RECENT DEVELOPMENTS IN EMPLOYMENT LAW AND LITIGATION

Michael Lotito, Missy Parry, and Meredith McDonald

Michael Lotito (mlotito@littler.com) is a shareholder in the San Francisco and Washington, D.C., offices of Littler Mendelson, P.C. Missy Parry is special counsel in the Walnut Creek office of Littler Mendelson P.C. Meredith McDonald (mlm@omhlaw.com) is a partner with Overturf McGath & Hull, P.C., in Denver.

Labor and employment law has continued to change, in many ways dramatically, over the last year. The constant change in National Labor Relations Board (NLRB or Board) precedent is difficult for employers to follow and creates significant compliance hurdles. The Board's decisions over the past few years have greatly altered the landscape of labor relations, increasing exposure and risk for both union and nonunion employers and making compliance increasingly difficult. In addition, recent changes to the Department of Labor (DOL) regulations affecting overtime pay have greatly impacted many employers over the last year, dramatically changing how many of their exempt employees may be compensated. However, as employers consider what adjustments to their policies and practices may be warranted, they should also recognize that further developments and new trends may emerge as the new president appoints fresh leadership in the NLRB and the DOL. Under the new administration, we can certainly expect to see a different approach toward and potential harmony between employees' protected rights and industry needs under the National Labor Relations Act (NLRA or Act).[1] In addition, we will likely see additional changes in how certain employees may be compensated.

1. Jacob Gershman, *Trump Poised to Reshape Labor Board, Lawyers Say*, WALL ST. J., Nov. 14, 2016, http://blogs.wsj.com/law/2016/11/14/trump-poised-to-reshape-labor-board-lawyers-say/.

I. FINAL DECISIONS OF THE OBAMA NLRB: A YEAR OF DEVELOPMENTS IN FEDERAL LABOR LAW

In the last year of the Obama administration, the NLRB issued a flurry of significant decisions. The Board's majority is appointed by the president, and the Board's decisions and actions typically support the president's labor policies. Many of these decisions appear results-oriented and heavily favor labor organizations and the continued expansion of employees' Section 7 rights. In fact, the Obama NLRB, which is charged with enforcing the Act, remains one of the most partisan Boards since the agency's formation, overturning large numbers of decades-old bipartisan precedent.[2] Even given the Board's usual politicized nature, the decisions of its current majority reached new heights of rejecting established precedent. In none of the cases changing an established precedent did a Republican Board member join with the Democratic majority in overturning the decision. The constant change in NLRB precedent is difficult for employers to follow and creates significant compliance hurdles.

For now, Democrats will continue to have a two-to-one majority. However, the new administration will reconstitute the Board after the inauguration. President Trump will make two appointments to the Board early in the new term, subject to Senate confirmation, which will result in a new Board majority controlled by the president's party. In addition, Trump will be able to appoint a new NLRB General Counsel when the term of the current General Counsel expires in November 2017.

This year, the agency overturned decisions at an accelerated pace and continued its expansion of new standards. The Board has continued to expand its jurisdiction, redefine the joint-employer standard across multiple industries, limit employer actions under management rights' provisions, scrutinize employer handbooks and policies, expand employee picketing and strike rights, redefine the "perfectly clear" successor standards, and issue numerous cases seeking to enforce its view of class action waivers in arbitration agreements while declining to defer cases to arbitration.

In sum, federal labor law and policy has once again experienced a watershed year under the Obama NLRB. Some of the most significant developments are discussed below.

A. *Expansion of Board's Definitions*

In 2016, the Board continued its expansion of statutory definitions under the NLRA, including expanding the joint-employment standard, its jurisdiction, and the definition of protected concerted activity.

2. Timothy Noah & Brian Mahoney, *Obama labor board flexes its muscles*, POLITICO, Sept. 1, 2015, http://www.politico.com/story/2015/09/unions-barack-obama-labor-board-victories-213204.

1. Joint Employer Standard

a. Continuation of McDonald's Cases—The NLRB's General Counsel's pursuit of the joint employer cases against McDonald's USA, LLC and its franchisees persisted into 2016. In 2014, the General Counsel filed a consolidated complaint stemming out of unfair labor practice charges against McDonald's USA, LLC, as a joint employer with numerous franchisees.[3] The complaint alleges that McDonald's and its franchisees were jointly liable for interfering with and discriminating against local restaurant employees who participated in nationwide fast food worker protests about their terms and conditions of employment.[4] After initial hearings were held, the Board enforced the administrative law judge's (ALJ) case management order requiring the General Counsel and the parties to present evidence on the joint-employment issue first before proceeding to the individual unfair labor practice cases.[5] Presumably, the General Counsel will present evidence attempting to establish that McDonald's USA, LLC, is a joint employer under the NLRB's new standard in *Browning Ferris Industries*, including whether McDonald's maintained indirect control over its franchisees' labor relations.[6] In a continuing dispute over the Board's discovery requests, the Board recently found that the ALJ may also determine whether McDonald's properly complied with the Board's subpoena after it was enforced in federal court. The dissent (and McDonald's) contended that the authority to make that determination rested with the district court.[7] Given the complexity and broad scope of the complaints, these cases will linger well past 2017.

b. Joint Employment for Staffing Companies and Their Users—The Board expanded the joint-employer standard to the contingent worker industry. In *Miller & Anderson, Inc.*, the Board majority held that employer consent is unnecessary in a bargaining unit combining jointly employed and solely employed employees of a single user-employer and that the Board will apply traditional community of factors to decide whether these units are appropriate.[8] The decision reversed existing precedent in *Oakwood Care Center*, returning to a previous precedent, *M.B. Sturgis*, which held that employer consent was required for bargaining in multiemployer

3. *See* Press Release, National Labor Relations Board, NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and Their Franchisor McDonald's, USA, LLC as Joint Employers, Dec. 19, 2015, https://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-issues-consolidated-complaints-against.

4. *Id.*

5. McDonald's USA, LLC, 363 N.L.R.B. No. 92 (2016); *see also* McDonald's USA, LLC, N.L.R.B. ALJ, Case No. 02-CA-093893 (Oct. 10, 2016) (order).

6. Browning-Ferris Indus. of Calif., Newby Island Recyclery, 362 N.L.R.B. No. 186 (2015).

7. McDonald's USA, LLC, 364 N.L.R.B. No. 144 (2016).

8. 364 N.L.R.B. No. 39 (2016).

units.[9] The majority stated that the *Sturgis* decision was more responsive to the Act's requirement that the Board ensure that employees receive the fullest freedom in exercising the rights guaranteed by the Act.

The Board majority applied this approach to joint employment in *Retro Environmental, Inc. and Green Jobs Works, LLC*.[10] In that decision, the majority found a construction company and a staffing agency to be joint employers of a combined unit of employees from both companies, as petitioned for by the union.[11] The majority found that both companies co-determined essential terms and conditions of employment.[12] Each employer maintained primary areas of responsibility. The staffing company oversaw the hiring, firing, and assignment of employees to project sites. The construction company oversaw the day-to-day supervision of the job.[13] Each employer had some influence on the other company's decisions. The majority concluded that the two employers controlled all of the unit employees' employment terms.[14] In addition, the majority found that, contrary to the regional director's determination, the employers failed to prove an imminent and definite cessation of their joint operations, even though at the time of the hearing the companies had no joint current projects or bids for future projects.[15]

Employers that use staffing agencies to routinely staff projects and supplement their own employees may be subject to union petitions seeking to include an agency's employees in bargaining units with the employer's own employees. These units may eventually require employers to engage in joint bargaining, even if no temporary employees are used on current projects. Along with *Browning Ferris*, which makes it easier for employers to be found joint employers, these cases make it more likely that employers' own employees will be placed in a bargaining unit with temporary employees unless employers keep a clear separation between the groups to ensure little similarity in supervision, work locations, working conditions, skills, and duties.

