Notable Decisions of the National Labor Relations Board

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By: Brooke Bahlinger, Kaleb Berhe, Carrie Hoffman, Kamran Mirrafati and Ryan Parsons

FOLEY

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The following is a summary of key decisions from the National Labor Relations Board (Board) and its Division of Advice during the period in which the Republican Party has controlled the Board under the Trump administration.

Although President Trump was inaugurated in January 2017, the Board's membership was not controlled by the Republican Party until late September 2017. Shortly thereafter, the Trump-era Board began steadily overruling and whittling away at the Obama-era Board's regulations and decisions. Over the last three years, the Board has nearly restored the balance between protecting employers' and employees' rights.

There have been so many key decisions and sweeping changes in the law that it has been difficult for even experts in the field to keep up to date with all of the changes. This summary is intended to provide a concise overview of key Board decisions and memoranda from the Division of Advice since September 2017. It is organized by the primary topic that relates to the decision or memorandum. Please note that this summary does not include references to any memoranda from the Board's General Counsel, proposed and actual rulemaking, or any Federal Circuit Courts of Appeal decisions that may be relevant.

I. WORKPLACE POLICIES

- ***The Boeing Company*** **(December 14, 2017):** Overruling existing precedent holding that a work rule is unlawful if an employee "would reasonably construe" the rule to restrict protected concerted activity. Under the new test, the Board will now evaluate (i) the potential impact on the National Labor Relations Act (the Act), and (ii) legitimate justifications associated with the rule. As a guide, the Board analysis requires categorizing each rule into one of the following three categories after performing the two-step evaluation. Category 1 rules are lawful on their face, and therefore do not prohibit or interfere with protected rights (under Section 7 of the Act), or the potential impact on protected rights is outweighed by the business justification for the rule. Category 2 rules require individualized scrutiny where the Board weighs any possible infringement on the Act against an employer's business justifications for prohibiting the conduct. Category 3 rules are unlawful and include rules that prohibit or limit protected rights and the impact is not outweighed by the business justification for the rule. Applying the new test retroactively to Boeing's no-camera rule, the majority found that the justifications for the rule, including the protection of information implicating national security, proprietary trade secrets, and employees' personal information, outweighed any potential impact on employees' protected concerted activity, and therefore held the rule was lawful.

- ***Lyft, Inc.*** **(Division of Advice – June 14, 2018):** Applying *Boeing*, the division advised its position that two work rules are lawful under Section 8(a)(1): (1) an "Intellectual Property" policy prohibiting use of the employer's logos without express written approval, and (2) a "Confidentiality" policy prohibiting use of proprietary and confidential information that includes "User information." It reasoned that employees would not reasonably interpret these policies to cover Section 7 activity.

- ***Wilson Health*** **(Division of Advice – June 20, 2018):** Applying *Boeing*, a "Commitment to My Co-workers" document and rules restricting speaking on behalf of the employer on social media, prohibiting the sharing of confidential information online and prohibiting the use of cellphone cameras were considered lawful. A rule prohibiting disparaging comments online about the employer and the use of the electronic communication systems (specifically email) was unlawfully overbroad as it restricted employees' ability to engage in protected concerted activity for (potentially) improving working conditions.

- ***Ally Financial*** **(Division of Advice – July 5, 2018):** Applying *Boeing*, the division advised its position on four work rules: (1) a rule forbidding insubordination is lawful because the majority of disrespectful conduct is

unprotected; (2) a rule forbidding the solicitation or distribution of literature without HR approval is unlawful because it does not distinguish between non-work time and work time; (3) a conflict of interest rule banning all activity that is adverse to the employer's interests is unlawful because it would include any public expressions of workplace dissatisfaction; and (4) a rule forbidding employees from using company supplies for solicitation (including phone, email, mail, etc.) is unlawful under *Purple Communications*.

- ***ADT, LLC* (Division of Advice – July 31, 2018):** Applying *Boeing*, the Division advised its position on three work rules: (1) a rule restricting texting during "working hours" is unlawful because employees are allowed to communicate during breaks about their conditions of employment; (2) a rule prohibiting "inappropriate commercial advertising or insignia" is lawful because it is not an unlawful attempt at restricting dress that supports union activity; and (3) a data security rule prohibiting the sharing of confidential financial, health, or proprietary information is lawful because it would not reasonably be construed to impact communications regarding terms of employment.

