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A New Wave in Workplace Law

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The Ebb and Flow of Labor Relations Policy and Procedure at the NLRB

Recapturing flexibility and control in an employer-friendly labor climate

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Introduction

Over the past 18 months, a Republican-controlled National Labor Relations Board ("NLRB" or "the Board") has shifted the labor-relations current in a more employer-friendly direction. From new regulations altering "quickie-election" procedures and joint employer standards, to decisions regarding independent contractor issues, protected concerted activity, non-employee and off-duty employee access rights, workplace rules, dues checkoff clauses, and the perfectly clear successorship doctrine, the tide has turned for union and non-union businesses alike. This paper summarizes these developments while charting a course toward recapturing flexibility and control in this favorable labor climate.

I. Independent Contractor Standards

A. Background

The National Labor Relations Act ("the Act" or "the NLRA") protects statutory "employees," but not "independent contractors." Consequently, an integral part of the Board's responsibility is to properly classify the workers at issue. In 2019, the Board issued a pair of significant decisions strengthening the ability of businesses to effectively and reliably classify workers as independent contractors, thereby avoiding unionization and unfair labor practice liability under the Act.

B. *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019)

In *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), the Board overturned an Obama-era decision that "impermissibly altered the common-law [independent contractor] test and longstanding precedent." In that case, the Amalgamated Transit Union filed a petition to represent SuperShuttle franchisee ride-share drivers at the Dallas Fort-Worth airport. The survival of the Union's petition depended on whether or not those drivers were "statutory employees" under the NLRA.

The union's petition was dismissed because the Board ultimately concluded that the ride-share drivers were not statutory employees but were instead independent contractors and could not be represented by a union. Returning to the traditional common-law agency test, the Board concluded that the drivers exercised significant entrepreneurial opportunity and control to the extent that they: (1) made significant initial investments in their businesses by purchasing or leasing trucks and entering into franchise agreements; (2) had near limitless ability to meet or exceed their weekly overhead because they had complete control over their schedule, including when and how often they worked; (3) retained all of their fares and could, therefore, dictate what they earned based on how much they worked; and (4) could choose whether to accept bids, which meant they had the ability to weigh the cost of a particular trip against the fare received.

The traditional common-law test of agency, as set forth in the Restatement (Second) of Agency § 220 (1958), involves application of the following factors:

> (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
> (b) Whether or not the one employed is engaged in a distinct occupation or business.
> (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
> (d) The skill required in the particular occupation.
> (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
> (f) The length of time for which the person is employed.
> (g) The method of payment, whether by the time or by the job.
> (h) Whether or not the work is part of the regular business of the employer.
> (i) Whether or not the parties believe they are creating the relation of master and servant.
> (j) Whether the principal is or is not in business.

Under this test, all factors must be assessed and weighed, and no single factor is determinative. The core of this traditional test, however, revolves around the concept of entrepreneurial opportunity, which the *SuperShuttle* Board described as “a principle by which to evaluate the overall effect of the common-law factors on a putative contractor’s independence to pursue economic gain.”

In deciding *SuperShuttle*, the Board overturned a prior decision in *FedEx Home Delivery*, 361 NLRB 610 (2014). In that case, a Board panel fundamentally changed the NLRB’s traditional common-law agency test to a new union-friendly “economic realities” test. The *FedEx* Board purported to “refine” the independent contractor test by establishing a new factor: whether the evidence tends to show that the putative contractor is, in fact, rendering services as part of an independent business. The *FedEx* Board characterized entrepreneurial opportunity as simply one aspect of this new factor. The Board further held that only actual, not theoretical, entrepreneurial opportunity should weigh in favor of a finding of independent contractor status, and that it should also evaluate whether the putative employer imposes restrictions on an individual’s entrepreneurial opportunities. The result of this “refined” test was a substantial broadening of the definition of “employee” under the Act.

The *SuperShuttle* Board opined that *FedEx* did not “refine” the test so much as it “fundamentally shifted the independent contractor analysis, for implicit policy-based reasons, to one of economic-realities, i.e., a test that greatly diminishes the significance of entrepreneurial opportunity and selectively overemphasizes the significance of ‘right to control’ factors relevant to perceived economic dependency.” According to the Board, “[E]mployer control and entrepreneurial opportunity are opposite sides of the same coin: in general, the more control, the less scope for entrepreneurial initiative, and vice versa.” The Board concluded that it should not rigidly and mechanically apply the entrepreneurship question so as to constitute an end-all-be-all factor, but instead should analyze all ten Reinstatement factors equally.

SuperShuttle is a significant decision for employers who rely heavily on temporary or short-term service providers, particularly in the delivery service and ride-sharing industries. The prior *FedEx* standard made it difficult for those businesses to avoid an employment relationship while retaining a modicum of control over workers necessary to ensure consistency and timeliness of customer service.

C. *Velox Express, Inc.*, 368 NLRB No. 61 (2019)

In *Velox Express, Inc.*, 368 NLRB No. 61 (2019), the Board held that an employer does not violate the Act merely by misclassifying employees as independent contractors. The case involved a medical courier service that classified its drivers as independent contractors for all purposes. One of the drivers filed an unfair labor practice charge alleging that she was discharged in violation of the Act, and that the employer separately violated the Act by misclassifying her (and her coworkers) as independent contractors.

