RECENT DEVELOPMENTS UNDER NATIONAL LABOR RELATIONS ACT

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I. National Labor Relations Board

- **Board Members**

On April 24, 2017, Philip Miscimarra was appointed Chairman of the National Labor Relations Board. At present he is the Board's only Republican. Mr. Miscimarra recently announced he will not seek appointment to another term when his current term expires December 16, 2017.

The other Members are former Chairman Mark Gaston Pearce and Lauren McFerran. Mr. Pearce has been on the Board since April 7, 2010 and Ms. McFerran has been a Member since December 17, 2014.

The President has nominated two Republicans -- Marvin Kaplan and William Emanuel -- to vacant seats on the Board. The Senate Committee on Health, Education, Labor and Pensions approved both nominees on July 19, 2017. Mr. Kaplan was confirmed on August 2, 2017. The vote on Mr. Emanuel will be held after the August recess. If he is confirmed as expected, Republicans will have a majority for the first time since 2007.

- **General Counsel**

Richard Griffin has been the Board's General Counsel since November 4, 2013. His term expires November 4, 2017. Mr. Griffin previously served as a Board Member from January 9, 2012 to August 2, 2013.

II. Joint Employer Standard

Browning-Ferris Industries of California

In *Browning-Ferris Industries of California*, 362 NLRB No. 186 (August 27, 2015), the Board reexamined the test for determining when legally separate entities are joint employers under the Act. The case involved Browning-Ferris (BFI), an operator of a recycling business, and Leadpoint, a subcontractor that provided staff to BFI to sort the recyclables, clean the screens on the sorting equipment and clear jams, and clean the facility. *Id.* at *3. BFI solely employed loader operators, equipment operators, forklift operators, and spotters, and those employees were part of an existing separate bargaining unit represented by the Teamsters. *Id.* The union sought to represent the staff provided by Leadpoint as well. *Id.*

The Board determined that, consistent with the Third Circuit's decision in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982), *enfd.* 259 NLRB 148 (1981), the determination whether a joint employer relationship existed required two inquiries: First, whether a common-law employment relationship existed, and second, whether the putative joint employer possessed sufficient control over the employees' essential terms and conditions of employment to permit meaningful collective bargaining. *Id.* at *2. The Board specifically rejected the requirement that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority, and

clarified that control exercised indirectly – for example, through an intermediary -- would also be relevant to the joint employer inquiry. *Id.*

As the Board acknowledged, this standard is a significant departure from the standard applied in prior Board decisions such as *TLI, Inc.*, 271 NLRB 798 (1984), *enfd. mem.* 772 F.2d 894 (3d Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (1984), which emphasized the actual exercise of authority. *Id.* at *19. In explaining the rationale for adoption of the revised standard, the Board stated, "It is not the goal of joint-employer law to guarantee the freedom of employers to insulate themselves from their legal responsibility to workers, while maintaining control of the workplace. Such an approach has no basis in the Act or in federal labor policy." *Id.* at *25. The Board also observed that the previous standard was not compatible with the modern workplace, where the use of staffing companies to provide workers had increased dramatically, with 2.87 million workers employed through staffing agencies as of August 2014. *Id.* at *15.

Applying the revised standard to the facts of the case, the Board found that BFI, the *user employer*, was a joint employer of the workers provided by Leadpoint, the *supplier employer*. *Id.* at *3. Key factors in the Board's analysis included:

(1) With respect to hiring, firing, and discipline, while BFI was not involved in the hiring process itself, it did "codetermine" the outcome of that process by imposing significant conditions on hiring, including requirements that the staffers not be ineligible for rehire at BFI, meet or exceed BFI's hiring criteria, and pass a drug test. *Id.* at *22. BFI also retained the right to reject anyone sent by Leadpoint for any or no reason, and had the same unqualified right to stop using a staffer. *Id.*

(2) With respect to supervision, direction of work, and hours, BFI, either independently or through Leadpoint supervisors, assigned tasks, exercised control over the pace of work by determining the speed of the streams of recyclables, positioned the Leadpoint staffers on the line, and provided "near-constant" oversight of their work. *Id.* at *23. BFI also directly gave detailed work directions to Leadpoint staffers, held meetings with them to address business issues and communicate preferred work practices, and assigned tasks that took precedence over any work assigned by Leadpoint. *Id.* Finally, in addition to requiring a BFI representative to sign off on their time in order for Leadpoint to receive payment for their work, BFI also controlled the number of workers required, the timing of shifts, and the availability of overtime. *Id.*

(3) While Leadpoint determined pay rates and administered the pay process, BFI created a "de facto wage ceiling" for Leadpoint workers by prohibiting Leadpoint from paying more than BFI employees were paid. *Id.* Additionally, BFI and Leadpoint had a "cost-plus" contract that required BFI to reimburse Leadpoint the cost of its workers, and workers could not receive pay increases without approval by BFI. *Id.*

The potential impact of the Board's decision in *Browning-Ferris* is significant, and reaches far beyond industries where the use of staffing firms is prevalent. For example, the General Counsel is currently prosecuting consolidated complaints against McDonald's and its franchisees under the revised joint employer standard. *See McDonald's USA, LLC, A Joint Employer, et al.*, 362 NLRB No. 168 (Aug. 14, 2015). However, per the Board's decision, the extent of the joint employer / franchisor's obligation to bargain would be limited to only "such terms and conditions which it possesses the authority to control." *Browning-Ferris*, 362 NLRB No. 186 at *20. The franchisor / joint employer would also face increased potential liability for unfair labor practices, and one common tactic of terminating a business relationship with a franchisee or contractor because of imminent unionization would be off-limits.

The employer appealed the Board's decision to the D.C. Circuit Court of Appeals. *Browning-Ferris Indus. Of Calif., Inc. v. NLRB*, No. 16-1028 (D.C. Cir. filed Jan. 20, 2016). A three-judge panel heard oral argument on March 9, 2017. A decision is pending. General Counsel Griffin, in a March 28, 2017 interview, opined that a decision affirming the Board's decision could make it more difficult for the NLRB to revisit the revised standard, depending on whether the court found that the Board's interpretation was required or merely permissible.[1]

Retro Environmental

In *Retro Environmental*, 364 NLRB No. 70 (2016), the Board applied the revised joint employer standard in a case involving Retro Environmental, Inc., a construction firm providing demolition and asbestos abatement services, and Green JobWorks, LLC, a staffing agency. In the summer of 2015 Green JobWorks provided staff to Retro for demolition and asbestos abatement projects at two schools. *Id.* at *1. Both projects were scheduled to terminate in mid-July 2015 because both schools would reopen for classes in August. *Id.* Over the five prior year period Green JobWorks had provided staff to Retro on more than ten, and possibly more than twenty, separate projects. *Id.* at *2. Retro's president testified that he was satisfied with Green JobWorks' services and that he did not envision terminating their relationship. *Id.*

A labor organization filed an election petition seeking to represent hourly-rated employees of both companies in a mixed unit. The Regional Director dismissed the petition without deciding whether Retro and Green JobWorks were joint employers because he found that Retro and Green JobWorks had met their burden of proving an imminent cessation of operations. *Id.* On review, the Board reversed the dismissal and found that Retro and Green JobWorks were a joint employer under the revised standard of *Browning-Ferris*. *Id.* at *4. The Board explained that:

> [E]ach employer has its primary areas of responsibility in the joint relationship -- Green JobWorks in the hiring, firing, and assigning of employees to project sites, and Retro in the day-to-day supervision of the job -- with each of the employers able to influence

[1] Chris Opfer, *New Joint Employer Liability Test Tough to Undo*, NLRB Counsel Says, BLOOMBERG BNA, Mar. 29, 2017, available at https://www.bna.com/new-joint-employer-n57982085895/ (last accessed August 4, 2017).

