DOL's Persuader Regulations and NLRB Update[1]

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I. PERSUADER RULE

On March 23, 2016, the U.S. Department of Labor (DOL) issued final regulations revising the "advice exemption" and requiring employers and consultants (including lawyers) to report labor relations advice and services under the Labor-Management Reporting and Disclosure Act's "persuader activity" regulations. The effective date of the new regulations was April 25, 2016. The rule was to be applicable to arrangements and agreements as well as payments (including reimbursed expenses) made on or after July 1, 2016.

The new regulations greatly expand the scope of reportable persuader activity for employers and outside labor relations consultants, including lawyers, and significantly limit the advice exemption from reporting contained in the LMRDA.

Public Disclosure of "Persuader Activity"

"Persuader activity" as defined by Section 203(b) of the LMRDA must be reported by labor relations "consultants" (including lawyers, law firms, public relations firms, and even trade associations) on Form LM-20 within 30 days of the engagement or agreement to provide persuader services, and by "employers" on Form LM-10 within 90 days after the end of the fiscal year in which the employer engaged persuader services. Failure to file, or the filing of false or incomplete information, exposes the consultant and employer to civil and criminal penalties.

The History of Reportable "Persuader Activity" and the Advice Exemption

The final regulation significantly narrows the LMRDA Section 203(c) "advice exemption" from mandated disclosure and reporting by employers and outside labor relations consultants. The final regulation dramatically expands the scope of reportable persuader activity far beyond its original meaning when the LMRDA was enacted in 1959.

For over 50 years, the LMRDA persuader activity regulations required reporting only when labor relations consultants were hired to communicate directly with employees to persuade them concerning unionization. The regulation, consistent with the original intent of Congress, was designed to prevent the deceptive practice whereby "middlemen" were hired to

[1] Thank you to my colleagues Harold P. (Hal) Coxson (DC) for the Persuader Rule background and Bindu Gross (Dallas) for his assistance in the development of this update.
[2] Admitted North Carolina and Georgia only.

pose as employees—when, in fact, their role was to "persuade" fellow employees not to join a union—in order to report the results back to the employer.

The former persuader activity regulations worked—they prevented undisclosed persuader activities where outside consultants communicate directly with employees.

Congress also included Section 203(c), which exempted the reporting of "advice" to employers by outside consultants. This "advice" included legal services by lawyers, which did not involve direct communications with employees and which an employer was free to accept or reject.

What's Reportable Now

The new revisions to the persuader regulations now require consultants that were formerly exempt from reporting under Section 203(c) to report a broad scope of labor relations advice and services, even though they do not involve direct communications with employees. Reportable advice and services now include:

- **Direct Persuasion**

According to the final rule, "[t]he obligation to report direct persuasion by consultants remains." An example of direct persuasion is direct communication with an employee with an object to persuade the employee about how to exercise his or her representation or collective bargaining rights.

- **Indirect Persuasion**

i. *Planning, Directing, or Coordinating Supervisors or Managers.* According to the final rule, it is a reportable activity for a consultant to plan, direct, or coordinate activities (including meetings or less structured interactions with employees) that supervisors undertake if the consultant's object was to persuade.

ii. *Providing Persuader Materials*. The final rule states that it is a reportable activity for a consultant to provide materials to or communicate with an employer, with an object to persuade, for dissemination or distribution to employees.

1. *Reportable Examples:*

- Drafting or selecting persuader materials for an employer to disseminate or distribute to employees; and

- (including editing, adding, or translating) employer-created materials "only if an 'object' of the revisions is to enhance persuasion, as opposed to ensuring legality."

2. *Nonreportable Examples:*

    - The use of persuader materials, which were not created specifically for the employer, "such as videos or stock campaign literature" is not reportable unless the consultant helps the employer select materials.

    - The use of literature that a consultant created previously, without any knowledge of the employer, labor union, industry, or employees is not reportable if the consultant also does not have a role in disseminating the literature.

iii. *Conducting a Seminar for Supervisors.* The final rule includes a number of reporting rules related to seminars that cover a "labor-management relations matters, including how to persuade employees concerning their organizing and bargaining rights."

1. *Reportable Examples:*

    - Labor relations consultants are required to report their activity if they develop or assist employers attending such seminars "in developing anti-union tactics and strategies for use by the employer, the employers' supervisors or other representatives."

