

PREPARING FOR THE NEW NLRB'S RULES IN YOUR WORKPLACE

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THE NEW NLRB

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NLRB MEMBERS

- Chair: Lauren McFerran (D)
- Member: John F. Ring (R)
- Member: Marvin E. Kaplan (R)
- Member: David Prouty (D)
- Member: Gwynne Wilcox (D)

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GENERAL COUNSEL

- Peter Robb – Fired by President Biden on January 21, 2021, along with Deputy General Counsel Alice Stock the following day
 - Robb's four-year term as General was not set to expire until November 16, 2021
- Peter Sung Ohr – Appointed Acting General Counsel on January 25, 2021
- Jennifer Abruzzo – Replaced Ohr as General Counsel on July 22, 2021

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TRUMP-ERA GUIDANCE MEMOS RESCINDED

- Robb rescinded several Trump-era Guidance Memos upon taking his position
- Reasoning: the Memos were either inconsistent with the NLRB's goal of encouraging collective bargaining and protecting workers' rights under or they were no longer necessary

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MANDATORY SUBMISSIONS TO ADVICE

- Shortly after taking her position, Abruzzo issued a Guidance Memo regarding cases NLRB counsel need to submit to their Regional Advice Branch to reexamine and determine whether a change is necessary to fulfill the mission of the NLRA
- The memo includes cases where the Trump NLRB overruled previous legal precedent and areas of the law that are not the subject of a recent NLRB decision but that Abruzzo would like to reexamine

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RECENT CASES AND TOPICS THAT ABRUZZO WILL REVISIT

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EMPLOYER HANDBOOK RULES

- Cases involving the applicability of *Boeing*, including *Boeing's* applicability to confidentiality rules, non-disparagement rules, social media rules, media communication rules, civility rules, respectful and professional manner rules, offensive language rules, and no camera rules
 - Includes the applicability of *LA Specialty Produce*
- Cases involving the applicability of *AT&T Mobility*

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CONFIDENTIALITY PROVISIONS/SEPARATION AGREEMENTS AND INSTRUCTIONS

- Cases involving the applicability of *Baylor University Medical Center*
- Cases involving the applicability of *Apogee Retail LLC*
- Cases involving the applicability of *California Commerce Club*

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WHAT CONSTITUTES PROTECTED CONCERTED ACTIVITY

- Cases involving the applicability of *Alstate Maintenance, LLC*
- Cases involving the applicability of the inherently concerted doctrine set forth in *Hoodview Vending Co.*, including to subjects other than wages that regularly arise in the workplace such as issues involving employee health and safety

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WHAT CONSTITUTES PROTECTED CONCERTED ACTIVITY (CONT.)

- Cases involving the applicability of *Rio All-Suites Hotel and Casino* and cases involving employees' use of other electronic platforms in the workplace (Discord, Slack, Microsoft Teams, Skype, etc.)
- Cases involving the applicability of *Wynn Las Vegas, LLC*
- Cases involving the applicability of *Amnesty International of the USA*

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WRIGHT LINE/GENERAL COUNSEL'S BURDEN

- Cases involving the applicability of *Tschiggfrie Properties, Ltd.*
- Cases involving the applicability of *Electrolux Home Products*
- Cases involving the applicability of *General Motors*

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REMEDIAL ISSUES

- Cases involving the applicability of *Shamrock Foods Co.*
- Cases involving the applicability of *UPMC*

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UNION ACCESS

- Cases involving the applicability of *Tobin Center for the Performing Arts*
- Cases involving the applicability of *UPMC*

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UNION DUES

- Cases involving the applicability of *Valley Hospital Medical Center*
- Cases involving the applicability of *United Nurses & Allied Professionals (Kent Hospital)*

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EMPLOYEE STATUS

- Cases involving the applicability of *SuperShuttle DFW, Inc.*

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BOARD JURISDICTION OVER RELIGIOUS INSTITUTIONS

- Cases involving the applicability of *Bethany College*

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EMPLOYER DUTY TO RECOGNIZE AND/OR BARGAIN

- Cases involving the applicability of *MV Transportation and Bath Iron Works Corp.*
- Cases involving the applicability of *Johnson Controls, Inc.*
- Cases involving the applicability of *Ridgewood Health Care Center, Inc.*
- Cases involving the applicability of *Raytheon Network Centric Systems*

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EMPLOYER DUTY TO RECOGNIZE AND/OR BARGAIN (CONT.)

- Cases involving the applicability of *Arlington Metals Corp.*
- Cases involving the applicability of *American Security Programs, Inc.*
- Cases involving the applicability of *Sysco Grand Rapids, LLC*
- Cases involving the applicability of *Pittsburgh Post-Gazette*

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EMPLOYER DUTY TO RECOGNIZE AND/OR BARGAIN (CONT.)

- Cases involving the applicability of *Care One at New Milford*
- Cases involving a refusal to furnish information related to customer complaints

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DEFERRAL

- Cases involving the applicability of *United Parcel Service*

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OLDER NLRB CASES AND RULES ABRUZZO WOULD LIKE TO REVISIT

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EMPLOYEE STATUS

- Cases involving the applicability of *Velox Express, Inc.*
- Cases involving the applicability of *Brevard Achievement Center, Inc.*
- Cases involving the applicability of *Toering Electric Co.*

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WEINGARTEN

- Cases involving the applicability of *United States Parcel Service*
- Cases involving the applicability of *Weingarten* principles in non-unionized settings as enunciated in *IBM Corp.*

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NATIONAL MEDIATION BOARD VS. NLRB JURISDICTION

- Cases involving the applicability of *AMB Onsite Services-West*

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EMPLOYER DUTY TO RECOGNIZE AND/OR BARGAIN

- Cases involving surface bargaining akin to what the Board found lawful in *The George Washington University Hospital*
- Cases involving a refusal to furnish information related to a relocation or other decision subject to *Dubuque Packing*
- Cases involving the applicability of *Shaw's Supermarkets, Inc.*

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EMPLOYER DUTY TO RECOGNIZE AND/OR BARGAIN (CONT.)