2. Expansion of Board Jurisdiction

The Board continued its expansion of who falls under its jurisdiction in 2016.

a. University Students—Although the NLRB previously rejected union organizing for college football players, in *Trustees of Columbia University*,

9. Oakwood Care Ctr., 343 N.L.R.B. No. 659 (2004); *see also* M.B. Sturgis, Inc., 331 N.L.R.B. 1298 (2000).
10. 364 N.L.R.B. No. 70 (2016).
11. *Id.* slip op. at 1.
12. *Id.* at 4.
13. *Id.*
14. *Id.*
15. *Id.*

the Board reversed its decision in *Brown University* and found that students performing services for Columbia University were statutory employees under the Act.[16] The majority found that the Act's definition of "employee" did not explicitly exclude students.[17] The majority disagreed with the Board's *Brown University* rationale that graduate assistants cannot be statutory employees because they share primarily an educational, not economic, relationship with their university.[18] The employment relationship with the university permitted statutory coverage to the students.[19] The majority concluded that the policy of the Act is to encourage collective bargaining and to protect workers' freedom to designate representatives of their own choosing.[20] This policy, coupled with the broad statutory definitions of both "employee" and "employer," support extended coverage of the Act to students working for universities. The Board's decision significantly expands coverage of the Act and creates new ground for union organizers.

b. Charter Schools—In two cases, a Board majority expanded its jurisdiction over charter schools operated under state law in Pennsylvania and New York.[21] In both cases, the majority concluded that the schools were not exempt from the Board's jurisdiction as a political subdivision of the state.[22] The Board found that the schools were not created directly by the state, did not constitute a department or administrative arm of the government, and were not administered by individuals responsive to public officials or the general electorate.[23] In addition, the majority found no compelling reasons not to exercise jurisdiction.[24] These decisions open up another area closely related to state governments where unions may organize employees.

3. Protected Concerted Activity

The Board's definition of protected concerted activity expanded to encompass behavior that employers would find unprofessional in the workplace. In *United States Postal Service*, a Board majority found that an employer unlawfully disciplined a union steward for profane, threatening, and insubordinate conduct during a grievance hearing.[25] The majority

16. Trs. of Columbia Univ., 364 N.L.R.B. No. 90 (2016); Brown Univ., 342 N.L.R.B. 483 (2004).
17. *Id.* slip op. at 2.
18. *Id.*
19. *Id*. at 13.
20. *Id*.
21. Pa. Virtual Charter Sch., 364 N.L.R.B. No. 87 (2016); Hyde Leadership Charter Sch.-Brooklyn, 364 N.L.R.B. No. 88 (2016).
22. *Pa. Virtual Charter Sch*., slip op. at 5; *Hyde Leadership Charter Sch*., slip op. at 5.
23. *Pa. Virtual Charter Sch*., slip op. at 5; *Hyde Leadership Charter Sch*., slip op. at 5.
24. *Pa. Virtual Charter Sch*., slip op. at 10; *Hyde Leadership Charter Sch*., slip op. at 9.
25. 364 N.L.R.B. No. 62 (2016).

stated that the steward's conduct, although "obnoxious," was not "so opprobrious that it caused her to lose the protection of the Act."[26]

The Board also further defined what constituted protected conduct. A Board panel found that an employer violated the Act by telling an employee not to discuss her suspension with other employees.[27] The employer's statement infringed on the employee's Section 7 right to discuss discipline with her fellow employees, and the employer failed to provide a business justification for the restriction.[28] A majority also found that an employer violated the Act by discharging an employee for seeking a fellow employee's advice regarding how to respond to discipline that she received for violating the employer's dress code.[29] The majority found that the employee's conduct was concerted and for the purpose of mutual aid or protection.[30] Employers should exercise care when considering discipline for employees for misconduct when they are also engaged in protected concerted activity.

B. *Application of the NLRB Election Rule*

On December 15, 2014, the Board adopted a final rule regarding its representation case procedures.[31] The rule went into effect on April 14, 2015.[32] The rule continues to be a controversial shift in the Board's representation case procedures. The rule makes significant changes to how election petitions are processed and to employers' obligations in responding to an election petition. Under the new rule, parties must file a statement of position, typically within seven calendar days from the date that a representation petition is filed.[33] The statement of position requires that the parties take specific legal positions regarding the election and the petitioned-for unit prior to any hearing with the regional director.[34] Additionally, if a party fails to raise legal arguments in this statement of position, the election rule requires that those defenses be waived.[35]

In a decision interpreting the election rule, the Board found that the rule's requirement that each party file and serve a position statement by

26. *Id.* slip op. at 3.
27. Aliante Casino & Hotel, 364 N.L.R.B. No. 80 (2016).
28. *Id.* slip op. at 2.
29. UniQue Personnel Consultants, Inc., 364 N.L.R.B. No. 112 (2016).
30. *Id.* slip op. at 3–4.
31. Representation Case Procedures, 79 Fed. Reg. 74307–90 (Nat'l Labor Relations Bd. Dec. 15, 2014).
32. *Id.* On April 6, 2015, Richard F. Griffin, the Board's General Counsel, issued a guidance memorandum outlining the new election procedures under the Rule. Office of Gen. Counsel, NLRB, Guidance Memorandum on Representation Case Procedure Changes, Memorandum GC 15-06 (Apr. 6, 2015).
33. 29 C.F.R. § 102.63(b).
34. 29 C.F.R. § 102.63(b).
35. 29 C.F.R. § 102.63(b).

noon on the business day before a representation hearing must be enforced literally.[36] In that case, the union served its position statement on the employer three hours late.[37] Accordingly, the Board should have precluded the union from introducing evidence at the hearing of defenses raised in its position statement, including that a contract bar existed to a decertification petition.[38] However, the Board found that the regional director would have discovered the existence of the contract and considered the evidence without the position statement.[39] The Board concluded that the regional director appropriately dismissed the petition under the contract bar rules.[40] Although the Board found a way to allow the union's evidence, its stated position in this case suggests that the practical effect of the ruling will be to read the procedural requirements of the new rules strictly.

