Employer Voice at Risk

HR Policy Association
NLRB Update
Second Quarter, 2023

HRPA Future Workplace Policy Council

FOREWORD

Welcome to the sixth edition of 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 analyses of specific issues or topics from a rotation of writers.

The second quarter of 2023 saw the Board issue an unusually small number of decisions, particularly given the continued backlog of cases, including several pending cases that could drastically rewrite federal labor law. The Biden Board has continued its snail's pace in issuing significant decisions despite its announced consideration of – and even intention to – rewrite several decades of NLRB precedent. As more Board member terms expire before the end of the year, expect this pace to increase considerably.

In the meantime, however, this quarter nevertheless saw the Board issue two decisions on significant labor law policy issues – independent contractor status and discipline of offensive speech in the workplace – and rewrite precedent in the process. Moreover, General Counsel Abruzzo extended her pro-labor, anti-employer crusade to a new front – non-compete agreements. Even in an unusually "light" quarter, the current Board continues to provide headaches for employers.

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ISSUE SPOTLIGHT

NLRB for CHROs: What HR Executives Should Know About Current Board Activity

By Gregory Hoff

The National Labor Relations Board is often off the radar screens for many CHROs, and for understandable reasons. The Board often deals in arcane areas of labor law and policy, and some issues may only be of significance for those with unionized workplaces. Further, as Republican and Democratic administrations have come and gone over the last two decades, we have seen the Board oscillate back and forth on the same issues over and over again, with this pendulum swinging reaching a fever pitch over the last decade in particular. It is therefore unsurprising that many CHROs may choose to ignore goings on at the Board to focus on more pressing practice matters.

Nevertheless, the current Board and labor law and policy landscape requires the attention of all top HR executives. The simple reality is that the same old issues are back once again – along with some unsettling new ones – and the way the Board acts on them can and will significantly impact large employer workplaces, *regardless of whether the workplace is unionized or not*. This is particularly true today, as the current Board and its General Counsel are taking the most aggressive approach we have yet seen on these "same old issues," putting employers at greater risk than before.

Minimization – or elimination – of employer voice. The Board and its General Counsel seem to be starting with the premise that workers that do not have a union are inherently being taken unfair advantage of by their employers, notwithstanding the wages, benefits, and employment practices of that employer. Regardless of whether that is true, that is the lens through which the Board is viewing each issue, and each case brought before it. Accordingly, every action taken by the Board and its General Counsel will be to increase union density and to minimize employer voice. This philosophy will impact employers' – and by extension CHROs' – ability to engage with employees on workplace concerns, and to help address the same. The Board has already acted (or will act) on several issues in ways that will minimize or eliminate employer voice, and by extension employers' ability to engage with their employees and manage their workplaces, including: maintaining a diverse and inclusive workplace; employer communication with employees; and managing the workplace.

Maintaining a diverse and inclusive workplace: The Board recently issued a decision – detailed below in this report – in which it ruled that employers may not discipline employees for highly offensive language or actions in the workplace in most contexts,[1] unless such language is "particularly severe." However, the Board's view of what is "particularly severe" is

[1] The employee's language or activity must also be in the course of protected concerted activity. This is generally understood as engaging in collective action for the purposes of protesting or bettering workplace conditions (unionization being the classic example). The current Board, however, defines protected activity extremely broadly, such that nearly any employee activity, so long as it has some potential nexus to the workplace, is protected.

completely at odds with current norms and even federal anti-discrimination law. Indeed, the Board has consistently penalized employers for disciplining employees for using racist, sexist, and threatening language or behavior. In doing so, the current Board is preventing employers from maintaining a harassment-free and inclusive workplace, to the detriment of DEI practices and programs, among other negative implications.

Employer communication with employees: The Board's General Counsel is seeking to ban so-called "captive audience meetings." While such meetings are historically understood to be employer-held meetings during unionization campaigns to provide the employer's point of view, the General Counsel considers such meetings to be *any* type of mandatory, employer-held meeting about employees' work conditions – regardless of whether a union campaign is present or not. This would even include one-off conversations between one manager and one employee. Should the Board adopt the General Counsel's approach, employers will be significantly restricted in how they can communicate with their employees on workplace issues.