- ***Colorado Professional Security Services* (Division of Advice – Aug. 7, 2018):** Applying *Boeing*, the Division advised that a rule prohibiting employees from criticizing the employer was unlawfully overbroad in violation of Section 8(a)(1) because the impact on employee NLRA rights outweighed the employer's business justification.

- ***Blue Cross Blue Shield of Tenn.* (Division of Advice – Aug. 10, 2018):** Applying *Boeing*, the Division advised that a policy prohibiting audio recordings was lawful because it advanced substantial legitimate management interests. Although no-recording rules may occasionally chill employees from engaging in Section 7 activity, they do not significantly impact the ability to engage in such activity.

- ***Nuance Transportation Services* (Division of Advice – Nov. 14, 2018):** Applying *Boeing*, the Division advised that an employer's directive requiring cooperation in its investigations was lawful because it contained no references to unfair labor practices, the Board, government agencies in general, or any Section 7 activity.

- ***Prime Healthcare Paradise Valley, LLC* (June 18, 2019):** Applying *Boeing*, the Board held that a mediation and arbitration agreement that makes arbitration the exclusive forum for all claims is unlawful.

- ***Alorica, Inc. and its subsidiary/affiliate Expert Global Solutions, Inc.* (July 25, 2019):** Applying *Boeing* and *Prime Healthcare*, the Board held that it is unlawful to terminate an employee for refusing to sign an arbitration agreement.

- ***Cordua Restaurants, Inc.* (August 14, 2019):** The Board applied the recent Supreme Court case *Epic Systems Corp. v. Lewis* and held that it is lawful for employers to enforce arbitration agreements that waive an employee's ability to opt in to a collective action.

- ***Southern Bakeries, LLC* (August 28, 2019):** Applying *Boeing*, the Board held that a rule prohibiting employees from using company time for personal use was lawful, but a rule that forbid unauthorized entry was unlawful.

- ***Tarlton and Son, Inc.* and *Robert Munoz* (October 30, 2019):** The Board applied *Cordua Restaurants* and held that an individual arbitration agreement in response to Section 7 activity is lawful.

- ***LA Specialty Produce Co.* (October 10, 2019):** The Board clarified the *Boeing* analysis providing that the General Counsel has the initial burden to prove that a facially neutral rule could be interpreted to interfere with Section 7 rights. The General Counsel must meet that burden for the Board to then address the justifications and interests behind the rule. The Board held the following policies were lawful: (1) a confidentiality rule that specifically applied to client/vendor lists and other nonpublic information; (2) a media contact rule that prohibited employees from speaking on the employer's behalf.

- ***Lowe's Home Centers, LLC* (December 12, 2019):** Finding that a policy that required employees to keep salary information confidential was unlawful.

- ***Wal-Mart Stores, Inc.* (December 16, 2019):** Finding that a dress code policy requiring logos to be "small" and "non-distracting" was unlawful as it applied to areas away from the selling floor, but was lawful as it applied to the selling floor. The majority explained that limitations on the display of union insignia short of outright prohibitions will vary in the extent to which they serve legitimate employer interests and the degree to which they interfere with Section 7 rights; thus, they will "warrant individualized scrutiny in each case."

- ***Apogee Retail LLC d/b/a Unique Thrift Store* (December 16, 2019):** Overruling the Board's former approach to investigative confidentiality rules as set forth in *Banner Estrella Medical Center*, requiring an employer to make a case-by-case determination of whether confidentiality can be required in a specific investigation. Instead, the Board applied the test for facially neutral workplace rules established in *Boeing*, and found such confidentiality rules generally to be lawful. The Board found that the *Banner Estrella* approach improperly placed the burden on the employer to determine whether its interests in preserving the integrity of an investigation outweighed presumptive employee Section 7 rights, contrary to both Supreme Court and Board precedent. Further, the Board's prior test failed to consider the importance of the employer's confidentiality assurances to both employers and employees during an ongoing investigation and was inconsistent with other federal guidance, including from the EEOC regulations requiring an employer to provide confidentiality assurances throughout sensitive discrimination investigations.

