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RECENT DEVELOPMENTS IN TRADITIONAL LABOR LAW

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I. INTRODUCTION

With the 2008 election of President Barack Obama and strong Democratic majorities in both the House of Representatives and the Senate, Labor loudly trumpeted that it was poised to achieve significant legislative changes in labor law. Under the eight years of the Bush Administration, Labor viewed Washington as a hostile environment. During those years, Labor struggled to maintain the status quo and to prevent any major setbacks, either from Congress, the National Labor Relations Board (NLRB or "the Board"), or the Executive Branch. Upon President Obama's election, Labor sought to make up for lost time, primarily in Congress by pushing hard for the Employee Free Choice Act ("EFCA"). Due to other legislative priorities and a series of setbacks for Labor's agenda, however, Congress failed to produce any of the labor law reforms sought by Labor. Now, with the recent Republican victories in the 2010 mid-term elections, Labor must once again adjust downward its legislative expectations. Given the stalemate that Congress is likely to be, at least until after the 2012 elections, Labor and their supporters most likely will give up on EFCA, at least in the short term, and instead will turn more than ever to their friends in the Administration and elsewhere, both inside and outside the Beltway. The Obama-appointed National Labor Relations Board is now making significant progress in working through an extensive backlog of cases after being stalled for years by the lack of a quorum. Over the next year, the NLRB is expected to decide several important decisions in Labor's favor. In addition, Labor, now that it is starting to resolve some of its internal rivalries, likely will return to its traditional strategy of union organizing under traditional NLRB rules, but with the added leverage of corporate campaigns to assist their organizing efforts and advantageous decisions and possibly new regulations from the NLRB.

II. DEVELOPMENTS IN CONGRESS

A. EFCA: From Its Seeming Inevitability to Its Likely Demise

Since even before it was formally introduced in Congress, the Employee Free Choice Act, sometimes called the "Card Check Bill", prompted more debate over national labor policy than has occurred in many years. H.R. 1409, S. 560, 111th Cong. (2009).

What Labor sought in the way of reform, and what was proposed in the Employee Free Choice Act, is a tightly wrapped package that makes the organizing process easier for unions and more costly for employers by rewriting the National Labor Relations Act (NLRA or "the Act") in several significant ways. *First*, EFCA would authorize the use of a required card-check recognition procedure in situations where the union presents authorization cards signed by a majority of employees, thus obviating both the need for secret ballot elections and the need for labor unions to extract card check promises via corporate campaigns. *Second*, it stiffens employer, but not union, sanctions for labor law violations that occur during organizing campaigns and first contract negotiations. And *finally*, by mandating interest arbitration for first contracts, EFCA strips the fundamental right underlying collective bargaining that allows the parties to establish the terms of their own initial collective bargaining agreements, by giving one party the power to request arbitration where there is a failure to reach agreement within a short time period. In other words, EFCA makes it easier for a union to organize an employer's workforce; riskier, and likely more costly, for the employer to resist those efforts; and easier for a union, regardless of actual bargaining power, to obtain a contract that it will find acceptable.

EFCA proponents claim that reform is imperative to safeguard employee rights and fix a broken system. In reality, though, EFCA is not about employee choice. Rather, it is an effort to dismantle the key underpinnings of the NLRA in an attempt to generate greater reliance on unions and resuscitate declining union membership rosters. Unions plead for majority card check rules and increased penalties for alleged discrimination because they claim that employees suffer at the hands of employers as a result of Board elections. However, unions have a slightly higher rate of victory in Board elections—approximately 65%—than they did in 1965. *Compare NLRB Election Report; Six Months Summary – April 2010 through September 2010 and Cases Closed September 2010*, at 10, *available at* http://www.nlrb.gov/nlrb/shared_files/brochures/Election%20Reports/ER2010/ERSept2010.pdf (noting that unions won 64.8% of all elections involving new organizing) *with Thirtieth Annual Report of the National Labor Relations Board*, at 198 (1965), http://www.nlrb.gov/shared_Files/Annual_Reports/NLRB1965.pdf (noting that unions won 61.8% of elections); *see also* Statement of Peter J. Hurtgen, Senior Partner, Morgan Lewis & Bockius LLP, before the U.S. Senate, at 9 (Mar. 27, 2007), *available at* http://help.senate.gov/old_site/Hearings/2007_03_27_a/Hurtgen.pdf (noting that "unions' election win rate declined before rising back to the level where it is today"). This relatively constant success rate suggests that Labor's disappointment with election results likely has more to do with the waning desire of employees to be union members than with disenfranchisement or discrimination by employers – a theory the Board's own Chairman acknowledges. *See* Wilma B. Liebman, *Labor Law Inside Out*, 11 WorkingUSA: The Journal of Labor & Society 9 n.22 (2008) (quoting Orly Lobel, *Between Solidarity and Individualism: Collective Efforts for Social Reform in the Heterogeneous Workplace, in* DIVERSITY IN THE WORKFORCE, RESEARCH IN SOCIOLOGY OF WORK, 131, 132 (2004) ("In many ways, the weakening of the labor movement and the increasing tension between workers of different identities echoes a wider crisis – that of fragmentation and self-interest in the political process, in which interest groups struggle to achieve the most for the individuals they represent rather than debating substantive ideological differences of social justice and reform.")).

While EFCA's public debate focuses largely on the card check provision, the arbitration and damages amendments are equally—if not more—important and fully integrated parts of the proposed legislative changes. When those provisions are considered, it becomes clear that EFCA is about more than organizing or "free choice." It more severely punishes employers that, in the view of the NLRB or the union, fail to follow the new rules of the game. And most significantly, EFCA creates—for the first time—a timetable for first contract negotiation, and backs that timetable with the threat of a never-before-tested system of mandatory first contract arbitration, effectively abandoning the NLRA's longstanding fundamental tenet that, while a party must negotiate in good faith, it need not agree to any particular contractual provision, or make any specific concession. 29 U.S.C. § 158(d); *see, e.g., H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348-49 (1958). By putting a first contract in the hands of an arbitrator, EFCA would force the employer either to accept a contract it would not otherwise accept or to submit its business decisions to a yet-to-be-defined system of arbitration that, under a yet-to-be-determined standard, will produce a contract binding the parties for two years. Thus, EFCA would change not just organizing and elections,

but it also undermines the careful balance between labor and management that Congress, the Board, and the courts have spent decades creating.

Heading into the 111th Congress, EFCA seemed to be an inevitability—if not as proposed, at least in some compromise form. While many Congressional observers expected a compromise bill from one source or another, no bipartisan compromise was ever achieved. The imminent passage of EFCA was widely (and incorrectly) announced throughout 2009. For example, while speaking at the AFL-CIO's annual convention in September 2009, Senator Arlen Specter (D-PA) predicted that EFCA would be achieved by the end of 2009 and unveiled some details of an allegedly agreed-upon compromise that involved quick elections and "last best offer" arbitration. *See Specter Says Compromise Reached On EFCA, But AFL-CIO Says No Deal Yet*, 177 DAILY LAB. REP. (BNA) AA-1 (Sept. 16, 2009). Both Labor and employer groups quickly distanced themselves from Senator Specter's proposed compromise, and no forged compromise on EFCA, from any source, was introduced in Congress. The loss of a filibuster-proof majority in the Senate further delayed EFCA, while Congress focused on other initiatives, such as health care reform.

And, after the outcome of the November 2010 mid-term elections, it seems even less likely that Congress will be the source of meaningful labor reform given the Republican's control of the House and the decrease in the Senate's Democrat majority. While EFCA remains pending in the 111th Congress during its lame duck session, it seems improbable that the still Democratically controlled House and Senate would be able to make substantive progress on the bill before the Republican-controlled House is sworn in for the 112th Congress. It appears all but certain that Labor has missed its chance to obtain labor law reform from the 111th Congress. As a result, Labor, probably reluctantly, will likely turn away from Congress and focus its efforts in other fora.

B. Other Pending Traditional Labor Legislation

Though it is unlikely that Labor will achieve reforms before Congress in the near term, practitioners should remain aware of the currently pending legislation. If not passed before the end of the year, these bills are likely to be reintroduced in their current form, in a compromise form, or find their way into other bills as amendments.

1. The National Labor Relations Modernization Act

The National Labor Relations Modernization Act (H.R. 1355), introduced in March 2009, proposes various amendments to the National Labor Relations Act meant to accelerate the first contract bargaining process, increase penalties against employers for violations of the Act, require employers to inform unions of their organization opposition campaigns, and allow equal access to unions. First, the bill includes a provision similar to the arbitration provision contained in EFCA, with the exception that the contract imposed on the parties by an arbitrator would be binding for 18 months, rather than two years. Second, the bill proposes amending section 10(*l*) of the NLRA to require that charges of employer violations during organizing drives or initial contract bargaining be given the same preliminary investigation priority currently given to charges alleging violations of sections 8(b)(4)(A)-(C), 8(b)(7), or 8(e). The bill also increases both the backpay and civil penalty violations against employers. Finally, the bill proposes

adding a new subsection to section 9 that would (1) require an employer to inform a union of its intentions regarding organizational opposition communications within 30 days of the NLRB directing an election; (2) require the employer to provide the union the opportunity to hold an equal number of meetings and to engage in other communications in the same manner as the employer does; and (3) make it an unfair labor practice to fail to provide notice and equal access. Like other pieces of legislation, the prospects for this bill passing are dim.

2. The Secret Ballot Protection Act

In an attempt to pre-empt the card check provisions of the Employee Free Choice Act, Republicans, led by Representative John Kline (R-MN) in the House and Jim DeMint (R-SC) in the Senate, introduced the Secret Ballot Protection Act (H.R. 1176; S. 478) on February 25, 2009. The Act proposes amending the National Labor Relations Act to prohibit union recognition based on a card check and provide that a union may only be recognized by an employer following certification by the NLRB that the organization has won majority support in a secret ballot election conducted by the NLRB. Given Republicans' minority status in the Senate, it is difficult to see how the Secret Ballot Protection Act could be passed.

3. The RAISE Act

The RAISE Act (H.R. 2732; S. 1184), introduced by Senator David Vitter (R-LA) and Representative Tom McClintock (R-CA) on June 4, 2009, would amend the National Labor Relations Act to permit employers to pay individual employees who work under a collective bargaining agreement higher wages than those set forth in the labor contract. A joint statement from Vitter and McClintock explained that, while employers would still be required to pay the wage-and-benefit schedules negotiated under collective bargaining agreements, employers "could add bonuses for those workers who go the extra mile - combining the benefits of collective bargaining with the rewards of individual achievement." The bill specifically states that nothing in sections 8(a)(1) or 8(a)(5) of the NLRA, or any collective bargaining agreement renewed or entered after the date of the RAISE Act's enactment, "shall prohibit an employer from paying an employee in the unit greater wages, pay, or other compensation for, or by reason of, his or her services as an employee of such employer. . . ."

These bills give employees working under a collective bargaining agreement an opportunity to earn more pay, and gives employers the opportunity to offer incentives for and reward superior performance. However, these bills are opposed by Labor as they would create the potential for competition within units and thus may erode unit morale. If passed, employers would need to review and revise pay policies as well as any currently effective collective bargaining agreements, given that the proposed legislation does not alter any agreement already in effect.

4. The Labor Relations First Contract Negotiations Act of 2009

Representative Green (D-TX) introduced the Labor Relations First Contract Negotiations Act of 2009 (H.R. 243) on January 7, 2009. Prior to the reintroduction of the Employee Free Choice Act, this bill reintroduced as a stand-alone bill the first contract negotiations portions of the previously introduced version of EFCA. Specifically, this stand-alone bill would amend the

National Labor Relations Act to add provisions requiring that, if a collective bargaining agreement is not entered within 60 days of recognition, the parties must mediate the outstanding issues and, if no agreement is reached after an additional 30 days, the disputes are referred to the Federal Mediation and Conciliation Service for binding arbitration.

5. The Teaching and Research Assistant Collective Bargaining Rights Act

The Teaching and Research Assistant Collective Bargaining Rights Act (H.R. 1461; S. 813), introduced in spring 2009, seeks to codify that students working for colleges and universities may be organized as employees under the National Labor Relations Act, an issue that the National Labor Relations Board has addressed in recent years. *See Brown Univ.*, 342 N.L.R.B. 483 (2004); *N.Y. Univ.*, 332 N.L.R.B. 1205 (2000); *see also N.Y. Univ.*, 356 N.L.R.B. No. 7 (Oct. 25, 2010). The proposed legislation would settle the issue by adding an amendment to section 2(3) of the NLRA clarifying that "[t]he term 'employee' includes a student enrolled at an institution of high education (as defined in . . . (20 U.S.C. §§ 1001, 1002), other than an institution of a State or political subdivision) who is performing work for remuneration at the direction of the institution, whether or not the work relates to the student's course of study."

6. FAA Reauthorization

Beyond coverage issues from the definition of independents contractors decided in *FedEx Home Delivery*, *see* Section VI.D, *infra*, Federal Express—encompassing overnight deliveries and the associated network of airplanes and trucks—faced coverage issues from Congress as well. *See* FAA Reauthorization Act of 2009, H.R. 915, 111th Cong. § 806 (2009). On May 21, 2009 the House passed H.R. 915, reauthorizing the Federal Aviation Administration for five years, and including several Labor-backed provisions affecting airlines and FAA employees. Perhaps most significantly, the bill removes language defining "express carrier" from the Railway Labor Act ("RLA"), which governs labor relations in the railway and aviation industries, and generally makes organizing more difficult than under the NLRA. As a result of the language change, the delivery drivers at Federal Express, currently covered by the RLA, would instead be governed by the NLRA—a move supported by the International Brotherhood of Teamsters (which represents most workers at FedEx's primary competitor, UPS) and other unions. However, in late September 2009, the Senate Commerce, Science, and Transportation Committee approved a version of the bill that did not include the clause affecting Federal Express. In addition, the primary proponent of this bill in the House was defeated in his November 2010 re-election bid. The new Republican head of the committee has stated that he will drop the FedEx amendment from the pending legislation.