C. *Limitation of Actions Taken Under Management Rights' Clauses*

The Board majority issued several decisions undermining the enforceability of management rights' clauses. In *Graymont PA, Inc.*, a majority found that an employer unlawfully changed its work rules, absenteeism policy, and progressive discipline schedule during the term of the parties' collective bargaining agreement.[41] The employer relied on a management rights clause, which gave it "sole and exclusive rights to manage, direct its employees, evaluate performance, discipline and discharge for just cause, adopt and enforce rules and regulations and policies and procedures, and set and establish employee performance standards."[42] The majority concluded that the management rights provision did not specifically reference work "rules, absenteeism, or progressive discipline" and no evidence was presented showing that the parties discussed these subjects during negotiations.[43] Therefore, the employer failed to establish a "clear and unmistakable waiver" of the right to bargain over these changes.[44]

In *IMI South, LLC*, a majority found that an employer violated the Act by unilaterally transferring work from a unionized facility in Kentucky to a nonunion facility fifteen miles away in Indiana.[45] The majority concluded that the employer's practice of assigning Indiana work to the Kentucky facility became "an implied term and condition of employment and the [employer] had an obligation to give the union notice and opportunity

36. Brunswick Bowling Prods., LLC, 364 N.L.R.B. No. 96 (2016).
37. *Id.* slip op. at 1.
38. *Id.* at 2.
39. *Id.*
40. *Id.* at 3.
41. 364 N.L.R.B. No. 37 (2016).
42. *Id.* slip op. at 1.
43. *Id.* at 3.
44. *Id.*
45. 364 N.L.R.B. No. 97 (2016).

to bargain over its change in that practice."[46] The employer relied on a detailed zipper clause stating that the agreement included all working conditions and limiting the contract geographically to Kentucky.[47] The majority found that the zipper clause did not establish a bargaining waiver because it did not specifically refer to transfer of unit work.[48] In addition, the majority stated that the employer presented the union with a fait accompli by unlawfully implementing the transfer before the union learned of it.[49]

In *E.I. DuPont de Nemours*, on remand from the D.C. Circuit, a majority found that an employer unlawfully unilaterally changed companywide benefit plans after expiration of collective bargaining agreements at two facilities.[50] The employer relied on plan documents reserving the company's right to change or discontinue the plans at its discretion. In addition, the employer made widespread annual changes to the plan each fall during the collective bargaining agreements.[51] After the agreements expired, the employer again made various changes to the plans.[52] The union objected and demanded bargaining.[53] The majority concluded that the employer's discretion to change the plan existed solely because the union agreed that it could make changes during the term of the agreement under the reservation-of-rights clause.[54] The majority held that discretionary unilateral changes made pursuant to a past practice developed under an expired management-rights clause are unlawful because the clause "does not extend beyond the expiration of the agreement in the absence of evidence of a contrary intention by the parties."[55]

The Board reached the same decision in *American National Red Cross*.[56] The Board found, contrary to the ALJ, that two local Red Cross organizations unlawfully unilaterally implemented pension and 401(k) changes announced by the National Red Cross after the expiration of their local collective bargaining agreements.[57] The local chapters relied on contract provisions allowing them to implement any changes made by the National Red Cross to its benefit plans.[58] The panel found that these clauses did not survive the expiration of local agreements because they were the

46. *Id.* slip op. at 2.
47. *Id.* at 3.
48. *Id.*
49. *Id.* at 4 n.8.
50. 364 N.L.R.B. No. 113 (2016).
51. *Id.* slip op. at 2.
52. *Id.*
53. *Id.*
54. *Id.* at 12.
55. *Id.* at 5.
56. 364 N.L.R.B. No. 98 (2016).
57. *Id.* slip op. at 2.
58. *Id.* at 3.

equivalent of management rights' clauses.[59] No waiver existed because the language made no reference to continuing after expiration, and the past practice was random or intermittent and did not occur on such a regular and consistent basis to become a term and condition of employment.[60]

A Board majority again reached the same result in *Staffco of Brooklyn, LLC*.[61] The majority found that the employer unlawfully ceased making contributions to a pension fund upon the expiration of a collective bargaining agreement extension.[62] The collective bargaining agreement required the employer to sign a form binding it to the plan's agreement and declaration of trust.[63] The plan agreement provided that if the employer did not submit a new agreement to the plan office, "the employer's participation in and status as an Employer under the Fund shall forthwith terminate."[64] In that event, the policy also provided that the employees would be notified that "the employer is no longer maintaining the Plan and that the covered employment of the employees of the employer terminated on the expiration/termination date of the collective bargaining agreement."[65] The majority rejected an argument that language in a pension plan agreement and declaration of trust constituted a waiver by the union of its right to bargain about the continuation of benefits following contract expiration.[66]

Based on the Board's focus on this issue, the Obama Board clearly intended to limit employers' rights under the management rights' provision to make changes to terms and conditions of employment for represented employees. Accordingly, under current Board precedent, employers should proceed with caution when relying on these provisions for unilateral actions.

D. *Imposition of Bargaining Obligation over Serious Discipline with Newly Certified Union*

In *Total Security Management Illinois 1, LLC*, a Board majority found that discretionary discipline is a mandatory subject of bargaining and employers may not unilaterally impose serious discipline, including suspension, demotion, and discharge, before the employer enters into an agreement concerning discipline with a newly certified union.[67] Recognizing the unique nature of discipline, the majority found that the employer need not

59. *Id.*
60. *Id.* at 4.
61. 364 N.L.R.B. No. 102 (2016).
62. *Id.* slip op. at 1.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. 364 N.L.R.B. No. 106 (2016).

bargain to agreement or impasse before implementing discipline.[68] However, bargaining must occur before the discipline is imposed.[69] If pressing circumstances exist, the employer may act prior to bargaining if it immediately provides the union with notice and an opportunity to bargain about the disciplinary decision and its effects.[70] Finally, if the employer has properly implemented its disciplinary decision without first reaching agreement or impasse, the employer must bargain with the union to agreement or impasse after imposing discipline.[71] For less serious discipline, such as oral or written warnings, the employer may wait to bargain until after action is taken.[72] This decision imposes additional requirements on employers with newly certified unions before they impose serious employee discipline.

E. *Financial Audits During Bargaining*

In *Wayron, LLC*, a Board majority found that the employer violated the Act by refusing to submit to a financial audit during negotiations for a collective bargaining agreement.[73] Board precedent requires employers to submit to a union financial audit during negotiations when the employer claims an "inability to pay."[74] Although the employer never took the position that it had an inability to pay, the majority found no need for the employer to recite any "magic words."[75] Instead, the majority looked at the employer's statements during negotiations to determine that its financial circumstances conveyed an inability, rather than unwillingness, to pay. In negotiations, the employer stated that it had suffered losses for several years, needed cost reductions to secure a new line of credit, and was out of reserves and in debt.[76] The employer also met with employees to explain that significant wage and benefit reductions were critical to remain competitive.[77] Employers should carefully consider their responses on economic proposals during negotiations to protect financial information and avoid the imposition of external audits.

F. *Employer Policies*

The Board majority continued to scrutinize employer's employee handbooks and personnel policies to construe otherwise neutral language as

68. *Id.* slip op. at 10.
69. *Id.* at 8.
70. *Id.*
71. *Id.*
72. *Id.*
73. 364 N.L.R.B. No. 60 (2016).
74. *Id.* slip op. at 4.
75. *Id.*
76. *Id.*
77. *Id.* at 5.

a restriction on employees' potential rights to engage in protected concerted activity. However, in three surprising decisions, the Board approved of substantive language in confidentiality policies.