An administrative law judge ("ALJ") found that the drivers were indeed employees and that the employer independently violated the Act by misclassifying its workers. According to the judge, "[B]y misclassifying its drivers, Velox restrained and interfered with their ability to engage in protected activity by effectively telling them that they are not protected by Section 7 and thus could be disciplined or discharged for trying to form, join or assist a union or act together with other employees for their benefit and protection."

The Board reversed the ALJ, holding that employee misclassification does not constitute an independent violation of the Act. In support of its finding, the Board first noted that it had never previously found a worker misclassification, standing alone, to rise to the level of a per se violation. The Board then underscored that it was improper to assume that the act of misclassification, in and of itself, is coercive.

According to the Board, when an employer decides to classify its workers as independent contractors, it forms a legal opinion regarding the status of the workers, and its communication of that legal opinion to its workers is privileged by Section 8(c) of the Act, which states: "The expressing of any views, arguments, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . ., if such expression contains no threat of reprisal or force or promise of benefit." The Board further observed that important legal and policy concerns weigh against finding a stand-alone misclassification violation, and that to hold otherwise would "significantly chill the creation of independent-contractor relationships," because employers would not want to risk an erroneous classification.

Had the *Velox* Board accepted the argument that worker misclassification, standing alone, constitutes a violation of the Act, employers would have faced significant contingent liability. For example, the employer in *Velox* could have been required to post a remedial notice and reinstate the terminated individual with backpay. By rejecting the argument that misclassifying workers as independent contractors is a per se violation, the Board reached a common-sense conclusion that a violation exists only where an employer actually interferes with, restrains, or coerces employees in the exercise of their rights under the Act. Simply mischaracterizing a worker as an independent contractor is not enough.

II. Email Use

In *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (2019), the Board finally overturned its controversial *Purple Communications* decision, which had subordinated employer property rights to the rights of employees to engage in union and other protected concerted activities.

The employer in *Caesars*, which operates a hotel and casino in Las Vegas, Nevada, maintained a "Computer Usage" policy prohibiting use of its IT systems for various purposes, including sharing confidential information, sending chain letters, soliciting for personal gain or advancing personal views, visiting inappropriate websites, and excessively using personal email. The Painters' Union filed an unfair labor practice charge challenging the policy under *Purple Communications*, 361 NLRB 1050 (2014).

In *Purple Communications,* the Board had held that an employer providing employees access to its email system cannot prevent those employees from using it for protected activities during non-worktime in the absence of "special circumstances." The Board acknowledged that such circumstances would be "rare," and in the years that followed, the Board never found "special circumstances" justifying a prohibition on the use of email systems for non-business/work-related reasons.

The *Caesars* Board reversed course and concluded that *Purple Communications* placed too little weight on employer property rights in IT resources and overstated the importance of employee needs to use those resources for union or other protected concerted activity. The *Caesars* Board explained, "In the typical workplace . . . oral solicitation and face-to-face literature distribution provide more than 'adequate avenues of communication.'" The Board further explained that the prevalence of smartphones, personal email accounts, and social media further supported the conclusion that a prohibition on the use of an employer's email system for nonwork purposes does not create an unreasonable impediment to statutory rights. Ultimately, the *Caesars* Board held that "an employer does not violate the Act by restricting the nonbusiness use of its IT resources absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other, or proof of discrimination."

Caesars effectively rebalances the competing interests of employer property rights and employee Section 7 rights. In light of that decision, employers should evaluate their current work rules to make sure that any needed and justified limits on the use of company equipment, including IT systems and emails, are sufficiently and clearly documented. This evaluation should specifically examine rules restricting non-business use of employer equipment and any impact on employee communications. Conducting this initial analysis should also help to protect against allegations of unlawful discrimination with respect to union and other concerted activities.

III. Confidentiality Rules

In *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019), the Board held that employers may require confidentiality from employees participating in open workplace investigations. The decision resolves conflicting directives from the NLRB and the Equal Employment Opportunity Commission ("EEOC") that had plagued employers for years.

In reaching its decision, the *Apogee Retail* Board overruled *Banner Estrella Medical Center*, 362 NLRB 1108 (2015), which "placed the burden on the employer to determine, on a case-by-case basis, whether its interests in preserving the integrity of an investigation outweighed presumptive employee Section 7 rights." Under *Banner Estrella*, employers were required to justify their investigative confidentiality rules by demonstrating that "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." With these limitations, employers were unable to adequately safeguard the integrity of their internal investigations or the identity of participating witnesses.

In *Apogee Retail*, the employer maintained two written rules in connection with its internal investigations: (1) requiring employees to "maintain confidentiality" regarding workplace investigations into "illegal or unethical behavior"; and (2) prohibiting "unauthorized discussion" of investigations or interviews "with other team members." In evaluating these rules, the Board rejected *Banner Estrella* in favor of the 3-category test announced in *Boeing Co.*, 365 NLRB No. 154 (2017), which places workplace rules into one of three categories:

- Category 1 – rules that the Board will designate as lawful to maintain because, when reasonably interpreted, they do not prohibit or interfere with the exercise of employee rights, or their potential adverse impact on protected rights is outweighed by associated justifications;
- Category 2 – rules that warrant specialized scrutiny in each case as to whether they would prohibit or interfere with NLRA rights and, if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications; and
- Category 3 – rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by the justifications associated with the rule.