II. Settlement Agreements

- ***UPMC Shadyside Hospital* (December 11, 2017):** Overruling *United States Postal Service,* and reinstating the authority of judges to accept settlements over the objection of the General Counsel and the charging party based on the "reasonableness" factors set forth in *Independent Stave*, subject to Board review.

III. Joint Employer

- ***Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.* (December 14, 2017):** Overruling *Browning-Ferris Industries* (2015) and returning to the pre-*Browning Ferris* standard for making joint employer determinations, which required proof that a company actually exercised some "direct and immediate control" over the essential employment terms of another company's employees. The Board later vacated this decision because Board member Emanuel did not recuse himself. Therefore, *Browning-Ferris* remains the current standard. However, the Board has plans to address this issue via rulemaking and is in the process of finalizing the regulation after the comment period closes.

IV. Appropriate Bargaining Unit

- ***PCC Structurals, Inc.* (December 15, 2017):** Overruling the "overwhelming" community-of-interest standard of *Specialty Healthcare & Rehabilitation Center of Mobile*, and reinstating the traditional community-of-interest standard for determining an appropriate bargaining unit in union representation cases. Under the traditional community–of-interest standard, the Board will assess whether employees in the proposed bargaining unit share interests that are sufficiently separate and distinct from those of the remainder of the work force to constitute an appropriate unit for bargaining, considering whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work; are functionally integrated with the employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. Additionally, the Board reinstated the standard established in *Park Manor Care Center* for determining appropriate bargaining units in non-acute health care facilities.

- ***Domino's Pizza LLC* (Division of Advice – March 20, 2019):** Allowing an election to proceed despite allegations of "packing" of a bargaining unit with new employees in an effort to dilute the union's showing of interest. Distinguishing the instant case from previous cases where the alleged unit-packing happened *after* a representation petition and *right before an election*, the General Counsel opined that when the unit-packing occurs at such an early stage in the process, employee free choice and the purposes and policies of the Act are actually better served by allowing the election process to proceed, undeterred by lengthy and contentious litigation.

V. Bargaining Obligations

- ***Raytheon Network Centric Systems* (December 15, 2017):** Overruling *E.I. du Pont de Nemours* (DuPont) and finding that the employer did not violate the Act by announcing and unilaterally implementing changes to employees' healthcare benefits. Holding that actions do not constitute a change if they are similar in kind and degree with an established past practice consisting of comparable unilateral action. This principle applies regardless of whether (i) a collective bargaining agreement was in effect when the past practice was created, and (ii) no collective bargaining existed when the disputed actions were taken. The majority also ruled such actions consistent with an established practice do not constitute a change requiring bargaining merely because they involve some degree of discretion. Applying these holdings to the facts of this case, the Board held that the changes to employees' health care benefits were a continuation of the employer's past practice involving similar unilateral changes made at the same time every year for the previous decade.

- ***St. Barnabas Medical Center* (Division of Advice – March 22, 2019):** The employer unilaterally changed how the parties resolved grievances by requiring employees to bring their grievances to HR instead of nurse management (as was previously the policy). Holding that this was not a sufficiently material, substantial, or significant change because HR was just stepping in as scheduling coordinator for grievances and there was nothing in the collective bargaining agreement that specified who needed to receive the grievances from employees. It was further held that any anti-union animus was irrelevant to the decision.

- ***MV Transportation, Inc.* (September 10, 2019):** The Board abandoned the "clear and unmistakable waiver" standard to address whether a collective bargaining agreement permitted an employer's unilateral action. In doing so, the Board adopted the "contract coverage" standard, which gives employers more leeway to act unilaterally so long as agreement contains language within the scope of the action.

VI. Protected Concerted Activity / Employee Discipline

- ***Google, Inc.* (Division of Advice – January 16, 2018):** Finding no violation in the termination of an employee for unprotected speech, even if that speech was embedded in a document that was composed of primarily protected speech. Holding that employers have the right to be proactive and "nip in the bud" discriminatory speech, and that discriminatory speech, even if "it involves concerted activities regarding working conditions," can still be grounds for dismissal.