    - Trade associations are required to report their activity surrounding seminars "if they organize and conduct the seminars themselves, rather than subcontract their presentation to a law firm or other consultant."

2. *Nonreportable Examples:*

    - The final rule does not impose a reporting obligation on employers whose representatives attend such seminars.

    - The final rule does not impose a reporting obligation on consultants who conduct a seminar without developing or assisting employer-attendees in developing a plan to persuade their employees.

    - The final rule does not impose a reporting obligation on consultants who "merely makes a sales pitch to employers about persuader services it could provide."

iv. *Developing or Implementing Personnel Policies or Actions*. Reporting is required if a "consultant develops or implements personnel policies or actions for the employer with an object to persuade employees."

1. *Reportable Examples:*

- Consultants must report their identification of employees for discipline, reward, "or other targeting" on the basis of the employee's "involvement with a union representation campaign or perceived support for the union."

- Consultants must report their "development of a personnel policy during a union organizing campaign in which the employer issues bonuses to employees equal to the first month of union dues."

2. *Nonreportable Examples:*

The final rule clarifies that a consultant's activity will only be considered reportable if the consultant's object is to persuade employees, "as evidenced by the agreement, any accompanying communication, the timing, or other circumstances relevant to the undertaking." Thus, the final rule states that the following activity would not be reportable:

- "[A] consultant's development of personnel policies and actions are not reportable merely because they improve the pay, benefits, or working conditions of employees, even where they could subtly affect or influence the attitudes or views of the employees."

Labor Consultant - Reporting Non-Persuader Activity

Once a labor relations consultant reports on Form LM-20 a single instance of "persuader" advice or services, the consultant then must disclose "all labor relations advice and services" on Form LM-21, filed annually, even though the advice and services do not involve persuader activity.

Undefined "Labor Relations Services" Under Form LM-21

Although the final regulation provides examples of the broadened definition of "persuader activity" reportable on Form LM-20, it does not define "all labor relations advice or services," which form the basis for receipts and disbursements that are reportable on Form LM-21. The final regulation did not comment on the scope of reporting for Form LM-21. Instead, that issue will be addressed in bifurcated rulemaking to revise Form LM-21 currently scheduled to start in September 2016. Until then, it will be difficult for consultants, including lawyers, who engage in what is now classified as persuader activity to know the extent that they must provide

information pertaining to receipts and disbursements relating to labor relations advice and services.

Employer – Reporting Requirement

The employer will also have to file its own report. The employer's report must be filed on Form LM-10 within 90 days of the end of the employer's fiscal year. It must disclose:

- the date of each reportable arrangement and the date and amount of each transaction made pursuant to that arrangement;
- the name, address, and position of the person with whom the agreement or transaction was made; and
- "a full explanation of the circumstances of all payments made, including the terms of any agreement or understanding pursuant to which they were made." This includes attaching a copy of any written agreement between the employer and the persuader.

Attorney-Client Confidences

The American Bar Association (ABA) and the Association of Corporate Counsel, as well as numerous state attorneys general, strongly opposed the DOL revisions to the advice exemption because the mandated disclosure would force lawyers to reveal attorney-client confidences in violation of their ethical obligations under the ABA's Model Rules and Annotated Model Rules of Professional Conduct and would interfere with access to legal counsel.

The U.S. Department of Labor insists that the new "persuader regulations" do not require the disclosure of attorney-client confidences and that the attorney-client privilege is protected by section 204 of the LMRDA. Yet disclosing a client's identity, financial arrangements, and services rendered are all attorney-client "confidences," which attorneys are not at liberty to disclose pursuant to their ethical obligations under state bar rules, without the client's informed consent. This ethical concern and the federal government's interference with the attorney-client relationship, both of which result from the new rule, are the reasons the American Bar Association strongly opposes the new persuader regulations.

Problems for Small Business

To the extent the persuader regulations impose a burden on small businesses that do not have in-house legal and labor relations staff, these businesses may have difficulty responding to a union organizing campaign and lawfully communicating with their employees. This difficulty with access to counsel poses a problem especially within the shortened seven-day time frame for an employer's response to a union petition for a representation election imposed by the National Labor Relations Board's new R-Case (Representation Election) rules. Employers should note that legal advice provided by their attorneys continues to be protected and is not reportable.

Rule Not Applicable To Labor Unions or Their Attorneys or Consultants

Unions, their law firms, and their outside consultants are not covered by the persuader activity reporting and disclosure requirements. Even if a union was to engage in the types of deceptive practices that the LMRDA originally targeted in 1959, the final rule would not require it to disclose the identity of its paid "salts" or the existence of a "union front organization".