In *Minteq International, Inc.*, the Board found that a unionized employer's confidentiality agreement did not violate the Act.[78] The agreement defined confidentiality as

> any information not generally known in the relevant trade or industry which was obtained from the Company, or which was learned, discovered, developed, conceived, originated, or prepared by me in the scope of my employment. Such Confidential Information includes, but is not limited to, software, technical, and business information relating to the Company inventions or products, research and development, production processes, manufacturing and engineering processes, machines and equipment, finances, customers, marketing, and production and future business plans and any other information which is identified as confidential by the Company.[79]

The panel stated that a rule against disclosing any information that is "identified as confidential by the Company" would be unlawful if viewed in isolation.[80] However, the panel concluded that when read in context, employees would understand that it referred to the preceding examples of proprietary information and trade secrets, not information related to wages or working conditions.[81]

Despite this finding, the Board scrutinized the remaining provisions of the agreement. The panel found a non-compete provision in the agreement unlawful. That provision prohibited an employee from soliciting or encouraging "any present or future customer or supplier of the Company to terminate or otherwise alter his, her, or its relationship with the Company in an adverse manner" during employment and for eighteen months after termination.[82] The panel found that employees would reasonably read this section to prohibit lawful Section 7 conduct, such as asking customers to boycott the employer's products in support of a labor dispute.[83] The panel also found an "at-will" acknowledgment in the agreement unlawful.[84] The panel found that this provision conflicted with the "just cause" requirement of the collective bargaining agreement and would discourage employees from engaging in conduct protected by that agreement.[85]

78. 364 N.L.R.B. No. 63 (2016).
79. *Id.* slip op. at 6.
80. *Id.*
81. *Id.*
82. *Id.* at 6–7.
83. *Id.* at 7.
84. *Id.*
85. *Id.*

In a case concerning employer handbook policies, *G4S Secure Solutions (USA) Inc.*, a Board panel found that a portion of a security company's confidentiality policy did not violate the Act by including language that restricted the use or disclosure of company or client information.[86] The rule stated,

> Employees who improperly use, reveal, copy, disclose or destroy G4S or client information will be subject to disciplinary action, up to and including termination of employment. They may also be subject to legal action even if they do not actually benefit from the disclosure. Such information includes any information considered proprietary by G4S or the client organization.[87]

The Board found this language did not restrict disclosure of employee information and was limited to employer and client proprietary information.[88]

However, a majority of the panel found another part of the confidentiality policy unlawful because it prohibited interviews or public statements "about the activities or policies of the company or our client without written permission."[89] The majority stated that employees would understand this portion of the rule to prohibit public statements by employees concerning protected conduct.[90]

The same majority found the employer's social networking policy unlawful. That policy included a disclaimer stating, "this policy will not be construed or applied in a manner that interferes with employees' rights under federal law."[91] The employer asserted that employees would reasonably understand that "rights under federal law" included Section 7 protections because the Department of Labor required it to post a notice informing employees of their rights under the Act as a federal contractor.[92] The majority concluded "the policy's vague reference to 'rights under federal law' was not sufficient to inform employees that the policy did not prohibit conduct protected by Section 7." As this case shows, the Board continues to reject handbook disclaimers as a method for clarifying that employer's policies are not intended to impinge Section 7 protected rights.[93]

86. 364 N.L.R.B. No. 92 (2016).
87. *Id.* slip op. at 4.
88. *Id.*
89. *Id.* at 4–5.
90. *Id.*
91. *Id.* at 34.
92. *Id.* at 6.
93. In another case, the majority affirmed the ALJ's decision finding that the employer's disclaimer ("[t]his code does not restrict any activity that is protected or restricted by the National Labor Relations Act, whistleblower laws, or any other privacy rights") did not save its policies, even though it specifically mentioned the National Labor Relations Act. Chipotle Mexican Grill, 364 N.L.R.B. No. 72 (2016).

In *Schwan's Home Service, Inc.*, the Board approved language in an employee handbook stating that employees were "not permitted to reveal information in company records to unauthorized persons or to deliver or transmit company records to unauthorized persons."[94] A majority of the panel then went on to find portions of this section, and several other handbook provisions, unlawful. The majority concluded that the portion of the policy restricting disclosure of "information concerning customers, vendors or employees" was unlawful because employees would reasonably believe this rule prohibited sharing employee information with each other or third parties, including union representatives.[95] That same majority found the handbook statement that "Schwan's business shall not be discussed with anyone who does not work for Schwan or with anyone who does not have a direct association with the transaction" unlawful because "Schwan's business" could encompass terms and conditions of employment.[96] Employees possess the Section 7 protected right to share employment-related information with third parties, such as the Board, the media, or union representatives.[97] The use of the word "transaction" reinforced the coerciveness of the rule because sales transactions were important to the sales employees, and the details of transactions with customers affected their terms and conditions of employment, including commissions and hours of work.[98]

In addition, the majority found a rule requiring employees to obtain approval of "articles, speeches, records of operation, pictures or other material for publication, in which the company name is mentioned or indicated" unlawful because employees have a right to publicize labor disputes.[99] Any rule requiring employees to seek permission before engaging in protected activity is unlawful.[100] The majority rejected the employer's argument that the rule merely prohibited employees from speaking on the employer's behalf.[101] The majority also struck down a rule prohibiting "conduct on or off duty which is detrimental to the best interests of the company or its employees" because it contained no examples of prohibited conduct.[102] The majority believed that since the rule left it up to the employer's discretion to determine what conduct was unacceptable, employees would assume the employer would not consider labor protests or public criticism of its policies to be in its best

94. 364 N.L.R.B. No. 20, slip op. at 2 (2016).
95. *Id.* slip op. at 2–3.
96. *Id.* at 3.
97. *Id.* at 3–4.
98. *Id.*
99. *Id.* at 4.
100. *Id.*
101. *Id.*
102. *Id.* at 5.

interests and might refrain from engaging in such activity.[103] Finally, the majority found a rule prohibiting disclosure of information about "wages, commissions, performance, or identity of employees" to any person not employed by the employer unlawful because the rule prohibited providing the information to third parties, such as union representatives, which is protected by Section 7.[104]

In *Whole Foods Market, Inc.*, a majority distinguished existing precedent and found that the employer violated Section 8(a)(1) by maintaining rules in its general information guide prohibiting photographing and recording in the workplace without prior management approval.[105] Finally, in *Chipotle Mexican Grill*, a Board panel found that the restaurant violated Section 8(a)(1) by instituting a rule prohibiting employee solicitation during non-work time "in work areas within the visual or hearing range of customers."[106] This rule was overbroad because it included areas where customers had no right to be physically present but might have some visual or hearing access.

At least until a newly appointed Board addresses employer handbooks and policies, employers should consider using confidentiality language similar to that approved by the NLRB in evaluating their own policies.

G. *Employee Picketing*

1. Employee Picketing on Hospital Property

In *Capital Medical Center*, a Board majority found that an acute care hospital violated the Act by preventing off-duty employees from picketing on hospital property, threatening them with discipline and arrest, and calling police.[107] The employees held picket signs near the hospital's main lobby and physicians' entrance.[108] Although previous Board precedent allowed acute care hospitals to restrict employee picketing on hospital premises, the Board imposed a balancing test weighing the employees' Section 7 rights with the employer's property rights and business interests.[109] In this case, the majority found no evidence that the picketers' patrolling in the hospital entrance, marching in formation, and chanting and making noise, barred the entryways or disturbed patients or hospital operations.[110] In addition, the majority concluded that holding picket signs near the hospital entrance was no more disruptive or disturbing than the distribution of literature.[111]

103. *Id.*
104. *Id.* at 6.
105. 363 N.L.R.B. No. 87 (2015).
106. 364 N.L.R.B. No. 72 (2016).
107. 364 N.L.R.B. No. 69 (2016).
108. *Id.* slip op. at 1.
109. *Id.* at 4.
110. *Id.* at 5.
111. *Id.*

2. In-Store Work Stoppages

In a work stoppage case, a Board majority found that the employer unlawfully disciplined six employees because they engaged in an in-store work stoppage in the presence of customers.[112] With a group of non-employee protestors in the customer service area, the employees displayed an eight-foot-long banner, took photographs, wore union shirts, and held signs.[113] The majority found that work stoppages are protected by Section 7 of the Act, and an inconvenience or dislocation of property rights may be necessary in order to safeguard Section 7 rights.[114] The Board is willing to allow employees to protest in areas traditionally protected by Board policy, such as retail sales floors and acute care hospitals, at the expense of employer property and business interests.