Applying the *Boeing* framework, the Board in *Apogee Retail* concluded that investigative confidentiality rules that *are limited to the duration of an investigation* fall into Category 1. Accordingly, the Board found that the employer's articulated justification for the rules significantly outweighed their slight effect on employee rights to discuss discipline. The Board further concluded that such rules do not broadly prohibit employees from discussing incidents that could result in discipline. Instead, according to the Board, such confidentiality rules narrowly require that participating employees refrain from discussing *investigations* of incidents or *interviews* conducted during the course of investigations. Importantly, the *Apogee Retail* Board also found that confidentiality rules that *are not specifically limited to the duration of an investigation* fall into *Boeing*'s Category 2, which requires a case-by-case balancing of employer and employee interests. The Board remanded the case for further proceedings for specialized scrutiny of the rule under the facts of the case.

In light of *Apogee Retail*, employers should review their handbooks and other employment policies concerning workplace investigations to evaluate the scope of any confidentiality rules in effect. The Board has made clear that confidentiality restrictions during investigations will be deemed presumptively lawful only for the duration of an open investigation. Such policies may only require confidentiality in the investigation itself, and may not prohibit employees from discussing the underlying incident on which the investigation is based.

IV. Access Rights

Between June and September 2019, the Board issued three significant decisions overturning precedent and granting employers greater rights to limit union activity on their premises. In *UPMC*, 368 NLRB No. 2 (2019), the Board held that employers need no longer allow nonemployee union representatives access to public areas of their property, unless the union has no other reasonable means of communicating with employees, or they discriminate against the union by permitting similar activity by other nonemployees. In *Bexar County Performing Arts Center Foundation*, 368 NLRB No. 46 (2019), the Board held that employers may exclude from their property off-duty contractor employees seeking access to engage in union or other protected concerted activity, unless they work both regularly and exclusively on the property, and the employer fails to show that they have one or more reasonable non-trespassory alternative communication means. In *Kroger Limited Partnership 1 Mid-Atlantic*, 368 NLRB No. 64 (2019), the Board held that employers can rightfully eject outside union representatives soliciting petition signatures from a shared shopping center parking area.

A. *UPMC*, 368 NLRB No. 2 (2019)

In *UPMC*, two nonemployee union organizers entered a hospital's public cafeteria and met with a group of at least six employees to discuss organizing activities, displaying flyers and pins on the meeting tables. At least one manager and one employee complained to security about union organizers soliciting in the cafeteria.

A security officer responded by asking the organizers for identification and inquiring why they were there. One of the organizers told the officer they were having lunch with some employees and talking about the union. The officer instructed them to leave because the cafeteria was for employees, patients, families and visitors. The organizer explained that she had approached a woman in the cafeteria who acknowledged that she was not an employee (but rather the friend of one). The organizer asked the officer if that woman would have to leave too, and the officer replied, "Maybe, but I'm dealing with this right now." The union organizers ultimately refused to leave, prompting the officer to call the police, who arrived shortly thereafter and escorted the organizers away.

Although the employer did not post any signs restricting access or prohibiting solicitation, it had a history of responding to reports of solicitation by nonemployees. On at least two prior occasions, the employer ejected individuals from the cafeteria after receiving reports that they were soliciting for money, and approximately one month after the incident, it ejected two individuals from a spiritual advisory group who were distributing literature in front of the cafeteria.

In *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), the Supreme Court established the standard governing nonemployee access when an employer's property rights conflict with employee rights to engage in self-organization. In that case, the Court held that an employer may legitimately protect its property against nonemployee union solicitation, unless the union has no reasonable alternative for communicating its message (the "inaccessibility" exception), or it discriminates by treating similar activities differently because of their union or other protected status (the "discrimination" exception).

In *Ameron Automotive Centers*, 265 NLRB 511 (1982), the Board recognized a third exception to an employer's general right to protect its property against nonemployee union solicitation. Under the "public space" exception, nonemployee union organizers could not be denied access to employer property open to the public if they used the property in a manner consistent with its intended use and were not otherwise disruptive. Until *UPMC*, the Board consistently applied this exception to invalidate employer efforts to restrict nonemployee union organizers from accessing public areas of their property to engage in solicitation or other organizational activities, so long as the organizers were not disruptive.

In *UPMC*, the union filed an unfair labor practice charge claiming that the employer's exclusion of its organizers from the public cafeteria was unlawful based on the "public space" exception. The Board dismissed the charge, expressly overruling *Ameron Automotive* and all other cases in which the Board recognized a "public space" exception under *Babcock*. The Board reasoned that its prior approach had been soundly rejected by multiple federal appellate courts as contravening *Babcock*'s principles. Consistent with *Babcock*, the *UPMC* Board explained, inaccessibility and discrimination are now the only exceptions to the general rule that an employer does not have to permit nonemployee union representatives access to public areas of its property for organizational activity.

In the absence of the "public space" exception, the *UPMC* Board found the employer's conduct in barring the union organizers from its cafeteria lawful because the union had other reasonable means of communicating with employees, and there was no discrimination, even though the nonemployee who was waiting to dine with an employee was not barred. According to the Board, the proper comparative was not the nonemployee waiting to eat lunch, but other nonemployees who engaged in promotional activity in the cafeteria. Of further significance, when the employer was informed of those comparable nonemployees' actions, it removed them just as it removed the nonemployee union organizers.

UPMC is a significant victory for restaurant, hospital, and other employers who maintain public dining areas. Employers may now lawfully maintain and enforce a valid no-solicitation/distribution policy to exclude nonemployee union organizers so long as the organizers have other reasonable means of communicating with employees (which, in most all cases, they do), and do not discriminate by treating groups differently because of their union or other protected status (e.g., permitting solicitation by one union but not another). Employers are no longer required to permit nonemployee union representatives access to a public area of their property merely because it is a "public space" and the representatives are not being disruptive.