What's Next?

The new "persuader activity" rule, which will apply to arrangements and agreements as well as payments made on or after July 1, 2016, has and will continue to be challenged by employers and attorneys in Congress and the courts. DOL's regulatory agenda lists September of 2016 for proposed rulemaking to revise Form LM-21.

DOL Enforcement "Tweaks"

Since publishing the new Persuader rule, the DOL has announced two significant tweaks to its enforcement of the new rule.

- **DOL Suspends Filing of Certain Parts of Required Form LM-21 Reports**

On April 13, 2016, the Office of Labor-Management Standards (OLMS) at the U.S. Department of Labor (DOL) issued a Form LM-21 Special Enforcement Policy announcement. Effective immediately, the policy suspended the enforcement of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) requirement for the filing of two parts of the annual Form LM-21 Receipts and Disbursements Report for the foreseeable future.

The current LMRDA Form LM-21 regulations do not define the term "labor relations advice and services." OLMS had announced separate rulemaking scheduled for September 2016 to define the scope of that term and to make other changes to the Form LM-21 reporting requirements.

Employers have argued—both in written comments during the LM-10 and LM-20 rule making and now in federal district court litigation seeking to enjoin the new rules from taking effect—that until the term "labor relations advice and services" is defined for purposes of Form LM-21, enforcement of the new persuader activity reporting requirements will impose irreparable harm for employers and labor relations consultants, including lawyers.

Until further notice from OLMS, filers of Form LM-21 reports will not be required to complete Part B Statement of Receipts and Part C Statement of Disbursements. Part B ordinarily requires the filer to "[r]eport all receipts from employers in connection with labor relations advice or services regardless of the purposes of the advice or services" and whether the advice or services are persuader activities. Part C ordinarily requires the filer to "[r]eport all disbursements made by the reporting organization in connection with labor relations advice or services rendered to the employers listed in Part B."

Now and for the foreseeable future so long as the OLMS Special Enforcement Policy remains in effect, a Form LM-21 Report that omits Parts B and C will be deemed to be complete. Also, filers are not required to maintain records solely related to parts B and C of Form LM-21 as otherwise would be required by LMRDA's Section 206, which requires individuals to maintain applicable records for a period of at least five years after such reports have been filed.

The newly-announced Form LM-21 Special Enforcement Policy does not address the substantive changes to the definition of reportable "persuader activity" and the greatly restricted scope of the advice exemption set forth in the final regulations, which took effect on July 1, 2016.

- **Exemption of multi-year arrangements entered into before July 1, 2016**

In an email to the U.S. Chamber of Commerce dated June 8, 2016, an OLMS official confirmed that the OLMS would not apply the new persuader rules to services provided pursuant to multi-year arrangements entered into between an employer and labor relations consultants (including lawyers) before July 1, 2016.

Legal Challenges – Rule Enjoined

Since the DOL promulgated its new rule, three separate legal challenges have been filed in federal district courts in Little Rock, Arkansas, Minneapolis, Minnesota, and Lubbock, Texas. The U.S. District Court for the District of Minnesota issued a decision in *Labnet, Inc. v. U.S. Department of Labor* on June 22, 2016, holding that while Plaintiffs there had a substantial likelihood of success on the merits of their claim, their motion for a preliminary injunction was denied because, according to the Court, Plaintiffs had failed to make a sufficient showing of irreparable harm.

On June 27, 2016, in *National Federation of Independent Business et al. v. Perez, et al.*, the U.S. District Court for the Northern District of Texas (Lubbock Division) granted Plaintiffs' Motion for a Preliminary Injunction, thereby enjoining the U.S. Department of Labor ("DOL") from implementing and enforcing its revised persuader rule on a national basis. The Court found that Plaintiffs' challenge to the new rule, which was set to become effective July 1, 2016, has a substantial likelihood of success on the merits and that Plaintiffs have shown that they would be irreparably harmed if the rule was not enjoined.

This lawsuit was filed on March 31, 2016, by Plaintiffs the National Federation of Independent Business, the Lubbock Chamber of Commerce, the Texas Association of Business, the National Association of Home Builders, and the Texas Association of Builders. Ogletree Deakins represents the Plaintiffs in this case. The State of Texas along with nine other states intervened in support of Plaintiffs' position.