3. Intermittent Strikes—General Counsel Memo

The Board's General Counsel also recently urged the Board to clarify and broaden the protection afforded employees who engage in intermittent and partial strikes.[115] Intermittent strikes refers to multiple strikes for short periods of time that are repeated periodically, such as a series of one-day strikes. Previously the Board has found such conduct unprotected by the NLRA.[116]

The General Counsel requested that the NLRB modify its precedent to find intermittent strikes protected activity.[117] He contended that the Board has never had a compelling reason under that statute to deprive employees of this "economic weapon." The General Counsel's memorandum included a model brief for use by the NLRB when the issue arises in a pending matter. In addition to the recent cases, the General Counsel's request clearly signals increased efforts to expand protection for picketing and intermittent strikes.

H. *Permanent Replacement of Economic Strikers*

It is well established under Board precedent that an employer has a right to hire permanent replacements for employees who engage in an economic strike.[118] However, the Board recently added new subjective components for the lawful hiring of replacement workers. In *Irving Materials*,

112. Wal-Mart Stores, Inc., 364 N.L.R.B. No. 118 (2016).
113. *Id.* slip op. at 2.
114. *Id.* at 3.
115. Office of the Gen. Counsel, NLRB, Model Brief Regarding Intermittent and Partial Strikes, Memorandum OM 17-02 (Oct. 3, 2016), http://files.constantcontact.com/f5aff548201/f18a6c51-e3cd-4c6f-b7e6-604b84e15dbc.pdf.
116. *Id.* at 3–4.
117. *Id.* at 12.
118. Hot Shoppes, Inc., 146 N.L.R.B. 802 (1964); *see also* Nat'l Labor Relations Bd. v. MacKay Radio, 304 U.S. 333 (1938).

a Board majority held that the employer violated the Act by failing to reinstate employees who engaged in an economic strike after the union made an unconditional offer to return to work.[119] The employer contended that it permanently replaced the strikers in order to continue operations during the strike, which constituted a legitimate and substantial business justification.[120] The majority found that the employer had the burden of proving the permanent status of the replacements by showing there was a mutual understanding regarding the permanent nature of their employment, including evidence of the replacements' understanding of the relationship.[121] The employer's own intent to employ the replacements permanently was insufficient.[122]

In another case, *Piedmont Gardens*, a majority found that the employer must also have a proper motive for hiring permanent replacements during an economic strike.[123] The majority concluded that the General Counsel did not need to demonstrate the existence of an unlawful purpose for the strike, only that the hiring of replacements was motivated by a purpose prohibited by the Act.[124] The employer cannot hire replacements to teach strikers or the union a lesson or to avoid the cost of hiring temporary replacements for strikers in the future.[125] Under these cases, the Board will now look at subjective intent to determine if hiring replacement workers is lawful. Employers deciding whether to replace workers permanently during an economic strike must proceed carefully to avoid any appearance of union animus.

I. *Settlement Agreements*

In a rare decision favoring employers, *S. Freedman & Sons, Inc.*, a majority held that an employer may lawfully require an employee to sign a settlement agreement, including a confidentiality clause, in exchange for reinstatement.[126] Although employees have a legal right to discuss discipline with other employees, the majority found that a narrow waiver of that right is permissible as part of the settlement of a charge.[127] The majority explained that the Board favors the private resolution of labor disputes whenever possible.[128] "An employer may condition a settlement on an employee's waiver of Section 7 rights if the waiver is narrowly tailored

119. 364 N.L.R.B. No. 97 (2016).
120. *Id.* slip op. at 5.
121. *Id.* at 6.
122. *Id.*
123. 364 N.L.R.B. No. 13 (2016).
124. *Id.* slip op. at 2–3.
125. *Id.* at 7.
126. 364 N.L.R.B. No. 82 (2016).
127. *Id.* slip op. at 2.
128. *Id.*

to the facts giving rise to the settlement and if the employee receives some benefit in return for the waiver."[129] In this case, the confidentiality agreement contained a narrow waiver limited to the terms of the settlement, and the employee received the benefit of reinstatement in return.[130] Nothing in the agreement limited the employee's right to discuss discipline, file grievances, or pursue litigation in unrelated matters.[131]

However, in another case, *United States Postal Service*, a Board majority rejected an ALJ's consent order approving an employer's proposed settlement terms over the objections of the General Counsel and the charging party.[132] The majority explained that the order did not provide a full remedy for the alleged violations. The majority also noted that the agreement contained a six-month sunset clause, which limited the Board's enforcement procedure to six months following the closure of the case. Board orders do not place time limitations on remedies. The majority overruled earlier Board decisions to the extent they were inconsistent with this decision.

J. *Election Observers*

The Board imposed less lenient standards for union election observers. In *Equinox Holdings, Inc.*, a Board majority found that it was not objectionable for a union to use a terminated employee as a union observer in a representation election.[133] The employee was arrested and terminated for making threats and brandishing an imitation gun at work.[134] The union did not know about his misconduct until the morning of the election.[135] The majority found the use of a nonemployee is not objectionable unless evidence of observer misconduct or prejudice to the other party exists.[136]

In another case, *Longwood Security Services, Inc.*, a majority set aside an election narrowly lost by the union because the Board agent refused to allow a high-ranking regional union official to serve as an observer.[137] The majority rejected an argument that the use of a union official as an observer is always objectionable and should never be permitted.[138] Absent evidence of misconduct, a union official as an observer is not grounds to set aside an election.[139] Even if a party objects to an observer, the Board

129. *Id.*
130. *Id.*
131. *Id.*
132. 364 N.L.R.B. No. 62 (2016).
133. 364 N.L.R.B. No. 103 (2016).
134. *Id.* slip op. at 1 n.1.
135. *Id.*
136. *Id.* (citing Embassy Suites Hotel, Inc., 313 N.L.R.B. 302, 302 (1993)).
137. 364 N.L.R.B. No. 50 (2016).
138. *Id.* slip op. at 2.
139. *Id.*

agent should allow the election to proceed with the chosen observers and leave any issues regarding a questionable observer to the objections process.[140] The Board appears to be creating different rules for employers and unions, excluding employer representatives to protect the election process from undue influence while allowing union officials and non-employees to attend elections, even if their presence may have a potentially coercive impact on employee choice.