> some of the other's decisions. Between them, they control all of the employees' employment terms. Green JobWorks and Retro thus share or codetermine the employees' essential terms and conditions of employment and we find them to be joint employers.

Id. at 5.

The Board then addressed the Regional Director's finding that Retro and Green Job Works had met their burden of proving an imminent cessation of operations. The Board recognized that where cessation of the employer's operations is imminent, such as when an employer completely ceases to operate, sells its operations, or fundamentally changes the nature of its business, no election would be held because it would serve no purpose. *Id.* at *6 (citing *Hughes Aircraft Co.*, 308 NLRB 82, 83 (1992); *Martin Marietta Aluminum*, 214 NLRB 646, 646-647 (1974); *Cooper International*, 205 NLRB 1057, 1057 (1973). The Board found that neither Retro nor Green JobWorks was ceasing operations, selling its operations, changing the nature of its business, or moving. *Id.* at *7. The Board further determined that each would continue to perform the same work in the same geographic area. *Id.* Finally, the Board found that there was no evidence that the companies intended to discontinue their relationship, only that two particular projects were scheduled to end. *Id.* As a result, the Board found that the employers had failed to meet their burden of proving that cessation of their joint operations was "immediate and definite." *Id.*

On remand, the Regional Director ordered an election, and ultimately the union was certified as the bargaining agent for the jointly-employed unit.

III. Appropriate Bargaining Units

A. Mixed Units of Jointly Employed and Solely Employed Employees

In *Miller v. Anderson, Inc.*, 364 NLRB No. 39 (July 11, 2016), the Board again examined the question of whether solely and jointly employed employees could be included in the same bargaining unit absent employer consent. In 2000, the Board had determined that the Act permitted such units without regard to employer consent, provided the employees shared a community of interest. *M.B. Sturgis, Inc.*, 331 NLRB 1298, 1304-08 (2000). In reaching this decision the Board expressly overruled its contrary decision in *Lee Hospital*, 300 NLRB 947 (1990). *Sturgis*, 331 NLRB at 1304. Then, in *Oakwood Care Center*, 343 NLRB 659, 663 (2004), the Board expressly overruled *Sturgis* and returned to the standard in *Lee Hospital*.

In *Miller*, a 3-1 majority of the Board overruled *Oakwood Care Center* and returned to the standard established in *Sturgis*. *Miller*, 364 NLRB at *18. In reaching this decision, the Board relied on two key findings. First, the Board found that a unit comprising jointly and solely employed employees of the user employer was an "employer unit" within the meaning of Section 9(b) of the Act because such employees all worked "side by side, as part of common enterprise." *Id.* at 8. Second, the Board found that the *Sturgis* standard "was more responsive than *Oakwood* to Section 9(b)'s 'statutory command' to the Board, in deciding whether a petitioned-for bargaining unit is appropriate, 'to assure employees the fullest freedom in exercising the rights guaranteed' by the[e] Act.'" *Id.* at *11 (quoting *Gallenkamp Stores Co. v. NLRB*, 402 F.2d 525, 532 (9th Cir. 1968). On this second point, the Board reasoned that, under *Oakwood*, "by

requiring employer consent to an otherwise appropriate bargaining unit desired by employees, Oakwood has upended the Section 9(b) mandate and allowed employers to shape their ideal bargaining unit, which is precisely the opposite of what Congress intended." *Id.* at *12.

The Board also drew a direct connection between its decision to overrule *Oakwood* and the Board's decision in *Browning-Ferris* to reject its prior decisions in *Laerco* and *TLI*:

> In BFI, we concluded that given our "responsibility to adapt the Act to the changing patterns of industrial life," this change in the nature of the workforce was reason enough to revisit the Board's then current joint-employer standard. 362 NLRB No. 186, slip op. at 11. Just as was the case with respect to that standard, *Oakwood* imposes additional requirements that are disconnected from the reality of today's workforce and are not compelled by the Act. We correspondingly conclude that to fully protect employee rights, the Board should return to the standard articulated in *Sturgis*.

Id. at *14.

In his dissent, then Member Miscimarra raised expressed the view that the new standard was in reality a change to the consent requirement for multiemployer bargaining:

> Specifically, my colleagues hold that the Board may require two or more businesses to engage in multi-employer bargaining without their consent, even though one of the entities has no employment relationship with some of the unit employees, provided that other employees in the same unit are jointly employed by the employer entities.

Id. at *20.

The majority rejected this view, reasoning that the bargaining in a combined unit is not multiemployer bargaining because "all the employees in a *Sturgis* unit perform work for the user employer and all the employees are employed (either solely or jointly) by the user employer. By contrast, there is no common user employer for all the employees in a multi-employer bargaining unit." *Id.* at *18.

The majority also rejected the argument that the new mixed unit standard would obligate a *supplier employer* to bargain with non-employees in the unit, stating that "each employer is obligated to bargain only over the employees with whom it has an employment relationship (and only with respect to such terms and conditions which it possesses the authority to control)." *Id.* (citing *Sturgis*, 331 NLRB at 1306).

On remand, the Regional Director ordered an election, and ultimately the union was certified as the bargaining agent for the jointly-employed unit.

B. Micro Units

Specialty Healthcare

One of the most controversial decisions in recent years involved the NLRB's determination that small bargaining units within larger groups of employees – known as micro units – can be appropriate for purposes of collective bargaining. In August 2017, the District of

Columbia Court of Appeals joined seven other federal circuits in affirming the Board's standard and analytical framework for determining whether micro units are appropriate in such cases.

In *Specialty Healthcare*, the Board held that a petitioned-for unit consisting only of certified nursing assistants at a nursing home was an appropriate bargaining unit under the law without including other nonprofessional employees at the facility. 357 NLRB 934, 943-47 (2011). In so finding, the Board departed from, and expressly overruled, *Park Manor Care Center*, 305 NLRB 872 (1991), finding that its "idiosyncratic" approach to determining the appropriateness of a proposed bargaining unit in nursing homes, rehabilitation centers, and other non-acute healthcare facilities had become "obsolete." *Id.* at 941.

The Board announced a return in *Specialty Healthcare* to the application of the previous community-of-interest approach. *Id*. According to the Board, the suggestion that there is only one set of appropriate units in a given industry conflicts directly with the statute and unit jurisprudence. *Id.* at 940. It is well established that the Board need only find that a petitioned-for unit is an appropriate unit instead of the most appropriate unit that could be proposed, and, further, that multiple units in any workplace can be appropriate under the community of interest analysis. *Id.* The Board reasoned that Section 9(b) of the Act purposefully permits multiple, presumptively appropriate, bargaining units in that it provides the agency shall decide whether "the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." *Id.* at 941 (referencing 29 U.S.C. § 159(b)).

Further, the Board expressed the view that the principal right encompassed in the Act is employees' right to self-organization, stating that Section 9(a), "read in light of the policy of the Act, implies that the initiative in selecting an appropriate unit resides with the employees." *Id.* (quoting *American Hosp. Assn.*, 499 U.S. 606, 610 (1991)). The first step in the representation process is permitting the petitioner to describe the unit in which a number of employees want to be represented. *Id.* Section 9(b) directs the Board to make appropriate unit determinations "which will assure to employees the fullest freedom in exercising rights guaranteed by the Act." *Id.* (quoting *Federal Electric. Corp.*, 157 NLRB No. 89 (1996)). The Board recognized that employees exercise their Section 7 rights by petitioning to be represented in a particular unit, not just by petitioning to be represented in general. *Id.* at 941 n. 18. Ultimately, if the unit is determined to be appropriate, the inquiry ends. *Id.* at 941.