Plaintiffs contend that the DOL's new rule violates the LMRDA, the First and Fifth Amendments to the U.S. Constitution, and the Regulatory Flexibility Act.

II. UNION ORGANIZING

a. New Representation Case Rules

i. Introduction

On December 12, 2014, the National Labor Relations Board ("NLRB" or "Board") implemented revised union representation election rules. The rules became effective April 14, 2015. The rules were enacted by a 3-2 vote. Approved by Board Chairman Mark Gaston Pearce and Members Kent Y. Hirozawa and Nancy Schiffer, Board Members Philip A. Miscimarra and Harry I. Johnson, III, dissented. The rule includes detailed explanations regarding the rule's impact on current procedures and the views of the majority and dissenting members.

The most notable changes to the NLRB's election procedures are outlined below.

ii. Rules

1. Petition

The new rules allow (but do not require) petitions to be filed electronically – a departure from the prior requirement of in-person filing or filing by facsimile. The new rules require that the petition be served "on all other interested parties" including the employer. This requirement will ensure the earliest possible notice of the petition to all interested parties, and, once served by the Region, start the clock for the accelerated elections process.

The new rules require more detailed information including: type of election requested; date(s) of election; time(s) of election; and, location(s) of election. The new rules also require the petitioner to file its showing of interest (signed authorization cards/petitions) with the election petition, replacing the 48-hour requirement.

2. Notice Posting

The rules require employers to post a "Notice of Petition for Election" following a union's petition. The notice will provide employees with notice that the petition has been filed, the name of petitioner, the type of petition, the proposed unit, the basic election procedures, a summary of basic rights of employees, and the NLRB's website address. The posting is now mandatory. The rules require the notice to be posted in conspicuous places. Employers who "customarily communicate" with employees using electronic forms of communication are now required to distribute this notice electronically. The notice must be posted within two (2) business days after service of the Notice of Hearing. Failing to timely post can be a valid basis for objections to an election. The employer must maintain the posting until the petition is dismissed, withdrawn, or the Notice of Petition is replaced by the Notice of Election.

3. Voter List

The rules expand the voter information that must be provided by the employer in the *Excelsior* List. The rules make the *Excelsior* list due sooner - 2 business days (not 7) after the Regional Director's approval of an election agreement or issuance of a Decision and Direction of Election. The rules require the employer to furnish the list to the NLRB Regional Director, as well as directly to the union. Previously, the employer was simply required to send the voter list to the Region. The Region would then send the list to the union. The rules require the employer to file a Certificate of Service with the Regional Director when the *Excelsior* list is furnished to the union. The list must be served on the union and filed with the Region in an electronic format (unless the employer certifies it does not have the capacity to do so).

The new rules now include each eligible voter's:

- Full name
- Home address
- Personal (not work) email address (if available)
- Available home and personal cellular telephone numbers (if available)
- Work location
- Shift
- Job classification

4. Hearing

Under the new rules, most disputes over voter eligibility and bargaining unit inclusion/exclusion will not be resolved until *after* the election. The NLRB's "Representation Case Fact Sheet" states:

> *Generally, only issues necessary to determine whether an election should be conducted will be litigated in a pre-election hearing. A regional director may defer litigation of eligibility and inclusion issues affecting a small percentage of the appropriate voting unit to the post-election stage if those issues do not have to be resolved in order to determine if an election should be held. In many cases, those issues will not need to be litigated because they have no impact on the results of the election.*

This leaves important issues unresolved, such as supervisory status and whether certain employees are part of the voting unit. It also undermines the ability of employees to make an informed decision and hinders all employers' ability to present an effective campaign.

5. Statement of Position

Employers must file a Position Statement with the Regional Director and serve it on all parties by noon on the business day before the hearing is set to open. The Regional Director may

require the Position Statement to be filed earlier than the day before if the hearing is set to start more than eight (8) days after service of the Notice of Hearing. According to the Board, the purpose of the Statement of Position is to facilitate an election agreement and narrow the scope of any hearing issues.

If the employer claims that the unit proposed by the union is not a unit, the employer will have to set forth in the Position Statement:

- The basis for that contention (state the precise objections to the appropriateness of the proposed unit); and

- A list of prospective voters, their job classifications, shifts and work locations.

If the employer takes no position on the appropriateness of the union's requested unit, the petitioner will be allowed to present evidence on that point (without opposition from the employer). The employer would not be allowed to offer evidence or cross-examine witnesses.