K. *Withdrawal of Recognition*

In *Loomis Armored US, Inc.*, a Board majority overruled previous precedent and found that an employer, which voluntarily recognized a "mixed-guard" union as the representative of its security guards, could not withdraw recognition without an actual loss of majority support for the union.[141] A "mixed-guard" union admits both guards and non-guards to membership. The Act provides that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."[142] The majority found that existing precedent based on an expansive reading of the prohibition against certifying a mixed-guard union created an unwarranted exception to the general rule.[143] As with any other unit of employees, once an employer voluntarily recognizes a mixed-guard union as the representative of its security guards, the employer "must continue to recognize and bargain with the union until it can be shown that the union has actually lost majority support."[144] Without that showing, the Board will find an employer's withdrawal of union recognition a violation of the Act. The holding was not applied retroactively to employers that withdrew recognition from a mixed-guard union prior to the date of the decision.[145]

Similarly, in *Southern Bakeries, LLC*, a Board panel found that an employer's withdrawal of recognition of a union while a decertification petition was pending was unlawful under the Act.[146] The panel affirmed the ALJ's finding that employee dissatisfaction and the decertification petition were caused by the employer's excessive and repeated violations of the Act.[147] The employer cannot lawfully withdraw recognition from a union where "it has committed unfair labor practices that directly relate

140. *Id.* at 1.
141. 364 N.L.R.B. No. 23 (2016).
142. *Id.* slip op. at 4.
143. *Id.* at 2.
144. *Id.*
145. *Id.* at 7.
146. 364 N.L.R.B. No. 64 (2016).
147. *Id.* slip op. 1–2.

to an employee decertification effort, such as actively soliciting, promoting, or assisting the effort."[148]

L. *"Perfectly Clear" Successors*

Established Board precedent provides that a successor employer retains the right to fix initial employment conditions without bargaining with a predecessor's union, if it announces its intent to establish new conditions prior to, or at the same time, it expresses its intent to retain the predecessor's employees. However, several recent Board decisions underscore the need for successor employers to exercise caution. In *Nexeo Solutions, LLC*, a Board majority found that the purchaser of a unionized facility was a "perfectly clear" successor based on language in the purchase agreement and the seller representative's communications to the employees.[149] The majority found that the purchaser controlled and ratified the seller's employee communications.[150] Therefore, the successor unlawfully implemented new conditions when it began operating the business.

In another case, *Creative Vision Resources, LLC*, a labor supply company distributed job applications to about twenty of the predecessor's employees before taking over operations.[151] The company told the employees there would be changes in employment conditions. Fifty more employees received the application, but without the warning about changed conditions.[152] Prior to the first day of operations, all of the employees were informed that conditions would change.[153] The majority decided that this notice was too late, and most of the earlier notices were insufficient, so the company was a "perfectly clear" successor that violated the NLRA by changing conditions.[154]

Generally, these decisions expand the Board's successorship doctrine and impose the obligation to recognize and bargain with the union on more purchasers that continue the seller's operations and hire a majority of the seller's union employees.

M. *Representation Election Campaigns*

Several 2016 Board decisions impose new restrictions on employers' campaign conduct. In one recent case, *Southern Bakeries, LLC*, the majority acknowledged that an employer may "criticize, disparage or denigrate" a union without violating the law.[155] However, the majority found that

148. *Id.* at 32.
149. 364 N.L.R.B. No. 44 (2016).
150. *Id.* slip op. at 11.
151. 364 N.L.R.B. No. 91 (2016).
152. *Id.* slip op. at 1.
153. *Id.* at 2.
154. *Id.* at 5.
155. 364 N.L.R.B. No. 64 (2016).

the employer violated the Act by disparaging a union during a decertification campaign.[156] The majority concluded that the employer implicitly threatened that continued representation would lead to plant closure by characterizing the union as "untrustworthy, powerless in negotiations, and prone to engaging in strikes that resulted in job loss" and stating that the employer's "represented employees earned less than its unrepresented employees."[157] In a similar case, *Hogan Transports, Inc.*, a majority found that the employer's statements regarding the possibility of job loss due to client contracts requiring a nonunion work force were unlawful because the record showed only "one client contract requiring the respondent to remain nonunion."[158]

In *Durham School Services, LP*, a majority found that a high-level manager violated Section 8(a)(1) by suggesting to two employees that it was futile to choose a union for representation because it would take years for the union to enter into a collective bargaining agreement.[159] In *Stahl Specialty Company*, a majority found that the employer violated the Act by stating that "strikers often lose their jobs" because the employer failed to accurately explain when it could hire permanent replacements.[160]

Contrary to previous precedent, the Board also held an employer liable for statements of a pro-union supervisor. In *Ace Heating & Air Conditioning Co., Inc.*, the majority also found that a pro-union supervisor involved in organizing, who threatened business closure on behalf of the employer, was acting in his capacity as a supervisor and agent with apparent authority.[161] Therefore, the employer was liable for his threat.

These cases provide little guidance to employers on where the line is between an unlawful threat and lawful free speech allowing an employer to "criticize, disparage or denigrate a union" without violating the law.

N. *Remedies*

In *King Soopers, Inc.*, a majority modified the Board's make-whole remedy for search-for-work expenses.[162] The Board will award search-for-work and interim work expenses as part of the remedy for discriminatory termination of employment regardless of interim earnings.[163] The Board no longer treats these expenses as an offset that reduces the amount of interim earnings deducted from back pay.[164] Essentially, even if an em-

156. *Id.* slip op. at 1.
157. *Id.* at 4.
158. 363 N.L.R.B. No. 196 (2016).
159. 364 N.L.R.B. No. 107 (2016).
160. 364 N.L.R.B. No. 56 (2016).
161. 364 N.L.R.B. No. 22 (2016).
162. 364 N.L.R.B. No. 93 (2016).
163. *Id.* slip op. at 1.
164. *Id.* at 5.

ployee finds no interim employment, they may still be compensated for these expenses at the Board.

O. *The Board's Continued Invalidation of Class Action Waivers*

The Board continues its campaign against class action waivers in arbitration agreements. In the 2012 case, *D.R. Horton, Inc.*, a three-to-two majority found that requiring employees to agree to a collective action waiver in arbitration agreements violates the Act because it deprives employees of the right to engage in protected concerted activity.[165] The Fifth Circuit reversed this decision and applied Supreme Court precedent upholding class and collective action waivers under the Federal Arbitration Act (FAA).[166] In *Murphy Oil USA*, the Board ignored federal and state court precedent and reaffirmed its decision in *D.R. Horton, Inc.*[167] On October 26, 2015, the Fifth Circuit overruled *Murphy Oil*.[168] The court held that the employer "did not commit unfair labor practices by requiring employees to sign its arbitration agreement or seeking to enforce that agreement in federal district court."[169]

Two other circuits joined the Fifth Circuit in upholding class action waivers. In *Sutherland v. Ernst & Young, LLP*, the Second Circuit upheld an arbitration agreement compelling employees to arbitrate FLSA claims on an individual basis.[170] In its decision, the appellate court expressly declined to follow the Board's decision in *D.R. Horton*. The Eighth Circuit also has rejected the NLRB's holding in *D.R. Horton*.[171] However, a split exists among the circuits. Recently, the Seventh Circuit and the Ninth Circuit sided with the NLRB and found class action waivers in arbitration agreements unlawful because they violate the NLRA.[172]

In early September 2016, Epic Systems and Ernst & Young filed petitions for certiorari with the U.S. Supreme Court, asking the Court to review the recent decisions by the Seventh and Ninth Circuits invalidating employee class action arbitration waivers. The NLRB immediately requested that the Supreme Court review the Fifth Circuit's decision in *Murphy Oil*.

165. 357 N.L.R.B. No. 184 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013).

166. D.R. Horton, Inc. v. Nat'l Labor Relations Bd., 737 F.3d 344 (5th Cir. 2013).

167. Murphy Oil USA, Inc., 361 N.L.R.B. No. 72 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015).

168. 808 F.3d 1013 (5th Cir. 2015), *petition for cert. filed* (U.S. Sept. 9, 2016) (No. 16-301).

169. *Id.* at 1015; *see also* Citigroup Techs., Inc. v. Nat'l Labor Relations Bd., Case No. 15-60856 (5th Cir. Dec. 8, 2016).

170. 726 F.3d 290 (2d Cir. 2013), *petition for cert. filed* (Sept. 8, 2016) (No. 16-300).

171. *See* Owen v. Bristol Care Corp., 702 F.3d 1050 (8th Cir. 2013); *see also* Cellular Sales of Mo. v. Nat'l Labor Relations Bd., 824 F.3d 772 (8th Cir. 2016).

