiating for a successor CBA.

# *Quickway Transportation, Inc.*

*Quickway Transportation, Inc.*, 372 NLRB No. 127 (Aug. 25, 2023)

**Issue:** Plant Closure

**Facts:** The Employer, a truck carrier, operated at a terminal in Louisville as part of a distribution agreement with a grocery store. Employees at the terminal voted to unionize and threatened to strike if necessary. Employees of other companies with operations at the terminal agreed to strike in solidarity, threatening to shut down all operations at the location. After one round of initial bargaining, the Employer decided to permanently shut down operations at the terminal. Employer communications also reflected a managerial concern that the union activity at that terminal could "infect" drivers at other terminals. The Union filed a complaint alleging that the Employer's decision to shut down operations was an unfair labor practice. An ALJ dismissed the allegation, finding that although the Employer's decision was motivated by a desire to stop recognizing and bargaining with the Union, there was not enough evidence to support that the decision was also motivated by a desire to stop unionization at other locations (which is required to make such a decision unlawful under Board precedent).

**Decision:** **(3-1, Member Kaplan dissenting in part)** A Board majority overruled the ALJ and found that the Employer did in fact close the location to stop unionization at other locations, and therefore the closure was unlawful. According to the Board, the Employer's concern over the union activity "infecting" other drivers, in addition to Employer awareness of potential union drives at other locations, established that the Employer was seeking to stop unionization at such other locations by closing the Louisville terminal. The Board ordered the Employer to reopen the location and provide employees with backpay and moving expenses as necessary.

**Significance:** The Board's decision here shows the extent to which the Board can wrest control of business operations from employers. Here, the employer was faced with an ultimatum from a customer to either terminate its contract and cease operations at a location, or immediately prevent an impending strike. The Employer made the business decision to undertake the former, knowing the latter to be impossible. Now, the Employer must reverse that business decision based on a Board decision that gave little consideration to the practical effects of doing so.

# *West Shore Home, LLC*

*West Shore Home, LLC*, 372 NLRB No. 143 (Sept. 26, 2023)

**Issue:** Workplace Rules

**Facts:** The Employer maintained handbook rules governing employee use of social media. Specifically, the Employer prohibited employees from referring to or identifying any customers or clients of the company in social media posts without express management approval. An employee filed a complaint alleging that the rules unlawfully infringed upon protected concerted activity. An ALJ, applying the Board's previous standard for evaluating workplace rules (*Boeing*), found the rules to be lawful and dismissed the complaint. The Board subsequently adopted a new, stricter standard (*Stericycle*, as detailed above).

**Decision:** **(3-1, Member Kaplan dissenting in part)** A Board majority, in light of *Stericycle*, remanded the case back to the ALJ to apply the new *Stericycle* standard. Member Kaplan dissented, arguing that the Board made no indication of what other factual determinations were to be made by the judge. Member Kaplan also noted that the Board continued to fail to provide guidance regarding how an Employer could rebut a presumption under *Stericycle* that a workplace rule was unlawful – specifically, how an Employer can show that no more narrowly tailored rule could exist that would advance the same business interest. Member Kaplan noted that this burden placed on employers is seemingly impossible to meet.

**Significance:** The decision to remand clearly highlights that the same workplace rules that may have been lawful under *Boeing* may be unlawful under *Stericycle*. This result shows not only how much stricter *Stericycle* will be, but also the compliance insanity presented by the Board's constant policy swings. In a span of two years, the same handbook rule was both lawful and (most likely) unlawful under federal labor law. Further, Member Kaplan's dissent here articulates the exceedingly high (and likely impossible) burden that employers must meet under *Stericycle* to prove that a workplace rule is lawful.