The employer must identify any individuals in classifications in the petitioned-for unit whose eligibility to vote the employer intends to contest. Additionally, the employer must outline all other issues the employer intends to raise at the hearing.

Another important component of the Position Statement is the Board's requirement that the employer take a position on the election details including: (1) the type of election (manual, mail, or mixed); (2) the date(s) the election should be held; (3) the election time(s); and (4) the location(s) where the election should be held. The union has the first opportunity in the petition itself to state its preference on these issues. This requirement for the Position Statement is the employer's opportunity to rebut the union's preferences.

Perhaps most importantly from an employer's perspective is that any issue not identified in the Position Statement will be waived, except the Board's statutory jurisdiction.

6. Effect

- Have seen an uptick in representation petitions - 2083 RC petitions filed (a 1.1% increase). A total of 131,825 voters impacted. The average unit size 63 (but largest unit is 6,300).
- The average time to election is down from 38 to 25 days.
- Very few petitions go to hearing. In fact, 6% of petitions have gone to hearing.

Who wins?

- Unions - 70%
- Management - 30%

Prior Year?

- Unions 69%

III. CASES

a. Joint Employer

i. Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery

Overturning decades of precedent, the Board issued its decision in *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015). The decision establishes a new standard for determining when two entities are a single "joint employer" over a group of workers.

Under the historical standard, to be considered a joint employer, it was necessary that both entities exercise control over the terms and conditions of the workers' employment and, importantly, that the control was both "direct and immediate." In comparison, "limited and routine" control or the ability to control without actually exercising control was not sufficient to qualify as a joint employer. The Board's new test eliminates the requirement that the control be either immediate or direct and considers the potential (*e.g.*, contractual rights) one party has to directly or indirectly control the employment terms of another entity's workers. This type of control is typically reserved or exercised by parent companies over subsidiaries, franchisors over franchisees, leasing employers over leasing or temporary services providers, contractors over subcontractors, and, indeed, any company that contracts with another to perform work necessary to its operations.

The NLRB majority concluded that the current standard requiring "direct and immediate" control was inconsistent with the realities of today's workplace and inimical to the National Labor Relations Act's purpose of fostering collective bargaining. According to the majority, "the right to control is probative of an employment relationship—whether or not that right is exercised [emphasis added]." Furthermore, the majority held that the right to control "may be very attenuated" or indirect.

As the Board stated in the introduction to its decision, this case rejects decades-old principles for determining joint-employer status under the Act. The Board's holding on the facts of this case demonstrates that joint-employer status can be based on the rights a party reserves under a contract, the indirect control it exercises over a third party's workers due to the nature of the services it contracted to the third party, or the standards and limitations it imposed on those services. Moreover, by claiming that it was applying the common law test for determining whether an employment relationship exists, the Board is creating precedent for other governmental agencies—state and federal alike—to rewrite historical understandings of the employment relationship and apply them far beyond the Board's reach under the National Labor

Relations Act. Browning-Ferris has filed an appeal with the U.S. Court of Appeals for the D.C. Circuit.

ii. Miller & Anderson, Inc.

The NLRB's July 11, 2016 decision in *Miller & Anderson, Inc.* overturns more than a decade of precedent under the NLRB's 2004 *Oakwood Care Center* decision, in which the NLRB previously held that jointly-employed employees could not be included in a bargaining unit with solely-employed employees unless both employers consent to the multi-employer bargaining arrangement. In overturning *Oakwood Care Center*, the NLRB expressly reverted to the NLRB's rule set forth in its 2000 decision in *M.B. Sturgis, Inc.*

In Miller & Anderson, the Sheet Metal Workers International Association, Local Union No. 19 filed a petition seeking to represent a bargaining unit of all sheet metal workers employed by Miller & Anderson, Inc., a mechanical and electric contractor, within a specific geographic area. Importantly, the petition expressly sought to include not only a group of sheet metal workers employed solely and directly by Miller & Anderson, but also an additional group of sheet metal workers provided by a staffing company (Tradesmen International), whom the union alleged were jointly employed by Miller & Anderson and the staffing company. The Regional Director for the NLRB applied the NLRB's precedent in *Oakwood Care Center*, which required consent of all parties for such arrangements and dismissed the petition based upon the fact that the two alleged joint employers did not consent.