Managing the workplace: The Board is expected to issue a decision in the coming months in which it will rule that most employer workplace rules and policies are presumptively unlawful. In the past, under the Obama-era Board, this has meant that even the most mundane, seemingly straightforward workplace rules – such as "be courteous to your co-workers," or "maintain a harassment-free workplace" – have been considered unlawful. The Board has already ruled that employer dress codes are presumptively unlawful if they do not allow employees to wear union attire. Accordingly, employers may have their hands tied when it comes to maintaining productive and safe workplaces.

While the NLRB may be on the periphery of many CHRO's focus, the majority of major labor policy change will be channeled through it. With the current Board, these changes – many of them unprecedented – will have significant impacts on HR practice through the minimization of employer voice and employers' ability to manage the workplace, regardless of whether the workplace is unionized or not. As a result, CHROs must remain aware of Board activity and how it will restrict their ability to engage with their employees.

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SIGNIFICANT DECISIONS

Atlanta Opera, Inc.

Atlanta Opera, Inc., 372 NLRB No. 95 (June 13, 2023)

Issue: Independent Contractor Standard

Facts: The Union petitioned to represent a group of workers – makeup artists, wig artists, and hairstylists – that it claimed were employees. The Employer claimed the workers were independent contractors, but the Regional Director ruled that the workers were employees and ordered a representation election. The Board invited *amicus* briefs in this case to determine whether it should change its standard for determining independent contractor status under the NLRA.

Decision: **(3-1, Member Kaplan dissenting)** A Board majority overturned Trump Board precedent and instituted a new, narrower test (albeit essentially a reinstatement of an Obama-era standard) for independent contractor status under the NLRA. The new (old) test considers a multitude of factors when assessing employee status, with no one factor being decisive. The Trump Board had, in practice, afforded special weight to a worker's entrepreneurial opportunity for profit or loss – this factor is now simply one of many, which as mentioned above, are not singularly decisive. Member Kaplan dissented, arguing that the Trump Board standard was consistent with both the NLRA and common law.

Significance: The Board's decision here increases not only the risk of unionization but of legal liability. Only employees, and not independent contractors, are covered by the NLRA, meaning only employees have the right to collectively bargain and unionize, among the other rights afforded under the Act. Thus, under a stricter, narrower test for independent contractor status, thousands of contractors could be converted into employees, significantly increasing the pool of workers eligible for unionization among other rights. The potential for misclassifying workers is now greater as well, as the NLRB may consider workers that heretofore have been contractors as employees – even if such workers are still classified as contractors under other employment laws, including the Fair Labor Standards Act. The risk of misclassification becomes even more tricky given that the Board and its General Counsel's current attempts to make misclassification, by itself, an unfair labor practice under the NLRA.

Lion Elastomers, LLC

Lion Elastomers LLC, 372 NLRB No. 83 (May 1, 2023)

Issue: Offensive Speech in the Workplace

Facts: An employee was terminated for, among other reasons, making repeated angry and inappropriate comments towards management during an employee safety meeting. The Trump Board originally found that the employee was terminated for protected concerted activity and was therefore unlawful. However, subsequent to the ruling, the Trump Board established a new standard (in *General Motors*) for evaluating employer discipline of employees for offensive speech in the workplace while they are engaged in protected concerted activity – specifically, when speech rises to such an outrageous level that employees lose protection of the NLRA. Under *General Motors*, the Trump Board established that an employer may discipline employees for using offensive language in the workplace, provided they can prove such discipline was motivated by the use of the offensive language itself, and not by any underlying protected concerted activity. The present case was then remanded back to the Board to be evaluated under the new standard.

Decision: **(3-1, Member Kaplan dissenting)** A Board majority overturned *General Motors* and purported to return to a "long-established Board standard for evaluating employer discipline of offensive workplace language." Under this standard, it is unlawful for employers to discipline employees for using abusive or offensive language in the course of protected activity unless the language or conduct was especially severe. The Board majority declined to specifically articulate what constitutes "especially severe" language. Member Kaplan dissented on the grounds that *General Motors* was the correct standard.

Significance: The decision creates significant workplace management difficulties for employers, particularly when trying to create civil, harassment-free workplaces in an era when "employee voice" issues are increasing. Promoting a culture of diversity, inclusion, and civility becomes challenging when the employer is unable to discipline offensive language – including racially and sexually charged conduct – without running afoul of federal labor law. Previous Board cases under the new (old) standard indeed showed a remarkable tendency to tolerate blatantly offensive and abusive language.

