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RECENT POSITIVE LEGAL DEVELOPMENTS AT THE NATIONAL LABOR RELATIONS BOARD

The most positive developments in the labor field over the past year have been two trends: the increase in union organizing; and the series of National Labor Relations Board (Board) decisions strengthening private sector employee rights to organize under the National Labor Relations Act (NLRA)[1]. The first trend includes the recent increase of unionization in workplaces that are not considered « traditional » occupations for unionization. In the period from October 2021 to June 2022, there was a 58 percent increase in union election petitions filed at the NLRB[2]. This is consistent with the rising positive U.S. public opinion of unions to a 71 percent approval rating, which is the highest rating since 1965[3]. Over the past two years, workers have unionized across a range of businesses and employment settings, including successful union elections at the Amazon warehouse in Staten Island, multiple Starbucks locations, graduate student employee unions in private universities, and unionization in the technology sector at two Apple retail stores and in the video game industry at Activision Blizzard[4]. These developments show the interest in unionization by a new generation of workers across a range of occupations. Moreover, in all these examples, employees unionized in the face of vociferous anti-union campaigns by large, powerful employers.

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1 29 U.S.C. §151 et seq.

2 Office of Public Affairs, NLRB, *First Three Quarters' Union Election Petitions Up 58%, Exceeding All FY21 Petitions Filed* (July 15, 2022): www.nlrb.gov/news-outreach/news-story/correction-first-three-quartersunion-election-petitions-up-58-exceeding

3 J. McCarthy, « U.S. Approval of Labor Unions at Highest Point Since 1965 », *Gallup* (August 30, 2022): https://news.gallup.com/poll/398303/approval-laborunions-highest-point-1965.aspx

4 H. Shierholz, M. Poydock, J. Schmitt and C. McNicholas, « Latest Data Release on Unionization is a Wake-up Call to Lawmakers », *Economic Policy Institute* (January 20, 2022): www.epi.org/publication/latest-data-release-onunionization-is-a-wake-up-call-to-lawmakers/; K. Tarasov, « Unions are Forming at Starbucks, Apple and Google. Here's Why Workers are Organizing Now », *CNBC* (August 5, 2022): www.cnbc.com/2022/08/05/ why-starbucks-apple-and-google-are-unionizing-now-for-the-first-time.html; J. Novet, « Activision Employees Announce Second Union Ahead of Game Company's Sale to Microsoft », *CNBC* (July 19, 2022): www.cnbc.com/2022/07/19/activision-blizzard-workers-forming-second-union-before-microsoft-deal.html; R. Iafolla, « Yale Union Election Is Latest Move in Campus Labor Renaissance », *Bloomberg Law News* (November 30, 2022).

The positive legal trends are attributable to the Biden administration appointments to the Board, with a majority - three of five - now being Democratic appointments. In its recent decisions, the current Board has protected employee rights under the NLRA by overruling multiple decisions handed down by the Board under the Trump administration. As importantly, the current Board has strengthened employee rights in ways that go beyond correcting the Trump Board's decisions. Additionally, the Biden-appointed General Counsel of the NLRB is implementing a creative agenda to strengthen the enforcement of the NLRA. The General Counsel has announced priorities of issues that she would like to bring before the Board, either to overrule Board decisions from the Trump administration or to extend Board interpretations of the NLRA to provide more effective protection of employee rights[5]. Further the General Counsel has actively used a legal tool under the NLRA to deter employer unlawful conduct, the Section 10(j) injunction, which permits the NLRB to seek an injunction from a federal court pending a trial and ruling on unfair labor practice complaints by an administrative law judge[6]. For example, the Board has authorized the NLRB General Counsel to file for ten federal court injunctions against Starbucks, asking the court to order Starbucks to reinstate employees alleged to have been discharged for their union activities[7].