III. A Reconstituted and Re-Energized National Labor Relations Board

A. Finally, a Return to a Full Board

For well over two years, the five member NLRB operated with only two Members, Chairman Wilma Liebman (D) and Member Peter Schaumber (R). With the March 2010 recess appointments of Members Craig Becker (D) and Mark Pearce (D), as well as the June 2010 confirmation of Brian Hayes (R), the Board finally returned to a full complement of five sitting Members for the first time since December 2007. (Members Pearce and Hayes, but not Member

Becker, have now been confirmed by the Senate.) The full-board distinction was short-lived, however, as Member Schaumber's second term expired on August 27, 2010, leaving the Board with only four Members.

Current Chairman Liebman is in her third term on the Board, first serving from 1997 through 2002, when she was reappointed by President George W. Bush to a second term expiring in 2006, and again to her current term, which expires on August 27, 2011. For the first time in years, Chairman Liebman finds herself part of a Board with a Democrat-appointed majority.

Mr. Pearce comes to the Board from a private practice of union-side labor and employment law. Mr. Pearce also served as a Board Member on the New York State Industrial Board of Appeals and taught classes at Cornell University's School of Industrial Labor Relations Extension.

Mr. Becker, whose recess appointment currently would expire at the end of 2011, has not yet been confirmed by the Senate. Prior to joining the Board, Mr. Becker was the Associate General Counsel to the SEIU and also worked for the AFL-CIO. Mr. Becker has taught at the law schools of UCLA, the University of Chicago, and Georgetown University. In his academic work, Mr. Becker wrote various articles that gave Republican senators concern, eventually leading Senator John McCain to place a hold on the nomination, preventing Mr. Becker's confirmation. *See President Again Nominates SEIU's Becker to Serve on National Labor Relations Board*, 13 DAILY LAB. REP. (BNA) A-17 (Jan. 22, 2010). The Senate held hearings on Mr. Becker's nomination—a rare occurrence for NLRB nominees—and during those hearings Mr. Becker described the Employee Free Choice Act's card check provisions, *see* Section II.A, *supra*, merely as an "alternate route" to board certification of representatives, rather than the current requirement of a secret ballot election. He also described his statements in a 1993 law review article that "employers should be stripped of any legally cognizable interest in their employees' election of representatives" as part of an article that was "intended to be provocative" and that "employers clearly have the right to express their views" on union representation. *HELP Committee Questions Becker Over Past Statements in Articles*¸ 21 DAILY LAB. REP. (BNA) A-15 (Feb. 3, 2010). The Senate fell eight votes short of obtaining cloture on Mr. Becker's nomination and, as a result, he remains unconfirmed.

The Board's third new Member is Republican appointee Brian Hayes, who served as the Republican Labor Policy Director for the U.S. Senate Committee on Health, Education, Labor and Pensions before joining the Board. Confirmed on June 22, 2010, this is a return to the Board for Member Hayes, who previously worked as a clerk for the NLRB's Chief Administrative Law Judge before acting as counsel to the Board Chairman.

In addition to new Members Becker, Hayes, and Pearce, the Board also has a new acting General Counsel. Lafe Solomon took on the role of Acting General Counsel in June 2010 after former General Counsel Ronald Meisburg stepped down on June 20th. Prior to earning his law degree from Tulane University, Mr. Solomon worked for the NLRB as a field examiner, eventually returning to the Board in its Appellate Court Branch. During his career, Mr. Solomon has worked for ten different Board Members, including Chairman Liebman. As discussed elsewhere, *infra* at Section III.C.1, one potential development from the Board is the General Counsel's increased use of section 10(j) relief—an initiative Mr. Solomon continues to advance.

See Expedited Process Set Out in Memo Could Be Expanded, Solomon Suggests, 197 DAILY LAB. REP. (BNA) A-2 (Oct. 13, 2010).

B. *New Process Steel* and the Invalidity of Two-Member Opinions

1. The *New Process Steel* Decision

The Board's return to a four-Member Board follows a long period when opinions were being issued by two-Member panels. As the terms of Members began expiring in late 2007, the Board temporarily delegated its powers to a three-Member panel of Members Liebman, Schaumber, and Kirsanow. And, when Member Kirsanow's term expired, the Board operated with Chairman Liebman and Member Schaumber issuing opinions as a two-Member quorum of the three-Member panel.

By statute, the Board consists of five Members appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 153(a). Each Member serves for a five-year term. *Id.* Section 3(b) of the Act describes the Board's ability to delegate powers to a group of three Members and then to further delegate powers to a two-Member group of the three-Member group. *See* 29 U.S.C. § 153(b). The statute reads:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

Id. When the Board began issuing two-Member Orders, the validity of those orders was challenged in six circuits, with five finding the delegation valid and only the D.C. Circuit—where an appeal from any order of the Board may be filed—holding the delegation invalid. *Compare Ne. Land Servs., Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009) (delegation valid); *New Process Steel, L.P.*, 564 F.3d 840 (7th Cir. 2009) (accord); *Narricot Indus., L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009) (accord); *Snell Island SNF LLC, v. NLRB*, 568 F.3d 410 (2d Cir. 2009) (accord); *Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009) (accord); *with Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009) (delegation invalid).

In a 5-4 decision, the Supreme Court agreed with the D.C. Circuit and held invalid all two-Member decisions and orders. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (June 17, 2010). Writing for the Court, Justice Stevens held that section 3(b) required that the delegee group maintain a membership of at least three Members at all times in order for the delegation to remain valid. *Id.* at 2640-41. The majority rejected the Government's argument that Congress had intended to authorize two Members to act alone, noting that if Congress's intent was to allow two Members to act alone, it could have retained the NLRA's original language allowing this. *Id.* at 2641. The Court also rejected the Government's argument that the so-called vacancy clause allows for Members of the delegee group to continue to act despite a vacancy in the

delegee group. Because Congress used the word "Board" in the vacancy clause but "group" elsewhere in section 3(b), the Court refused to read "Board" and "group" to mean the same thing, particularly when the remainder of the clause stressed that "three members of the Board shall, *at all times*, constitute a quorum of the Board. . . ." *Id.* at 2640 (emphasis added). Thus, when the Board lacks a quorum, which is "at all times" at least three Members, the Board may not act.

Justice Stevens and the majority stated that they "were not insensitive to the Board's understandable desire to keep its doors open despite vacancies." *Id.* at 2644-45. They further noted that Congress might have a similar desire and, if so, Congress could amend section 3(b). *Id.* at 2645. But, section 3(b) as written did not authorize the Board to operate with only two sitting Members. As a result, the case was reversed and remanded for further proceedings. *Id.*

2. The Board's Response

While the Court's opinion in *New Process Steel* was straightforward, its immediate impact on the Board was anything but clear. At the time of the Court's opinion there were approximately 90 cases pending in the federal circuit courts and six more cases before the Supreme Court, all of which challenged the authority of two-Member opinions. The Board requested remand of all of those decisions and agreed to have each matter reconsidered by Chairman Liebman, Member Schaumber, and a randomly assigned third Member. *See NLRB OKs General Counsel's Litigation Steps, Certain Actions Taken by Two-Member Board*, 130 DAILY LAB. REP. (BNA) A-2 (July 8, 2010).

The Board's commitment to reconsider all open cases, undoubtedly, has been and likely will be a time consuming endeavor. This assumes, of course, that the newly participating Member actually considers the matter and does not simply ratify the act of the two-Member Board. The NLRB's website, www.nlrb.gov, contains a link allowing the public to track the progress of the two-Member decisions under consideration. Of the 595 two-Member decisions, 337 of them were closed, meaning that the original Board decision resulted in some conclusion, such as settlement, withdrawal, or full compliance. *See* www.nlrb.gov, Two-Member Cases (last visited Nov. 10, 2010). Another 102 cases are either in enforcement or compliance proceedings stemming from the original decisions, while 29 cases have returned to the Board via remand or some other return or refiling. *Id.* Eighty-four cases have had new decisions issued, and two cases have "other" or "unknown" status. *Id.* To date, it appears that the vast majority of the 84 "new" decisions have incorporated the prior decision by reference.[1]

C. The Board as an Alternative to EFCA – Injunctions, Remedies, Organizing Decisions, and Rulemaking

Labor's inability to push EFCA through Congress raises the question of what other forums might be willing participants in the reform Labor desires. Of course, the most obvious alternative forum for change in labor law is the Board. As former SEIU Secretary-Treasurer Anna Burger wrote in late April, the union should "use smart strategies to push the labor-friendly majority on the NLRB to level the playing field and make it easier to organize through regulation

[1] While the Board's website indicates that 595 decisions were issued during the relevant period, it only provides data for 554 of these cases.

and reconciliation to make quick elections and first contract arbitration the law of the land." *See* Apr. 18, 2010 Letter from Anna Burger to SEIU International Executive Board, *available at* http://www.politico.com/static/PPM136_100421_anna_burger.html (last visited Nov. 10, 2010).

The Board could achieve certain of EFCA's goals through four primary tools: increasing the number of cases in which injunctions are sought; expanding the remedies available to unions in organizing and first contract bargaining cases; modifying prior Board decisions relating to the recognition and organizing process; and modify its policies and procedures through rulemaking or otherwise. (Board decisions on other topics are addressed in Section V, *infra*.)

1. Increased Use of Section 10(j) Injunctions

While increasing the number of injunctions sought by the Board would significantly increase the agency's litigation burden, it appears that the agency is headed in that direction. On September 30, 2010, Acting General Counsel Solomon issued a memorandum in which he stated that "[a]n important priority during [his] time as Acting General Counsel will be to ensure that effective remedies are achieved as quickly as possible when employees are unlawfully discharged or victims of other serious unfair labor practices because of union organizing in their workplace." *See Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns*, Gen. Couns. Mem. 10-07 (Sept. 30, 2010). These cases, which AGC Solomon refers to as "nip-in-the-bud" cases, should have a 10(j) determination made within 49 days of a charge being filed. *Id.* It would appear that AGC Solomon's memorandum is having an effect; in the seven weeks between September 23, 2010 and Nov. 10, 2010, the Board sought 10(j) relief in eleven cases. As a comparison, the Board authorized only 112 such proceedings in the over four years from January 4, 2006 through April 30, 2010. *See End-of-Term Report on Utilization of Section 10(j) Injunction Proceedings January 4, 2006 through April 30, 2010*, Gen. Couns. Mem. 10-05(A1) (June 15, 2010).

2. Expanding the Remedies Used in Organizing and Refusal to Bargain Cases

A second method for the Board to achieve EFCA's objectives is to expand the remedies it awards against parties who violate the Act. Of course, the Board could not award monetary penalties in excess of those permitted by the Act, so the increased monetary penalties of EFCA would likely not be achieved. However, the Board could increase its use of affirmative bargaining orders and, in cases of first contract negotiation, hold that the certification bar does not begin to run until the parties begin negotiating in good faith—a remedy the General Counsel recently sought and obtained in *Ampersand Publishing*, Case No. 31-CA-28589, 2010 WL 3285398 at *147-48 (N.L.R.B. Div. of Judges, May 28, 2010), discussed *infra*. *See* Section V.E.1.d.

Further, the Board could begin requiring that employers grant increased access to the employer's property. While the Board may only mandate equal access where an unfair labor practice has "truly diminished" a union's ability to reach the employees, *see NLRB v. United Steelworkers*, 357 U.S. 357, 362-63 (1958), the current Board may be more willing to determine that such a "true diminishing" occurred. And, while compelled speech and private property concerns remain, the General Counsel has already sought and obtained the "special remedy" of

requiring a high-ranking official to either read a Board order himself or allow a Board agent to come on premises and read the order. *See Ampersand Publishing*, 2010 WL 3285398 at *153. Additionally, the Board may revisit its recent holding that employers are not required to provide work e-mail addresses under *Excelsior Underwear*, 156 N.L.R.B. 1236 (1966), even when the employees are not reachable at home addresses. *See Trustees of Columbia Univ.*, 350 N.L.R.B. 574 (2007). By requiring employers to provide work e-mail addresses, the union would have instant and constant access to the entire work force.

Additionally, the Board may reconsider the employer's right to participate in the organizing process, including questioning whether elections should be held on the employer's premises. Prior to joining the Board, Member Becker wrote that:

> The union election should not be thought of as a contest between employer and union. . . . . Instead, the union election should be conceptualized in terms of the category of 'self-organization,' the central right the Wagener Act guaranteed to labor. . . . Such a reconception entails the corollary that employers should neither have legal standing as parties to the representation proceeding nor have rights tantamount to those of candidates in union elections.

Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 585-86 (1993). While Becker also stated that employers have no right to be heard in representation cases or in first contract unfair labor practice cases, "even though Board rulings might indirectly affect their duty to bargain." *Id.* at 587. But finally, then-Professor Becker opined that "[a]ll elections should take place on neutral ground." *Id.* at 592.

Under current Board practice, the Board will only order that an election be held offsite where the violations of the Act are sufficiently egregious and pervasive. *See Fieldcrest Cannon, Inc.*, 318 N.L.R.B. 470, 474 (1995); *see also* NLRB Casehandling Manual Part II § 11302.2, *available at* http://www.nlrb.gov/publications/manuals/index.aspx (last visited Nov. 10, 2010). However, given Member Becker's views as expressed in his 1993 article, as well as similar views expressed in Jonathan P. Hiatt & Craig Becker, *Drift & Division on the Clinton NLRB*, 16 LAB. LAW 103 (2000), the Board may begin to restrict employer participation in election and representation cases or, at a minimum, increase the frequency with which elections are held at neutral sites.