Further, given the current Board's especially broad view of what constitutes "protected concerted activity," as long as offensive speech has some potential nexus to an employee's working conditions – even as simple as yelling at a manager – the Board would likely find it to be protected by the NLRA. Finally, the decision places employers between a rock and hard place, as attempting to prevent offensive and harassing speech in the workplace could result in an unfair labor practice finding by the Board, but failing to do so could create liability under federal anti-discrimination laws such as Title VII.

Noah's Ark Processors, LLC

Noah's Ark Processors, LLC, 372 NLRB No. 80 (April 20, 2023)

Issue: Remedies

Facts: In a prior proceeding, the Board found that the Employer had unlawfully bargained in bad faith with the Union. A 10(j) injunction was granted ordering both sides to bargain, and the Union subsequently filed a new charge against the Employer alleging that it was violating the injunction. A court agreed with the Union and found the Employer in contempt, and the two sides resumed court-ordered bargaining. After several back and forth negotiations, the Employer declared an impasse, to which the Union responded by filing charges alleging the Employer to have bargaining in bad faith yet again. An ALJ sided with the Union and found the Employer to have unlawfully bargained in bad faith for several reasons, including an unwillingness to consider most Union proposals and any, even minor, modifications. The ALJ ordered the Employer to resume bargaining with the Union as well as an eventual notice-reading to its employees.

Decision: **(3-1, Member Kaplan concurring in part, dissenting in part)** The Board affirmed the decision of the ALJ and ordered a "broad" cease-and-desist order (traditionally ordered in cases where a party has repeatedly and egregiously violated the Act, or otherwise engaged in widespread misconduct). A Board majority tacked on special remedies in addition to what was ordered by the ALJ, including compensation for the employees for any direct or foreseeable pecuniary harms incurred as a result of the Employer's violations, a notice-reading by the Employer's CEO to employees, signing of the notice by the CEO, mailing the notice to all employees, and visitation to ensure compliance. The majority also used the decision to enumerate "detailed potential remedies" (including the above) it will consider in cases where parties are shown to have repeatedly or egregiously violated the NLRA.

Dissenting in part, Member Kaplan agreed with the majority's decision to order a broad cease-and-desist order, but (mostly) disagreed with the imposition of additional extraordinary remedies. Member Kaplan also criticized the majority for using the decision to enumerate the non-exhaustive list of appropriate extraordinary cases such as these, believing that doing so was improperly encouraging and incentivizing the General Counsel to seek such broad and extraordinary remedies in cases brought before the Board.

Significance: The decision puts employers on notice that the current Board is willing to seek extraordinary – and unprecedented – remedies where it deems an employer has particularly crossed the line. Moreover, as Member Kaplan points out, the Board majority appears to be encouraging the General Counsel to press for such remedies wherever she can. It is worth noting – as Member Kaplan does in his dissent – that the Board, under the NLRA, has fairly broad discretion in what types of remedies it may order in different cases, and accordingly, the Board's enumeration of "detailed potential remedies" is non-binding on future Boards and in future cases.

Columbus Electric Co.

Columbus Electric Co., 372 NLRB No. 89 (June 8, 2023)

Issue: Remedies

Facts: The Employer was alleged to have failed to bargain in good faith with the Union after employees voted to unionize. After an initial settlement, the two parties were unable to come to an agreement and the Union filed unfair labor practice charges alleging that the Employer failed to bargain in good faith. An ALJ ruled for the Union and issued a bargaining order to the Employer.

Decision: **(3-0)** The Board upheld the ALJ's decision but ordered additional extraordinary remedies. The Board ordered the Employer to compensate both the union and attending employees for their costs during negotiations, to submit progress reports of negotiations to the Board every 30 days and extended the Union's certification bar by a year.

Significance: The decision once again highlights this Board's willingness to order extraordinary remedies where it deems an employer has egregiously violated the NLRA. The Board has shown to be particularly willing to do so in failure to bargain cases, which have resulted in significant penalties imposed on employers such as here.

SJT Holdings, Inc., McDonald's USA

SJT Holdings, Inc., McDonald's USA, LLC 372 NLRB No. 82 (April 26, 2023)

Issue: Constitutionality of the NLRB

Facts: The Employer was served with a subpoena duces tecum seeking information for an unfair labor practice proceeding. The Employer petitioned the Board to revoke the subpoena on the grounds (in part) that it was defective because the structure of the NLRB was unconstitutional. The Employer argued that the structure of the NLRB violated Article II of the Constitution and the separation of powers by insulating Board members from presidential removal except for cause.