In a series of cases over the past year, including multiple decisions handed down in the past few months, the current Board has interpreted the NLRA to extend labor rights in ways that address longstanding problems of ineffective statutory enforcement. These cases fall into the following categories: expanding the scope of employees covered by the NLRA **(I)**; protecting employee rights to engage in speech and concerted activity **(II)**; strengthening employees' ability to effectively exercise their rights to unionize and collectively bargain **(III)**; enhancing remedies for enforcing the NLRA **(IV)**. The following discussion describes key recent Board decisions in each of these categories.

I - EXPANDING THE SCOPE OF EMPLOYEES COVERED BY THE NLRA

In 2016, the Board held that private university graduate student teaching assistants (TAs) or research assistants (RAs) are considered « employees » covered by the NLRA. In 2019 the conservative Board under the Trump administration proposed a regulation stating that TAs and RAs are not employees, which would override the earlier Board holding. In March, 2021, however, that conservative Board withdrew its

5 J. A. Abruzzo, General Counsel, Mandatory *Submissions to Advice*, Memorandum GC 21-04 (August 12, 2021): https://www.nlrb.gov/guidance/memos-research/general-counsel-memos

6 J. A. Abruzzo, General Counsel, *Seeking 10(j) Injunctions in Response to Unlawful Threats or Other Coercion During Union Organizing Campaigns* 22-02 (February 1, 2022): https://www.nlrb.gov/guidance/memos-research/general-counsel-memos

7 R. Iafolloa, « Starbucks on Verge of Beating NLRB Injunction Bid in N.Y. (1) », *Bloomberg Law News* (August 23, 2023).

proposed regulation[8]. Since that time, union organizing by TAs and RAs has greatly increased, solidifying their legal rights under the NLRA[9].

The current NLRB General Counsel seeks to build on these recent legal developments by arguing that the Board should hold that college or university athletes are employees under the NLRA. A pending complaint alleges that the National Collegiate Athletic Association, Pac-12 Conference, and University of Southern California are joint employers of student football and basketball players, whom they unlawfully misclassified as « non-employee student-athletes »[10]. This case will not reach the Board until after a trial before an administrative law judge. If the Board does decide the case in favor of the General Counsel's arguments it would create two new precedents by expanding the scope of employees covered by the NLRA and holding that employers' misclassification of employees is a per se violation of the NLRA[11].

The current Board has addressed the scope of «employee» status by overruling the decision in *SuperShuttle DFW, Inc.*[12], where the Trump Board had created a new test for determining whether workers are independent contractors excluded from protection of the NLRA. The Trump Board had held that « entrepreneurial opportunity » was a key factor in applying the Board's traditional common-law multi-factor test for determining independent contractor status. The current Board has returned to its earlier precedent of *FedEx Home Delivery*[13], in which « entrepreneurial opportunity » is only one of multiple factors to determine independent contractor status, including the extent of control exercised by the employer, the skilled required in the particular occupation, and whether the work is part of the employer's regular business.

In another significant development, the Board issued a new regulation to expand the definition of joint employer status. This regulation replaces the narrower definition under a regulation adopted by the Board in 2020 under the Trump administration[14]. Under the new regulation, joint employer status may be found where an employer either possesses but does not exercise, or actually exercises direct or indirect control over terms and conditions of employment[15]. This new regulation more accurately reflects the actual economic circumstances of current employment relationships

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8 Office of Public Affairs, NLRB, *NLRB Withdrawing Proposed Rule Regarding Student Employment* (March 12, 2021): https://www.nlrb.gov/news-outreach/news-story/nlrb-withdrawing-proposed-rule-regarding-student-employment

9 P. Purifoy, « Unionization Nears Record Levels as Students, Interns Organize », *Daily Labor Report* (August 24, 2023).

10 R. Iafolla and P. Purifoy, « Punching In : NCAA Lawsuit Aims for Two Precedential Rulings (1) », *Daily Labor Report* (June 5, 2023).

11 *Ibid.*

12 367 NLRB No. 75 (2019).