B. ***Bexar County Performing Arts Center Foundation*, 368 NLRB No. 46 (2019)**

In *Bexar*, the owner of a performing arts center prohibited off-duty contractor employees of a symphony from passing out leaflets on the owner's sidewalk to members of the public who were attending a performance by contractor employees of a ballet. The symphony's employees were represented by the American Federation of Musicians Union and were protesting the ballet's use of recorded production music. The union filed an unfair labor practice charge against the property owner for prohibiting symphony employees from leafleting outside the performance.

The Board held that the property owner's refusal to allow off-duty contractor employees to pass out leaflets on its property did not violate the Act. In so doing, the Board expressly overruled its prior decisions in *New York New York Hotel & Casino*, 356 NLRB 907 (2011), and *Simon DeBartolo Group*, 357 NLRB 1887 (2011). In *New York New York*, the Board held that off-duty employees of an onsite contractor who worked regularly and exclusively in a restaurant on the hotel's property had the right to access the property to engage in union or other protected concerted activity, unless the hotel could show that such activity would significantly interfere with the use of its property or could be restricted for another legitimate business reason. In *Simon DeBartolo*, the Board expanded its holding in *New York New York* to require access by off-duty contractor employees even though they did not work exclusively on the owner's property.

According to the *Bexar* Board, *New York New York* and *Simon DeBartolo* failed to properly accommodate the property owner's property rights, including its right to exclude. The Board explained that a contractor's employees are not entitled to the same Section 7 access rights as the property owner's own employees. Instead, off-duty contractor employees are trespassers who are only entitled to access for Section 7 purposes if: (1) they work both regularly and exclusively on the property; and, (2) the property owner cannot show that the contractor employees have reasonable alternative nontrespassory channels of communicating with their target audience.

Applying these principles to the symphony's employees, the *Bexar* Board held that the property owner's actions did not violate the Act because the employees did not work regularly or exclusively on the owner's property, and there were other avenues available for them to reach their target audience, including across the street on public property or through mass and social media.

Bexar represents another victory for employers in their ability to restrict union access to their facilities, even when a contractor relies upon union labor. There will almost always be another non-trespassory means to contact a union's target audience. Indeed, the Board specifically pointed to newspapers, radio, television, and social media as available avenues to convey the union message, thus foreclosing arguments that the only way to convey that message is through access to employer property.

C. *Kroger Limited Partnership 1 Mid-Atlantic*, 368 NLRB No. 64 (2019)

In *Kroger*, the employer responded to reports of on-premises solicitation activity by calling the police and barring two union representatives from the parking area adjacent to its store. One of the union representatives was in the process of collecting customer signatures for a petition protesting the transfer of union employees at the time of the incident.

The parking area was part of a shared shopping center, leading the union to believe that the activity was permissible. Moreover, although the store maintained an "unofficial" policy prohibiting such solicitation, its managers had previously permitted charity organizations and other groups to assemble in the same area to solicit donations and distribute literature.

These factors led an administrative law judge to conclude that the employer violated the Act by ejecting union representatives from the parking area. She ruled that it had enforced its unofficial policy in a way that illegally discriminated against the union, citing the Board's Clinton-era decision in *Sandusky Mall Co,* 329 NLRB 618 (1999). In the 20 years since that ruling was handed down, the NLRB has reaffirmed this standard on several occasions, leading the union to believe that its solicitation activity was protected in this case.

In overruling the judge, the Board first harkened back to the Supreme Court's 1956 *Babcock & Wilcox* decision, which held that an employer may not discriminate against a union distributing literature on its property while allowing other forms of third-party distribution. In *Kroger*, the Board concluded that the agency had improperly extended the *Babcock & Wilcox* doctrine, concluding that the *Sandusky Mall* ruling "improperly stretched the concept of discrimination well beyond its accepted meaning in a manner that finds no support in Supreme Court precedent."

The new interpretation? The Board ruled that discrimination only violates *Babcock & Wilcox* where the facts show unequal treatment of activities that are "similar in nature." In undertaking such an analysis, the Board will now look beyond the activity itself (e.g., handbilling), to consider the underlying "purpose of the activity."

In the *Kroger* case, the activity at issue bore little resemblance to the charitable information and solicitation drives that had previously been permitted. "We hold that protest and boycott activities are not sufficiently similar in nature to charitable, civic, or commercial activities to warrant a finding of discrimination based on disparate treatment of such conduct," the Board majority said, "regardless of the amount of charitable, civic, or commercial activities permitted."

Under the Board's new legal framework, an employer may bar nonemployees from its property if they are engaging in picketing, boycotts, or similar solicitation activities, even if the employer allows charitable groups or other community or commercial activities on its premises. An employer may also bar non-employees from its property while overtly engaging in union organizing activity, so long as it prohibits comparable organizational activities by other third parties.

V. Protected Concerted Activity

A. *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019)

In *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019), the Board reversed a 2011 Obama-era decision that was widely derided as tilting the playing field too far in favor of employees. Under *WorldMark by Wyndham*, 356 NLRB 765 (2011), the Board essentially held that any employee complaint made to management in the presence of coworkers qualifies as protected concerted activity under the Act. In *Alstate Maintenance*, however, the Board returned to a more stringent standard, whereby only those complaints that either seek to initiate group action or involve truly "group" complaints will be considered protected concerted activity.