3. Revisiting Board Decisions Regarding Recognition and Organizing

Another way in which the Board could achieve some of the objectives of EFCA is by revisiting certain of its prior decisions regarding recognition and organizing issues. In fact, the Board has already indicated that it will review the Bush-Board's decision that restricted voluntary recognition of unions by employers.

a. *Dana I* – Notice of Voluntary Recognition and the Recognition Bar Doctrine

The Board recently solicited amicus briefs to "consider the actual experience of employees, unions, and employers under *Dana Corp.*, [351 N.L.R.B. 434 (2007)]." *See Lamons*

Gasket Co., 355 N.L.R.B. No. 157 (Aug. 27, 2010). The Board's invitation to file briefing, *available at* http://www.nlrb.gov/About_Us/news_room/Notice_for_Briefs/index.aspx (last visited Nov. 10, 2010), noted that "*Dana* represented a major departure from prior law and practice" and, after three years and over 1,000 voluntary recognition notices, "the Board is now in a position to evaluate whether its decision in *Dana* and the procedures developed to implement that decision have furthered the principles and policies underlying the Act." *Id.* at 2. The Board asks for factual descriptions of experiences and empirical data on the following six issues:

> (1) What has been the experience under *Dana* and what have other parties to voluntary recognition agreements experienced under *Dana*? (2) In what ways has the application of *Dana* furthered or hindered employees' choice of whether to be represented? (3) In what ways has the application of *Dana* destabilized or furthered collective bargaining? (4) What is the appropriate scope of application of the rule announced in *Dana*, specifically, should the rule apply in situations governed by the Board's decision regarding after-acquired clauses in *Kroger Co.*, 219 NLRB 388 (1975), or in mergers such as the one presented in *Green-Wood Cemetery*, 280 NLRB 1359 (1986)? (5) Under what circumstances should substantial compliance be sufficient to satisfy the notice-posting requirements established in *Dana*? (6) If the Board modifies or overrules *Dana*, should it do so retroactively or prospectively only?

Id. at 3. Briefs were due to be submitted by November 1, 2010.

In addressing what the Board hopes to learn from the briefing, Chairman Liebman cited that while there were 1,111 requests for *Dana* notices, only 54 of those requests resulted in an election and, of those 54 elections, the union was only rejected 15 times. Thus, "[i]n 99 percent of the total cases . . . it is arguable that *Dana* did not serve any clear purpose. As for the 1 percent remainder, it is important to remember that the pre-*Dana* regime would have kept the (unwanted) union in place only temporarily." 355 N.L.R.B. No. 157 at 3 n.5. In dissent, Members Schaumber and Hayes objected to the "unprecedented invitation for parties and amici to brief the labor-management experience under *Dana*," which they describe as "but a prelude to what will most likely result in the overruling of *Dana*, in derogation of employees' Section 7 free choice rights." *Id.* at 3. While the Board's outcome is not certain, it is reasonable to conclude, as the dissent does, that Chairman Liebman and Members Becker and Pearce will at least narrow, if not overturn, the Board's holding in *Dana*.

b. *Dana II* – Negotiating Principles of Organization and Initial Collective Bargaining

Beyond reconsideration of *Dana I*, the Board could also clarify the legal landscape related to union organizing in the currently pending *Dana Corp.*, Nos. 7-CA-46965, 7-CB-14803, 7-CA-47078, 7-CB-14119, 7-CA-47079, 7-CB-14120 ("*Dana II*"). *Dana II* involves the right of an employer and a union to negotiate the principles by which a union may seek to organize the employer's employees should the union choose to do so and to negotiate the general principles that would guide collective bargaining in the event that bargaining authority is obtained from an

uncoerced majority of these employees. The administrative law judge that heard *Dana II* determined that the employer and union did not violate the Act by agreeing that, following proof of majority status, certain principles would inform future bargaining. *Dana Corp.*, 7-CA-46965, 2005 WL 857114 (N.L.R.B. A.L.J. Apr. 11, 2005). These principles included, for example, the union's willingness to support co-payments for health care and other similar items that the General Counsel alleged amounted to pre-recognition negotiation of terms and conditions of employment. *Id.* To support his argument, the General Counsel relied principally on *Majestic Weaving Co.*, 147 N.L.R.B. 859 (1964), *op. supplemented*, 149 N.L.R.B. 1523 (1964), *enforcement denied on other grounds*, 355 F.2d 854 (2d Cir. 1966), where recognition preceded majority support and the parties executed a completed collective bargaining agreement in an effort to give the appearance of majority support—a very different case than *Dana II*.

The reality of union organizing in 2010 is much different than it was at the time of *Majestic Weaving* in 1964—the top-down or corporate campaign was virtually unheard of at that time. Given the increasing use of the corporate campaign and card check and neutrality agreements, the kind of agreements that are at issue in *Dana II* and those prohibited by *Majestic Weaving* have the potential to facilitate relationships between employers and unions, without interfering with employee rights, so long as two conditions are met. First, of course, any framework must be contingent (as it was in *Dana II*), upon proof that an uncoerced majority of employees wish to be represented by the union. And second, employees should be notified of the terms negotiated within the framework. Indeed, this would likely assist employees in making an informed choice about unionization, as they could do so with relatively accurate information about the terms that the union may be able to achieve in bargaining, rather than simply promises of the sort that unions are now permitted to offer when organizing a workplace.

It is likely that the Board will recognize these realities and affirm the ALJ decision in *Dana II*. By doing so, it would provide both employers and unions a way to reach agreements that will inform employees of what they can expect if they choose to be represented. Employers would then be allowed to condition neutrality/card check agreements on reaching understandings on what will be negotiated, which may make employers more receptive to such agreements. Overall, such a system would give unions broader ability to organize an employer's employees, employers more certainty regarding what would happen if employees selected a union representative, and would give employees more information from which to decide the representation question. Finally, and as importantly, it would streamline the always difficult first contract negotiation process, and thus lead to quicker contracts. Of course, if EFCA were to pass at some point in the future, the need for a union to enter into a neutrality agreement—let alone a *Dana II* agreement—would disappear, given that the union could make its promises and then, if the employer does not yield, put those demands before an arbitrator in mandatory interest arbitration. But the Board in *Dana II* has an opportunity to approve a system with the potential to benefit all stakeholders: employees, unions, and employers.

4. Policy Changes and Rulemaking – The Board's Return from Administrative Exile[2]

A significant potential development for Labor is the Board's potential decision to modify its internal procedures on election issues or even to engage in rulemaking. While the Board has the statutory authority to engage in rulemaking, *see* 29 U.S.C. § 156, it has rarely done so. *See* Fisk & Malamud, *supra* at 2016. However, there is reason to expect at least a slight increase in rulemaking, as Chairman Liebman identified the employment status of graduate assistants as one issue that might be suited for rulemaking. *See Radical Policy Changes Not Expected At Reconstituted Board, Liebman Says*, 69 DAILY LAB. REP. (BNA) B-1 (Apr. 13, 2010). She went on to note, however, that "comprehensive rulemaking would be an enormous undertaking." *Id.* Nonetheless, it appears that the Board is increasing its administrative efforts in the following key areas.

a. *Electronic Voting*

On June 9, 2010, the Board issued a solicitation, No. RFI-NLRB-01, "seeking industry solutions regarding the capacity, availability, methodology and interest of industry sources for procuring and implementing secure electronic voting services both for remote and on-site elections." *See* Solicitation Number RFI-NLRB-01, available at https://www.fbo.gov/spg/NLRB/DA/OPFB/RFI-NLRB-01/listing.html (last visited Nov. 10, 2010). The request indicated that "[i]f the NLRB decides to proceed, it plans to award a fixed price or fixed unit price contract with a base year and four option year terms. . . . It is noted that the NLRB prefers to execute *pilot programs prior to full implementation.*" *Id.* (emphasis added). Chairman Liebman indicated that the request was "exploratory and informational" and that speculation as to how the voting might occur was premature. *See* Maher, *Labor Board Explores Electronic Voting*, Wall St. J. (June 15, 2010), available at http://online.wsj.com/article/SB10001424052748703685404575306992906763792.html (last visited Nov. 10, 2010). Nonetheless, Chairman Liebman did point to the National Mediation Board (NMB), which uses electronic voting exclusively. *Id.*

Electronic voting would achieve the same objectives that the Board might accomplish by ordering neutral site elections as advocated by Member Becker—indeed, his 1993 article Becker advocated for an increased use in mail balloting. *See* Becker, *Democracy in the Workplace*, *supra* at 592 n.473. Further, electronic balloting could lead to quicker elections and, in turn, decrease the amount of time the employer has to have its voice heard on representation issues. Thus, through rulemaking, the Board could achieve EFCA's goal of accelerating the election timeline.

b. *Accelerating Election Timelines*

Of course, electronic voting is not the only way the Board could accelerate the election timeline. While electronic voting may accelerate the election, the Board could guarantee a quicker election by changing its internal procedures to shorten the time frame in which an

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[2] *See* Fisk & Malamud, *The NLRB in Administrative Exile: Problems With Its Structures and Function and Suggestions for Reform*, 58 DUKE L. J. 2013 (2009).

election could occur. For instance, the NLRB's Casehandling Manual requires that a Regional Determination must be made within "a very few days" of receipt of the petition and that a hearing must be "set [for] an early date . . . consistent with the Agency goals of expeditious processing." NLRB Casehandling Manual §§ 11080, *et seq.* By modifying its own internal protocols to set concrete dates for these events, the Board could accelerate the timelines for elections. The Board could also make similar revisions to its rules and regulations regarding elections. *See NLRB Rules & Regulations*, §§ 101.17, *et seq.*, available at http://www.nlrb.gov/publications/rules_and_regulations.aspx (last visited Nov. 10, 2010).

The Board may also attempt to accelerate elections by reconsidering what must occur before an election takes place. Currently, prior to an election, an employer may raise objections to voter eligibility by attempting to exclude part-time employees, independent contractors, low-level supervisors, and others, from the unit and thus from the election. One potential for rulemaking would be to prohibit such hearings until after the election has occurred and allowing employees in question to cast provisional ballots. Then, after the election, the employer and union could litigate their differences. The Board could likewise prohibit an unfair labor practice from blocking an election, instead holding the election and then resolving the alleged violation in post-election proceedings.

c. *Members-Only Bargaining*

In June 2010, a group of approximately fifty labor law professors asked the Board to engage in rulemaking allowing for members-only bargaining. Specifically, the professors asked the Board to accept rulemaking petitions filed by various unions in 2007 and 2008. The 2007 petition, filed by the United Steelworkers and other unions, *see In the Matter of Rulemaking Regarding Members-Only Minority-Union Collective Bargaining*, available at http://www.nlrb.gov/nlrb/about/foia/documents/PetitionRequestingRulemaking.pdf (last visited Nov. 10, 2010), asked the Board to adopt a rule that:

> Pursuant to Sections 7, 8(a)(1), and 8(a)(5) of the Act, in workplaces where employees are not currently represented by a certified or recognized Section 9(a) majority/exclusive collective-bargaining representative in an appropriate bargaining unit, the employer, upon request, has a duty to bargain collectively with a labor organization that represents less than an employee-majority with regard to the employees who are its members, but not for any other employees.

Id. at 6. The petition claimed that, while the Act requires majority support for exclusive bargaining representation, "as unequivocal legislative history demonstrates, the drafters of the Act were careful to protect the preliminary stages of collective bargaining—i.e., less-than-majority bargaining—for such bargaining often served as a steppingstone on the path to majority-based exclusivity bargaining." *Id.* at 10 (footnotes omitted). Likewise, the professors supporting the petition noted that "[m]inority-union bargaining will allow unions to grow in the natural way that most associations grow—by starting small and growing larger with experience and achievement." *See Forty-Six Labor Law Professors Urge NLRB To Issue Rule On Members-Only Bargaining*, 113 DAILY LAB. REP. (BNA) A-1 (June 15, 2010).

Labor, unsuccessful in their Congressional efforts, would clearly like to find a method for gaining access to non-unionized environments. As the Steelworkers' Petition makes clear, members-only bargaining would serve as such a device. However, it is unclear whether the Board would be willing to take on such a major issue. Using rulemaking to approve members-only bargaining would be an aggressive way to announce that the Board is now comfortable using its section 6 authority, and, as Chairman Liebman has stated, "radical" changes are unlikely to occur. *See* 69 DAILY LAB. REP. (BNA) B-1.

5. The Limits of EFCA via the NLRB – Contracts Imposed Through Mandatory Arbitration

Whether through the increased use of injunctions, revising the remedies sought, revisiting prior decisions, changing its protocols, or engaging in rulemaking, the Board has the ability to effectuate much of what Labor seeks, but has not gained, from Congress. However, Labor will not be able to achieve EFCA in its entirety from the Board; specifically, it appears that the Board has no method for compelling mandatory first contract arbitration.

EFCA's provisions on mandatory first contract arbitration are the least developed and arguably the most potent provisions. In EFCA's brief section on interest arbitration, unrealistic timetables are imposed on the completion of first contract negotiations, which have their own unique circumstances, by providing for the Federal Mediation and Conciliation Service to become involved after only 90 days of bargaining. If 30 days of mediation does not produce a contract, "the Services *shall* refer the dispute to an arbitration board [which] shall render a decision *settling the dispute* [that] shall be binding upon the parties for a period of 2 years." While the provision allows for parties to agree to extensions of time, or amend the implemented contract, management representatives reasonably conclude that such a system impinges on the freedom of contract and right to refuse to agree, after good faith bargaining. *See* Kramer, Holmes, & Medsker, *Two Sentence, 104 Words: Congress's Folly in First Contract Arbitration and The Future of Free Collective Bargaining*, in Proceedings of New York University 62nd Annual Conference on Labor (Eigen ed.) (Kluwer Law International) (publication forthcoming).