- ***SEIU Healthcare 1199NW* (Division of Advice – March 30, 2018):** Holding that indoor picketing, although not categorically unlawful, was more likely to be unlawful as conduct that may solicit "violence, intimidation, and reprisal or threats." The nature of the business where the indoor picketing takes place is also a factor in assessing if a violation has taken place. Finding that picketing inside of tranquil locations such as hospitals and hospice settings is more likely to be unduly intimidating.

- ***Menard's* (Division of Advice – April 19, 2018):** Holding that it is unlawful to terminate an "independent contractor" for testifying against the employer in a labor dispute. Section 8(a)(4) should be read expansively to protect "anyone who initiates or assists the Board to assure an effective administration of the Act." To hold any less would permit the retaliation against witnesses and claimants, which would impermissibly restrain access to the Board's processes.

- ***Brighton Rehabilitation* (Division of Advice – May 3, 2018):** Finding that it is lawful to terminate an employee who posted about patient neglect on social media instead of reporting such neglect to their supervisor. Although the NLRB did not decide the issue, assuming *arguendo* that posting on social media is protected under Section 7, it was still proper to terminate the employee for being in violation of neglect reporting standards. Such conduct by the employer passes the "*Wright Line* Test" because the employer can establish that it would have terminated the employee for a different infraction regardless of whether the speech they engaged in was protected or not.

- ***Constellium Rolled Products Ravenwood* (July 24, 2018):** Finding protected concerted activity even though the employee conduct at issue was the defacing of an employer's overtime sign-up sheet by writing "whore board" on an overtime sheet while the employees were engaged in an overtime boycott. The Board found that the employee's termination was unlawful. This case is an important reminder that even though the Board as a whole is controlled by Republican appointees, panels of three Board members can include two Democratic appointees, as was the case here. However, the DC Circuit remanded this case to the Board to evaluate its analysis of the NLRA with the employer's obligations under Title VII and applicable state law.

- ***Alstate Maintenance, LLC* (January 11, 2019):** The Board reversed its ruling in *WorldMark by Wyndham*, which previously held that an individual complaint made in a group setting is protected concerted activity under the Act. The Board reinstated the *Myers Industries* test, which states that concerted activity is defined as (1) group action or action on behalf of other employees; (2) activity seeking to initiate or prepare for group activity; or (3) bringing a group complaint to the attention of management. The Board found the union failed to demonstrate the employee's individual gripe was seeking to initiate or prepare group activity.

- ***Centura* (Division of Advice – June 24, 2019):** Finding that employees who go beyond their normal work activity to obtain employer's confidential information are no longer protected by Section 7 activity. Therefore, an employer may terminate based on a reasonable belief of misconduct.

- ***Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino* (December 16, 2019):** Overruling *Purple Communications*, *Inc.*, which gave employees the presumptive right to use employer email systems for union activities, notwithstanding any rules regarding use of email systems for non-work activities. The Board found that employers generally have the right to impose nondiscriminatory restrictions (including outright bans) on the use of employer-owned IT systems for non-work purposes, essentially reinstating the Board's decision in *Register Guard*, 351 NLRB 1110 (2007). The Board created an exception where the use of such equipment is the only reasonable means for employees to communicate with one another during the workday.

VII. Information Requests

- ***Colorado Symphony Association* (April 13, 2018):** Employer wrongfully refused to furnish overscale contracts between the employer and individual unit members that were requested by the union to investigate potential gender pay inequities. Holding that there was a presumption that the union was acting in furtherance of its statutory duties when it requested the contracts, and found the employer failed to rebut this presumption or express a justification for refusing to provide the contracts.