In determining unit appropriateness, the Board stated that the focus is on whether the employees in a proposed unit share a "community of interest." *Id.* at 942. In determining whether employees share a "community of interest," the Board stated that it would examine:

> [W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with the other employees; have distinct terms and conditions of employment; and are separately supervised." *Id.* (quoting *In re United Operations, Inc.*, 338 NLRB No. 18 (2002).

In *Specialty Healthcare*, the union proposed a unit of certified nursing assistants which consisted of an entire classification of employees that could clearly be identified as a group. *Id.* By applying the traditional community of interest factors, the Board found that the CNAs' distinct training, certification, supervision, uniforms, pay rates, work assignments, shifts, and work areas -- as well as the employees' lack of integration and interchange with other employee classifications in comparison to other employees -- supported a finding that the CNAs shared a community of interest. *Id.* at 942-43. CNAs were found to be separate and distinct from all other employees. *Id.* The Board noted that, "A cohesive unit -- one relatively free of conflicts of interest -- serves the Act's purposes of effective collective bargaining." *Id.* at 944 (quoting *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, (1941)).

The Board suggested that when a proposed unit consists of employees readily identifiable as a group, especially after a consideration of the traditional factors, this expressly demonstrates that the proposed unit of employees shares a community of interest as required under the *Specialty Healthcare* test. Id. The process to include additional employees in an existing requires a heightened showing on behalf of the party proposing to enlarge the unit. *Id.* Applying this analysis, the Board determined that a heightened showing is a showing that the included and excluded employees share an "overwhelming community of interest" such that there is no legitimate basis upon which to exclude certain employees from it. *Id.* (citing *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008). A unit is too narrow, according to the Board, only when it is fractured and has no rational basis. *Id.* at 946. Here, the Board determined that the proposed unit of all CNAs was not a fractured unit simply because a larger unit of employees might also be an appropriate unit, or even a more appropriate unit than the one already proposed. *Id.* The Board turned to *Blue Man Vegas*, which held, while considering traditional community of interest factors, two groups of employees have an overwhelming community of interest only when the factors overlap almost completely. *Blue Man Vegas*, 529 F.3d at 422.

The Board determined that continuing to apply *Park Manor* would be inconsistent with the statutory charge and expressly returned to the application of traditional community-of-interest considerations in determining if a proposed unit is an appropriate unit in non-acute healthcare facilities. *Id.* at 941. The Board made clear that when employees or a labor organization petition for an election in a unit of employees who are identifiable as a group -- including job classifications, departments, functions, work locations, skills, or other similar factors -- and the Board subsequently finds that the employees in the group share a community of interest after a consideration of the traditional criteria set forth under *Specialty Healthcare*, the Board will find the petitioned-for unit to be appropriate whether or not other employees could be placed in the unit to make a larger unit, which would also be appropriate or even more appropriate for that matter. *Id.* at 945. Only if an interested party demonstrates that the employees in a larger unit share an "overwhelming" community of interest with those employees in the existing petitioned-for unit will the Board find the proposed unit inappropriate. *Id.* at 945-46.

1. Application of *Specialty Healthcare*

The NLRB has applied the *Specialty Healthcare* analysis in *Macy's Inc.*, 361 NLRB No. 4 (2014), and *Value City Furniture*, 2014 WL 1321039 (Apr. 3, 2014). In *Macy's*, the Board upheld the Regional Director's ruling that cosmetic and fragrance employees in a single Macy's department store were an appropriate unit. 361 NLRB No. 4, at *1 (2014). In *Value City Furniture*, the Board upheld the Regional Director's determination that a group of home furnishing consultants was an appropriate unit under *Specialty Healthcare*. 2014 WL 1321039 at *1 n.1 (Apr. 3, 2014). The employer had asserted that the bargaining unit should include all non-supervisor and guard employees in the store -- not just home furnishing consultants. *Id.*

However, the Board signaled that there is an outer limit to the reach of *Specialty Healthcare* in *The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman*, 361 NLRB No. 11 (2014). In *Neiman Marcus Group*, women's shoe sales associates in two separate departments in the store petitioned for recognition as a bargaining unit. *Id.* at *1. Relying on *Specialty Healthcare*, the Regional Director found that the proposed unit was appropriate. *Id.* The Board reversed that decision, however, finding the "boundaries of the petitioned-for unit [did] not resemble any administrative or operational lines drawn by the [employer]." *Id.* at *3. The Board noted that though one group of women's shoe sales associates worked in a stand-alone department, the other group of employees were assigned to a larger department that sold clothes as well as shoes. *Id.* Additionally, the Board noted that the two groups did not share distinct skills or receive specialized training compared to other apparel sales staff. *Id.* Accordingly, the Board determined that the petitioned-for unit was inappropriate. *Id.*

Rhino Northwest, LLC

In *Rhino Northwest, LLC v. NLRB*, 2017 WL 3443032 (D.C. Cir. August 11, 2017), the Court addressed the *Specialty Healthcare* standard. The case involved an employer that assembled equipment for concerts and other events in the Pacific Northwest and a proposed unit comprised of *riggers*. *Id.* at *1. The Board certified the petitioned-for unit and the employer challenged the certification, asserting that other employees' skills and working conditions were so similar to the riggers that a bargaining unit could not consist solely of riggers. *Id.*

The *Rhino Northwest* Court observed that under the Board's decisions, the prima facie appropriateness of a bargaining unit depended on two factors: (1) whether the employees are readily identifiable as a group based on factors such as job classifications, departments, functions, work locations or skills, and (2) whether the employees share a community of interest. *Id.* (citing *Specialty Healthcare & Rehab. Ctr. Of Mobile*, 357 NLRB 934, 935 (2011) and *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008)). The Court stated that the Board weighs all relevant factors on a case-by-case basis to determine whether a group of employees are sufficiently alike to constitute an appropriate bargaining unit and that as long as the requisite connections between such employees exist, the unit is prima facie appropriate. *Id.*

The Court also observed that under the Board's approach more than one bargaining unit can be appropriate, and that when an employer claimed that a unit was under inclusive the employer's burden was to show that the unit was *truly inappropriate* as would be the case where

excluded employees shared an "overwhelming community of interest" with included employees. *Id.* The "overwhelming community of interest" standard was met only where the employer could show that there was "no legitimate basis" for excluding the other employees from the unit. *Id.*

The employer argued that (1) the "overwhelming community of interest" standard violated the NLRA, and (2) even under the "overwhelming community of interest" standard the riggers-only unit was inappropriate because excluded employees shared a community of interest with the riggers. *Id.* at *2. On the first point, the employer contended that in adopting the "overwhelming community of interest" standard the Board "imported that standard from an entirely different context, breaking from the agency's past practice without adequate explanation." *Id.* In rejecting this argument, the Court reasoned that the Board had adopted the standard from the D.C. Circuit's decision in *Blue Man Vegas*, and that the Court's use of the term "overwhelming community of interest" was to "encapsulate" Board decisions that conformed to a "consistent analytic framework." *Id.* As a result, the Court concluded that the Board in *Specialty Healthcare* "stood on solid ground" when it asserted that it had consistently applied this heightened standard, even if the verbiage varied slightly from case to case. *Id.*

The Court further stated that a review of prior decisions confirmed that the Board in *Specialty Healthcare* simply took a "fitting 'opportunity to make clear' the exact language it would employ going forward, and that its 'formulation' was 'drawn from Board precedent.'" *Id.* (quoting *Specialty Healthcare*, 357 NLRB at 945-47) The Court concluded by noting that this determination put the appellate court in line with seven other circuits who had also concluded that Specialty Healthcare "worked no departure" from prior Board decisions. Id. (citing *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 792-93 (2d Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 839 F.3d 636, 638 (7th Cir. 2016); *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 441-43 (3d Cir. 2016); *Macy's, Inc. v. NLRB*, 824 F.3d 557, 567 (5th Cir. 2016); *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 500 (4th Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515, 523-24 (8th Cir. 2016); *Kindred Nursing Ctrs. East, LLC v. NLRB*, 727 F.3d 552, 561 (6th Cir. 2013).