With its reversal of the *Oakwood Care Center* rule, the NLRB has remanded the case to the Regional Director for further proceedings. These further proceedings, under the reinstated *M.B. Sturgis* rule, necessarily would include a determination of:

- whether Miller & Anderson and the staffing company are, in fact, joint employers—a finding made much more likely by the *Browning-Ferris* decision issued in the interim; and
- whether the solely-employed workers and the jointly employed workers share a sufficient "community of interest" to be included in the same bargaining unit, applying the NLRB's traditional community of interest factors.

Some of these traditional factors include functional integration in the work of the employer, similarity of the type of work performed, interaction and interchange between employees, similarity of working conditions, wages and benefits, and common supervision. In the few years following *M.B. Sturgis*, which was issued in 2000, the NLRB conducted "community of interest" analyses with regard to such units—which may provide some guidance for what is to be expected under *Miller & Anderson*. In one example, the NLRB found a sufficient community of interest between agency workers and employees of a primary employer where workers performed very similar work, and the primary employer controlled assignments, directions, discipline, and wages even though the agency employees had lower wages, lacked benefits, did not have seniority rights and worked under a different attendance policy. Under the community of interest standards, it can be challenging to exclude the jointly employed

employees if they are used in a capacity that is functionally integrated into the existing workforce.

The bargaining obligation for each employer under *M.B. Sturgis* was to bargain over all terms of employment for those employees it solely employs, and also to bargain over jointly employed employees "to the extent it controls or affects their terms and conditions of employment." Applying the broader joint employer standard established in *Browning-Ferris*, the NLRB now adjusts this standard to require each employer to bargain over the jointly employed employees "only with respect to such terms and conditions that it possesses the authority to control."

iii. Implications

At this early stage, the practical implications of these two cases are still speculative. However, as described, the *BFI* decision, combined with the decision in *Miller & Anderson*, have significant potential implications for organizing, contract bargaining, the administration of unfair labor practices, and secondary picketing.

b. Employment Arbitration Agreements: Class Action Waivers

i. D.R. Horton

In January 2012, the NLRB ruled that employer D.R. Horton violated Section 7 of the NLRA by requiring employees to agree to mandatory arbitration of employment disputes and to forego class and collective action as a condition of their employment. *In re D.R. Horton*, 357 NLRB 2277 (2012). The Fifth Circuit Court of Appeals, however, refused to enforce the Board's order, concluding that the decision violated the FAA, and nearly all federal courts that have since addressed the issue have decided not to follow the Board's view. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). Other courts generally followed this decision until . . . .

ii. Epic Systems

On May 26, 2016, in *Lewis v. Epic Systems Corp.*, No. 15-2997, 2016 WL 3029464 (7th Cir. May 26, 2016), the Seventh Circuit disagreed with other federal circuits and aligned itself with the Board, ruling that an employer's arbitration agreement requiring employees to bring wage-and-hour claims against the company in individual arbitrations and prohibiting class and collective actions, violates the NLRA.

c. Replacement of Economic Strikers

i. American Baptist Homes of the West

On May 31, 2016, the NLRB issued *American Baptist Homes of the West*, increasing the impact of an employer's motive in deciding whether the permanent replacement of economic strikers is lawful. Given this new focus on the employer's motive, the floodgates to second-

guessing employers' motivations in retaining permanent replacement workers for economic strikers are now open. Under the logic used by the Board, the NLRB conceivably could now find a discriminatory employer motivation in virtually every replacement strike and use it as a reason to order immediate reinstatement of economic strikers with full back pay and the dismissal of replacement workers. This result would chill the hiring of replacement workers, thus reducing an employer's ability to maintain its operations during an economic strike.

The *American Baptist Homes* decision issued by two Board members over the lengthy dissent of Member Philip Miscimarra, in effect, overrules well-established Board precedent (*Hot Shoppes, Inc.*, 146 NLRB 802 (1964)) that an employer's motivation in retaining replacement workers is immaterial. The decision also undercuts one of the Supreme Court's longest-established Board precedents in *Mackay Radio*, 304 U.S. 333 (1938), which authorizes employers to hire replacement workers "at will" and "with impunity" in economic strikes and allows the replacement workers to continue working long-term without automatic dismissal, while offering the returning economic strikers placement on a future preferential rehire list should jobs become available. Under *Mackay Radio*, an employer has the right to replace striking workers "at will" during an economic strike and, thus, can replace them without scrutiny into the employer's motivation regarding hiring long-term replacement workers.