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# Employers Beware: Pendulum Continues to Swing in Favor of Unions

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Since President Biden took office and subsequently appointed union attorney Jennifer Abruzzo to the General Counsel role, the National Labor Relations Board (the "Board" or "NLRB") has issued pro-union decision after pro-union decision, several of which reversed Trump-era precedent. The trend continued this past week as the Board issued a series of consequential decisions.

Two of the recent decisions overrule standards set by the Trump-era Board by reviving standards set during the Obama-era Board. A third decision creates an entirely new remedy for unfair labor practices. The fourth decision reaffirms existing limits on an employer's ability to question employees in relation to unfair labor practice proceedings.

***American Steel Construction, Inc.* – Micro-Units Revived**

In *American Steel Construction, Inc.*, the Board revived the concept of collective bargaining "micro-units," a tool used to organize a workplace more easily. The *American Steel Construction* decision overturns Trump-era precedent and reinstates the labor-friendly standard set by the Obama-era Board in *Specialty Healthcare & Rehabilitation Center of Mobile*, which allowed unions to more easily organize a small segment of an employer's workforce (i.e., micro-units).[1]

Under the *Specialty Healthcare* standard, if a union petitioned for an election among a group of employees, it merely needed to show the group they organized represented a "readily identifiable" group based on job classifications, departments, functions, work locations, skills, or similar factors. If the union made such a showing, the burden then shifted to the employer to make a near-impossible showing: that employees outside the micro-unit "shared an ***overwhelming*** community of interest" with the petitioned-for employees. Put differently, the standard required employers to show the interests between the petitioned-for and excluded employees "overlap almost completely."

The *Specialty Healthcare* standard was struck down by the Trump-era Board in *PCC Structurals, Inc.* Under *PCC Structurals*, a small group of the workforce could only form a collective bargaining unit to the exclusion of other employees where the excluded employees had "meaningfully distinct interests in the context of collective bargaining that outweighs similarities" with the employees included in the proposed bargaining unit. The standard made it much more difficult for labor organizations to organize micro-units.

The *American Steel Construction* decision marks a return to the "overwhelming community of interest" standard articulated in *Specialty Healthcare*. Consequently, unions will once again have an easier path to establishing footholds in workplaces even where a majority of employees do not desire representation. Employers who may be subject to micro-unit organizing should plan to implement measures that will make splintering its workforce more difficult.

***Bexar County II* – Enhanced Section 7 Rights for Off-Duty Contractor Employees**

In *Bexar County II*, the NLRB's democratic majority narrowed the circumstances in which property owners may lawfully limit off-duty contract workers' access to the property and abandoned the standard created by the Trump-era Board in *Bexar County I*.

The case concerned union musicians who were prohibited from distributing leaflets outside the Tobin Center for the Performing Arts (the "Tobin Center") in San Antonio, Texas. The property owner there operates the Tobin Center, which is used by the San Antonio Symphony (the "Symphony"), by whom the musicians were employed. The musicians attempted to protest the Symphony's decision to use recorded music at the Tobin Center rather than live performers.

The Board has long held that a property owner's own employees have a right to engage in Section 7 activities while off-duty and in non-work areas, with some limitations. Prior to 2019, the Board treated off-duty employees of contractors similarly using the standard articulated in the 2011 case, *New York New York Hotel & Casino*. Under that standard, contractor employees were permitted to access the property to engage in Section 7 activity unless the owner demonstrated that such activity "significantly interfere[d]" with the use of its property or to "maintain production or discipline."

However, the *New York New York* standard was overruled in *Bexar County I*. In *Bexar County I*, the majority established a standard whereunder a property owner could lawfully prohibit off-duty employees of its on-site contractors from accessing the property to engage in Section 7 activity unless they work "regularly and exclusively" on the property and the owner cannot show the workers have a "reasonable and nontresspassory alternative" for communicating their message.

The Court of Appeals for the District of Columbia rejected the new standard in 2021, reasoning it effectively eliminated Section 7 rights for employees working on property owned by entities other than their employer, and remanded the case back to the Board. On remand, the Board abandoned the *Bexar County I* standard altogether, returning instead to *New York New York* standard. Unlike the *Bexar County I* standard, the *New York New York* standard is likely to withstand any appellate challenge as it has been upheld by courts in the past.[2]

The *Bexar County II* standard significantly restricts the circumstances in which property owners can restrict contractor employees' Section 7 right to engage in publicly accessible areas. As was the case prior to 2019, before excluding individuals engaged in Section 7 activity, property owners must carefully determine whether legitimate business reasons support the decision.

***Thryv, Inc.* – Consequential Damages Now Available**

In *Thryv, Inc.*, the Board upheld an administrative law judge's finding that a software company violated labor law by laying off workers before bargaining with their union. In the process, the Board broadened the scope of remedies available for unfair labor practices.