With respect to the employer's second argument that a "rigger-only" unit was inappropriate under the *overwhelming community of interest* test, the Court found substantial evidence supported the Board's determination that the riggers did not share such an interest with excluded employees. *Id.* at *5. The Court noted that riggers performed a "unique function" requiring special tools and training, they were paid significantly more than other employees, they took direction from a rigger supervisor, they did not participate in the same pre-show tasks as other employees and, unlike other employees, that they could leave after their tasks were completed. *Id.* While the employer had shown that a bargaining unit including all employees also would have been appropriate, that was insufficient to show that the rigger-only unit was inappropriate, and the Board's conclusion that differences in wages, hours, training, supervision, equipment and working conditions justified a riggers-only unit was reasonable. *Id.* As a result, the Court denied the employer's petition for review and granted the Board's cross-petition for enforcement of its order. *Id.* at *6.

IV. Election Rules

A. Expedited Election Rules

On December 15, 2014, the NLRB published its final rule on representation case procedures. 79 Fed. Reg. 74308. The final rule made a number of changes to the election process, including:

(1) Allowing filing of representation petitions electronically;

(2) Requiring service of representation petitions and related documents by the petitioner;

(4) Requiring employer posting and distribution of a Board notice about the petition and election to the employees;

(5) Scheduling of the pre-election hearing 8 days from the notice of hearing;

(6) requiring non-petitioning parties to state a position and requiring the employer to provide names, shifts, work locations, and job classifications of the employees in the petitioned-for unit 1 day before commencement of the pre-election hearing;

(7) Specifying that the purpose of the pre-election hearing is to determine whether there is a question of representation;

(8) Giving the regional director discretion to decide, in light of the purpose of the hearing, which, if any, voter eligibility issues should be litigated before an election is held;

(9) Requiring that the hearing close with oral argument unless the regional director grants permission to file briefs;

(10) Requiring the regional director to decide the matter and prohibiting *sue sponte* transfer to the Board;

(11) Allowing a party to request Board review after the election;

(12) Eliminating the automatic stay of elections in anticipation of requests for Board review;

(13) Requiring an employer to provide a list of voters, including their shifts, job classifications, and work locations, within 2 business days of the direction of election;

(14) Requiring that parties file objections and offers of proof in support within 7 days of the conclusion of the election;

(15) Requiring that any post-election hearing on challenges and objections commence 21 days after the tally or "as soon as practicable thereafter;" and

(16) Requiring the regional director to issue a final decision.

Id. at 74309 -10.

The Board also directed the General Counsel to "promptly determine whether, when, and how electronic signatures can practicably be accepted" to support a showing of interest and issue guidance on the matter. *Id.* at 74331. The General Counsel concluded that electronic signatures

could be used in this context and that the Board's existing evidentiary standards for handwritten signatures would apply. GC Memo 15-08 (Revised).

Prior to its implementation on April 14, 2015, the final rule was challenged in two federal civil actions. Both district courts granted summary judgment for the Board. *Chamber of Commerce of United States of Am v. Nat'l Labor Relations Bd.*, 118 F.Supp.3d 171, 220 (D.D.C. July 29, 2015); *Associated Builders & Contractors of Texas, Inc. v. Nat'l Labor Relations Bd.*, 2015 WL 3609116 at *17 (W.D. Tex. June 1, 2015).

On appeal, the Fifth Circuit affirmed the decision of the Western District of Texas. *Associated Builders & Contractors of Texas, Inc. v. Nat'l Labor Relations Bd.*, 826 F.3d 215, 229 (5th Cir. 2015). ABC advanced five arguments on appeal, all of which were rejected by the Court. First, the Court rejected ABC's argument that by allowing regional directors to not address voter eligibility issues in the pre-election hearing the Board had exceeded its authority under Section 9 of the Act, concluding that permitting regional directors to defer such determinations was within the Board's discretion. *Id.* at 223. Second, the Court rejected ABC's challenge to the required disclosures of employee information on privacy grounds, finding that ABC had failed to identify any federal law that restricted the disclosure of such information to unions by employers, and finding that the disclosure requirements further the Board's valid objective of encouraging an informed electorate. *Id.* at 224. Third, the Court rejected ABC's contention that the disclosure requirements were arbitrary and capricious, finding that the "expanded disclosure regime is rationally connected to the transformative changes in communications technology." *Id.* at 226 (citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (remarking that the Board is entrusted with "[t]he responsibility to adapt the [NLRA] to changing patterns of industrial life"). Fourth, the Court rejected ABC's assertion that the shortened pre-election period violated the NLRA by interfering with protected speech during election campaigns, reasoning that "[b]ecause the Board considered the potential burdens on speech and afforded the regional director discretion in setting an election date," there was no violation. *Id.* at 227. Finally, the Court rejected ABC's claim that the entire rule was invalid because the Board acted arbitrarily and capriciously in violation of the Administrative Procedures Act (APA), deciding that in adopting the final rule the Board acted rationally and in furtherance of its congressional mandate. *Id.* at 229.

B. Impact of Expedited Election Rules

On April 20, 2016, the NLRB Office of Public Affairs released data comparing processing times during the first full year under the new rule (4.14.15 – 4.15.16) to the prior twelve-month period (4.14.14 – 4.14.15).[2] That data showed a reduction in the median days between petition filing and (1) the pre-election hearing from 14 to 10; (2) an election agreement from 11 to 8; (3) an election from 38 to 24 overall, 38 to 23 with an election agreement, and 64 to 34 with a directed election;, and (4) unit certification from 50 to 35. The data also showed that the reduction in median days was reasonably consistent for RC, RD, and RM petitions, and that, with the exception of RM petitions, where the union won 39 percent in the year prior to

[2] *Annual Review of Revised R-Case Rules*, National Labor Relations Board (April 20, 2016). The report and data are available online at https://www.nlrb.gov/news-outreach/news-story/annual-review-revised-r-case-rules (last accessed August 9, 2017).

final rule implementation and 29 percent in the year following implementation, the union win rate was essentially unchanged. The data also showed that the election agreement rate was unchanged. The number of petitions blocked by ULP charges dropped from 194 to 107, a 45 percent reduction from the prior twelve-month period.

V. Collective and Class Action Arbitration Waivers

D.R. Horton, Inc.