- ***NP Palace LLC d/b/a Palace Station Hotel & Casino* (December 16, 2019):** Adopting a modified remedial approach for a certification-testing employer facing the union's request for relevant, but confidential information. Previously, an employer forfeited its confidentiality defense unless it responded to the union's information request with an offer to engage in accommodative bargaining over the disputed information. But at the same time, the Board and courts held that, if it engaged in accommodative bargaining, the employer waived its right to challenge the union's certification in the court of appeals. To eliminate the Hobson's choice under the prior law, the majority held that, if the Board finds that an employer articulates a legitimate, specific confidentiality interest in particular requested information, it will order the employer to engage in accommodative bargaining, rather than the immediate production of the requested information.

VIII. Surveillance of Union Activity

- ***Brasfield & Gorrie, LLC* (May 8, 2018):** Dismissing complaint alleging improper surveillance. Holding that the standard for employer photographing and videotaping of employee misconduct was for *as it is occurring* rather than for "anticipatory misconduct." Also holding that that the picketing employees blocking of vehicle traffic into the worksite was a "legitimate justification" for taking photographs of and videotaping employees.

IX. Railway Labor Act Preemption

- ***ABM Onsite Services - West, Inc.*, (November 14, 2018):** Holding that the employer and its employees at the Portland International Airport are subject to the Railway Labor Act (RLA). The Board referred the case to the National Mediation Board (NMB) and the NMB issued an advisory opinion, returning to its traditional six-factor carrier control test and stating its view that the employer's operations at the Portland International Airport are subject to the RLA.

X. Contract Bar Doctrine

- ***Samuel, Son & Co.* (October 26, 2018):** Holding that under the contract-bar doctrine, an employer's RM petition is not barred when it is filed after a CBA's execution but before its effective date.

XI. Independent Contractors

- ***SuperShuttle DFW, Inc*. (January 25, 2019):** The Board applied the traditional multifactor common law agency test to conclude that airport shuttle driver franchisees were independent contractors and thus excluded from the Act's coverage. The Board gave significant weight to the following facts regarding the franchisees: they controlled their daily work schedules and working conditions, owned or leased their vans, and kept all collected fares while paying a monthly fee to the franchisor. The Board found these facts showed the franchisees were exposed to "entrepreneurial opportunity for economic gain" and "risk of substantial loss." The Board overruled *FedEx Home Delivery*, which significantly limited the importance of entrepreneurial opportunity in the independent contractor analysis. This marked a return to decades-old precedent, which focused on viewing the common law factors through the lens of entrepreneurial opportunity, with the Board reasoning that "employer control and entrepreneurial opportunity are opposite sides of the same coin: in general, the more control, the less scope for entrepreneurial initiative, and vice versa."

- ***Uber Technologies* (Division of Advice – April 16, 2019):** Applying the common-law agency test used in *SuperShuttle DFW, Inc.*, to conclude that Uber drivers are independent contractors. Holding that in the shared-ride and taxicab industries, the Board gives significant weight to two factors: (1) the extent of the company's control over the manner and means by which drivers conduct business and (2) the relationship between the company's compensation and the amount of fares collected. Finding that the drivers had significant entrepreneurial opportunity by virtue of their near complete control of their cars and work schedules, together with freedom to choose log-in locations and work for competitors of Uber. On any given day, at any free moment, drivers could decide how best to serve their economic objectives: by fulfilling ride requests through the app, working for a competing ride-share service, or pursuing a different venture altogether.

- ***Velox Express, Inc.* (August 29, 2019):** Applying *SuperShuttle DFW* to conclude that an employer's misclassification of employees is not by itself a violation of the Act. Further, the Board held that a reclassification was not the appropriate remedy; the appropriate remedy in a misclassification case is a traditional notice-posting.

XII. Successor Liability

- ***Ridgewood Health Care Center, Inc. and Ridgewood Health Services, Inc.*** **(April 2, 2019):** A buyer of a company initially told employees that she planned to keep 99.9% of them after purchasing the company. However, the buyer subsequently changed her mind and informed employees she would close the plant if they unionized. Ultimately, the buyer company brought on 49 former unit employees and hired 52 new employees. The Board found this evidenced the buyer's attempt to avoid a majority of unit employees and the resulting successor liability, and concluded the buyer had an obligation to bargain with the union. The Board, however, declined to apply "perfectly clear successor" liability, which would have bound the buyer to the existing CBA and required her to bargain with the union *before* setting initial wages, hours, and other terms of employment. The Board reasoned that the buyer did not create an uncertainty as to whether she would have hired all or substantially all of the predecessor's unionized employees, despite her statement that she intended to hire 99.9% of the employees and clear evidence of her anti-union animus. The Board effectively narrowed the application of "perfectly clear successor" liability by overruling *Galloway School Lines*, which previously extended "perfectly clear successor" liability to situations where there was merely evidence that a union's majority status would continue after a company's purchase.