Decision: **(3-0)** The Board rejected the Employer's petition to revoke the subpoena. The Board cited Supreme Court precedent recognizing the validity of the structure of the Board and similarly situated agencies. Member Kaplan joined in rejecting the petition to revoke the subpoena but declined to rule on the merits of the constitutionality claim.

Significance: While the underlying proceeding is not itself noteworthy, the Employer's challenge to the constitutionality of the Board is somewhat significant in that it is a shot across the bow at the entire existence of the Board. The overall administrative state is currently under a broad legal attack, with the constitutionality of SEC administrative law judges currently pending before a Supreme Court (the outcome of which could impact NLRB ALJs) that has already expressed its legal disdain for agency overreach through its development of the major questions doctrine. While it is a longshot, should this decision be appealed in federal court, the Supreme Court could eventually weigh in and significantly curtail Board authority.

Stern Produce Co.

Stern Produce Co., 372 NLRB No. 74 (April 11, 2023)

Issue: Workplace Surveillance

Facts: The Employer, a wholesale distribution and delivery service provider, installed a camera system in its delivery trucks that provided views outside of the truck as well as inside the truck's cab. The camera system would alert the Employer in limited circumstances, including when a driver traveled to an unauthorized residential area, stopped for an extended period, or engaged in aggressive braking. The Employer did not routinely review camera footage, and the cameras were primarily used for preventing unsafe driving and protecting drivers from liability. Driver safety manuals required the cameras to remain on at all times unless specifically authorized to be turned off.

An employee driver – who had previously supported a successful union driver at the facility – covered his camera while on lunch break. A supervisor texted the employee stating that covering the camera was against company rules. An unfair labor practice charge was subsequently filed, and the General Counsel argued that the text message unlawfully created the impression that the employee and any of his potential union activity was under surveillance. An ALJ dismissed the claim, ruling that the employee was not engaged in any union activity in the cab of his truck when the camera was accessed and the text sent, and that accordingly the camera access and text was "mere observation" that did not create an unlawful impression of surveillance.

Decision: **Decision: (3-0)** The Board overturned the decision of the ALJ and found that the supervisor's activity created an unlawful impression of surveillance of potential union activity on the basis that the camera access and text message were deviations from the Employer's normal practice. The Board found that none of the usual conditions for camera access – safety, accident review for liability, etc. – were present. The Board accordingly considered the camera access here as "unusual interest" in an employee who had previously been an open union supporter.

Significance: The decision puts employers that utilize video surveillance equipment in the workplace – and those considering same – on notice. Even though the employee here was not engaged in any protected activity while the Employer accessed the camera, the Board nevertheless found such access to be unlawful surveillance. Employers should be aware that reviewing surveillance camera footage, without a specific purpose in line with the employer's usual practice, could create liability for an unfair labor practice under the current Board.

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, ruling that the Union's request was not unreasonable. If the Employer does not settle the case in light of the dismissal, Board prosecutors will file suit 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.

Starbucks Corp.

Starbucks Corp. No. 03-CA-285671 et al., (Consolidated Complaint Issued May 6, 2022)

Issue: Bargaining Orders, Card Check Elections

Facts: The Union filed a slew of unfair labor practice allegations against the employer, including that the employer unlawfully terminated several employees for pro-union activity, unlawfully disciplined and surveilled other employees for pro-union activity, as well as unlawfully closed stores and changed work policies in response to union organizing efforts. An NLRB regional director subsequently filed an order seeking a bargaining order from the Board that would require the Employer to recognize and bargain with the Union, even though the Union lost the representation election. The RD claimed that "serious and substantial" misconduct by the Employer during the union's representation campaign made it nearly impossible to hold a fair election.

Where will the Board go? The case provides the Board an opportunity to reexamine decades-old precedent regarding bargaining orders. Currently, the Board only issues bargaining orders where a union has obtained a majority of petitioned-for employees signed authorization cards ("card check") and where the employer has committed unfair labor practices so egregious as to destroy any possibility of a fair election. Such orders have been very rare over the last six decades. As discussed in our previous installment of the NLRB Report, General Counsel Abruzzo is seeking to establish a new standard under which employers could be forced to bargain and recognize with a union on the bases of card check alone, unless the employer provide a good faith basis to question the union's majority status – a very high bar for the employer to meet. It is unclear whether the current Board supports such a radical approach, but it could use this case to establish Abruzzo's preferred standard, or something in between it and the current framework for bargaining orders (the Board could instead simply lower the bar for when it can issue bargaining orders, making them more frequent).