The Board addressed the issue of collective and class action arbitration waivers in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012). In that case, the Board determined that a mutual arbitration agreement requiring all employment-related claims to be determined in an individual employee arbitration violated Section 8(a)(1) of the NLRA by interfering with employee rights to engage in *other collective action* under Section 7. *Id.* at 2282. The Board rejected the argument that such agreements must be enforced because invalidating them would conflict with the Federal Arbitration Act (FAA). *Id.* at 2284. The Board reasoned that the FAA was not an impediment to invalidating the agreement because the decision did not disfavor arbitration since it treated the agreement as it would any other private contract that violated federal labor law; the right to collective action was a substantive right under the Act, and the FAA could not extinguish substantive rights; because the agreement was unlawful it was not enforceable under the Saving Clause of the FAA; and if the NLRA and FAA could not be reconciled, the FAA would have to yield. *Id.* at 2284-2288. The Board also rejected the theory that invalidating such agreements would be inconsistent with Supreme Court decisions stating that a party could not be compelled to submit to class arbitration, reasoning that barring employers from requiring employees to waive all collective and class actions did not prohibit employers from also requiring that individual claims be conducted individually in arbitration. *Id.* at 2288.

The Fifth Circuit reversed, stating that requiring a class mechanism is an impediment to arbitration in violation of the FAA, and there was no contrary command in the NLRA that would require the FAA to yield. *D.R. Horton, Inc., v. NLRB*, 737 F.3d 344, 360-362 (5th Cir. 2013). The Court also noted that other circuits which had addressed the issue had either stated they would not defer to the Board's view or had enforced comparable collective and class waivers. *Id.* at 362 (citing *Richards v. Ernst & Young, LLP*, 734 F.3d 871, 873-874 (9th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297-298 n. 8 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013).

The Fifth Circuit did agree with the Board's determination that the language of the arbitration agreement at issue could lead an employee to reasonably believe that the waiver barred the filing of unfair labor practice charges in violation of the Act, and upheld the Board's direction that the employer take appropriate corrective action. *Id.* at 364. The Board filed a petition for rehearing, which was denied. The Board did not file a petition for writ of certiorari.

Murphy Oil USA, Inc.

In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), the Board again considered whether an employment agreement requiring individual arbitration of all employment-related claims violated the Act. The agreement at issue, like the one in *D.R. Horton*, required employees to submit all employment-related claims to individual arbitration. *Id.* at *3-4. The Board reaffirmed its holding in *D.R Horton* that such agreements violated Section 8(a)(1) of the Act by interfering with employee rights to engage in *other collective action* under Section 7. Id. at *6-7. The Board further reasoned that the agreements were unenforceable because (1) the FAA Saving Clause barred enforcement of the waivers because they were unlawful, and (2) the broad language of the NLRA evidenced a contrary congressional command that prevailed in the event of any conflict with the FAA. Id. at *11-14. The Board also expressed disagreement with the Fifth Circuit's purported reliance on decisions of the Second, Eighth and Ninth Circuits, stating that the Ninth Circuit decision had been amended "so that it specifically refrained from deciding the issue," the Second Circuit had only endorsed the Eighth Circuit's treatment without any substantive analysis, and that the Eighth Circuit's reliance on the reenactment of the FAA after both the Norris-LaGuardia Act and the NLRA was misplaced because such reenactment had no substantive effect. *Id.* at *14-15.

The Fifth Circuit, relying on *D.R. Horton*, again refused to enforce the Board's order. *Murphy Oil USA, Inc., v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). The Board filed a petition for writ of certiorari on September 9, 2016 and the Supreme Court granted the petition on January 13, 2017 (Docket No. 16-307). The case has been consolidated with *Epic Systems v. Lewis*, Docket No. 16-285, and *Ernst & Young LLP v. Morris*, Docket No. 16-300, both of which are discussed below. The cases are scheduled for oral argument on October 2, 2017.

On June 16, 2017, the Solicitor General, which filed the petition for a writ of certiorari on behalf of the Board, filed an amicus brief opposing the Board's position. The NLRB is now representing itself before the Supreme Court. General Counsel Richard Griffin will present oral argument on behalf of the agency.

Epic Systems Corporation

In *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), the Court addressed the same issue the Fifth Circuit grappled with in *D.R. Horton* and *Murphy Oil* -- whether an employment agreement requiring individual arbitration of employment-related disputes was permissible under the NLRA. The plaintiff, a technical writer, had brought suit under the Fair Labor Standards Act (FLSA) based on Epic's alleged misclassification of him and other technical writers as exempt, thereby depriving them of overtime pay. *Id.* at 1151. The employer moved to dismiss the civil action and compel arbitration based on Lewis' prior agreement to waive all class and collective claims and to arbitrate employment disputes on an individual basis. *Id.* Lewis asserted that the waiver was unenforceable because it violated the NLRA. The district court agreed and denied defendant's motion for dismissal. *Id.* The employer appealed.

On appeal, the Seventh Circuit rejected Epic's contention that the NLRA did not establish the right to pursue class actions, stating that Section 7's inclusion of the phrase "other concerted

activities" should be construed broadly and apply to civil actions available both before and after passage of the NLRA. *Id.* at 1154. The Court then determined that the specific collective action waiver at issue violated Section 7 by conditioning continued employment on waiving the right to collective action. *Id.* at 1155. The Court then rejected the employer's argument that the FAA "resuscitated" the waiver, reasoning that the waiver was not enforceable under the FAA by reason of the statute's Saving Clause, which prohibited enforcement of illegal arbitration agreements. *Id.* at 1156-57.

The Seventh Circuit acknowledged that the Fifth Circuit had reached the opposite conclusion in *D.R. Horton*, but concluded that the Fifth Circuit's analysis was flawed because it made no effort to harmonize the NLRA and FAA, a step that in the Court's view was required under the statutory construction standard set forth in *Morton v. Mancari*, 417 U.S. 551 (1974). *Id.* at 1158. The *Lewis* Court stated that the statutes were reconcilable because the FAA's Saving Clause rendered the provision in dispute unenforceable under the FAA. *Id.* at 1159-60.

Additionally, the Court rejected Epic Systems' argument that the right to pursue class and collective actions was only procedural in nature and not a substantive right, and that as a result the waiver was enforceable under the FAA. *Id.* at 1160. The Court stated that Section 7 is the NLRA's only substantive provision, and that every other provision of the statute is designed to enforce Section 7 rights. *Id.* Because the waiver precluded employees from seeking "any class, collective, or representative remedies to wage-and-hour disputes," the waiver violated Section 7 and 8 of the Act, and nothing in the FAA saved the waiver. *Id.* at 1161. As a result, the Court affirmed the district court's judgment for Lewis.

Epic Systems filed a petition for writ of certiorari on September 2, 2016 and the Supreme Court granted certiorari on January 13, 2017 (Docket No. 16-285). The case has been consolidated with *Murphy Oil*, Docket No. 16-307, and *Ernst & Young LLP v. Morris*, Docket No. 16-300. All three cases are scheduled for oral argument on October 2, 2017.

Ernst & Young LLP

In *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016), the Court considered whether an employment agreement requiring individual arbitration of employment-related disputes was permissible under the NLRA. The plaintiffs were required to sign a *concerted action waiver* as a condition of employment with Ernst & Young. *Id.* at 979. The plaintiffs subsequently brought a collective action against the employer under the FLSA alleging misclassification that resulted in a denial of overtime pay required under both the FLSA and California labor law. *Id.* The district court granted the employer's motion to compel arbitration and dismissed the case. *Id.* Plaintiffs appealed.