Absent a legislative change, the Board should not be able to compel the parties to arbitrate given the well-settled law that arbitration is solely a product of contract and agreement between the parties. *See United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). Nonetheless, the Board will likely continue to protect the bargaining relationship in other ways. For instance, as it seems ready to do, the Board may reverse *Dana I* and deny employees the ability to remove a voluntarily-recognized union prior to negotiations. Or, the Board may become less willing to find that parties were at impasse when implementation occurs following bargaining for first contracts. Finally, the Board will almost certainly continue, and likely increase, the initiative began by General Counsel Meisburg to submit first contract bargaining cases to the Division of Advice and make recommendations concerning the appropriateness of section 10(j) proceedings in those cases. *See Submission of First Contract Bargaining Cases to the Division of Advice*, Gen. Couns. Mem. 08-09 (July 1, 2008); *First Contract Bargaining Cases*, Gen. Couns. Mem. 06-05 (Apr. 19, 2006).

IV. Developments in Case Law from the Courts

A. Arbitration

The 2010 Supreme Court issued two major opinions on arbitrability, including clarifying when a court or an arbitrator must decide issues of arbitrability as well as whether an arbitrator can imply class arbitrability when a clause is silent. In addition, the ongoing dispute regarding whether successor employers are required to arbitrate under agreements between the predecessor employer and unions continues to receive the attention of federal courts.

1. *Granite Rock Co. v. International Brotherhood of Teamsters*

In *Granite Rock Co. v. International Brotherhood of Teamsters*, 130 S. Ct. 2847 (2010), the Court held that a dispute over the ratification date of a CBA—and thus whether a grievance under the CBA was arbitrable—must be decided by a court, rather than an arbitrator. *Granite Rock* involves the circumstances surrounding the renegotiation and ratification of a collective bargaining agreement between Granite Rock Company ("Granite Rock") and the Local 287 of the International Brotherhood of Teamsters. *See Granite Rock Co. v. Int'l Bhd. of Teamsters, Local 287*, 546 F.3d 1169, 1171-72 (9th Cir. 2008). Prior to the April 30, 2004 expiration of their collective bargaining, the parties began negotiations for a new contract but, in June 2004, with no agreement reached, Local 287 members went on strike. *Id.* at 1171. On July 2, 2004, the parties eventually reached a tentative four-year agreement containing a broad arbitration clause requiring the arbitration of "'[a]ll disputes arising under this agreement.'" *Id.* Local 287 members allegedly ratified this agreement, which also contained a "no strike" clause, on July 2, 2004. *Id.* at 1172. Nonetheless, on July 5, 2004, an administrative assistant to the General President of the International Union ("IBT") called Local 287 workers and instructed them not to return to work on July 6, 2004. *Id.* The members complied, and the administrative assistant "played an active leadership role" in the ensuing strike, including offering both encouragement and financial support, in addition to the International Union providing benefits for workers as long as they did not return to work. *Id.*

Granite Rock sued Local 287 and the IBT in federal district court under section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), alleging that Local 287 breached its July 2, 2004 contract with Granite Rock and that IBT engaged in tortious interference with that contract. *Id.* The District Court granted IBT's Rule 12(b)(6) motion to dismiss for failure to state a claim, but denied Local 287's motion to compel arbitration of the entire dispute under the broad arbitration clause included in the July 2, 2004 agreement. *Id.* The Ninth Circuit affirmed the dismissal of IBT but reversed the District Court on the arbitration issue and remanded with instructions to compel arbitration. *Id.* at 1178-79. As to the dismissal of IBT, the Court concluded that "the district court was correct to dismiss Granite Rock's claim against IBT because a claim for tortious interference cannot be said to 'arise under' the new CBA between Granite Rock and Local 287," as required for a claim under section 301(a). *Id.* at 1173. The Supreme Court unanimously affirmed that there is no cause of action for tortious interference under section 301(a). 130 S. Ct. at 2863-66.

Writing for the seven-Justice majority on the arbitration question, Justice Thomas "reemphasize[d]" that the proper framework in determining arbitrability was that "a court may

order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*." *Id.* at 2856. In answering that question, "the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce." *Id.* Such issues for the court include the scope of the arbitration clause and its enforceability, when the clause does not commit those issues to an arbitrator, and "always include whether the clause was agreed to, and may include when that agreement was formed." *Id.*

Based on this precedent, the Court rejected the argument that the District Court erred when it determined the ratification date of the agreement as part of its inquiry into arbitrability. *Id.* at 2856-2858. Though agreeing with the Local union that there is a presumption in favor of arbitrability, that principle "cannot be divorced from the first principle that underscores all of [the Court's] arbitration decisions: Arbitration is strictly a matter of consent." *Id.* at 2857 (internal quotation omitted). Justice Thomas concluded that "courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor*… its enforceability or applicability to the dispute is in issue." *Id.* at 2857-58.

Once an agreement is reached, the court's duty then becomes to determine whether the agreement covers that particular matter. *Id.* at 2858. In discharging this duty, the court should "(1) appl[y] the presumption of arbitrability only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand; and (2) adher[e] to the presumption and orde[r] arbitration only where the presumption is not rebutted." *Id.* at 2858-59. Because where, as here, "the date on which an agreement was ratified determines the date the agreement was formed, and thus determines whether the agreement's provisions were enforceable during the period relevant to the parties' dispute," the court did not err in deciding the ratification-date dispute. *Id.* at 2860.

2. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), the Supreme Court held that an arbitrator erred when the panel held that class arbitration of claims was permitted under an arbitration clause that was admittedly silent on the issue. Writing for the Court, Justice Alito stated that the arbitration panel, "[r]ather than inquiring whether the FAA, maritime law, or New York law contains a 'default rule' under which an arbitration clause is construed as allowing class arbitration in the absence of express consent . . . proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation." *Id.* at 1768-69. Because the panel imposed its own policy choice, it exceeded its powers under § 10(b) of the FAA. *Id.* at 1770.

Rather than remanding for rehearing, the Court answered the question at issue, finding that "there can be only one possible outcome." *Id.* Justice Alito summarized *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), which produced no majority opinion but a plurality that found that the arbitrator, rather than a court, should decide whether the contracts were "silent" on the issue of class arbitration. *See* 130 S. Ct. at 1771. However, the Court noted, *Bazzle* did not address the rule to be applied in deciding whether class arbitration is permitted. *Id.* at 1772. Justice Alito summarized the arbitral tenets that arbitration "is a matter of consent, not coercion;" that arbitrators must give effect to the parties' rights and expectations; and that parties

are free to choose with whom they arbitrate. *Id.* at 1773-74. From those precedents, the Court concluded that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775. Where, as in this case, the agreement was silent, there has been no agreement and class arbitration may not be compelled. *Id.*

3. Obligation to Arbitrate and Successorship

Last year, the Second Circuit issued a potentially important opinion on a successor's obligation to arbitrate whether it is bound to a predecessor's collective bargaining agreements. *Local 348-S v. Meridian Mgmt. Corp.*, 583 F.3d 65 (2d Cir.), *r'hrg and r'hrg en banc denied* (Dec. 11, 2009). The Court, over strong dissent, held that while an employer's status as a successor does not automatically bind the successor to the substantive terms of the predecessor's CBA, the successor "is required to arbitrate the issue of whether and to what extent it is bound by the terms of that agreement." *Id.* at 66.

The dissent argued that the majority confused circumstances in which a successor had a duty to recognize and bargain with those rarer cases in which a successor was actually bound by the pre-existing terms. *Id.* at 79 (Livingston, dissenting). According to the dissent, the majority's opinion would either be limited to its "unique facts," making it an aberration in the case law, *id.*, or impose upon "*all* successor employers who hire the bulk of a predecessor's employers . . . a duty not only to bargain with and recognize a union but also to arbitrate with it the extent to which it is bound by the previous CBA." *Id.* at 80. As the dissent noted, the true impact of *Meridian Management* remains to be seen through its application in other cases.

4. Extent of Arbitration Clauses in Collective Bargaining Agreements

The Third Circuit addressed the scope of arbitration provisions contained in collective bargaining agreements as they relate to union access to after-acquired stores. *See Rite Aid of Pa. Inc. v. United Food & Comm. Workers Union Local 1776*, 595 F.3d 128 (3d Cir. 2010). The employer and the union had three collective bargaining agreements covering stores in 24 Pennsylvania counties, with each agreement containing a basic recognition clause, observation clause, and privileges clause. *Id.* at *130, 133-35. Additionally, each agreement contained an arbitration clause that did not require the maintaining of any grievance "that does not involve the interpretation of any provision of this Agreement." *Id.* at *130 (emphasis omitted).

During the life of the agreements, Rite Aid completed the purchase of a drugstore chain formerly operated by Brooks Eckerd. *Id.* at 130. Shortly after the stores were acquired, Local 1776 representatives attempted to enter six of these newly-acquired stores for the purposes of organizing and were excluded by Rite Aid. *Id.* After Rite Aid refused to arbitrate grievances over access, it brought a declaratory judgment action to determine the arbitrability of the grievances. *Id.* at 130.

Much like the Supreme Court's opinion in *Granite Rock* and *Stolt-Nielsen*, the Third Circuit noted that while there is a federal labor law policy favoring the resolving of disputes through arbitration, "arbitration is still a creature of contract and a court cannot call for arbitration of matters outside of the scope of the arbitration clause." *Id.* at 131. Because the

clause here did not allow for arbitration that did not involve interpretation of a contract provision, the Union was required to base its access grievance in a contractual provision.

The Court affirmed the District Court's rejection of the Union's arguments on recognition clauses, observation clauses, and privilege clauses. Regarding the recognition clause, the Court admitted that a recognition clause waives an employer's right to demand an election in a new store, but also noted that the Union was required to show majority support in those stores, which it had not done here. *Id.* at 133. The Court likewise rejected reliance on the observation clause, finding that because there was no collective bargaining agreement in place at the new store, there was no agreement for the union to "observe" for compliance purposes. *Id.* at 134. Finally, regarding the privileges clause, the Court held that access was not a "privilege" as defined in the clause, which focused on the rights and responsibilities of *employees* rather than unions. *Id.* at *135-36. Accordingly, the court affirmed the District Court's conclusion that the matters were not subject to arbitration.

B. Collective Bargaining Agreement Rejection in Bankruptcy

1. Section 1114 and Unilateral Modification of Retiree Benefits

In *In re Visteon Corp.*, 612 F.3d 210 (3d Cir. 2010), the Third Circuit held that an employer in bankruptcy must comply with the requirements of Section 1114 before modifying retiree benefits, even where the employer retained the right to unilaterally modify those benefits outside of bankruptcy. Reversing both the Bankruptcy Court and the District Court, the Third Circuit panel focused on the language of § 1114(e)(1), stating that "'[n]othwithstanding any other provision of this title, the [trustee] shall timely pay and shall not modify *any retiree benefits*,' except through compliance with the procedures set forth therein." *Id.* at 220 (quoting 11 U.S.C. § 1114(e)(1)) (alteration in original).

The panel recognized that other district courts had held "that § 1114 does not limit a debtor's ability to terminate benefits during bankruptcy when it has reserved the right to do so in the applicable plan documents." *Id.* at 219 (collecting cases). The Court stressed the importance of applying the plain language of Section 1114, which it found "restricts a debtor's ability to modify *any* payments to *any* entity or person under *any* plan, fund, or program in existence with the debtor files for Chapter 11 bankruptcy, and it does so notwithstanding any other provision of the bankruptcy code." *Id.* at 220. The Court also noted that the 2005 amendments to Chapter 11 and the addition of § 1114(*l*), which prohibits an insolvent debtor from modifying retiree benefits in the 180 days prior to filing for bankruptcy, further supported its holding because that provision made no exception for an employer who reserved the right to unilaterally modify the benefits. *Id.* at 225.

2. Rejection by Municipalities Under California Law

In a significant development for municipalities facing increasing budgetary concerns during a slumping economy, a District Court affirmed the ruling of the Bankruptcy Court in the Eastern District of California that municipalities may use the chapter 9 bankruptcy procedures, including the ability to reject collective bargaining agreements under 11 U.S.C. § 365 without

needing to satisfy the requirements of 11 U.S.C. § 1113. *See In re City of Vallejo, Cal.*, 432 B.R. 262 (E.D. Cal. 2010), affirming *In re City of Vallejo*, 403 B.R. 72 (Bankr. E.D. Cal. 2009).

Discussing the interplay of the Supremacy Clause, the Contracts Clause, and the Tenth Amendment's reservation of rights to the States, the Bankruptcy Court noted that Congress harmonized these provisions through section 903, retaining the right of a State to control a municipality's political or governmental powers, notwithstanding the remainder of chapter 9. *See id.* at 75; 11 U.S.C. § 903. But while that section "ensures the constitutionality of Chapter 9, it does not provide an independent substantive limit on the application of Chapter 9 provisions." 403 B.R. at 75. Thus, once "a municipality is authorized by the state to file a Chapter 9 petition," *id.* at 76, as California did in the "broadest possible . . . authorization," *see* Cal. Gov't Code § 53760, the municipality "is entitled to fully utilize 11 U.S.C. § 365 to accept or reject its executory contracts." 403 B.R. at 76.

Addressing the proper standard to apply to rejection under section 365, the Bankruptcy Court rejected both state law and the standards applied to contract rejection under 11 U.S.C. § 1113. *See id.* at 76-78. First, state law could not be the source of the standard because both the Supremacy Clause and the Contracts Clause prohibited state law from controlling chapter 9 proceedings, particularly when Congress had enacted section 365 to provide debtors the ability to reject executory contracts. *Id.* at 76-77. Second, the Bankruptcy Court also rejected the argument that the standard for rejecting a collective bargaining agreement in a chapter 9 matter came from 11 U.S.C. § 1113, which "imposes on chapter 11 debtors procedural and substantive requirements that must be met prior to rejection of collective bargaining agreements." *Id.* at 77-78. Because Congress neither incorporated section 1113 into chapter 9, nor did it adopt a proposed 1991 amendment that would have required chapter 9 debtors to first exhaust state law procedures for bargaining, implementation, and amendment before rejecting or modifying a collective bargaining agreement, the court refused to look to section 1113. *Id.* at 78.