XIII. Property Access Rights

- ***UPMC*** **(June 14, 2019):** Overruling *Ameron Automotive Centers* and *Montgomery Ward & Co., Inc.*, a more than 30-year-old precedent, which dealt with the "public space" exception. Prior to *UPMC*, the "public space" exception required employers to grant third parties access to any portion of the employer's property that was public. Now, an employer does not have a duty to permit nonemployees to use a public space for union activity.

- ***Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts*** **(August 23, 2019):** Overruling *New York New York Hotel & Casino* and *Simon DeBartolo*, the Board held that contractors do not have the same property access rights as the property owner's own employees. The new standard, which the Board will apply retroactively, is that a property owner may exclude off-duty contractors unless (1) the workers work regularly and exclusively on the property, and (2) the owner fails to show an alternative means to communicate their message.

- ***Kroger Limited Partnership I Mid-Atlantic*** **(September 6, 2019):** Overruling *Sandusky Mall Co.*, the Board held that an employer may deny access to nonemployees seeking to engage in protest activities on employer property. For the action to be deemed unlawful, the General Counsel must prove that the employer denied access to nonemployee union agents while allowing access to other nonemployees for similar activities.

XIV. Anticipatory Withdrawal Doctrine

- ***Johnson Controls, Inc.*** **(July 3, 2019):** The Board modified the anticipatory withdrawal doctrine set by *Levitz Furniture Co. of the Pacific* in two respects: (1) the "reasonable period of time" prior to contract expiration that anticipatory withdrawal may be exercised is now no more than 90 days before the parties' contract expires, and (2) when the employer announces a withdrawal of recognition, the incumbent union may file an election petition within 45 days from the announcement (and a competing union may intervene with a sufficient showing of interest). The Board did not adhere to or endorse the "dual signers" signatures, which previously allowed a union to show a reacquired majority. Instead, the Board stated that a Board-conducted secret ballot election is the preferred method to resolve this representation question. A union can no longer reacquire majority status between anticipatory and actual withdrawal.

XV. Deferral to Arbitration

- ***United Parcel Service, Inc.*** **(December 23, 2019):** Overruling *Babcock & Wilcox Construction Co.*, and returning to the post-arbitration deferral standard set forth in *Spielberg Mfg. Co.* and *Olin Corp*. Under the restored standard, the Board will defer to the arbitrator's decision where (1) the arbitral proceedings appear to have been fair and regular, (2) all parties have agreed to be bound, (3) the arbitrator considered the unfair labor practice issue, and (4) the arbitrator's decision is not clearly repugnant to the Act. In addition, the Board restored policies for pre-arbitral deferral established in *United Technologies Corp*. and for deferral to pre-arbitral settlement agreements set forth in *Alpha Beta Co*.

XVI. Dues Checkoff

- ***Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center*** **(December 16, 2019):** Overruling *Lincoln Lutheran of Racine*, and restoring the longstanding rule established in *Bethlehem Steel,* which allows employers to stop dues checkoff when the CBA expires. The majority explained that this holding applies even where the CBA does not contain a union-security provision.

CONTACT US

Carrie Hoffman
Partner, Dallas
+1 214.999.4262
choffman@foley.com

Kamran Mirrafati
Partner, Los Angeles, San Francisco
+1 213.972.4797
kmirrafati@foley.com

Ryan Parsons
Senior Counsel, Milwaukee
+1 414.297.5863
rparsons@foley.com

Brooke Bahlinger
Associate, Dallas
+1 214.999.4031
bbahlinger@foley.com

Kaleb Berhe
Associate, Los Angeles
+1 213.972.4572
kberhe@foley.com