The Ninth Circuit observed the NLRB had concluded that an employer violated the Act when it required employees, as a condition of employment, to waive their right to engage in collective actions in any forum. *Id.* at 980. The appellate court evaluated the Board's interpretation using the two-step *Chevron* framework and determined that the interpretation was consistent with the intent of Congress as expressed in the clear language of the statute. *Id.* at 981-83. The Court then applied that deferential doctrine to the class and collective action waiver

in dispute and determined that the waiver -- which required individual arbitration and prevented "the initiation of concerted legal action anywhere else" -- violated Sections 7 and 8 of the Act. *Id.* at 983-84.

Addressing whether application of the FAA required a different outcome, the Court stated that "the NLRA obstacle is a ban on initiating, in any forum, concerted legal claims – not a ban on arbitration." *Id.* at 984. The Court further explained that because the provision illegally infringed on a substantive right under the NLRA, it was unenforceable under the FAA Saving Clause. *Id.* at 985-86. The Court concluded that when private contracts conflict with the NLRA, "they must yield or the Act would be reduced to a futility." *Id.* at 990 (quoting *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944)). The Court reversed the decision of the district court and remanded the case.

Ernst & Young filed a petition for a writ of certiorari on September 8, 2016 and the Supreme Court granted certiorari on January 13, 2017 (Docket No. 16-300). The case has been consolidated with *Murphy Oil*, Docket No. 16-307, and *Lewis v. Epic Sys. Corp.*, Docket No. 16-285. All three cases are set for oral argument on October 2, 2017.

On Assignment Staffing Systems, Inc.

In *On Assignment Staffing Svs., Inc.*, 362 NLRB No. 189 (August 27, 2015), the Board considered an issue left open by its decision in *D.R. Horton* -- whether an opt-out provision would save an individual arbitration agreement. The arbitration agreement provided that an employee could opt-out of the waiver by signing a form and returning it to the employer within 10 days, and that if the employee did not do so the employee's continued employment would "constitute Employee's and Company's mutual acceptance" of the waiver agreement. *Id.* at *4. The Board held that the opt-out provision did not save the agreement because the procedure reasonably tended to interfere with the employees' exercise of Section 7 rights in two ways. *Id.* at *5.

In this connection, the Board reasoned that the provision interfered with the exercise of Section 7 rights because it put the burden on the employees to take affirmative steps to retain their rights. *Id.* And it required the employees to make an *observable* choice to retain those rights, making their views on concerted activity known to the employer. *Id.*

The Board also determined that Section 7 prohibited prospective waivers like the one in question regardless of whether their acceptance was a condition of employment. The Board stated that such rights "may not be traded away" because allowing such waivers would be inconsistent with the public policy of the Act to protect workers' freedom of association. *Id.* at *9.

On review, the Fifth Circuit granted the employer's petition for summary reversal. *On Assignment Staffing Servs., Inc. v. NLRB*, 2016 WL 3685206 (5th Cir. June 6, 2016).

A. Memorandum OM 17-11: Impact of *Murphy Oil* on Pending Cases

On January 26, 2017, NLRB General Counsel Richard Griffin issued *Memorandum OM 17-11*, providing guidance to the regional offices on how to prosecute cases involving arbitration agreements barring employees from pursuing collective claims in light of the Supreme Court's consideration of whether such agreements are enforceable. The General Counsel directed that until the Supreme Court decides the issue, regional offices are to follow one of three approaches:

(1) In cases involving an agreement prohibited by the Board's decision in *Murphy Oil*, Regions are to pursue informal settlement agreements conditioned on the Board prevailing before the Supreme Court.

(2) To the extent any charge involves both an agreement violating *Murphy Oil* and an allegation unrelated to such agreement, the various Regions are to pursue informal settlement agreements conditioned on the Board prevailing before the Supreme Court and proceed on the unrelated allegations (absent settlement).

(3) In situations involving opt in/opt out clauses in mandatory arbitration agreements, or where there is some other distinguishing feature, the Regions are directed to hold such cases in abeyance.

In *Memorandum GC 17-02*, the General Counsel provided a complete list of pending cases related to *D.R. Horton* and their status. 2017 WL 1018652 at *23 (May 10, 2017).

VI. Local Right-to-Work Ordinances

Hardin County, Kentucky

In *United Auto., Aerospace & Agric. Implement Workers of Am. Local 3047 v. Hardin Cty., Kentucky*, 842 F.3d 407 (6th Cir. 2016), the Sixth Circuit addressed the legality of a political subdivision passing a right-to-work ordinance. The district court had reviewed the language of Section 14(b) of the Act, which provides that nothing in the Act interferes with *State or Territorial* laws prohibiting membership in a union as a condition of employment, and concluded that using traditional principles of statutory construction, the laws of a political subdivision of a State were not the laws of a "State or Territory" and so were not shielded from preemption by the provision. *Id.* at 412-13. The appellate court, applying the same traditional principles of statutory construction, disagreed. *Id.* at 413. The Court found further support for the County's position in two Supreme Court decisions, *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991) and *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424 (2002), and one Sixth Circuit decision, *State of Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016). All three decisions, in the Court's view, supported the notion that political subdivisions of a state enjoyed the same authority as the state absent a "clear statement" in the statute to the contrary. *Id.* at 413-17.

The Court also considered the Union's assertion that this construction of Section 14(b) would frustrate Congressional intent to preempt the field of industrial relations regulation. The Court rejected this assertion, reasoning that "Congress can hardly be deemed to have implicitly intended to preempt a state law that it has explicitly excepted from preemption." *Id.* at 419.

The Court then addressed two additional provisions relating to hiring halls and dues checkoff, finding that arrangements for the payment of union dues were regulated by the Labor Management Relations Act and that the use of hiring halls was regulated by Section 8(a)(3) of the Act. *Id.* at 420-422. Consequently, the Court concluded that the provisions addressing hiring hall agreements and due checkoff requirements were "preempted and unenforceable." *Id.* at 422.

In January 2017, Kentucky became the 27th so-called right to work state, thereby mooting the dispute in *Hardin County*. Ohio is now the only state in the Sixth Circuit that is not a "right to work" state.

VII. Agency Fee Agreements

Friedrichs v. California Teachers Association

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court upheld the constitutionality of requiring non-union public employees to pay agency fees. More than 30 years later, the Court declined to apply *Abood* to personal assistants who were, in the Court's view, not "full-fledged" public employees. *Harris v. Quinn*, 134 S. Ct. 2618, 2638 (2014). More significantly, Justice Alito, writing for the Court, engaged in a detailed analysis of *Abood* and the cases that preceded it and concluded that the *Abood* Court's analysis was "questionable on several grounds." *Id.* at 2632. Specifically, Justice Alito wrote that the *Abood* Court failed to understand the difference between a statute that authorizes imposition of an agency fee and a state instrumentality imposing such a fee; failed to appreciate the difference between public and private sector bargaining; failed to appreciate the difficulty in distinguishing which expenditures are made for bargaining and which are made for political reasons; failed to appreciate the administrative problems associated with determining which expenditures are chargeable and which are not; failed to foresee the practical problems non-members would face in challenging expenditures; and rested its analysis on an incorrect assumption that the principle of exclusive representation in the public sector is dependent on a union or agency shop. *Id.* at 2632-2634.