Instead, the Bankruptcy Court applied the standard for section 365 cases developed in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 526 (1984). Under that standard, "a debtor may . . . reject an unexpired collective bargaining agreement if the debtor shows that: (1) the collective bargaining agreement burdens the estate; (2) after careful scrutiny, the equities balance in favor of contract rejection; and (3). [sic] 'reasonable efforts to negotiate a voluntary modification have been made, and are not likely to produce a prompt and satisfactory solution.'" 403 B.R. at 78 (quoting *Bildisco*, 465 U.S. at 526) (footnote omitted).

The Bankruptcy Court initially delayed determining whether the City had satisfied the *Bildisco* standard, *see id.*, but eventually reached that question in August 2009, granting the City's motion for contract rejection of its collective bargaining agreement with the IBEW. *See In re City of Vallejo*, No. 08-26813-A-9 (Bankr. E.D. Cal. Aug. 31, 2009). After having found that the contract with IBEW was burdensome because of salary increases and costs related to health benefits; that the balance of equities favored rejection, given that it was necessary for Vallejo to emerge from bankruptcy; and that the City had made reasonable efforts to reach voluntary modification, the Bankruptcy Court granted the motion for total rejection.

C. The Antitrust Nonstatutory Labor Exemption and Profit Sharing

In *California ex rel. Brown v. Safeway, Inc.*, 615 F.3d 1171 (9th Cir. 2010), the Ninth Circuit found that four supermarket chains, three of which were engaged in multiemployer unit bargaining, violated the Sherman Act by agreeing to share profits in the event of a strike. Albertson's, Ralphs, Vons (a subsidiary of Safeway), and Food 4 Less all had collective bargaining agreements with the UFCW. *Id.* at 1175. Because the agreements to which Albertson's, Ralphs, and Vons were parties all expired on the same day, and because the Food 4 Less agreement expired a few months later, the stores entered into Mutual Strike Assistance Agreements in anticipation of whipsaw tactics by UFCW. *Id.* The agreements involved two key matters: (1) in the event of a strike against one store, all stores would lock out their employees within 48 hours of the strike, and (2) in the event of a strike, a store that earned revenues over its historical share of the combined revenue of the four stores would redistribute 15% of those surpluses to the other parties. *Id.* at 1175-76. When a labor dispute arose and the agreement was applied, the state of California filed suit against the stores, alleging unlawful combination and conspiracy in restraint of trade, in violation of the Sherman Act. *Id.* at 1176.

The Court first held that the revenue sharing provision was anticompetitive on its face, *id.* at 1177, meaning that it could only be lawful if (1) it was actually procompetitive because it aided employers in winning labor disputes, or (2) it was exempt from the antitrust laws under the nonstatutory labor exemption because the agreement had a role in a labor dispute. *Id.* at 1177-78. After a "thoroughgoing inquiry," the Court found that the "defendants' profit sharing agreement creates 'a great likelihood of anticompetitive effects,' and that such effects are not outweighed or neutralized by any plausible procompetitive benefits." *Id.* at 1183. Specifically, the Court rejected arguments that the duration of the agreement, which lasted only for the strike, or the fact that the sharing was less than 100% altered the "principal tendency" of the agreement to share profits. *Id.*

Finally, the Court rejected the defendants' contention that the agreement was exempt from antitrust laws under the nonstatutory labor exemption. The Court explained the history of the exemption, stating that as courts "bec[a]me more sympathetic to collective bargaining," they "implied a nonstatutory labor exemption to shield from antitrust review basic arrangements involving labor and management." *Id.* at 1194. The Court explained that "[t]he logic behind the exemption is simple: 'it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves and with each other *any* of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable.'" *Id.* at 1194-95 (quoting *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996) (emphasis in *Brown*)).

However, the Ninth Circuit noted *Brown*'s limitation that the nonstatutory exemption "'applies where needed to make the collective bargaining process work.'" *Id.* at 1195 (quoting *Brown*, 518 U.S. at 234). *Brown*, which also involved multiemployer bargaining, held that post-impasse imposition of a proposed employment term on a mandatory subject across multiple employers fell within the exemption because it "'plays a significant role in a collective-bargaining process that itself constitutes an important part of the Nation's industrial relations system.'" *Id.* at 1196 (quoting *Brown*, 518 U.S. at 240). Applying *Brown*, the Ninth Circuit rejected the argument that the profit sharing agreement fell within the nonstatutory exemption.

The Court wrote that "defendants' profit sharing conduct has not traditionally been regulated under labor law principles, nor does it raise issues either on its face or in its practical implementation that are suitable for resolution as a matter of labor law. . . ." *Id.* at 1196-97. The Court concluded that "[i]t is the labor law practices essential to collective bargaining that the nonstatutory exemption is designed to protect. Profit sharing is not such a practice." *Id.* at 1197.

D. Dues Issues

In *Laborers International Union,* the Tenth Circuit Court of Appeals found the union violated federal labor law when it failed to give an employee adequate notice of his outstanding dues before requesting that the employer discharge the employee pursuant to the union security clause. *Laborers Int'l Union, Local 578 v. NLRB*, 594 F.3d 732 (10th Cir. 2010). In this case, Lopez, a Shaw Stone employee, fell several months behind in his union dues. On October 12, 2006, the Union sent Lopez a letter addressed to Shaw Stone requesting that Shaw Stone dismiss Lopez for failure to pay $145 in late dues and reinstatement fees. The Union sent Lopez a second notice on November 1, 2006. This notice specified that Lopez owed $415 and that he would be discharged if he failed to pay, but it did not explain how the amount was calculated. On November 14, 2006, the Union contacted Shaw Stone and requested that it dismiss Lopez for failing to pay his union dues, and shortly thereafter Lopez was dismissed.

Lopez filed an unfair labor practice charge with the NLRB, and the Board determined that the Union violated section 8(a)(3), by failing to provide Lopez adequate notice before moving for discharge. The collective bargaining agreement in place between Shaw Stone and the Union contained a union security clause that allowed the Union to obtain the discharge of any employee who fails to pay dues owed to the union. Before invoking this provision against an employee, however, the Union was required to: (1) provide the employee with the precise amount due; (2) provide the employee with a complete accounting, explaining how it computed the amount due; (3) give the employee a reasonable deadline for payment; and (4) explain to the employee that failure to reconcile the outstanding amount will result in discharge. The Tenth Circuit affirmed the Board's decision that the Union breached its fiduciary duty owed to Lopez by failing to give him adequate notice of his dues deficiency before requesting his discharge. The Court found that the Union's November 1 notice was inadequate, as the letter failed to explain how the Union calculated the outstanding amount, failed to give Lopez a deadline for payment, and yet still called for Lopez's immediate discharge. The October 12 letter was also deficient, as it too failed to explain how the Union calculated the outstanding dues.

E. Developments in Protected Employee Activity

1. Protected Activities and Union Insignia

In *Cintas Corp. v. NLRB,* the Eighth Circuit Court of Appeals affirmed an NLRB decision that Cintas interfered with protected union activity. In doing so, the Court rejected Cintas' assertion that the employees' activities were unprotected and part of a nationwide campaign of "economic extortion." *Cintas Corp. v. NLRB*, 589 F.3d 905 (8th Cir. 2009). In 2004, several employees donned stickers that said "Uniformed Justice!" the name of the union campaign. Cintas issued disciplinary warnings to the employees for wearing the stickers. Cintas argued that wearing the stickers violated the company's employee dress code and nonsolicitation

policy. Further, Cintas insisted that local activity by UNITE HERE sympathizers at several different work sites was unlawful, unprotected, and designed to support a national effort to "coerce Cintas into signing" a neutrality and card check agreement with the Union. The NLRB dismissed Cintas's argument, asserting that UNITE HERE's actions at a national level provided no defense for the charges against Cintas, as the acts or objectives of the national union could not be "imputed to an individual employee." The NLRB noted that Cintas could properly raise such concerns by filing a charge against the national union itself. *Id.* at 913-14.

2. Unlawful Secondary Activity

A U.S. District Court found that the IBEW engaged in unlawful secondary activity in a suit brought under Section 303 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 187. *See U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers, Local 164*, No. 08-1125, 2010 WL 1879275 (D.N.J. May 10, 2010). U.S. Information Systems ("USIS"), which employs workers represented by Communication Workers of America, was selected as a subcontractor on a project controlled by Ernst & Young. *Id.* at *2. Shortly thereafter, IBEW Local 164 picketed the site of the Ernst & Young project and, when no union members crossed the line, the project was stopped. *Id.*

USIS brought suit under the LMRA, claiming that the picket was unlawful secondary activity in violation of section 8(b)(4)(i), with the ultimate aim of earning the Ernst & Young project for a company that was signatory to an IBEW contract. *Id.* at *2-3. IBEW claimed that they were engaging in area standards picketing based on their knowledge of USIS's substandard wages. *Id.* at *2. Noting that the Union has "a 'heavy burden in supporting its contention that its only purpose in picketing was to protest Plaintiff's alleged substandard wages," the Court found that the Union had not sustained that burden. *Id.* at *4 (citing *NLRB v. Great Scot, Inc.*, 39 F.3d 678 (6th Cir. 1994)). The judge stated that the record evidence "unequivocally" demonstrated that the Union's knowledge of wages was not based on actual knowledge of USIS's wages. *Id.* at *6. The Court also found that USIS's state law claims of tortious interference were preempted by section 303 of the LMRA. *Id.* at *8.

3. Journalistic Freedom and Section 10(j) Injunctions

During 2010, the Ninth Circuit Court of Appeals tackled the delicate issue of journalistic freedom during union organizing campaigns. In *McDermott*, several reporters and editors resigned after clashes with Ampersand Publishing over newspaper content. *McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950 (9th Cir. 2010). The resignations prompted other employees to pursue union representation. During the union organizing campaign, the employees attempted to increase their editorial control through a subscription cancellation campaign. The regional director of the NLRB requested a temporary injunction compelling Ampersand Publishing to offer reinstatement to eight employees discharged during the organizing campaign. The Ninth Circuit affirmed the District Court's decision denying the petition for section 10(j) relief. The Ninth Circuit applied the heightened equitable relief standard established in *Overstreet ex rel. NLRB v. United Brotherhood of Carpenters & Joiners of America, Local Union No. 1506*, 409 F.3d 1199 (9th Cir. 2005), and found that granting the injunction would likely infringe Ampersand Publishing's First Amendment rights to publish the content that it desired. With that finding, the Court denied the injunction. *See* 593 F.3d at 966.

F. Developments in The Duty To Bargain Over Compensation for Donning and Doffing Time

The Fourth Circuit Court of Appeals held that under the Fair Labor Standards Act employers and unions may agree that employees will not be compensated for time spent donning and doffing protective gear. *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209 (4th Cir. 2009), *cert. denied*, 79 U.S.L.W. 3196 (2010). The dispute arose when an Allen Family Foods employee filed a putative class action against Allen Family Foods challenging a collective bargaining agreement providing that employees would not be paid for time spent changing into protective gear. The employee argued that, while the parties agreed that employees would not be paid for time spent changing clothes, changing clothes did not include donning and doffing protective gear. The Fourth Circuit disagreed and deferred to FLSA section 203(o), which allows employers and unions to agree to exclude "any time spent in changing clothes . . . at the beginning or end of each workday" from compensable work time. The Court noted that it would not engage in a fact-intensive determination that traditionally is tackled during collective bargaining. Despite a circuit split between the Fourth, Fifth and Eleventh Circuits holding that an employer and the union may agree to not compensate employees for donning and doffing time, and the Ninth Circuit's holding that they may not reach such an agreement, the Supreme Court denied a writ of certiorari. 79 U.S.L.W. 3196.

G. Developments in Procedural Issues

1. Preemption

Twice this year federal courts have found that state statutory or regulatory schemes were preempted by the National Labor Relations Act. First, in *Barbour v. International Union, UAW*, the Fourth Circuit Court of Appeals addressed whether Barbour and her fellow retirees' state law claims that the Union provided them with false information regarding their eligibility to receive retirement incentive packages was completely preempted by the NLRA. *Barbour v. Int'l Union, UAW, Local 1183*, 594 F.3d 315 (4th Cir. 2010). The court differentiated complete preemption, which provides a basis for removal jurisdiction, with defensive or ordinary preemption, which does not. For a court to find that complete preemption exists, the moving party must demonstrate that "Congress clearly intended the federal claim to provide the exclusive cause of action for claims of overwhelming national interest." *Id*. at 329 (emphasis omitted) (citation omitted) (internal quotation marks omitted). In *Barbour*, the court found that the district court had conflated the two types of preemption. Barbour pled typical state law causes of action for breach of fiduciary duty against the Union. The Union, in arguing for complete preemption, failed to identify any statutory language in section 9(a) of the NLRA demonstrating a clear intent by Congress that all state law claims relating to fiduciary duties owed by unions to employees represented by them are exclusively federal claims under the NLRA. Accordingly, the Court held that Barbour and the retirees' state breach of fiduciary duty claims were not completely preempted by the NLRA and remanded the case back to state court.