# *Cognizant Tech. Solutions and Google LLC*

*Cognizant Tech. Solutions and Google LLC, Joint Employers*, 372 NLRB No. 108 (Jul. 19, 2023)

**Issue:** Joint Employer Liability

**Facts:** The CWA sought to unionize 60 Cognizant employees that performed work for YouTube Music (owned by Google), and alleged that Google was the employees' joint employer. The employees subsequently unanimously voted to unionize. The Regional Director conducting the election found Google to be a joint employer of the employees, which Google subsequently appealed.

**Decision:** **(3-0)** The Board agreed with the Regional Director and held that Google was a joint employer of the Cognizant employees. The Board found that Google had substantial control over the employees' work conditions, including developing and maintaining workflow charts that governed their work, decided what tools and processes they used, and setting prioritization and expected rate of performance of assigned tasks. Even though such control was exercised through intermediary entities, the Board found that such intermediaries had no discretion or authority to modify Google's operational instructions.

**Significance:** Google makes extensive use of subcontracting and third party workers for much of its business operations, and this is the first instance in which it has been found to be a joint employer of such workers. Besides being unprecedented (for Google), the decision also highlights the joint employer liability risk for employers who rely heavily on subcontractors or third party suppliers. Further, this risk has substantially increased given the Board's new, stricter joint employer rule (discussed in detail later in this report). Unions will make extensive use of the Board's joint employer doctrine to gain organizing and bargaining footholds at user employers who are often large corporate entities.

# APPELLATE DECISIONS

## *PG Publishing Co., Inc.*

*PG Publishing Co., Inc., v. NLRB 3d Cir. App.*, No. 22-2774 (Sept. 26th, 2023)

**Issue:** Mandatory Subjects of Bargaining

**Facts:** A newspaper laid off two employees who were previously guaranteed work under an expired union contract. The union claimed that although the contract had expired, the provision guaranteeing shifts should remain in effect while the two sides negotiated a new collective bargaining agreement. A Board majority agreed, concluding the newspaper could not lay off the employees without bargaining with the union first. Dissenting Board members disagreed, finding that the guaranteed work clause had expired with the contract, and therefore the layoffs were lawful. The dissent also concluded that the newspaper was only required to bargain over the effects of the layoffs.

**Decision:** A Third Circuit Panel rejected the Board majority's reasoning and endorsed the dissent, concluding that the provision guaranteeing shifts expired when the contract expired. The court found that the Board's application of the "clear and unmistakable waiver" approach, which only permits unilateral employer changes where the union has clearly waived its right to bargain such changes, was incorrect. The court held that such approach should only be used when the collective bargaining agreement indicates that certain provisions are meant to survive contract expiration. Further, the court held that ordinary contractual principles should apply to determine whether certain provisions survive expiration.

**Significance:** The decision highlights the potential of federal courts to serve as a firewall against Board decision-making. Further, in a separate case currently pending before the Board, the Board is considering whether to make the "clear and unmistakable waiver" approach the standard for unilateral employer actions cases. In light of the Third Circuit's decision, the Board may reconsider that approach.

# CASES TO WATCH

## *Starbucks Corp.*

*Starbucks Corp.*, No. 13-CA-306406 (Nov. 2, 2022)

**Issue:** Virtual Bargaining, Refusal to Bargain

**Facts:** The Employer and the Union scheduled and attended bargaining sessions in-person, but no substantive bargaining occurred because the Employer objected to the Union's insistence that additional members of the bargaining team observe the meetings virtually. Board prosecutors dismissed complaints filed by the Employer alleging the Union was refusing to bargain by insisting on some members being able to participate virtually. If the Employer does not settle the case in light of the dismissal, Board prosecutors will pursue the complaint against the Employer for refusing to bargain by refusing the Union's request for some members to bargain virtually.

**Where will the Board go?** Board precedent holds that unions and employers fail in their duty to bargain if they fail to meet with either party at reasonable times and places. The question of how this precedent applies to so-called "hybrid" bargaining, or bargaining in which some members of a party are present while others participate virtually, and whether a party can refuse such arrangements, is novel – the Board to date has not ruled directly on this issue. Should the Employer refuse to settle and the case goes before the Board, given its current composition, it is more likely than not that that the Board would establish that refusing to bargain virtually is an unlawful refusal to bargain.