172. Lewis v. Epic Sys., 823 F.3d 1147 (7th Cir. 2016), *petition for cert. filed*, No. 16-285 (Sept. 2, 2016); Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016).

Despite these developments, in 2016 the NLRB's majority continued its policy of non-acquiescence with the circuits' decisions and declared arbitration agreements containing class action waivers invalid.[173] Given the split in the circuits, the Supreme Court will likely determine whether the NLRA or the FAA control class action waivers in arbitration agreements. Until that time, it appears that at least the current General Counsel of the NLRB will continue to pursue these cases at the Board level.

P. *Deferral to Arbitration*

In 2011, the Board's Acting General Counsel issued a memorandum asserting that the Board's arbitration deferral standard[174] failed to ensure adequately that employees' statutory rights were being effectively protected and remedied.[175] He urged "the Board to modify its approach in post-arbitral deferral cases to give greater weight to safeguarding employees' statutory rights in Section 8(a)(1) and (3) cases, and to apply a new framework in all such cases requiring post-arbitral review."[176] In *Babcock & Wilcox Construction Co.*, the Board adopted the General Counsel's approach and abandoned over thirty years of deferral policy.[177] The Board held that employers requesting deferral to an arbitration award must demonstrate that the Act reasonably permits the award.[178] In addition, the Board will no longer defer the processing of unfair labor practice charges alleging violations of Sections 8(a)(1) and 8(a)(3) of the Act, unless the arbitrator has been "explicitly authorized" by the parties to consider and decide the issue underlying the charge.

In *Cooper Tire & Rubber Company*, a Board panel applied this new standard and found that deferral to arbitration was inappropriate in a case

173. *See, e.g.*, ISS Facility Servs., Inc., 363 N.L.R.B. No. 160 (2016); Victory Casino Cruises, 363 N.L.R.B. No. 167 (2016); Prime Healthcare Paradise Valley, LLC, 363 N.L.R.B. No. 169 (2016); Bloomingdale's, Inc., 363 N.L.R.B. No. 172 (2016); Amerisave Mortg. Corp., 363 N.LR.B. No. 174 (2016); Spring Valley Hosp. Med. Ctr., 363 N.L.R.B. No. 178 (2016); Tarlton & Son, Inc., 363 N.L.R.B. No. 175 (2016); CVS RX Servs., Inc., 363 N.L.R.B. No. 180 (2016); Securitas Sec. Servs. USA, Inc., 363 N.L.R.B. No. 182 (2016); ZEP, Inc., 363 N.L.R.B. No. 192 (2016); Hobby Lobby Stores, Inc., 363 N.L.R.B. No. 195 (2016); Planet Beauty, 364 N.L.R.B. No. 3 (2016); Adecco USA, Inc., 364 N.L.R.B. No. 9 (2016); Jack in the Box, Inc., 364 N.L.R.B. No. 12 (2016); Lincoln E. Mgmt. Corp., 364 N.L.R.B. No. 16 (2016); Adriana's Ins. Servs., Inc., 364 N.L.R.B. No. 17 (2016); SJK, Inc., 364 N.L.R.B. No. 29 (2016); Calif. Commerce Club, Inc., 364 N.L.R.B. No. 31 (2016); Bristol Farms, 364 N.L.R.B. No. 34 (2016); Daily Grill, 364 N.L.R.B. No. 36 (2016).

173 Century Fast Foods, Inc., 363 N.L.R.B. No. 97 (2016).

174. Olin Corp., 268 N.L.R.B. No. 86 (1984).

175. Office of the Gen. Counsel, NLRB, Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases, GC 11-05 (Jan. 20, 2011).

176. *Id.* at 1.

177. 361 N.L.R.B. No. 132 (2014).

178. *Id.*

involving picket line misconduct.[179] The arbitrator found that the use of racial slurs on the picket line increased the possibility that the verbal exchanges between the picketers and replacement workers would escalate into violence.[180] In addition, the arbitrator found these statements were serious misconduct in any context, but in the context of the picket line, where there was a genuine possibility of violence, they were "even more serious."[181] The panel found the arbitrator's decision clearly "repugnant" to the Act because it was contrary to the Board's standard for evaluating picket line misconduct.[182]

In another case, *St. Francis Regional Medical Center*, a majority found deferral to arbitration inappropriate in a case alleging discipline and discharge of a union steward for conduct during grievance processing because of the employer's animosity to the employees' exercise of protected rights.[183] In *Verizon California, Inc.*, a Board panel also found that deferral to an arbitration award was not appropriate.[184] An employer suspended an employee for insubordination for refusing to continue a telephone interview after the employer's denial of his *Weingarten* request for union representation.[185] An arbitrator found that he was not entitled to *Weingarten* representation because his belief that discipline might result from the questioning was unreasonable.[186] The panel found that the arbitrator's finding that the employee was not entitled to *Weingarten* representation because his fear of discipline was "palpably wrong."[187] These cases show the Board's willingness to use its deferral rationale and strict compliance with the purposes of the Act to overturn arbitration awards, particularly if the case involves alleged protected conduct by employees.

II. THE DOL ATTEMPTS TO CHANGE OVERTIME RULES FOR WHITE COLLAR WORKERS

On May 23, 2016, in response to a directive from President Obama issued in March 2014,[188] the U.S. Department of Labor (DOL) published a final rule to update regulations under the Fair Labor Standards Act (FLSA or Act) governing the exemption from the Act's overtime requirement for ex-

179. 363 N.L.R.B. No. 194 (2016).
180. *Id.* slip op. at 5.
181. *Id.*
182. *Id.* at 5.
183. 363 N.L.R.B. No. 69 (2015).
184. 364 N.L.R.B. No. 79 (2016).
185. *Id.* slip op. at 1.
186. *Id.*
187. *Id.* at 5.
188. The White House, Presidential Memorandum—Update and Modernizing Overtime Regulations, Mar. 13, 2014, https://www.whitehouse.gov/the-press-office/2014/03/13/presidential-memorandum-updating-and-modernizing-overtime-regulations.

ecutive, administrative, professional, and computer employees.[189] This new overtime rule, entitled "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," was to take effect December 1, 2016.[190] However, as a result of a preliminary injunction issued on November 22, 2016, enjoining the DOL from implementing and enforcing the overtime rule, its future remains in question. Since this injunction was issued so close to the date the change was to take effect, however, many employers are left in limbo because many have likely taken steps to reclassify or reset employee wages to comply with the overtime rule.

A. *White Collar Overtime Exemption in Effect Prior to December 1, 2016*

The FLSA generally guarantees a minimum level of pay to employees for all hours worked in a work week[191] and requires that employees working more than forty hours per week in any work week are to be paid at a rate of not less than one-and-a-half times their regular rate of pay.[192] There are, of course, many exemptions to this general rule, including those qualifying as executive,[193] administrative,[194] professional,[195] computer,[196] or outside sales employees,[197] commonly referred to as a "white collar" exception.

Regulations under the FLSA mandate that in order to be exempt from overtime pay requirements, executive, administrative, professional, computer, and outside sales employees have to meet specific, standard job duties.[198] Job titles alone are insufficient to qualify for an exemption.[199] In addition, such employees have to be paid on a salary basis at a minimum salary level of $455 per week to be considered exempt.[200] Highly compen-

189. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391 (May 23, 2016).

190. *Id.*

191. 29 U.S.C. § 206.