Trevor Greenidge was a skycap for Alstate Maintenance at New York's JFK Airport. Part of a skycap's job is to assist airline passengers with their luggage outside of the terminals. The bulk of their compensation comes from passenger tips. Greenidge testified that he could earn up to $150 per day in tips, far exceeding what he earned in hourly wages.

In July 2013, an Alstate supervisor approached Greenidge and several other skycaps to inform them that a French soccer team was coming through the airport, and their airline had requested four skycaps to handle the 50 to 70 bags of equipment that would be accompanying them. Greenidge balked; in front of his coworkers, he remarked to his supervisor that, “We did a similar job a year prior and we didn’t receive a tip for it.”

When the equipment arrived to be handled, Greenidge and the other skycaps walked away, despite being waved over by manager for the airline and the terminal. The supervisor was compelled to explain to the managers that the skycaps did not want to do the job because they were anticipating a small tip. The managers then sought assistance from baggage handlers inside the terminal, who completed most of the work before Greenidge and the other skycaps returned and helped them finish the job. Despite offering only minimal assistance, the soccer team gave the skycaps an $83 tip to be split among the four of them.

That evening, the terminal manager emailed the skycaps’ manager and expressed her dismay over the situation, reporting that the skycaps provided subpar service to a VIP client and exclaiming that she had “never been this embarrassed in front of a customer” in her professional career. As a result, Alstate terminated all four skycaps, indicating that they were being discharged for their “indifference to the customer” and for “verbally making comments about the job stating you get no tip or it is a very small tip.”

Greenidge filed an unfair labor practice charge against Alstate claiming that his comment about the tipping habits of soccer players was concerted activity undertaken for the purpose of mutual aid and protection, rendering it protected by the Act. An ALJ dismissed Greenidge’s claim, but he requested review by the Board.

In the mid-1980’s, the Reagan-era NLRB established the standard for determining whether activity is “concerted” under the NLRA in a series of cases known as the *Meyers Industries* decisions. To be concerted under *Meyers Industries*, the Board held that an employee must engage in the activity with the authority of other employees, and not solely on behalf of himself. The Board went on to note that concerted activity encompasses only those circumstances where individual employees seek to initiate or induce or to prepare for group action, or where individual employees bring group complaints to the attention of management. Personal gripes or grievances would not suffice under *Meyers Industries*; instead, they had to have truly been group complaints.

In 2011, however, the Obama-era NLRB departed from this standard in *WorldMark by Wyndham*, finding that an employee who lodged a complaint in a group setting—without the employees having previously agreed to act in concert with each other—was protected by the NLRA simply because of the group nature of the activity. Specifically, the NLRB held that an employee who protests publically in a group meeting is engaged in initiating group action as a matter of law.

In *Alstate*, the Board tossed the *WorldMark* standard onto the scrap heap and resurrected the *Meyers Industries* test. The majority explained that, “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.” Contrary to the NLRB’s finding in *WorldMark*, the majority continued, “the fact that a statement is made at a meeting, in a group setting, or with other employees present will <u>not</u> automatically make the statement concerted activity.”

Applying the newly revived standard to the case at hand, the majority agreed with the ALJ and upheld Greenidge's discharge. The majority noted the lack of evidence suggesting that Greenidge's comment was part of a "group activity." Moreover, the majority observed, his statement did not demonstrate that he was seeking to initiate or induce any sort of group activity among the skycaps. Indeed, even Greenidge acknowledged that his remark "was just a comment" and not aimed at changing employer policies or practices. The majority also observed that, in cases pre-dating *WorldMark*, an employee's individual complaints were generally only found to constitute protected concerted activity when they were made during a group meeting called by management to announce changes to employment terms, and the meeting was the first opportunity for employees to comment on or protest the change.

The *Alstate* majority went on to find that even if Greenidge's comment was concerted activity under the *Meyers Industries* standard, it was not protected because it was not for the purpose of mutual aid or protection. Specifically, the majority opined, Greenidge was not seeking mutual aid or protection because the issue of customer tipping habits is between workers and customers, not between workers and their employer, as employers have no ability to control the amount customers choose to tip. The majority distinguished the situation from one in which an employee complains about a tipping *arrangement*, which would involve a term or condition subject to employer control.

Dissenting Board Member McFerran disagreed with the majority's understanding of *WorldMark* as establishing a per se rule that "concerted activity" is established where an employee's protest occurs in any group context. She also accused the majority of announcing a new set of factors—including that a complaint must be raised in a group meeting called to announce a change to a term or condition of employment in order to be concerted—that threatened to substantially narrow the situations in which statements made by individual employees in front of their coworkers would be found concerted. Finally, Member McFerran disagreed with the majority's determination that Greenidge's statement was not for the purpose of mutual aid or protection. According to her, Greenidge's goal in making the comment was to ensure that skycaps were fairly compensated.

The *Alstate* decision is certainly a welcome step towards a level playing field for employers that have been patiently waiting for the NLRB to overturn a decade of pro-labor precedent. By tightening the critical "concerted activity" standard, the Board has restored a measure of balance to the equation.

However, employers should still be cautious when disciplining employees for activities carried out in a group setting, particularly where they occur during group meetings at which management is announcing changes to terms and conditions of employment. Depending on what is said and how it is communicated, some matters could still be protected by federal labor law.