**Significance:** A Board decision on this issue could establish the right for either a Union or Employer to insist on bargaining virtually, either in whole or part. Such a decision could significantly impact the way negotiations are conducted, and could potentially be more easily made public.

# *ArrMaz Products, Inc.*

*ArrMaz Products, Inc.*, 372 NLRB No. 12 (Dec. 6, 2022)

**Issue:** Remedies for Refusal to Bargain

**Facts:** The Employer unlawfully refused to bargain with the Union. The Board's General Counsel asked the Board to retroactively impose monetary damages on the Employer and require the Employer to pay employees the wages and benefits they *could* have earned if the Employer had not unlawfully refused to bargain. In issuing its decision finding that the Employer unlawfully refused to bargain, the Board severed consideration of the General Counsel's suggested remedy for a future decision.

The Board has traditionally refused to award monetary relief in refusal to bargain cases, as established in 1970 in *Ex-Cell-O Corp.*, which held that such damages would be too speculative and would amount to a compelling contractual agreement in contravention of Section 8(d) of the NRLA (which prohibits forcing contractual terms on either party). Accordingly, in refusal to bargain cases, remedies have been limited to orders to bargain in good faith and notice posting.

**Where will the Board go?** The present case, along with several others the Board has teed up for similar consideration, provides the Board with the opportunity to overturn *Ex-Cell-O Corp*. and impose monetary damages on employers who have unlawfully refused to bargain. The Board's recent decision in *Thryv, Inc.* already expands the available remedies the Board can impose and seemingly indicates that it would be open to doing so again for refusal to bargain cases.

**Significance:** This type of approach would, in essence, be the institution of "interest arbitration" whereby a third party (in this case the Board) writes contract terms for the parties. Further, should the Board go the route desired by General Counsel Abruzzo, employers could potentially be on the hook for significant monetary damages in refusal to bargain cases. Further, determining where such damages begin and end is often likely to be entirely speculative, and will itself often result in separate litigation.

# *Home Depot USA, Inc.*

*Home Depot USA, Inc.*, No. 18-CA-273796 (June 10, 2022)

**Issue:** Workplace Rules, Workplace Dress Codes, Employee Protected Concerted Activity

**Facts:** The Employer instituted a dress code that prohibited employees from displays of "causes or political messages unrelated to workplace matters." At a specific store, management enforced this policy to prohibit employees from wearing "Black Lives Matter" on their work aprons. An employee filed an unfair labor practice claim alleging that the Employer was unlawfully interfering with workers' rights to protest against racial harassment, which the employee argued was a form of protected concerted activity under the NLRA. An administrative law judge issued a decision in which he held that the BLM messaging lacked a significant nexus to employees' job conditions, and that employees did not have a right to wear BLM clothing at work. The case is now pending before the Board, and the Board's Office of General Counsel is vigorously advocating for the Board to overturn the decision of the ALJ and take an expansive view of what is considered protected concerted activity under the NLRA.

**Where will the Board go?** The case provides the Board a vehicle for expanding what is considered "protected concerted activity" under federal labor law to social and political protests, among other employee activity. Historically, there has to be some sort of nexus between the activity and question and the employee's terms and conditions of employment. The Board is likely to take an expansive view of what constitutes that nexus, both in this specific case and others like it. Indeed, the General Counsel has already repeatedly expressed her view that employees have a right under the NLRA to wear BLM – and anti-BLM – insignia at work.