- Cases in which an employer refuses to recognize and bargain with a union where the union presents evidence of a card majority, but where the employer is unable to establish a good faith doubt as to majority status; specifically, where the employer refusing to recognize has either engaged in unfair labor practices or where the employer is unable to explain its reason for doubting majority status in rejecting the union's demand

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EMPLOYEES' SECTION 7 RIGHT TO STRIKE AND/OR PICKET

- Cases involving an allegation that an employer's permanent replacement of economic strikers had an unlawful motive under *Hot Shoppes*
- Cases involving the applicability of *Wal-Mart Stores*
- Cases involving the applicability of *Preferred Building Services, Inc.*
- Cases involving the applicability of *Service Electric Co.*

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REMEDIES AND COMPLIANCE

- Cases involving make-whole remedies for construction industry applicants or employees who sought or obtained employment as part of an organizing effort as enunciated in *Oil Capitol Sheet Metal, Inc.*
- Cases involving the applicability of *St. George Warehouse*
- Cases involving the applicability of *Ex-Cello Corp.*

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EMPLOYER INTERFERENCE WITH EMPLOYEES' SECTION 7 RIGHTS

- Cases involving the applicability of *Tri Cast* to employer statements that employee access to management will be limited if employees opt for union representation
- Cases involving the applicability of *Crown Bolt*
- Cases involving the applicability of *Cordua Restaurants, Inc.*

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CHANGING PRECEDENT

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INDEPENDENT CONTRACTOR ANALYSIS

- The test currently focuses on actual "control"
- The NLRB may move towards the "ABC Test" once Emmanuel is replaced later this year

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ABC TEST

- Under the ABC Test, all workers are presumed to be employees unless the employer can prove that:
 - The worker is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
 - The service is performed outside the usual course of the business of the employer; and
 - The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed

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JOINT EMPLOYER RULE

- Currently, to be a joint employer, you must:
 - Exercise substantial, direct and immediate control over the employees of another;
 - That control must be over the essential terms and conditions of employment; and
 - The control is more than just limited and routine

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EXPECTED JOINT EMPLOYER RULE

- Only indirect or potential control required for joint-employer liability
- Would allow a joint employment relationship to be found where the two entities' contract allows for the joint employer to *theoretically* exercise some control over the other employer's actual employees

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PURPLE COMMUNICATIONS WILL LIKELY BE REINSTATED

- Current rule: Employees cannot use their work email addresses for organizing or anything else inconsistent with the employer's interests – so long as the employer applies its policies uniformly to all non-work purposes
- Rule from *Purple Communications*: Employers' control and access to their email system must yield to their employees' Section 7 right to organize and/or engage in other "concerted activity"

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LUTHERAN HERITAGE WILL LIKELY BE REINSTATED

- Current rule: Allows consideration of whether a facially-neutral rule, when reasonably interpreted, could interfere with rights under the Act. If so, the Board would strike a balance between the nature and extent of the potential impact on employee rights and the employer's legitimate justification supporting the maintenance of the rule.

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LUTHERAN HERITAGE RULE

- Rule from *Lutheran Heritage*: Even if a facially-neutral employer rule does not explicitly restrict a protected activity, a violation would occur upon a showing of one of the following:
 - Employees would reasonably construe the language to prohibit Section 7 activities
 - The rule was promulgated in response to union activities
 - The rule has been applied to restrict the exercise of Section 7 rights

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PROTECTING THE RIGHT TO ORGANIZE ACT

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PROTECTING THE RIGHT TO ORGANIZE ACT ("PRO ACT")

- The House of Representatives has already passed the PRO Act with a vote of 225-206
 - However, it has sat in the Senate since March 11, 2021
- Bans employers from holding mandatory "captive audience" meetings with their employees
- Preempts state right-to-work laws
- Adopts the ABC Test for determining whether a worker is an employee or an independent contractor

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- Expands personal liability for unfair labor practices to corporate directors and officers
- Creates a private right, allowing unfair labor practices claims to be brought as civil actions
- Adds fines and liquidated damages as penalties for unfair labor practices
- Compels mediation in first contract negotiations where agreement is not reached in 90 days

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- Reinstates the persuader rule which requires employers to report the activities of third-party consultants that work behind the scenes to manage employers' campaigns in response to union organizing
- Codifies into law a more expansive joint employer rule and the 2014 representation election rules with shorter union election timelines

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- Allows unions to encourage their members to participate in strikes initiated by employees represented by a different union ("secondary strikes") and prohibits employer action against the unions for encouraging the secondary strikes
- Prevents employers from permanently replacing, or discriminating against, strikers
- Narrows the definition of supervisors
 - It's no longer enough to have the authority to assign or responsibly direct other employees and supervisory duties must take up a majority of an employee's worktime
- Eliminates the ability of employers to avoid class action lawsuits via arbitration
- Creates new "whistleblowing" claims

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THANK YOU!

QUESTIONS?

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