B. *Quicken Loans*, 367 NLRB No. 112 (2019)

In *Quicken Loans, Inc.*, 367 NLRB No. 112 (2019), a unanimous Board held that two mortgage brokers, who were overheard by a supervisor in a bathroom using foul language to complain about how their employer routed customer calls, did not engage in protected concerted activity. The Board found no evidence that the employees, as a group, had any preexisting concerns about the routing of customer calls. Additionally, there was no testimony to support a finding that either employee sought to initiate or induce group action over the issue.

Two mortgage brokers employed by Quicken Loans, Austin Laff and Michael Woods, had a conversation in a restroom at work open to the public and customers during which Woods complained to Laff that a client, whom Woods had worked with four years earlier, had recently been placed in his pipeline. Woods further complained that the "client should get in touch with a fucking Client Care Specialist and quit wasting [Woods'] fucking time." Laff did not complain, but responded that he "understood why [Woods] was frustrated."

Unbeknownst to Woods and Laff, a supervisor, Jorge Mendez, overheard the conversation and saw Laff when he exited his stall. Mendez did not see Woods in the restroom. Due to this conversation, Mendez sent an email to all employees at the facility reinforcing that employees should engage in proper behavior in public areas. The email specifically stated: "Never, EVER, should we be swearing in the bathroom especially about clients. Also please refrain from stating clients are wasting your (***swear word***) [sic] time."

Quicken Loans' site vice president, Matt Stoffer, and regional vice president, Drew Glomski, met with Mendez immediately after receiving the email in order to find out why Mendez sent the email. Mendez described the conversation he overheard in the bathroom and stated that he saw Laff in the restroom when he exited the stall. Stoffer then contacted HR for information on Laff. HR informed Stoffer that Laff's file contained previous accusations of "making rude comments about homosexuals" and an incident where Laff asked a female coworker if she "put out" on a first date.

Glomski and Laff's Supervisor, Jordon Smith, met with Laff the same day as the bathroom incident. Glomski asked Laff if he had any knowledge as to why Mendez sent out the email earlier that day and specifically asked Laff about "being in the bathroom speaking about clients, saying that clients were wasting his fucking time and that they should call the fucking CCS." Laff responded that he had "no clue" what prompted the emails.

Because Laff denied involvement in the bathroom incident, Glomski handed Laff his separation papers. At that point, Laff admitted his involvement but denied that he used profanities. Despite Laff's newfound honesty, the Company still terminated his employment, and Laff was escorted from the building.

That evening, Laff emailed Glomski to state that he now remembered the conversation, but that it was another person who used profanities about clients. Laff also left a voicemail with his supervisor about the incident. HR returned Laff's voicemail the next day, informing Laff that he was still being terminated and "the fact of the matter is that you shouldn't have been talking about clients at all."

The Board unanimously held that the General Counsel "failed to establish . . . that Laff was discharged because he engaged in protected, concerted activities." In reaching this conclusion, the Board continued its focus on restoring the standard of the *Meyers Industries* cases. The Board noted that protected concerted activity occurs "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."

In this case, the Board found there was no evidence that employees, as a group, had any preexisting concerns about the routing of customer calls. Additionally, there was no testimony to support a finding that either Laff or Woods sought to initiate or induce group action about the issue. Woods' complaint was about clients wasting *his time*, and nothing indicated that he sought Laff's support in protesting the routing of calls. Further, Laff's comments that he understood Woods' complaint did not suggest group action, but merely that he understood the frustration. The Board also held that, even if Laff and Woods' conversation was concerted activity, it was not for the goal of mutual aid or protection. Laff did not testify about any goals for the conversation, and Woods did not testify at all. There was no evidence of a policy about referrals established by the company or any evidence that such referrals adversely affected the terms and conditions of employment. Accordingly, the General Counsel failed to establish his case, and the Board dismissed the complaint.

The *Quicken* decision, especially when coupled with *Alstate*, demonstrates that the Board is now holding the General Counsel to the specific language in Section 7. For activity to be protected, employee conduct must be proven to be both concerted and for the purpose of mutual aid or protection. Those can be connected; however, these cases make clear they are distinct statutory requirements, each with different inquiries. Moreover, proof of both is required to show protected activity.

For activity to be "concerted," an employee's actions must be linked to the actions of their coworkers. Conversely, an analysis of "mutual aid or protection" looks at the goal of concerted conduct—whether the employee(s) involved are seeking to improve the terms and conditions of employment. As *Alstate* and *Quicken* make clear, the failure to prove either is fatal to a ULP charge.

VI. Joint Employer

The standard used by the Board to determine whether an entity is a joint employer is currently in fluctuation. This change is due to several procedural oddities occurring in the past several years.

For over 30 years, the Board consistently maintained that a joint-employer relationship exists only where two separate entities share or codetermine matters governing the essential terms and conditions of employment. To support a joint-employer finding, the Board required evidence that the putative joint employer meaningfully affected matters relating to the employment relationship and that control over such matters was "direct and immediate." See *Airborne Express*, 338 NLRB 597, 597 fn. 1 (2002) ("The essential element in [the joint-employer] analysis is whether a putative joint employer's control over employment matters is direct and immediate.").

In 2015, the NLRB issued its decision in *Browning-Ferris*, 362 NLRB No. 186 (2015), which established a new standard to evaluate: (1) whether a common-law employment relationship exists; and (2) whether the putative joint employer "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful bargaining." Under this new standard, the Board announced it would no longer require an employer to exercise "direct and immediate" control to be found a joint employer.