**Significance:** Expanding the umbrella of what is considered to be protected concerted activity under the NLRA to include social and political protests could significantly impact an employer's ability to set terms and conditions of employment, including workplace rules meant to maintain productivity and positive and inclusive work environments. Given that the Board is likely to begin applying stricter scrutiny to employer workplaces rules and policies in general, such scrutiny will likely involve a very broad view of what is connected to an employee's terms and conditions of employment, and consequently target employers who retaliate against employees for engaging in social or political activity that traditionally might not be considered related to their job.

# *Ralphs Grocery Co.*

*Ralphs Grocery Co.*, 371 NLRB No. 50 (Jan. 18, 2022)

**Issue:** Arbitration Agreements, Confidentiality Provisions in Arbitration Agreements

**Facts:** In a 2016 decision, the Board found that the Employer violated the NLRA by maintaining and enforcing mandatory arbitration policies that included class action waivers and confidentiality provisions. A subsequent Supreme Court decision regarding arbitration agreements under the NLRA, *Epic Systems Corp v. Lewis*, invalidated the Board's decision. The Board has now called for amicus briefs in this case to determine whether arbitration clauses that require employees to arbitrate all employment-related claims, but with savings clauses that preserve the right to pursue charges with the Board, unlawfully interfere with employees' rights under the Act. The Board also asked for briefs to determine whether confidentiality provisions in arbitration agreements unlawfully interfere with employees' rights under the Act.

**Where will the Board go?** The Board is likely to adopt an approach of much stricter scrutiny of mandatory arbitration agreements, despite the Supreme Court's decision in *Epic Systems*. A decision in this case could establish that arbitration agreements that require the use of arbitration for employment claims unlawfully interfere with employees' right to file charges with the Board, and that confidentiality requirements in arbitration agreements are always unlawful under the NLRA.

**Significance:** Employers could be forced to discard or rewrite countless employment contracts that contain arbitration clauses or agreements. Additionally, if confidentiality provisions are held to be unlawful under the NLRA, employers could face unwanted disclosure of arbitration proceedings and settlements.

# *Preferred Building Services*

*Preferred Building Services,* No. 20-CA-149353 (April 1, 2015)

**Issue:** Secondary Boycotts/Picketing

**Facts:** The Employer provided janitorial services to various commercial buildings. Employees of the employer were tasked with cleaning an office building. After disputes regarding their terms and conditions of employment arose, the employees picketed in front of the office building. The Employer subsequently fired the employees, which the Union alleged was an unfair labor practice. The Board held that the terminations were lawful because the employees were engaged in secondary picketing which is prohibited by the NLRA. The Ninth Circuit court disagreed, finding that the employees made it clear that they were protesting the Employer and not the office building at which they were picketing. On remand to the Board, General Counsel Abruzzo is asking the Board to overrule precedent and establish that secondary boycotts and picketing is presumptively lawful, shifting the burden of proof to employers to show that they are unlawful.

**Where will the Board go?** Prohibitions on secondary boycotting are clearly spelled out in the NLRA, and Board precedent established under *Moore Dry Dock* has long held that the burden of proof rests on unions or employees to prove that activity is not unlawfully secondary in nature. It would therefore be a substantial change to federal labor law should the Board go in the direction asked for by General Abruzzo.

**Significance:** Should the Board go with General Counsel Abruzzo's preferred approach, employers may be drawn in to labor disputes of which they have no direct part. Employers may face boycotts of their own business based on their third party business relationships, or picketing and protests on their own property regarding disputes of which they have no part.

# *Garten Trucking LC*

*Garten Trucking LC*, No. 10-CA-279843 (Jul. 14, 2021)

**Issue:** Union Access to Employer Property

**Facts:** The Employer terminated three employees for violating the Employer's solicitation and distribution policy by soliciting for support for the Union while on working time. An ALJ found both the terminations and the Employer's policy unlawful on the basis that the policy impermissibly prohibited solicitation/distribution during all work time, rather than just while the employee is actually working. On appeal to the Board, the General Counsel is arguing for the Board to overrule Trump Board decisions in *UPMC* and *Kroger* which collectively limited union access to employer property. Specifically, the decisions allowed employers to restrict solicitation and distribution on company property provided any such policy is enforced in a nondiscriminatory fashion. The General Counsel is urging the Board to establish a new standard under which union organizers may access public employer property for solicitation and distribution purposes, provided they are not disruptive.