192. 29 U.S.C. § 207.

193. 29 C.F.R. §§ 541.100–541.106.

194. 29 C.F.R. §§ 541.200–541.204.

195. 29 C.F.R. §§ 541.300.

196. "Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals under section 13(a)(1) of the Act and under section 13(a)(17) of the Act." 29 C.F.R. § 541.400(a).

197. 29 C.F.R. §§ 541.500–541.504.

198. 29 C.F.R. § 541.100 (general rule for executive employees); 29 C.F.R. § 541.200 (general rule for administrative employees); 29 C.F.R. § 541.300 (general rule for professional employees).

199. 29 C.F.R. § 541.2.

200. That amount has increased over the years. $455 per week was the minimum level enacted in 2004. The minimum salary and salary basis tests generally do not apply to lawyers (29 C.F.R. § 541.304(d)); doctors (29 C.F.R. § 541.304(d)); teachers (29 C.F.R. § 541.303(d)); or outside salespeople (29 C.F.R. § 541.500). In addition, computer employees are eligible for exemption as professionals under both 29 U.S.C. § 213(a)(1) and 29 U.S.C. § 213(a)(17). For

sated individuals customarily and regularly performing any one or more of the exempt duties of an executive, administrative, or professional employee have to earn a minimum total annual compensation of $100,000 per year.[201]

B. *DOL's Change to White Collar Exemption*

On May 23, 2016, the DOL promulgated the overtime rule to take effect December 1, 2016, significantly changing the existing white collar exemption. Although the rule does not change the job duties requirements for executive, administrative, professional, and computer employees, it significantly changes the "salary basis" test.[202] The overtime rule provides that to qualify for the white collar exemption, such employees must not only meet certain minimum job requirements related to their primary job duties, as they historically have, they must also generally meet a significantly increased salary level requirement. Specifically, such employees must earn salary levels "of not less than the 40th percentile of weekly earnings of full-time non-hourly workers in the lowest-wage Census Region, . . . exclusive of board, lodging or other facilities."[203] Currently, that rate is $913[204] per week, more than twice the current amount, that had been established in 2004.[205] Highly compensated employees must earn a total annual compensation of at least $134,004 to be considered exempt.[206]

In addition, for the first time, the overtime rule allows nondiscretionary bonuses, incentives, and commissions to be included as part of the salary.[207] For executive, administrative, professional, and computer employees, such nondiscretionary payments must be paid quarterly or more frequently.[208] For highly compensated employees, such nondiscretionary payments must be earned during a fifty-two-week period.[209]

Finally, the overtime rule has an automatic indexing mechanism for the first time. Pursuant to this, commencing on January 1, 2020, the minimum salary levels required under the overtime rule will be automatically

those qualifying under Section 13(a)(17), computer employees must be compensated on an hourly basis of not less than $27.63 an hour.

201. 29 C.F.R. § 541.601.

202. 81 Fed. Reg. 32391, 32457 (May 23, 2016).

203. 29 C.F.R. § 541.100(a); 29 C.F.R. § 541.200(a); 29 C.F.R. § 541.300(a); 29 C.F.R. § 541.400(a). This amount is 84 percent of that amount per week, if employed in American Samoa by employers other than the federal government. *Id.* The new overtime rule did not change the hourly rate basis for computer employees qualifying for overtime exemption under 29 U.S.C. § 213(a)(17).

204. Except in American Samoa, where the minimum salary level is set at $767 per week. 29 C.F.R. § 541.607(b)(1).

205. 29 C.F.R. § 541.607(a)(1).

206. 29 C.F.R. § 541.601(b)(1).

207. 29 C.F.R. § 541.602.

208. 29 C.F.R. § 541.602(a)(3).

209. 29 C.F.R. § 541.601(b)(1).

"updated" every three years "to equal the 40th percentile of weekly earnings of full-time non-hourly workers in the lowest-wage Census Region in the second quarter of the year preceding the update as published by the Bureau of Labor Statistics."[210]

C. *Preliminary Injunction*

On September 20, 2016, two separate lawsuits were filed in the U.S. District Court for the Eastern District of Texas, challenging the validity of the new overtime rules. One was brought by more than fifty business groups from around the country;[211] the other was brought by twenty-one states.[212] The lawsuits, which were subsequently consolidated, each generally sought to have the overtime rule be declared invalid, unlawful, and set aside. The states' lawsuit specifically argued that the overtime rule exceeded statutory authority under the FLSA, was enacted in violation of the Administrative Procedure Act (APA),[213] violated the Tenth Amendment, is arbitrary and capricious, and was enacted through unconstitutional exercise of Congress's legislative power.[214] The business groups' lawsuit claims that the new overtime rules exceed the DOL's statutory authority and are arbitrary, capricious, and otherwise contrary to the law in violation of the APA.[215]

On the state plaintiffs' emergency motion for preliminary injunction, the court entered a nationwide, preliminary injunction, enjoining the DOL from implementing and enforcing the overtime rule.[216] On December 1, 2016, the DOL appealed the preliminary injunction.[217] Whether the DOL maintains the appeal in light of the change in administration remains to be seen.

D. *Other Congressional Action*

1. House Bill H.R. 6094

On September 28, 2016, the House of Representatives passed a bill to delay the overtime rule until June 1, 2017. This bill now needs to be passed by the Senate. Even if this bill passes, its effect on the overtime

210. In American Samoa, this level will be 84 percent. 29 C.F.R. § 541.607(b)(2)(i).

211. This lawsuit, *Plano Chamber of Commerce v. Perez*, 4:16-cv-00732 (E.D. Tex. Sept. 20, 2016), was brought by Littler Mendelson, PC, with which authors Michael Lotito and Missy Parry are associated.

212. State of Nevada v. U.S. Dep't of Labor, 4:16-cv-00731 (Sept. 20, 2016).

213. 5 U.S.C. § 706.

214. Complaint for Declaratory and Injunctive Relief, *State of Nevada*, 4:16-cv-00731.

215. Complaint, *Plano Chamber of Commerce*, 4:16-cv-00732.

216. Memorandum and Order, *State of Nevada*, 4:16-cv-00731 (Nov. 22, 2016).

217. U.S. Dep't of Labor, Wage and Hour Division, Important Information Regarding Recent Overtime Litigation in the U.S. District Court of Eastern District of Texas, Dec. 2, 2016, *available a*t https://www.dol.gov/whd/overtime/final2016/litigation.htm.

rule remains unclear in light of the litigation filed by the states and business groups.

2. Overtime Reform and Review Act

On September 29, 2016, the Overtime Report and Review Act was introduced in the Senate.[218] This proposed law would, in part, amend Section 13 of the FLSA, 29 U.S.C. § 213, so that the DOL Secretary would require that any employee exempt under Section 13 of the Act to be compensated at a salary equal to $692 per week, or $35,984 per year starting December 1, 2016.[219] Thereafter, the salary threshold would be increased incrementally each year between December 1, 2018, through December 1, 2020.[220] After December 1, 2021, the DOL could change the salary threshold through the appropriate rulemaking process.[221] If passed, this law would require the DOL to change the overtime rule it promulgated in 2016. However, in addition to increasing the salary threshold level implemented by the DOL in 2004, it would provide specific congressional authority for the DOL to increase the same in the future.

218. S. 3464, 114th Cong., 2d Sess. (2016).
219. S. 3464, § 2(k)(2)(A).
220. S. 3464, § 2(k)(2)(B)(i–iii).
221. S. 3464, § 2(k)(2)(B)(iv).