13 361 NLRB 610 (2014), *enf. denied*, 849 F.3d 1123 (D.C. Cir. 2017)

14 Rule by the NLRB, « Joint Employer Status Under the National Labor Relations Act », 85 FR 11184 (February 26, 2020).

15 R. Iafolla, « New Labor Board Joint Employer Test Replaces Trump-era Rule (1) », *Bloomberg Law News* (October 26, 2023).

involving more than one employer, including where workers are employed through temporary agencies and workers employed in franchises.

II - PROTECTING EMPLOYEE RIGHTS TO ENGAGE IN SPEECH AND CONCERTED ACTIVITY

In August 2023, the Board overruled the *Boeing*[16] case decided by the prior Board under the Trump administration, which had expanded employers' power to adopt work rules restricting employees' speech and concerted activity. The new decision, *Stericycle*, returns to a legal standard that places the initial burden of proof on the NLRB General Counsel to prove that a work rule interpreted « from the perspective of the economically dependent employee » « has a reasonable tendency to chill employees from exercising their (…) rights » to engage in protected concerted activity[17]. Such a rule will be found to violate the NLRA unless the employer proves that its rule « advances legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule »[18].

Additional Board decisions have reestablished the fundamental nature of employees' Section 7 rights under the NLRA to speak and advocate for improving workplace conditions. These decisions have also strengthened employees' rights to express their solidarity with other workers. In *Miller Plastic Products*, overruling a decision under the Trump Board, the current Board returned to a « totality of the circumstances » approach that expands the scope of protected concerted activity. In *Miller Plastic*, the Board held that a manufacturing employer unlawfully discharged an employee for engaging in protected concerted activity by raising concerns about the employer's Covid-19 protocols and decision to remain open during the early stages of the pandemic[19]. In another case, *Lion Elastomers*[20], the current Board overruled a Trump Board's decision that had expanded employer power to discipline employees for using offensive speech while they were engaged in otherwise protected concerted activity, including union activity, employee conduct toward management at the workplace, strikes, and speech on social media. The *Lion Elastomers* decision reestablishes the Board's long-time recognition that « conduct occurring during the course of protected activity must be evaluated as part of that activity, not as if it occurred separately from it and in the ordinary workplace context »[21]. Employees will not lose protection for their concerted activity simply because they engaged in « heated or exuberant expression and advocacy that often accompanies labor disputes »[22].

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16 365 NLRB No. 154 (2017).

17 Stericyle, Inc., 372 NLRB No. 113 (2023), p. 14.

18 *Ibid.*, p. 4.

19 Miller Plastic Products, Inc., 372 NLRB No. 134 (2023), *overruling* Alstate Maintenance, LLC, 367 NLRB No. 68 (2019).

20 Lion Elastomers LLC, 372 NLRB No. 83 (2023), *overruling* General Motors LLC, 369 NLRB No. 127 (2020).

21 Lion Elastomers, 372 NLRB, p. 11.

22 *Ibid.*, p. 12.

The current Board recently reestablished broad protection of employees' rights to advocate on behalf of others, including individuals such as supervisors or independent contractors who do not fall within the definition of « employee » covered by the NLRA. Employees are protected in such solidarity action where their advocacy for nonemployees also benefits the employees' interests[23]. The current General Counsel is also seeking to strengthen social justice advocacy, arguing in a pending complaint that an employer violated the NLRA by prohibiting employees from wearing the Black Lives Matter slogan on their work aprons. The General Counsel argues that employee discussions about racism, including employer's racial discrimination or harassment or tolerance of such discrimination or harassment, should be protected as « inherently protected concerted activity », given the implications of such discussions for terms and conditions of employment and the potential to lead to employees' collective action. This protection should extend to employee conversations and employees wearing slogans or buttons[24].