Many commentators believed *Harris* signaled that *Abood* was at risk. In *Friedrichs v. California Teachers Ass'n*, a group of non-union member public school teachers brought suit against local and national teachers unions, asserting that any mandatory financial contributions in support of a labor organization violated their First and Fourteenth Amendment rights to freedom of speech and association. 2013 WL 9825479 at *1-2 (C.D. Cal. Dec. 5, 2013) The teacher unions filed a motion for judgment on the pleadings, contending their claims were foreclosed by *Abood* and *Mitchell v. Los Angeles Unified School District*, 963 F.2d 258 (9th Cir. 1992) (upholding "opt-out" provision for agency fee payers). *Id.* at *2. The district court granted the motion and entered judgment for the unions. Plaintiffs appealed to the Ninth Circuit, and the unions filed a motion for summary affirmance. *Friedrichs v. California Teachers Ass'n*, 2014 WL 10076847 (9th Cir. Nov. 18, 2014). The appellate court granted the motion, stating that "the questions presented in this appeal are so insubstantial as not to require further argument because they are governed by controlling Supreme Court and Ninth Circuit precedent." *Id.* at *1 (citing *Abood*, 431 U.S. at 232, and *Mitchell*, 963 F.2d at 263).

On June 30, 2015, the U.S. Supreme Court granted the plaintiffs' petition for writ of certiorari, and oral arguments were heard on January 11, 2016. Many expected the Supreme Court to overrule *Abood*, but Justice Scalia died on February 13, 2016 before a decision was issued. The Court affirmed the Ninth Circuit's decision with a per curiam decision stating that

"The judgment is affirmed by an equally divided Court." *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083, *reh'g denied*, 136 S. Ct. 2545 (2016). With Justice Gorsuch joining the Court on April 10, 2017, it is likely that the question of *Abood's* continued viability will again be addressed by the Supreme Court.

VIII. NLRA Coverage and Expansion of the Definition of Employee

A. Teaching and Research Assistants

In *Brown University*, 342 NLRB 483 (2004), the NLRB considered whether graduate teaching assistants at the school were employees under the Act. The Board framed the issue as follows:

> [W]hether graduate student assistants who are admitted into, not hired by, a university, and for whom supervised teaching or research is an integral component of their academic development, must be treated as employees for purposes of collective bargaining under Section 2(3) of the Act.

Id. at *1.

The Board had previously addressed the issue in *New York University*, 332 NLRB 1205 (2000). In that case, the Board concluded that graduate teaching assistants at NYU were employees under the Act, "notwithstanding that they simultaneously are enrolled as students." 332 NLRB at 1209.

The *Brown* Board overruled *NYU*, concluding it was wrongly decided and conflicted with 25 years of precedent. *Brown*, 342 NLRB at 487. The Board found that the graduate assistants, who had a "primarily educational" relationship with the school, were not statutory employees. 342 NLRB at *7, 13-16.

The Board reconsidered the issue in *Columbia University*, 364 NLRB No. 90 (Aug. 23, 2016), and overruled *Brown*. The Board rejected the notion that whether a graduate student was an employee under the Act depended on whether his or her relationship with the school was "primarily educational" in favor of the common law test. *Id.* at *7. The Board declared that extending coverage to graduate students was consistent with overall federal labor policy because there was nothing about the academic environment that argued against coverage in a compelling manner. *Id.* at *14. Applying the new standard to the facts of the case, the Board determined that the Columbia graduate students were employees under the Act. *Id.*

In dissent, Member Miscimarra opined that finding graduate assistants to be statutory employees would necessarily create a host of issues that were not compatible with academic life, including strikes and lock-outs. *Id.* at *29-30. He also raised the possibility that colleges and universities would be required to disclose sensitive information in the context of collective bargaining that could be inconsistent with school policies requiring confidentiality in sexual harassment cases. *Id.* at *31. The majority rejected these arguments, stating that the rules governing such activities were contextual. *Id.* at *13.

B. Student-Athletes

In *Northwestern University*, 362 NLRB No. 167 (Aug. 17, 2015), the Board was presented with the question whether scholarship football players were employees under the Act. The Board did not answer that question, instead declining to exercise jurisdiction because:

> [I]t would not effectuate the policies of the Act to assert jurisdiction. Our decision is primarily premised on a finding that, because of the nature of sports leagues (namely the control exercised by the leagues over the individual teams) and the composition and structure of FBS football (in which the overwhelming majority of competitors are public colleges and universities over which the Board cannot assert jurisdiction), it would not promote stability in labor relations to assert jurisdiction in this case.

Id. at *3.

General Counsel Griffin addressed the unanswered question in *GC Memorandum 17-01*, 2017 WL 467471 (Jan. 31, 2017). In that memorandum to the regional offices, the General Counsel expressed the view that "scholarship football players in Division I FBS private sector colleges and universities are employees under the NLRA, with the rights and protections of that Act." *Id.* at *11. He stated that this conclusion was supported by the language and policies of the NLRA, and the Board's interpretation of them in *Boston Medical Center* and *Columbia University*. *Id.* at *12. Specifically applying the common law employment test adopted in *Columbia University* to scholarship football players, he reasoned that the athletes were employees under the Act because "they perform services for their colleges and the NCAA, subject to their control, in return for compensation." *Id.* The General Counsel further stated that the Board's decision not to exercise jurisdiction in *Northwestern University* had no bearing on the question, since the question of whether the players are employees is distinct from the question whether the Board should, as a matter of policy, exercise jurisdiction over a specific representation petition. *Id.* at *13. Finally, he concluded that because they are statutory employees, the players have the right to be protected from retaliation when they engage in concerted activities for mutual aid and protection. *Id.* at *14.

IX. No Solicitation Rules

In *Conagra Foods, Inc.*, 361 NLRB No. 113 (2014), the Board considered the definition of *solicitation* as it related to work rules. The case arose in the context of a campaign by UFCW Local 75 to organize employees at Conagra's food processing plant in Troy, Ohio. *Id.* at *1. During the campaign Janette Haines, a third shift worker, had three encounters with second shift workers Andrea Schipper and Megan Courtaway. *Id.* In the first, which occurred in the restroom, Haines asked Schipper and Courtaway if they would sign authorization cards, and both said they would do so. *Id.* In a second encounter, Schipper gave Haines the number of the locker she shared with Courtaway so that Haines could leave the cards in the locker. *Id.* Finally, as she walked past them on the production floor, Haines told Schipper and Courtaway that she had placed the cards in their shared locker. *Id.* This last encounter last "no more than a few seconds." *Id.* Courtaway reported the exchange to her lead, and Conagra issued Haines a verbal warning for violating its non-solicitation policy. *Id.*

An Administrative Law Judge determined that Conagra violated Section 8(a)(3) and (1) of the Act by disciplining Haines. *Id.* at *2. The Board upheld the ALJ's order on review, concluding that Haines' conduct on the production floor was not "solicitation" activity because she did not request that Schipper and Courtaway sign an authorization card at the time or present an authorization card for signature. *Id.* at *3. The Board explained that "unlike the conduct found to be solicitation in prior cases, Haines' comment was not a request to take any action and posed no reasonable risk of interfering with production because it did not call for a response of any kind." *Id.* The Board also determined that the employer letter that "reminded" employees about the non-solicitation policy was unlawful because it could be viewed as barring all discussions about unions during working times. *Id.*

On February 19, 2016, the Eighth Circuit vacated the NLRB's decision in part, holding that the employer lawfully disciplined Haines under its non-solicitation policy. *Conagra Foods, Inc. v. NLRB*, No. 14-3771, 2016 WL 682979 (8th Cir. Feb. 19, 2016). The Court rejected the Board's assertion it had consistently held that presentation of an authorization card was required for conduct to qualify as a solicitation, and concluded that in any event such a categorical rule would be "patently unreasonable" and "would be contrary to the Act's policy of balancing the rights of employers and employees." *Id.* at *6. The Court also disagreed with the Board's reliance on the brief duration and non-disruptive nature of the discussion on the production floor, stating that "when that discussion solicits union support it may be subject to a blanket prohibition by an employer during working time." *Id.* at *7. The Court further stated that "where an employee makes a statement that is intended and understood as an effort to obtain a signed card, and that effort is part of a concerted series of interactions calculated to acquire support for union organization, that employee has engaged in solicitation subject to censure under an employer's validly enacted and applied no-solicitation policy." *Id.* at *9.