Two years later, the Board issued *Hy-Brand*, 365 NLRB No. 156 (2017), reinstating the prior joint-employer standard, including the "direct and immediate" control test. The Board, however, vacated the *Hy-Brand* decision two months later because the NLRB's Inspector General investigated Board Member William Emanuel's links, through his former law firm, to an employer in the *Browning-Ferris* case and found that he should have recused himself from the *Hy-Brand* decision due to that connection.

Just two months later the Board announced it would address the issue of joint employment through its rule making authority. Although the Board possesses the authority, like any other administrative agency, to promulgate such rules, it usually waits for a case to present the issue to the Board before announcing the new rule as part of its decision-making authority.

The proposed rule would again reverse the *Browning-Ferris* decision and reinstate the standard where a putative employer is only considered a joint-employer where it possesses and exercises "direct and immediate control." See 83 FR 46681-01 ("More specifically, to be deemed a joint employer under the proposed regulation, an employer must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine."). The comment period for this proposed rule ended on January 28, 2019, and the Board had yet to issue a final rule as of the date this paper was written.

Further complicating matters is the fact that the D.C. Circuit has since affirmed the Board's promulgation of the *Browning-Ferris* standard. The court held that the "right-to-control" test adopted by the NLRB has "deep roots" in common law, and thus can be justified. It pointed out that indirect control over workers was a justifiable factor to consider when rendering a determination on joint employment status. "Retained but unexercised control has long been a relevant factor in assessing the common law master-servant relationship," the court concluded, ruling that the reservation of a right to control "underpins" the historical employer-employee dynamic. The court did, however, express reservations over the Board's application of this new standard to the case at hand, and remanded the matter back to the agency for further review. See *Browning-Ferris Indus. of California, Inc. v. Nat'l Labor Relations Bd.*, 911 F.3d 1195, 1219-1222 (D.C. Cir. 2018).

The Board is expected to issue its final rule sometime in 2020. This rule will likely revert the standard back to the pre-*Browning-Ferris* rule requiring "direct and immediate" control. It may, however, be influenced to some extent by the D.C. Circuit's ruling upholding the existing standard.

VII. Quickie Election Rules

At the end stages of Member McFerran's term, the Board issued the first of what may be a number of procedural regulations rolling back some of the more onerous requirements of the agency's "quickie election" rule. That rule, which took effect in April 2015, removed long-standing due process rights that had been available to employers served with a union representation petition. It dramatically reduced the time period between petition and election, disadvantaging employers desiring to educate workers on the facts surrounding union representation, while leaving employees with less time to objectively consider those facts for purposes of making an informed choice at the ballot box.

In words that will be music to employers' ears, Chairman Ring describes the new rule as "common sense changes to ensure expeditious elections that are fair and efficient." The rule—which is "final" in nature and slated to take effect April 16, 2020—is a welcome move toward equipoise of power between employers and labor organizations. Although not a complete return to the pre-2014 landscape, it scales back many of the onerous election timelines, while allowing for resolution of representational issues prior to an election.

Although the ostensible objective of the quickie election rule was to expedite the period between petition and election, the NLRB has concluded that the abbreviated election period came at the expense of other fundamental interests. This new rule represents an adjustment intended to “improve upon” the quickie election rule.

Notable changes include:

- **Notice of Petition for Election.** Petitioned employers will now have five <u>business</u> days in which to post and distribute the mandatory Notice of Petition for Election, up from the current standard of two business days.
- **Pre-Election Hearing.** The pre-election hearing will generally be scheduled 14 <u>business</u> days from the service of the notice of hearing, up from the present standard of eight <u>calendar</u> days.
- **Statements of Position.** Employers will now have eight <u>business</u> days in which to file and serve their Statements of Position, up from the current standard of seven <u>calendar</u> days.
- **Responsive Statement of Position.** Petitioner must file and serve written response to Statement of Position by noon 3 <u>business</u> days before hearing is scheduled to open.
- **Eligibility Disputes.** Disputes concerning unit scope or voter eligibility (e.g., supervisor status) litigated at pre-election hearing and resolved by Regional Director before election is directed.
- **Post-Hearing Brief.** The rule reinstates the right of parties to file post-hearing briefs.
- **Election Date.** The Regional Director is generally precluded from scheduling an election less than 20 <u>business</u> days from the date an election is directed, absent mutual consent of the parties.
- **Voter List.** Employers will now have five business days from approval of the stipulated election agreement or direction of election in which to file the mandatory Voter List, up from the current standard of two <u>business</u> days.
- **Extension of Deadlines.** Regions will now have greater latitude to extend deadlines for good cause shown.
- **Request for Review.** Ballots impounded pending request for review filed within 10 <u>business</u> days of direction of election.

Most significantly, the new rule restores the NLRB’s practice of resolving questions of representation, unit scope, and voter eligibility (including supervisory status) *before* an election is scheduled. Under the quickie election rule, such matters were typically deferred until after the election and only resolved if they had a material impact on the results. As the NLRB noted, pre-election resolution safeguards fair and accurate elections by ensuring that employees understand the full ramifications of their decision.