Second, in *Grain Processing Corp. v. Culver*, 708 F. Supp. 2d 859 (S.D. Iowa 2010), the court found that Code of Iowa Chapter 679B was preempted by the Act. Under that Chapter, Governor Culver initiated proceedings related to a private labor dispute to appoint a board of arbitration and conciliation with the power to hear witnesses, administer oaths, compel testimony,

and render its binding "decision," in the form of a publicly published written report with recommendations to each party regarding the resolution of the labor dispute. *Id.* at 861-62. The court noted that the Chapter's scheme was "clearly" preempted by federal labor law, which promulgates a labor policy of free and unfettered collective bargaining that requires only good faith bargaining, but not agreement. *Id.* at 865 (citing *General Elec. Co. v. Callahan*, 294 F.2d 60 (1st Cir. 1961)). The Court also rejected Iowa's argument that the "local interest" exception applied, finding that there was no evidence of violence or imminent threat to public order. *Id.* at 866-67.

2. Subpoena Authority

A federal district court in Minnesota held that the NLRB has the authority to issue subpoenas to a resort casino that is a wholly owned and managed governmental entity of the federally-recognized Bois Forte Band of Chippewa Indians. *See NLRB v. Fortune Bay Resort Casino*, 688 F. Supp. 2d 858 (D. Minn. 2010). The United Steelworkers began organizing efforts at the casino in 2007 and, subsequently, filed unfair labor practices charges against the casino with the Board. In order to determine whether the it had jurisdiction over the casino, the Board subpoenaed various documents regarding the casino's effects on commerce, tribal authority, and other factors relevant to the Board's jurisdiction. The casino refused to provide the documents.

The court held that the NLRA granted the Board the authority to seek the subpoenas and, further, that the NLRA applied to the Bois Forte Band. The court held that the NLRA was a statute of general applicability—an issue of first impression in the Eight Circuit—and, as a result, applied to Indians and their property interests. *See Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). Further, the court found that Fortune Bay's potential commercial impact, including on non-Indian employees and customers, gave the Board a reasonable and legitimate basis for issuing the subpoenas. The court rejected Fortune Bay's sovereign immunity argument on the basis that this subpoena action was brought by the Board and not by the private litigant United Steelworkers.

3. Section 10(j) and 10(*l*) Injunctive Relief

In *Norelli v. HTH Corp.*, Case No. 1:10-cv-00014 (D. Hi. Mar. 29, 2010), the District Court granted the Board's request for an injunction under section 10(j). A 2008 charge filed by the International Longshore and Warehouse Union alleged that HTH engaged in numerous unfair labor practices including coercively interrogating employees regarding an election, maintaining an overly broad no-solicitation policy, illegally withdrew recognition, refused to bargain, and otherwise violated the Act. Granting the injunction, the Court found that the Regional Director had shown a likelihood of success in proving the violations. The Court also found that, absent injunctive relief, the employer's actions would deny an opportunity for collective bargaining and send a message to employees that the Union was powerless.

In another case, the Sixth Circuit reversed a district court's denial of a section 10(j) injunction request and reiterated that the Board's burden of proving reasonable cause to believe that a violation has occurred was "relatively insubstantial." *See Glasser v. ADT Sec. Servs., Inc.*,

379 F. App'x 483 (6th Cir. 2010). The Court noted that the legal theory must be "substantial and not frivolous" while having support in the facts alleged. But, beyond confirming that the theory met those standards, a court could not engage in a "searching inquiry." *Id.* at 486-88. Finding that the District Court erred by engaging in its own analysis of the merits, the Court reversed and remanded for further proceedings.

V. Recent Significant Developments in Board Law

With the Board returning to a full complement, the number of cases being decided has increased rapidly in recent months. The Board issued 315 decisions in contested cases between October 2009 and September 2010, with more than a third of those cases coming in August and September 2010. *See NLRB Issued 315 Decisions in FY 2010 As Board Member Positions Were Filled*, 195 DAILY LAB. REP. (BNA) A-2 (Oct. 8, 2010). The Board issued 16 decisions in October 2010. In addition to requesting briefing on *Dana Corp.*, see Section III.C.3.a, *supra*, the Board has addressed, election conduct, union misconduct with regards to union dues, obligations to provide information, and many other areas. And, based on the Board's recent decisions, the cases described below signal the beginning of an active Liebman Board.

A. Bannering as Lawful Secondary Activity

Perhaps the most significant series of cases to come from the Board since it returned to a full complement is *Eliason & Knuth of Arizona, Inc.*, 355 N.L.R.B. No. 159 (Aug. 27, 2010), and its progeny, which hold that a union does not violate section 8(b)(4)(ii)(B) of the Act by engaging in "bannering" at a secondary employer. In *Eliason & Knuth*, on which all five Members participated, a three-Member majority engaged in a lengthy and detailed analysis to hold that the peaceful posting of a stationary banners at a secondary employer's job site was not prohibited. First, the majority wrote that a violation of section 8(b)(4)(ii)(B), which prohibits conduct that "threaten[s], coerce[s], or restrain[s]," requires more than mere persuasion. *Id.* at *5. The majority then discussed the historical meaning of "picketing," which it described as generally involving "persons carrying picket signs and patrolling back and forth before an entrance to a business or worksite." *Id.* at *7. According to the Board, picketing's "core conduct" making it coercive under section 8(b)(4)(ii)(B) was "the combination of carrying of picket signs and persistent patrolling of the picketers back and forth in front of an entrance to a work site, creating a physical or, at least, a symbolic confrontation between the picketers and those entering the worksite." *Id.* Here, the banners read, "Labor Dispute," "Shame On [secondary employer]," and "Don't Eat [secondary employer's product]." Further, the bannering did not obstruct ingress or egress; was not accompanied by chanting, yelling, marching, or other similar conduct; and was manned by only enough individuals to hold the banners with rotating breaks. *Id.* at *2-3. The majority concluded that because there was no ambulatory movement or physical or symbolic confrontation, the bannering was not picketing and thus not inherently coercive under section 8(b)(4)(ii)(B). Likewise, because the picketing was directed at the public and not other union members, the picketing was not signal picketing. *Id.* at *11.

The Board also cited the "Constitutional Avoidance" doctrine as a basis for finding that bannering did not violate the Act. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988). Because a prohibition on bannering would raise First Amendment issues, the Board could only do so if such a holding was unavoidable. *See id.*;

355 N.L.R.B. No. 159 at *14-15. Because "[n]othing in the crucial words of Section 8(b)(4)(ii)(B) – 'threaten, coerce, or restrain' – *compels* the conclusion that they reach the display of a banner," the majority held that the Constitutional Avoidance doctrine supported its conclusion that bannering did not violate the Act. 355 N.L.R.B. No. 159 at *17.

Since *Eliason & Knuth of Arizona, Inc.*, the Board has reached similar results in a number of cases. *See, S.W. Reg'l Council of Carpenters (The Laser Institute for Dermatology & European Skin Care),* 356 N.L.R.B. No. 11 (Oct. 27, 2010); *Carpenters Local 1506 (Marriott Warner Ctr. Woodland Hills),* 355 N.L.R.B. No. 219 (Sept. 30, 2010); *Sw. Reg'l Council of Carpenters (Shea Props., LLC),* 335 N.L.R.B. No. 216 (Sept. 30, 2010); *United Bhd. of Carpenters & Joiners of Am. (Grayhawk Dev., Inc.),* 355 N.L.R.B. No. 188 (Sept. 21, 2010). In *Marriott Warner Center Woodland Hills*, the Board stated that "we are unwilling to draw an arbitrary line at some distance from the entrance to a secondary [employer]'s premises and hold that stepping over that line somehow transforms peaceful, expressive activity into coercion in the absence of some further evidence of coercion." 355 N.L.R.B. No. 219 at *2. In that case, one banner was four (4) feet from the secondary's entrance. The Board concluded that "[a]bsent the use of traditional picket signs, patrolling, blocking of ingress or egress, or some other evidence of coercion," the Act would not be violated. *Id.*

B. The Successor Bar Doctrine and Its Application to "Perfectly Clear" Successor Situations

On the same day that the Board requested briefing on the *Dana* issue in *Lamons Gasket Co.*, the Board also requested briefing in *UGL-UNICCO Service Co.*, 355 N.L.R.B. No. 155 (Aug. 27, 2010), on the issue of whether the Board should reverse *MV Transportation,* 337 N.L.R.B. 770 (2002), and return to the successor bar doctrine as articulated in *St. Elizabeth Manor, Inc.*, 329 N.L.R.B. 341 (1999). Unlike the request in *Lamons Gasket*, which vaguely asked for experiences and data, *UGL-UNICCO* is clearer in its intentions. Chairman Liebman noted that her views on the successor bar doctrine were articulated in the *St. Elizabeth Manor* majority opinion and the *MV Transportation* dissent, and that she is "open to being persuaded either that [her] prior position was wrong or that even if *MV Transportation* was mistaken, it should nevertheless be left in place." 355 N.L.R.B. No. 155 at *2.

As of the time of this writing, the current Board has not yet issued its decision in *UGL-UNICCO Service Co*., although it is not difficult to predict how the new Board majority will decide this case based on the reversals of prior Boards. In *St. Elizabeth Manor, Inc.*, a Clinton-era Board held that "once a successor's obligation to recognize an incumbent union has attached (where the successor has not adopted the predecessor's contract), the union is entitled to a reasonable period of bargaining without challenge to its majority status through a decertification effort, an employer petition, or a rival petition." 329 N.L.R.B. 341, 344 (1999). However, only a few years later, the Bush-Board in *MV Transportation* noted that "[a]t a minimum, the successor bar prohibits the employees' exercise of their right to select a bargaining representative for a 'reasonable period of time' as defined by the Board in a particular case." 337 N.L.R.B. 770, 773 (2002). As a result, while recognizing that *St. Elizabeth Manor, Inc.* "purported to strike a balance between" the employee's freedom of choice and the maintenance of stability in bargaining relationships, the Board held in *MV Transportation* that "the successor bar rule, by providing the union with an irrebuttable presumption of majority status and denying the

employees the opportunity to change or reject their bargaining representative for a 'reasonable period of time,' promotes the stability of bargaining relationships to the exclusion of the employees' Section 7 rights to choose their bargaining representative." *Id.* Returning to the law prior to *St. Elizabeth Manor*, the Board held that "an incumbent union in a successorship situation is entitled to—and only to—a *rebuttable* presumption of continuing majority status, which will not serve as a bar to an otherwise valid decertification, rival union, or employer petition, or other valid challenge to the union's majority status." *Id.* at 770.

Chairman Liebman's opinion concurring in the decision to grant briefing in *UGL-UNICCO Service Co*. clearly indicates her belief that *MV Transportation* was wrongly decided and that application of the successor bar doctrine under *St. Elizabeth Manor, Inc.*, is the proper decision. *See* 355 N.L.R.B. No. 155. But, as Chairman Liebman also notes, none of the current Board Members was involved in either of the prior decisions, meaning that the issue may be considered by new minds. Of course, this kind of "policy oscillation," or moving from one position to an opposite position based on Board composition, is nothing new. *See, e.g.*, Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 Admin. L. Rev. 163 (1985). And the concurring opinion's notion that reconsideration is warranted because "this is a matter of labor law policy" and the Board has new Members who have not yet addressed this issue is contrary to our judicial system's doctrine of *stare decisis*.

Despite the Board's opinion's statement "that we have made no judgments about the ultimate merits," 355 N.L.R.B. No. 155 at *1, it is difficult to imagine that *MV Transportation* will survive, at least in its current form.

C. Developments in Protected Employee Activity

1. Scope of Protection

a. Coverage Issues

(1) Religious Educational Institutions

Continuing a topic that has received attention from courts in recent years, the Board addressed *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), when it denied an employer's request for review of a Regional Director's assertion of jurisdiction over a not-for-profit Catholic childcare facility. *See Catholic Soc. Servs.*, 355 N.L.R.B. No. 167 (Aug. 27, 2010). Noting that *Catholic Bishop* sought to protect schools where there was a substantial religious activity and purpose to the education, the Board agreed with the Regional Director's determination that *Catholic Bishop* was inapplicable to a secular education such as that provided by Catholic Social Services. *Id.* at *1. The Board further noted that the school did not "hold itself out . . . as providing a religious educational environment" as required by *University of Great Falls*. *Id.* at *2. The majority rejected Member Schaumber's dissenting suggestions that (1) education should be broadly construed to include instruction and modeling that takes place during childcare and (2) that church sponsorship should imply that religious doctrine will inform how the education will be carried out. *Id.* at *4.

(2) Casino/Racetracks

The Board exhibited its openness to exercise jurisdiction in new areas when, in an advisory opinion in *Yonkers Racing Corp.*, 355 N.L.R.B. No. 35 (May 24, 2010), Chairman Liebman and Members Becker and Schaumber indicated that, if asked to do so, the Board would not decline to exercise jurisdiction over a joint horse racing and casino operation. While the opinion will affect only a small category of businesses, the opinion exhibits the Board's willingness to assert jurisdiction in areas where it had previously abstained. The Board has historically declined to exercise jurisdiction over racetracks based on its judgment that disputes arising from racetracks do not have a sufficiently substantial impact on interstate commerce. *See id.* at n.4. However, where, as the Board assumed in this case, the enterprise "was no longer 'essentially a racetrack'" and "'the racetrack was dependent on the casino, not the other way around,'" the Board would not decline to exercise jurisdiction. *Id.* at *3 (quoting *Delaware Park*, 325 N.L.R.B. at 156, 156 (1997)).

b. Protected, Concerted Activity

(1) Testing the Limits of Protected Activity

In *Kiewit Power Constructors Co.*, 355 N.L.R.B. No. 150 (Aug. 27, 2010), the Board, reversing an ALJ, found that an alleged threat of physical violence did not forfeit the protections of the Act under the four factor balancing test set forth in *Atlantic Steel Co. v. Chastain*, 245 N.L.R.B. 814, 816 (1979) ("(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."). In this recent Board decision, Kiewit unilaterally announced that employees would be required to break in place, which, according to employees, was unsanitary and unsafe. *Id.* at *1. After announcing that employees would be disciplined for taking breaks away from their stations, Kiewit managers began distributing warnings. Upon receiving a warning, one employee stated "in an angry tone" that "it was going to get ugly" and that the manager had "better bring [his] boxing gloves" if discipline for breaks led to his termination. *Id.* at *1-2.