Significance: Adopting the approach preferred by General Counsel Abruzzo would radically transform the union election process and make it much easier for unions to quickly and successfully organize workplaces.

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 they 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. In general, 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.

Stericycle, Inc.

Stericycle, Inc., 371 NLRB No. 48 (Jan. 6, 2022)

Issue: Employer Workplace Rules and Policies

Facts: The Employer was found by an Administrative Law Judge to have violated the NLRA because it maintained work rules related to personal conduct and confidentiality that the ALJ deemed unlawfully restricted employees' rights to protected concerted activity. The Board invited *amicus* in this case to determine whether it should change its standard for evaluating employer workplace rules and policies. In 2017, the Trump Board established the current standard in *Boeing Co.*, 365 NLRB No. 154 (2017), under which the Trump Board was more lenient towards employer workplace rules and policies.

Where will the Board go? The Board is likely to establish a new standard, similar to the standard under the Obama-era Board, and apply much stricter scrutiny to employer workplace rules and policies. Under such a potential standard, the Board would invalidate employer rules and policies on the basis that the rule or policy – even as merely maintained, and not applied – could be reasonably construed by a hypothetical employee to infringe upon their rights to protected concerted activity.

Significance: Under the Obama Board, countless innocuous-seeming employer rules and policies were invalidated, including rules such as "maintain a positive work environment" or "work harmoniously" or "behave in a professional manner." A similar standard adopted by the current Board would mean that many straightforward, widely accepted workplace rules and policies, particularly those designed to maintain civility and productivity, could become targeted for unfair labor practices. This has particular significance in the current divisive environment, where employees often wish to speak out, at work, on a number of potentially controversial topics. Employers may find themselves forced to choose between compliance with anti-harassment and anti-discrimination laws and compliance with the Board's handbook police.

Ralph's 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.

OFFICE OF GENERAL COUNSEL INITIATIVES

Restrictions on Non-Compete Agreements

In May, General Counsel Abruzzo issued a memo setting forth her position that non-compete agreements are generally unlawful under the NLRA, except in limited circumstances. In the memo, Abruzzo claims that such agreements chill employee rights to protected concerted activity, because if employees are fired for exercising such rights, they will feel that they have "greater difficult replacing their lost income as a result of the non-compete. Specifically, Abruzzo claims that non-compete agreements make employees afraid to threaten to resign or work elsewhere (which she considers to be protected activity – a dubious position at best), among other actions. Per the memo, under Abruzzo's framework, non-compete agreements are only lawful under the NLRA where they are "narrowly tailored to address special circumstances justifying the infringement on employee rights."

Significance: The memo, and its attack on non-competes, is the latest front of Abruzzo's pro-labor, anti-employer crusade, and perhaps its most legally far-fetched. Regardless, the memo itself has no legal effect – it will be up to the Board to decide in cases brought before it by Abruzzo whether to endorse her legal opinion. Further, as the NLRA only applies to non-supervisor employees, any restrictions from the Board would have no effect on non-compete agreements for executive-level employees (although perhaps not for certain non-executive employees with access to trade secrets). However, in the meantime, the memo will encourage the filing of unfair labor practice charges – particularly by unions – against employers using non-compete agreements, as well as Board prosecutors to pursue such charges.

Employee Protests as Protected Concerted Activity

The General Counsel's Office made public an advice memo from 2021 in which it argued that workers protesting racism or other civil rights issues are protected by the NLRA. Specifically, the advice memo argued that employers cannot enforce policies against employees from displaying Black Lives Matter slogans or other similar statements on work attire. Further, "conversations about systemic injustice should be deemed inherently concerted because civil rights issues, including systemic racism, can dictate workers' terms of employment," according to the memo.

Significance: The advice memo makes clear the General Counsel's extremely broad view of what constitutes "protected concerted activity." Even though BLM protests or similar activity may not have any direct nexus to a particular workplace or that workplace's conditions, the General Counsel believes it to be inherently protected by the Act. Under this theory of a broad umbrella of employee protected concerted activity, employers may be prohibited from enforcing wide array of workplace rules and policies such as dress codes.