Without question, this is welcome news to employers. Practically speaking, the rule will significantly extend the timetable between representation petition and election, thereby affording employees a more extensive opportunity to cast their ballots on an informed basis. The quickie election rule had reduced the period of time between petition and election from a median of 38 days in 2014 to only 23 days over the years that followed. This shortened election cycle effectively allowed labor organizations to "ambush" employers with petitions, leaving some scrambling to communicate with employees over a shorter time period. Not surprisingly, union win rates (particularly within smaller bargaining units) increased after the quickie election rule went into effect.

Unfortunately, employers and their workers will not reap the benefit of these improvements until the new rule takes effect in mid-April. Between now and then, it does not impact any pending—or soon-to-be-filed—petitions for election.

VIII. Dues Checkoff

In *Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139 (2019), the Board determined that "dues checkoff" provisions, which require employers to automatically deduct union dues from the paychecks of union members, do not survive expiration of the underlying collective-bargaining agreement ("CBA"). As a result, employers may now suspend dues deduction and remission after the agreement to do so expires.

In coming to this determination, the Board categorically rejected the rationale of the Obama Board in *Lincoln Lutheran*, 362 NLRB 1655 (2015). In *Lincoln Lutheran*, the Board rejected more than 50 years of precedent when it ruled that a "dues checkoff" provision is a mandatory subject of bargaining between the parties. As a result, the Board concluded that such provisions remain active even after CBA termination, unless the agreement "expressly and unequivocally" states otherwise. In practice, this decision required an employer to deduct dues from its workers' paychecks indefinitely, except where it could show that it had reached a "lawful impasse in good-faith attempts" to renegotiate the contract with the union, a very high hurdle to clear.

In overruling that decision, the *Valley Hospital* Board recognized that while "dues checkoff" provisions remain mandatory subjects of bargaining, they fall into a "limited category" of unique union rights that are purely contractual in nature. Unlike provisions relating to "wages, pension and welfare benefits, hours, working conditions, and numerous other mandatory bargaining subjects," the Board found no independent obligation to deduct and remit dues after CBA expiration. Instead, it concluded that dues checkoff is a statutory obligation "rooted in the contract" and endures "only for its term, unless the parties specifically agreed to extend it."

The impact of this decision is likely to be immediate. From an employer's perspective, a powerful negotiating tool has been restored. As the Board made clear, employers are now "free" to use "dues-checkoff cessation as an economic weapon in bargaining" after the initial contract expires. Going forward, employers will undoubtably consider this technique to remind employees that their union fees are not a sunk cost, and to pressure unions to reevaluate the effectiveness of hardnosed negotiating tactics, like strikes.

Meanwhile, unions are understandably frustrated with the decision, which shifts to them the burden of collecting dues from their members. Without the ease of mandatory deductions and automatic dues remittance, a union must directly solicit membership to remain solvent—a costly and time intensive process. For the past four years, unions have aggressively pushed the bargaining process well beyond contract expiration. There is now an economic incentive for them to quickly reach a new CBA before it impacts their bottom-lines.

IX. Successorship

In *Ridgeway Healthcare Center*, 367 NLRB No. 110 (2019), the Board reined in its application of the "perfectly clear successor" doctrine. A hospital in *Ridgeway* assumed operational control over a predecessor's unionized nursing home. During the months preceding its takeover, some of the hospital's managers made several conflicting statements to predecessor employees concerning prospects for continued employment and union representation. The hospital wound up hiring a total of 101 employees, of whom 49 had been employed by the predecessor and represented by the union. The hospital did not hire four of the predecessor's union-represented employees, thereby denying the union majority status and skirting a duty to recognize and bargain with it.

Before the hospital began operations, it rejected the union's bargaining demands and instituted new terms and conditions that differed from those of the predecessor. The union filed unfair labor practice charges alleging that the hospital: (1) discriminated against the four incumbent workers because of their union status; (2) refused to recognize and bargain with the union; and, (3) unilaterally changed working conditions without prior consultation with the union.

The Board affirmed an ALJ's finding that the hospital unlawfully refused to hire the four union-represented incumbent employees because of anti-union animus. The Board also held that, absent its discriminatory hiring practices, the hospital would have been a *Burns* successor. Thus, its refusal to recognize and bargain with the union also violated the Act.

In a change in remedial precedent, however, the Board held that, despite the hospital's discriminatory hiring practice, it would not order the hospital to restore the *status quo ante* (the terms under the predecessor's collective-bargaining agreement) and bargain with the union prior to changing those terms, a remedy traditionally applied to "perfectly clear successors." That remedy, under similar Board precedent, had also been applied to successor employers deemed to have discriminated in hiring to avoid conferring majority status on the incumbent union.

This decision limits application of "perfectly clear successor" doctrine remedies and reduces the risk to non-union entities that acquire unionized businesses and establish their own initial terms and conditions of employment, even in the face of potential liability for alleged discriminatory hiring.

X. Conclusion

Democratic-controlled Boards have consistently issued decisions that ostensibly elevate employee rights over employer rights without properly acknowledging and balancing the often-competing interests of the groups in light of the purposes of the Act. The Obama-era Board was particularly aggressive in its charge to tip the scales in favor of employees, including by promulgating election rules that substantially shortened the time-period between petition and election thereby disadvantaging employers, and by issuing decisions that altered long-standing principles concerning issues such as independent contractor and joint employer status, workplace rules, off-duty and nonemployee property access rights, successorship, dues checkoff, and protected concerted activity. The current Board has changed the tide and attempted to rebalance competing rights and interests to bring more consistency and predictability to its jurisprudence in order to better effectuate the purposes of the Act.