Applying *Atlantic Steel*, the Board noted that while the place of the discussion occurred in front of other employees, "*the Respondent* chose to distribute the warnings in a group employee setting in a work area during working time, and should reasonably have expected that employees would react and protest on the spot." *Id.* at *3. Thus, this factor favored protection or was at least neutral. Because the Board found the protest was based on safety concerns, the second factor weighed in favor of protection. *Id.* at *2-3. On the third factor—"the nature of the employee's outburst"—the Board found that the reference to "boxing gloves" was "more likely to have been a figure of speech" and that the remarks "were single, brief, and spontaneous reactions by [the] employee, not premeditated and sustained personal threats." Thus, the third favor weighed in favor of protection. *Id.* at *4. The fourth *Atlantic Steel* factor was neutral, as the conduct was not provoked by an unfair labor practice.

Dissenting, Member Schaumber objected to the majority's decision to disagree with the ALJ's balancing of the evidence and witness testimony on the nature of the outburst. Because the ALJ believed that the manager "provided the 'best evidence,'" Member Schaumber, like the

ALJ, would credit that testimony and find that the employee's outburst were physical threats causing him to forfeit the Act's protections. *Id.* at *9.

The Board addressed as similar case in which an employee used profanity with a manager and claimed that the company owner "would regret it" if he terminated the employee. *Plaza Auto Center, Inc.*, 355 N.L.R.B. No. 85 (Aug. 16, 2010). Again applying *Atlantic Steel*, all three Members agreed that the first, second, and fourth factors weighed in favor of finding that the conduct was protected. *Id.* at *2. Specifically, the meeting took place only in the presence of managers, regarded the employer's policies on granting meal breaks and compensation, and the employee was provoked by numerous statements suggesting that if the employee did not like working under the terms offered, he could simply quit. *Id.* at *3.

However, Chairman Liebman and Member Pearce found that the nature of the outburst was not so violent to justify losing the protections of the Act. *Id.* While the employee used profanity, evidence suggested that the managers present had also used profanity in the workplace. Further, the Board found that the threat that the employer "would regret" firing him likely was a threat of legal consequences, rather than violence. *Id.* Here, Member Schaumber disagreed and would have found the profanity was so outrageous as to forfeit the Act's protections. *Id.* at *5-6.

(2) Protected Activities and Union Insignia

In *Stabilus, Inc.*, 355 N.L.R.B. No. 161 (Aug. 27, 2010), the Board found that an employer violated section 8(a)(1) by prohibiting employees from wearing T-shirts with union insignia during a certification election. While the employer had a policy of requiring employees to wear shirts with the company name, it also allowed employees to wear that shirt unbuttoned, with other logo-bearing shirts underneath the company shirt. On the second and final day of a union election, the employer asked an employee to remove a union T-shirt and all other insignia, without allowing the employee to put a company shirt on over the union shirt. Thus, by applying the policy in an overbroad and targeted manner, the employer violated section 8(a)(1). *Id.* at *3-4. As a result, the Board did not find it necessary to engage in the "special circumstances" analysis under which an employer may implement a policy infringing upon an employee's right to wear union insignia. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). In addition, even if "special circumstances" could justify the policy, the Board found that the employer violated section 8(a)(1) by disparately enforcing the policy against employees engaging in statutorily protected activity. 355 N.L.R.B. No. 161 at *4. Member Schaumber dissented, claiming that the majority "for the first time [held] that the well-recognized right of employees to displace union insignia extends to substituting a prounion T-shirt for a required company uniform. . . . represent[ing] a radical rebalancing of the relevant interests and a sharp curtailment of legitimate management prerogatives. . . ." *Id.* at *9.

Prior to *Stablius*, in November 2009, the NLRB found that Starbucks violated federal labor law by unlawfully restricting protected activity. *In Re Starbucks Corp.*, 354 N.L.R.B. No. 99 (Oct. 30, 2009). In March 2006, Starbucks entered an agreement with the union, and approved by the NLRB, that allowed baristas to wear reasonably sized pins or buttons that identify an employee's support for a particular union. Starbucks management instructed employees that they could only wear one pin. The NLRB rejected Starbucks' position and

affirmed the ALJ's decision ordering Starbucks to allow its employees to wear more than one pro-union pin. *Id.*

(3) Unauthorized Media Contact

The NLRB recently affirmed a ruling by an ALJ declaring that it is unlawful to maintain and enforce a policy prohibiting an employee from speaking to the media. In *Trump Marina Associates*, Spina, a Trump Marina employee, granted an interview to a union representative and commented on the Board's decision to set aside the results of a union representation election. 355 N.L.R.B. No. 107 (Aug. 23, 2010) (three-Member panel reviewing December 31, 2009 two-Member Order). Spina believed that his comments would be used in a union publication. Subsequently, the Union issued a press release regarding the judge's decision to set aside the union representation election. As a result of the Union's press release, an Associated Press article appeared in the local paper. In providing comments published in the local newspaper, Trump Marina management believed Spina violated its policy prohibiting employees from speaking to the media without prior authorization. A Trump Marina manager spoke to Spina, reminded him of Trump Marina's policy against unauthorized media contact, and encouraged him to obtain prior approval before speaking to the media in the future.

Shortly thereafter, the Union filed a charge against Trump Marina, alleging the employer had violated section 8(a)(1) by maintaining a policy prohibiting employees from speaking to the media about protected activities. The NLRB agreed with the ALJ's finding that the policy interfered with the section 7 right of employees to communicate with the public about an ongoing labor dispute. Moreover, the NLRB declared that Trump Marina's "interrogation" of Spina about his possible violation of the rules was coercive. The ALJ ordered Trump Marina to rescind its policy prohibiting unauthorized contact with the media and to cease and desist from interrogating employees about the rules that infringe on protected section 7 activities. *Id.*

2. Strike/Lockout

While affirming an ALJ's finding that an employer did not violate sections 8(a)(3) or (1) of the Act by refusing to reinstate certain strikers upon an unconditional offer to return, the Board stressed the proper standard for determining whether a strike was an unfair labor practice strike. *Executive Mgmt. Servs., Inc.*, 355 N.L.R.B. No. 33 (May 11, 2010). In his decision, the ALJ implied "that the strikers had to have been motivated to strike in a 'significant manner' by unfair labor practices, or that unfair labor practices must have been a 'substantial part' of the employees' decision to strike." *Id.* at *1. In its review of the ALJ's decision, the Board noted that such a characterization "did not precisely track extant precedent." *Id.* Instead, the Board quoted *Golden Stevedoring Co.*, 335 N.L.R.B. 410 (2001), which states that "a work stoppage is considered an unfair labor practice strike if it is motivated, *at least in part*, by the employer's unfair labor practices." *Id.* at 411. Because the judge found that the strike was not in any way motivated by unfair labor practices, the Board adopted his findings.

3. Restraint or Coercion by Employers

a. Refusal to Hire and Refusal to Consider

In *Legacy Health Systems*, 355 N.L.R.B. No. 76 (Aug. 9, 2010), a three-Member panel considered on remand after *New Process Steel* its Order reported at 354 N.L.R.B. No. 45 (July 13, 2009). The Board found that an employer's policy prohibiting employees from holding dual part-time jobs, one of which is in a unit represented by a union and the other of which is in a non-represented unit, discriminated on the basis of section 7 and violated sections 8(a)(3) and (1). Based on this policy, the employer refused to hire three employees working in a represented unit for positions in a non-represented unit. While the ALJ found that the policy was "inherently destructive" to the employees' section 7 rights under *NLRB v. Great Dane Trailers*, 338 U.S. 26, 33-34 (1967), the Board instead held that even assuming the impact on section 7 rights was only "comparatively slight," the employer failed to prove a "legitimate and substantial justification for the policy." *Legacy Health Sys.*, 354 N.L.R.B. No. 45 at 1. While the company suggested the policy was driven by the need to avoid "legal uncertainties" that would arise if an employee was both represented and unrepresented, the Board noted that Legacy Health employees are allowed to hold two different jobs in two different bargaining units, even if those units are represented by different unions. *Id.* at 5. Because the Board found that the "comparatively slight" impact on the employees' section 7 rights was not supported by the employer's proffered business justification, it found that the employer had violated section 8(a)(3).

In *Allstate Power Vac, Inc.* the Board affirmed the ALJ's dismissal of an allegation that the Respondent violated section 8(a)(3) and (1) by failing to hire or consider for hire seven union sponsored applicants. 354 N.L.R.B. No. 111 (Nov. 30, 2009). The Board highlighted the General Counsel's failure to establish that the applicants had the relevant training or experience required for the open positions. The General Counsel also failed to establish that the Respondent was hiring for positions for which the union sponsored applicants would have been qualified. The Board also emphasized that the General Counsel failed to demonstrate that the Respondent excluded the applicants from the "hiring process" for the open positions.

b. Solicitation of Grievances During an Election

A 2-1 majority found that an employer engaged in objectionable conduct during a union election by holding focus meetings to address employee concerns regarding overtime. *See Mandalay Bay Resort & Casino*, 355 N.L.R.B. No. 92 (Aug. 17, 2010). Prior to an election, employer officers, including the CEO, held focus groups with employees so that they could understand employee concerns regarding working conditions. At one such meeting, the CEO stated that "'it was a failed strategy to bring in a large number of part-time officers and it was being addressed and looked at.'" *Id.* at *1.

The Board cited *Majestic Star Casino, LLC*, 335 N.L.R.B. 407 (2001) for the "long held" proposition that, without a past practice of soliciting grievances, doing so during an organizational campaign "is objectionable when the employer expressly or impliedly promises to remedy those grievances." 355 N.L.R.B. No. 92 at *1. The Board summarized that it was the employer's burden to rebut the inference of an implied promise and that an employer could do so by "establishing that it had a past practice of soliciting grievances in a like manner prior to the

critical period, or by clearly establishing that the statements at issue were not promises." *Id.* The majority concluded the CEO's statements regarding the hiring of part-time officers and that it "was being addressed and looked at" was "a promise to look into a specific grievance that the Employer knew was of great importance to a large number of employees." *Id.* Because this conduct was objectionable, the Board directed a second election.

4. Restraint or Coercion by Union – Union Misconduct

Two recent Board cases regarding union misconduct deserve mention, both of which involve the collection of dues.

The Board found that a union's statements to its members about dues obligations after a contract expired were sufficiently coercive to violate section 8(b)(1)(A). *See Local 121RN, SEIU (Pomona Valley Hospital Medical Center),* 355 N.L.R.B. No. 40 (June 8, 2010). After the expiration of SEIU's contract, which included a union-security clause, the Union circulated a flyer indicating that "YOU CONTINUE TO BE COVERED BY THE TERMS AND CONDITIONS OF YOUR CONTRACT!"; "Under the NLRA, dues and fees may be collected back to the expiration of the collectivebargaining [sic] agreement (contract)"; and informing members that "You may have been mislead [sic] into believing that you are not obligated to pay dues and fees during the period of negotiations. This is untrue . . . DUE [sic] AND FEE [sic] OBLIGATIONS REMAIN INTACT AND MAYBE [sic] COLLECTED PRIOR OR UPON RATIFICATION OF THE CONTRACT." *Id.* at *1-2. According to Chairman Liebman and Member Becker, such language violated section 8(b)(1)(A) by threatening employees with adverse consequences if they failed to continue to pay dues and fees under the expired contract. *Id.* at *2. The flyer asserted erroneously that the employees remained obligated to pay dues and that those dues could be enforced retroactively. *Id.* at *3. Such erroneous information coupled with the threat to collect dues retroactively—which is prohibited under the Act—constituted restraint and coercion, according to the Board. *Id.* at *4. Member Pearce dissented, noting that the Board had not previously found a violation where there was no actual or threatened discharge in the Union's communication. *Id.* at *4-5.

In *Local Lodge 2777 (L-3 Communications),* 355 N.L.R.B. No. 174 (Aug. 27, 2010), the Board held that the Union failed to present a legitimate justification for a annual renewal requirement for members who desired to be a fee payer under *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), and thus violated its duty of fair representation and section 8(b)(1)(A).

Addressing the proper standard for analyzing a member's claims under *Beck*, Chairman Liebman and Members Becker and Pearce all agreed that a union's *Beck* procedures were to be measured by the duty-of-fair-representation standard, under which a union breaches its duty "if its actions affecting employees whom it represents are arbitrary, discriminatory, or in bad faith." *Id.* at *2-3, 14. Dissenting in part, Members Schaumber and Hayes would have instead applied sections 8(a)(3)'s and 8(b)(1)(A)'s prohibitions on discrimination and restraint and coercion. *Id.* at *12, 13.

Applying the duty-of-fair representation standard, four Members found violations, but for varying reasons. Chairman Liebman, Members Becker, Hayes, and Schaumber found that the

Union's requirement that *Beck* objectors annually renew their objection was arbitrary because the burden it placed on objectors was not outweighed by the claimed legitimate reasons for the renewal requirement. Specifically, contrary to the proffered reasons of updated records and allowing members an opportunity to reconsider their objection, the Members found that the need for annually updated addresses could be met through other means and that objectors could change their minds at any time, with or without an annual renew requirement. In addition, Members Schaumber and Hayes also would have found a breach of the duty of fair representation based on the discriminatory nature of the requirement, while Chairman Liebman and Member Becker did not find evidence of discrimination. Mr. Pearce, writing alone, would not have found any violation, given the minimal burden of renewal and the level of deference that must be given to a union under the duty-of-fair-representation standard.