Supreme Court precedent prohibits the NLRB from prescribing penalties for labor law violators.[3] As a result, the Board has traditionally been limited to granting make-whole remedies such as reinstatement and back pay. However, in *Thryv, Inc.*, the Board's majority explained that it would add compensation "for all direct or ***foreseeable*** pecuniary harms" to its customary make-whole remedy. The majority reasoned that the NLRB's authority to make

workers whole is more fully realized when workers are compensated for direct ***and*** foreseeable harms resulting from an employer's unfair labor practice. According to the majority, these harms could include, but would not be limited to, "out-of-pocket medical expenses, credit card debt, or other costs simply in order to make ends meet." [4] Notably, the majority did specify that the expanded remedy would not cover pain and suffering or emotional distress.

As the dissent notes, the damages envisioned by the majority's expansion are highly speculative and more difficult to calculate than the traditional back pay remedy. The dissent further explained that the broad "foreseeable" standard would extend recovery to virtually indeterminate losses and stretch across an indeterminate chain of causation. The ambiguity will undoubtedly lead to more burdensome and complicated labor proceedings as employers will now be required to investigate affected workers' post-violation finances more closely.

The *Thryv, Inc.*, decision applies retroactively to any pending cases in which make-whole relief is available to employees. Thus, employers should immediately begin evaluating potential consequential damages when assessing personnel decisions.

***Sunbelt Rentals, Inc.*** **– Limits on Employer Questioning of Employees Reaffirmed**

The Board rejected an employer's request to overrule the standard governing employers' questioning of employees in relation to unfair labor practice proceedings.

The standard, first articulated nearly six decades ago in *Johnnie's Poultry*, establishes specific safeguards employers must observe when questioning employees about an unfair labor practice to "minimize the coercive impact of such employer interrogation." Under *Johnnie's Poultry*, employers must communicate why the employee is being questioned, assure he or she that no retaliation will follow the questioning, and obtain his or her participation on a voluntary basis. Failure to do so renders an interrogation per se unlawful under the standard.

In *Sunbelt Rentals, Inc.*, a construction equipment retailer, was accused by a union of unlawfully interrogating workers in Wisconsin about a pending Board case over the company's refusal to bargain. The company urged the Board to ditch the bright-line *Johnnie's Poultry* standard and instead utilize the less rigid "totality of the circumstances" standard used by numerous federal courts of appeal. [5] The Board declined to adopt the totality of circumstances test and reaffirmed the *Johnnie's Poultry* standard. According to the majority, the standard strikes an appropriate balance between employers' need to question employees when investigating unfair labor practice cases and the "inherent danger of coercion" in such questioning.

The dissenting members agreed that questioning related to pending cases posed an inherent danger of coercion. However, they argued the per se *Johnnie's Poultry* standard was too rigid in its failure to consider evidence that questioning was not coercive even though the procedural safeguards were not followed. The dissent then proposed slightly different version of the standard, under which the failure to provide the safeguards would create a presumption of coercion that the employer could rebut by demonstrating the actual questioning was noncoercive. The majority rejected the proposal because it would "invite[] employers to provide post hoc rationalizations, and open[] the door for employers to probe into employees' union sympathies."

The Board's reaffirmation of the *Johnnie's Poultry* standard serves as a reminder for employers to always provide the assurances before questioning employees during unfair labor practice investigations. The assurances should be communicated verbally and in writing. Moreover, employers must also ensure any subsequent interview questions are not coercive in nature or in substance.

**Key Takeaways**

The current NLRB has made it clear that it will seek to overturn long-standing precedent in many other areas. As such, it cannot be overstated how important it is for employers to stay abreast of pertinent developments in NLRB law.

The NLRB's recent decisions raise new concerns for employers, including an increased likelihood of union attempts to organize small bargaining units and greater challenges in defending unfair labor practice charges. Employers should consider undertaking union organizing risk assessments and placing a greater emphasis on their union avoidance efforts to curtail organizing efforts in their workplaces.

Moreover, in the event employers find themselves facing unfair labor practice charges, they should ensure their investigation is documented in writing from start-to-finish, including the *Johnnie's Poultry* safeguards. Finally, in evaluating potential liability for any unfair labor practice charge, employers must consider both the expanded range of remedies available for workers and also the likelihood of more protracted litigation based on the new remedy.

If you have any questions about this Alert or the effect of the NLRB's recent decisions, please contact one of the authors or the attorney(s) in our firm with whom you are regularly in contact.

**Footnotes**

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[1] *See, e.g.*, *Macy's Inc.* , 361 NLRB No. 4 (2014) (determining sales employees in cosmetics and fragrance departments as appropriate bargaining unit).
[2] *See New York-New York, LLC v. NLRB*, 676 F.3d 193 (D.C. Cir. 2012).
[3] *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940) ("The Act is essentially remedial…[The Board's] authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.").
[4] Although the majority was careful to avoid characterizing the expanded remedy as "consequential damages," its use of the phrase "direct or foreseeable" makes the new remedy indistinguishable from a consequential damages remedy (i.e., damages from an indirect result of an event or incident).
[5] *See, e.g., Tschiggfrie Properties, Ltd. v. NLRB*, 896 F.3d 880 (8th Cir. 2018) (rejecting *Johnnie's Poultry* and citing cases in which the Second, Fifth, and Seventh Circuits have done so).

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