III - STRENGTHENING EMPLOYEES' ABILITY TO EXERCISE THEIR RIGHTS TO UNIONIZE AND COLLECTIVELY BARGAIN

In a potentially monumental decision, the current Board decided the *Cemex*[25] case, which will strengthen the right of employees to choose to unionize. Prior to the *Cemex* decision, even if a majority of employees have signed union authorization cards stating that they want to be represented by the union, the employer could lawfully refuse to recognize the union and wait for the union file a petition for a formal election conducted by the NLRB. In *Cemex,* the Board changed this, holding that when the union requests that the employer recognize the union based on employees' majority support, the employer has two choices: the employer may recognize the union; or the employer may promptly file a petition for an election with the NLRB to test the union's claim of majority support. If the employer does not file an election petition promptly with the NLRB, generally within two weeks of the recognition demand, the union may file an unfair labor practice charge alleging that the employer has unlawfully refused to bargain. If the majority support for the union is proven, the NLRB will uphold the unfair labor practice complaint and will order the employer to recognize and bargain with the union. Further, if the employer files a petition for an election and then commits an unfair labor practice under the NLRA that would require setting aside the results of the vote, the NLRB will order the employer to recognize and bargain with the union.

The Board explains in *Cemex* that the bargaining order is necessary to remedy the employer's unlawful action that undermines the ability to have a fair and timely election. Where the union has filed a petition for an election, the NLRB will follow this

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23 American Federation for Children, Inc., 372 NLRB No. 137 (2023). See also, R. Iafolla, « Protections for Nonemployee Advocacy Revived by Labor Board (1) », *Bloomberg Law News* (August 31, 2023).

24 Office of the General Counsel, Advice Memorandum, The Home Depot, 18-CA-273796, National Labor Relations Board (Sept. 9, 2021): https://www.nlrb.gov/guidance/memos-research/advice-memos. See also, P. Purifoy, « Workers Protesting Racism are Protected, Labor Board Lawyers Say », *Bloomberg Law News* (June 30, 2023).

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

same remedial approach of ordering the employer to recognize and bargain with the union where the employer commits a violation of the NLRA that would require setting aside the election[26].

Without a doubt, employers will challenge the new *Cemex* legal standard and will likely argue that the Board's decision is inconsistent with the US Supreme Court's *Gissel* decision in 1969, which upheld remedial bargaining orders against employers that commit « serious and pervasive » unfair labor practices that undermine the majority support that the union had prior to an election[27]. However, the Supreme Court did not describe this as the only way for the NLRB to exercise its discretion in enforcing employee rights and remedying employer unlawful conduct. In *Cemex*, the Board provides the employer with the ability to test the union's majority status through an election, while also enabling the Board to exercise its remedial power to issue a bargaining order where the employer commits an unfair labor practice that would invalidate the election results.

IV - EXPANDED REMEDIES IN ENFORCING THE NLRA

Weak remedies under the NLRA have created an ongoing obstacle to effective enforcement of the Act. Over the past year, Board decisions have strengthened remedies in unfair labor practice cases. The Board has adopted as standard practice that in addition to reinstatement and backpay, make-whole remedies shall include the award of compensation for direct or foreseeable pecuniary harms that were consequences of the unfair labor practice, such as out-of-pocket medical expenses or credit card debt[28]. Additionally, the Board has strengthened the remedies that may be ordered in bad faith bargaining cases, such as ordering employers to read to employees a notice of the NLRB's findings of unfair labor practices and remedies required; ordering employers to pay employees for loss of earnings or benefits and other direct or foreseeable pecuniary harms resulting from unlawful unilateral changes during bargaining; payment for union bargaining expenses; and payment to employee bargaining committee members for lost wages[29]. The Board also strengthened the duty to bargain after a collective bargaining agreement has expired, holding that an employer's violation of the NLRA by making unilateral changes that involve significant discretion by the employer are not excused based on past practice under the management rights clause of the expired agreement[30].

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26 *Ibid*., p. 39.

27 NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

28 Thryv, Inc., 372 NLRB No. 22 (2022).

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

30 Tecnocap LLC, 372 NLRB No. 136 (2023).