The Eighth Circuit did, however, affirm the Board's conclusion that Conagra's "reminder" letter violated the Act, concluding that the letter, which the Court determined could be construed as conflating discussions about unions with solicitation, would reasonably tend to chill employees in the exercise of their Section 7 rights. *Id.* at *10.

X. General Counsel Initiatives

A. General Counsel Memorandum 16-03: Reconsideration of the *Levitz* Framework

In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board considered under what circumstances an employer can unilaterally withdraw recognition from an incumbent union. The case involved an employer who, after receiving a petition signed by what it determined was a majority of bargaining unit members, unilaterally withdrew recognition from a union upon expiration of the CBA despite the union's assertion that it had objective evidence showing it still enjoyed majority support. *Id.* at 719. The General Counsel urged the Board to adopt a standard allowing withdrawal of recognition "only pursuant to the results of a Board-conducted election." *Id.*

The Board had previously ruled that an employer may withdraw recognition by showing (1) that the union has lost the support of a majority of the unit employees or (2) that it has a good-faith doubt, based on objective considerations, of the union's continued majority status. *Celanese Corp.*, 95 NLRB 664 (1951). Under prior Board decisions, an employer with the same good-faith doubt could also test union support by either petitioning for a Board-conducted election or polling its employees on the subject. *United States Gypsum Co.*, 157 NLRB 652 (1966); *Texas Petrochemicals Corp.*, 296 NLRB 1057, 1059 (1989), *enfd. as modified* 923 F.2d 398 (5th Cir. 1991).

In *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998), the Supreme Court had addressed the good-faith doubt standard and upheld the application of a unitary standard to withdrawal of recognition, petitioning for an election, and polling. 522 U.S. at 364. The Court did, however, indicate that a unitary standard was not required, and that the Board could impose a higher standard for withdrawal of recognition. *Id.* at 373-374.

In *Levitz*, the Board decided to abandon the unitary approach and prospectively require that to unilaterally withdraw recognition of an incumbent union, the employer must be able to prove that the incumbent union has, in fact, lost majority support. *Levitz*, 333 NLRB at 723, 729. The Board also observed that an employer withdraws recognition at its peril, because if the union contests the withdrawal in an unfair labor practice proceeding and the company is unable to rebut the presumption of continued majority support, the withdrawal will constitute a violation of Section 8(a)(5). *Id.* at 725.

The Board adopted a different test for elections, stating that it "would allow employers to obtain RM elections by demonstrating reasonable good-faith *uncertainty* as to incumbent unions' continued majority status." (Emphasis in original) *Id.* at 723. The Board reasoned that processing RM petitions under this lesser standard would make that avenue more attractive than unilateral action. *Id.* at 727. The Board did not change the good-faith doubt standard for polling. *Id.*

In *Scomas of Sausalito, LLC v. NLRB*, the D.C. Circuit applied the *Levitz* framework in a case involving the employer's unilateral withdrawal of recognition of an incumbent union after it received a petition signed by a majority of the bargaining unit members. 849 F.3d 1147, 1150 (D.C. Cir. 2017). Unknown to the employer but known to the union, prior to its withdrawal of recognition several employees who had signed the petition revoked their support for decertification, reducing the number in support below 50 percent of the bargaining unit. *Id.* at 1153. The employer argued that it did not violate the Act because it had no knowledge of the revocations and relied with "good-faith certainty" on the petition showing that the union did not have majority support. *Id.* at 1155. The Court rejected this argument, noting that *Levitz* "squarely foreclosed the contention" and that such a petition does not shield an employer from an unfair labor practice charge unless the employer can prove that the union in fact lacked majority support. *Id.*

After determining that the employer violated the Act, the Court addressed the propriety of the bargaining order in the case. The Court determined that the bargaining order was not an appropriate remedy because the violation was unintentional, and given that 42 percent of unit employees continued to support an election, the order would not further the statutory policy of "protecting the exercise by workers of full freedom of association, self-organization, and

designation of representatives of their own choosing[.]" *Id.* at 1158 (quoting 29 U.S.C. §151). Accordingly, the Court remanded the case to the Board for determination of a new remedy. *Id.*

In a May 9, 2016 memorandum to the regional offices, General Counsel Griffin stated that the *Levitz* standard for unilateral withdrawal has "proven problematic." *Memorandum GC 16-03*, 2016 WL 2772273. He explained that the standard "has created peril for employers in determining whether there has been an actual loss of majority support for the incumbent union, has resulted in years of litigation over difficult evidentiary issues, and in a number of cases has delayed employees' ability to effectuate their choice as to representation." *Id.* He concluded his critique of *Levitz* by stating that due to these issues *Levitz* "has failed to serve two important functions of federal labor policy noted in that decision, specifically, promoting stable bargaining relationships and employee free choice." *Id.*

General Counsel Griffin directed the Regions to request that "the Board adopt a rule that, absent an agreement between the parties, an employer may lawfully withdraw recognition from a Section 9(a) representative based only on the results of an RM or RD election." *Id.* He stated that this rule "will benefit employers, employees, and unions alike by fairly and efficiently determining whether a majority representative has lost majority support." *Id.* He also stated that this proposed rule was even more appropriate now that the Board had adopted rules to streamline the election process. *Id.* As of May 10, 2017, there were two cases pending on appeal before the Board that involved the issue. *Memorandum GC 17-02*, 2017 WL 1018652 at *10 (May 10, 2017).

B. Memorandum OM 17-02: Intermittent and Partial Strikes

On October 3, 2016, the Office of the General Counsel circulated a memorandum to the regional offices addressing the standard for determining whether multiple short-term strikes are protected under Section 7 of the Act. *Memorandum OM 17-02* (Oct. 3, 2016). The memorandum observed that employees are more frequently engaging in multiple short-term strikes in disputes with employers and that the current Board test for determining whether short-term strikes are protected is difficult to apply in those situations. *Id.* The memorandum went on to say that the current test exposed employees to potential discipline for activities that should be considered protected under Section 7 of the Act. *Id.* The memorandum included a brief insert for use in cases involving such strikes.

In the brief insert, the General Counsel urged that the Board draw clear conceptual distinctions between partial and intermittent strikes and redefine the circumstances under which intermittent strikes become unprotected. *Memorandum OM 17-02*, Attachment 1 at 3 (Oct. 3, 2016). He further proposed that multiple strikes would be protected "if (1) they involve a complete cessation of work, and are not so brief and frequent that they are tantamount to work slowdowns; (2) they are not designed to impose permanent conditions of work, but rather are designed to exert economic pressure; and (3) the employer is made aware of the employees' purpose in striking." *Id.* The General Counsel reasoned that this standard more effectively protects the right to strike, dispenses with the unpersuasive rationales relied on in the past, and better addresses Supreme Court precedent. *Id.*

As of May 10, 2017, there were no pending cases scheduled for litigation or in the Division of Advice regarding intermittent strikes. *Memorandum GC 17-02*, 2017 WL 1018652 at *10 (May 10, 2017).