**Where will the Board go?** The Board is likely to overrule *UPMC* and *Kroger* and expand third party access to employer public property. Current Board Chair McFerran dissented in both of the above cases. The Board will likely restore prior precedent that allowed union organizers access to employer public property provided they did not disrupt employer operations.

**Significance:** *UPMC* and *Kroger* had empowered employers to limit union access to their property. Should the Board move to erase both precedents, employers will have their hands tied when it comes to dealing with union access to their public spaces.

# RULEMAKINGS

## *"Quickie" Election Rules*

In August, the Board issued a Final Rule amending its union election procedures. Collectively, the amendments shorten time periods significantly for several election processes, including pre- and post-election hearings, furnishing voter lists, and the overall election timeline itself. The Final Rule is essentially a restoration of procedures put in place by the Obama-era Board in 2014. The new (old) rule will shorten the timeline for union elections in the following ways:

- Pre-election hearings will be scheduled within 8 days of service of the Notice of Hearing, instead of 14 days.
- Regional directors are limited to up to 2 days for pre-election hearing postponements and submission of statements of position postponements, rather than unlimited time for postponement.
- Employers must post the Notice of Petition for Election in the workplace and email it to its employees within 2 days of service of the Notice of Hearing, instead of 5 days.
- Voter eligibility and inclusion disputes do not need to be litigated and resolved prior to an election. The 2019 rule generally required such issues to be resolved prior to the holding of an election.
- Regional Directors are required to schedule elections for "the earliest date practicable" after issuance of a decision and direction of election, rather than a 20-day waiting period.

Parties may only file supplemental pre- or post-election briefs with the "special permission" of the Regional Director, rather than simply upon a showing of good cause.

**Significance:** The cumulative effects of the new rule will be to streamline a union's path towards representation, while conversely reducing an employer's ability to educate its employees on the effects of potential union representation before an election occurs. Employers will have far less time – and fewer avenues – to educate employees on potential representation issues. Notably, but unsurprisingly, the Board recently took a diametrically opposite approach to decertification election campaigns, reviving a block charge policy that significantly delays such election processes, in some cases indefinitely. The contradiction evident in these two approaches is an apt representation of the Board's attitude towards labor law.

# OFFICE OF GENERAL COUNSEL INITIATIVES

## *Interagency Enforcement Collaboration*

We previously saw the Office of the General Counsel announce efforts to strengthen interagency enforcement coordination between the Board, the EEOC, the Department of Labor's Wage and Hour Division, OSHA, OFCCP, the FTC, the DOJ, and the CFPB, as reported in previous installments of our NLRB Quarterly Report. This quarter, General Counsel Abruzzo established yet another new interagency partnership, this time with the Occupational Safety and Health Administration. Like the others, the partnership is centered on enhanced enforcement coordination and information sharing, and will be focused on the intersection between workplace safety and employee rights under the NLRA. One specific facet of the collaboration will involve the NLRB training OSHA inspectors to spot potential unfair labor practices.

**Significance:** The growing partnerships between the Board and other agencies – including those that have not traditionally been involved in labor and employment regulation and policymaking, represent General Counsel Abruzzo's commitment to the Biden administration's "all of government" approach to labor and employment regulation. This particular relationship is made more concerning given a recently proposed "walkaround" rule from OSHA that would allow unlimited union representatives to accompany OSHA inspectors on site visits. Given this official collaboration between the NLRB and OSHA, that proposed rule is clearly an effort to increase union access to employer property in the guise of workplace safety, and no doubt will result in an increase in union organizing activity and unfair labor practice charges, especially over workplace safety issues.