Given that this was a complex issue of first impression, the Board only applied its opinion in *L-3 Communications* prospectively. Chairman Liebman and Member Becker noted that they did not endorse a *per se* rule against annual renew requirements and would apply the duty-of-fair-representation standard in future cases. They also suggested that if a union created a scheme allowing a member to make a "simple objection" subject to annual renewal or a continuing objection that was not subject to annual renewal, such an arrangement might pass muster. However where, as here, the Union refused to recognize the request for a continuing objection, the burden on the objector outweighed the Union's proffered legitimate reasons.

5. Campaign & Election Activity

a. Access to Employer Property and Elections

Upon review of objections to an election, the Board held that an employer, The Research Foundation of the SUNY, violated the Act when it interrupted a meeting between a union organizer and an employee and barred the organizer from the premises, threatening to call the police if the organizer did not leave. *The Research Foundation of the State Univ. of N.Y.*, 355 N.L.R.B. No. 170 (Aug. 27, 2010). Reversing the ALJ, the Board first held that because the employer failed to show that it held a lease or property interest in its office building, it had no right to exclude others under New York law. *Id.* at *2. The majority of Chairman Liebman and Member Pearce next held that, where there was no property interest at issue, there was no conflict between section 7 rights and private property rights and, as such, there was no need to accommodate an employer's rights under *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). 355 N.L.R.B. No. 170 at *3. The majority noted that the exclusion of the union agent was a violation of section 8(a)(1) and such conduct is conduct that interferes with an election under *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782 (1962). But, further, the Board found that the exclusion of the agent—and particularly the threat of arrest—was conduct that would tend to interfere with an employee's free choice in an election. *Id.* at *3. Because this election resulted in a tie, the Board held that the potential coercion of a determinative voter required the direction of a second election. *Id.* at *4.

Dissenting, Member Schaumber objected to the majority's reliance on *Dal-Tex Optical*, which he would only apply when there is both an objection to the election and an unfair labor practice charge. Because no unfair labor practice charge was at issue in this case, Member Schaumber would not have relied on the violation of section 8(a)(1) as evidence, a fortiori, of

objectionable conduct. And, because the union organizer could have met with employees elsewhere, he would not have directed a new election.

b. Promises of Benefits/Threats of Reprisals During Campaign

In *St. John's Community Services*, 355 N.L.R.B. No. 70 (Aug. 10, 2010), the Board found a violation of sections 8(a)(3) and (1) when a healthcare employer began enforcing a medication administration policy shortly after a union's successful election. The Board majority focused on a statement that "with all this stuff with the union, everything goes through our lawyers now, and we have to go by the book." *Id.* at *1. Characterizing discharge under the policy as "an unprecedented penalty" for the employer, the Board found that it was "clear that the Respondent was tightening its disciplinary policy in response to its employees' union activity." *Id.* Member Schaumber, dissenting, found that the "we have to go by the book" statement was insufficient, alone, to find a violation, particularly where there was no evidence of any antiunion animus or unfair labor practices during the organizing campaign. *Id.* at *2.

In another decision, Chairman Liebman and Members Becker and Schaumber agreed that an employer violated section 8(a)(1) when it stopped considering a wage increase after learning that the employees who asked for the increase were organizing. *Am. Girl Place, Inc.*, 355 N.L.R.B. No. 84 (Aug. 13, 2010). The employer and actors it employed were in the process of discussing a $6.00 per show increase. The employees were informed that, while the increase had been agreed upon, it was not finalized due to a missing signature. *Id.* at *2. However, when a union demanded recognition, the employer ceased considering the increase, with one manager telling an employee that "now that we see where your loyalties lie, we are no longer going to be able to give you a raise." *Id.* at *2. Member Schaumber concurred that it was unlawful to stop considering the raise but would have found that, because the raise was not final, the employer still could have decided not to grant the increase. *Id.* at n.6

In a two-Member decision that was incorporated into a three-Member decision on remand, *Community Medical Center & New York State Nurses Association*, 355 N.L.R.B. No. 128 (Aug. 26, 2010), the Board affirmed an ALJ's decision that the Center's promise to implement, and its later implementation of, a "shared governance" plan was an attempt to undermine the organizing drive of the New York State Nurses Association. In addition to numerous other violations, the judge found that the announcement of the implementation of the shared governance plan, which would give nurses a voice in practice issues and allow them to raise concerns, was done with the express purpose of attempting to dissuade nurses from selecting the Union as their representative. Thus, the Center violated section 8(a)(1) of the Act. Because the Union lost a representation election three months later, the judge ordered, and the Board affirmed, that a second election take place.

D. Developments in The Duty To Bargain

1. Mandatory Subjects of Bargaining

Perhaps one of the most active areas of case law development in recent years is the area of mandatory subjects of bargaining. Specifically, the Board has addressed the obligation to

bargain over the cessation of dues checkoff provisions and unilateral changes based on past practices.

The Board split 2-2 on the issue of whether dues-checkoff is a mandatory subject. *See Hacienda Resort Hotel & Casino*, 355 N.L.R.B. No. 154 (Aug. 27, 2010). This case, which has bounced been between the Board and the Ninth Circuit for ten years, ended in a deadlock, due to Member Becker's recusal from the case. Due to the split decision, the Board will follow existing precedent and affirm the dismissal of the complaint, which alleged a violation of the Act for unilaterally ceasing dues-checkoff after a collective bargaining agreement expired. Given the concurring opinions of Chairman Liebman and Member Pearce, it is clear that the current state of law is a target for change.

Chairman Liebman and Member Pearce wrote separately to note their "substantial doubts" about the continuing validity of *Bethlehem Steel Co.*, 136 N.L.R.B. 1500 (1962), which excludes dues-checkoff from the unilateral change doctrine, particularly as applied in right-to-work states where the collective bargaining agreement cannot contain a union security clause. Their opinion noted that "the Board has never adequately explained the basis for excepting dues checkoff from the postimpasse rule of *[NLRB v.] Katz*," 369 U.S. 736 (1962). 355 N.L.R.B. No. 154 at *3. Chairman Liebman and Member Pearce noted that "[i]n an appropriate case, [they] would consider overruling *Bethlehem Steel* and its progeny. . . ." *Id.*

In the companion cases of *E.I. DuPont De Nemours, Louisville Works*, 355 N.L.R.B. No. 176 (Aug. 27, 2010) and *E.I. DuPont De Nemours & Co.*, 355 N.L.R.B. No. 177 (Aug. 27, 2010), the Board found that an ALJ properly rejected the employer's argument that unilateral changes to benefit plans were continuations of past practices. During bargaining and after contract expiration, but before the parties were at impasse, the employer unilaterally implemented changes in a benefit plan it provided to union members. While the employer had made similar changes in the past, the Board noted that those changes had occurred when the contract—and a management rights clause—was in effect. 355 N.L.R.B. No. 176 at *1-2. The majority found it "apparent that a union's acquiescence to unilateral changes made under the authority of a controlling management-rights clause has no bearing on whether the union would acquiesce to additional changes made after that management-rights clause expired." *Id.* at *2. The Board distinguished the *Courier-Journal* cases, 342 N.L.R.B. 1093 (2004); 342 N.L.R.B. 1148 (2004), on the fact that the employer in those cases had proven a past practice of unilateral changes during contractual hiatus periods. *Id.* at *1-2. *Courier Journal* could not be extended to these cases because to do so "would conflict with settled law that a management-rights clause does not survive the expiration of the contract embodying it, absent a clear and unmistakable expression of the parties' intent to the contrary." *Id.* at *3. Accordingly, the employer violated sections 8(a)(5) and (1) by making the unilateral changes.

The Board also addressed a unilateral change in health care benefits in *Caterpillar, Inc.*, 355 N.L.R.B. No. 91 (Aug. 17, 2010). Under the health plan provided by Caterpillar, employees were responsible for a $5 co-payment when choosing generic drugs and a $20 or $35 co-payment for brand-name preferred or non-preferred drugs, respectively. *Id.* at *1 Without bargaining, Caterpillar announced that it was implementing a "generic-first" program. *Id.* Under the new program, when a generic drug was available but the employee chose a brand-name prescription, the employee would pay the full cost unless a physician specifies that the brand drug is required.

Id. The Board rejected the employer's argument that the change was only administrative, stating that "[t]he elimination of employee discretion in this area and the increase in the cost of brand-name drugs when not specified by a physician constitute[s] material, substantial, and significant changes." *Id.* at *4. Because Caterpillar did not bargain over the changes, the Board found a violation of sections 8(a)(1) and (5). *Id.* at *5.

2. Duty to Provide Information

The Board has continued to issue opinions regarding the obligation to provide information. One of these cases, *Stanford Hospital*, 355 N.L.R.B. No. 65 (Aug. 6, 2010), involved the relatively rare circumstance of a union being charged for violating the Act for failing to provide information. In that case, SEIU Local 715 was merged into part of a private sector local, Local 521. Stanford Hospital, concerned about its ongoing obligation to bargain with Local 715, requested that Local 715 provide information regarding both Local 715 as well as the current assets and officers of Local 521. The Board found that Local 715 violated the Act not only by failing to produce information regarding Local 715, but also by failing to produce information in its possession regarding the status of Local 521. Because information regarding Local 521 might be relevant to the continued existence of Local 715—by showing an increase in Local 521 assets and a corresponding decrease in Local 715's assets, for instance—the Board found that Local 715 was required to produce the information.

In a second information request case, the Board addressed when an employer must respond to a union's request for information pertaining to a suspected alter-ego relationship. Emphasizing that the test is *not* "whether an alter-ego relationship actually existed . . . but only whether the Union has a reasonable, objectively-based belief that such a relationship existed," the Board found a violation of the Act for refusing to provide the requested information. *McCarthy Constr. Co.*, 355 N.L.R.B. No. 10 at *2 (Feb. 2, 2010). Here, given that the two companies worked along side each other on projects, shared tools, had shared control of business records, and one company provided W-2 forms for employees of both companies, the Union had a reasonable belief of an alter-ego relationship.

The Board also addressed the timeliness of information requests as they relate to upcoming negotiations. In *Kraft Foods North America, Inc.*, 355 N.L.R.B. No. 156 (Aug. 27, 2010), the Board found Kraft in violation of the Act for failure to provide information requested 14 and 15 months prior to negotiations for a successor agreement. The Board noted that while the employer had not indicated an intent to bargain over health, sick pay, retirement, and other benefits, those benefits had been a topic of discussion between the parties for years. *Id.* at *1-3. Further, the Union unsuccessfully requested the information two months prior to the start of the previous negotiations and, though they filed a charge, an agreement was reached before the complaint had been processed. *Id.* at *1, 4. As a result, "it was entirely reasonable for the Union to assume that, in order to obtain corporate-wide information in time to make use of it in the [current] negotiations, it would have to submit its request early enough to obtain timely enforcement of the request through the Board if necessary" *Id.* at *4. The majority characterized its holding as "a relatively narrow one, grounded in the facts of this case and in the practical realities of litigation before the Board. . . ." *Id.* at *5.

Additionally, a three-Member panel adopted the prior two-Member Decision and Order in *Chrysler, LLC*, 354 N.L.R.B. No. 128 (Jan. 6, 2010). *See* 355 N.L.R.B. No. 61 (Aug. 5, 2010). In *Chrysler, LLC*, the Board found that the UAW's requested information pertained to matters outside of the bargaining unit and, as a result, the employer was not obligated to provide the information unless the Union demonstrated relevance. 354 N.L.R.B. No. 128 at *1-2. Because the UAW did not meet its burden under *Disneyland Park*, 350 N.L.R.B. 1256 (2007), to show "either (1) that the [U]nion demonstrated relevance of the nonunit information, or (2) that the relevance of the information should have been apparent to the Respondent under the circumstances," the Board adopted the ALJ's finding that the employer did not violate the Act. *Id.* at *1, 2.

Finally, the Board addressed an "inability-to-pay" case, finding that an employer had bargained on its financial condition to the point that it was obligated to furnish the Union with requested financial documents. *Stella D'oro Biscuit Co., Inc.*, 355 N.L.R.B. No. 158 (Aug. 27, 2010). Among other statements, employer negotiators stated that they "can't survive under the current labor contract" and "could not go on with the business unless [it was] able to further reduce costs;" that it "may have to close" if it could not recover losses, and that it was a "bleeding, distressed asset—a losing proposition." *Id.* at *1-2. While the Board noted that there are no "magic words" that convey an inability to pay, the Board will require production where "in the context of the particular circumstances of the case," statements "effectively" claimed an inability to pay. *Id.* at *2. The employer claimed that it had only expressed an unwillingness, rather than an inability, to pay. *Id.* at *3. The employer also pointed to statements indicating that the private equity firm that owned the company had ample funds, but chose not to deploy them without labor-cost concessions. But the Board focused on the employer's ability to pay—not the owning company's willingness. Because the negotiating position was that the employer could not pay if the owner did not pay, and the owner was not willing to pay without concessions, the Board found that the employer had claimed an inability to pay and was required to produce financial information. *Id.* at *4. The Board also found that the employer did not satisfy its duty to provide information by allowing the Union to view, but not retain, the relevant financial statements. *Id.* at *5-6.

3. Obligations to Bargain Over Discipline

In *Aramark Educational Services, Inc.*, 355 N.L.R.B. No. 11 (Feb. 18, 2010), the Board affirmed an ALJ's finding that an employer was required to bargain over its policy of terminating employees who resulted as a "no-match" against their claimed Social Security number. When, without bargaining, the employer revised its policy to require termination of nonmatching employees, it violated the Act because, according to the Board, policies on termination, continued terms and conditions of employment, and a shift from lax to stringent enforcement of a policy are all mandatory subjects of bargaining. While the Board agreed with the ALJ that the employer committed an unfair labor practice by making the initial unilateral change, it also agreed that the unfair labor practice did not taint the ensuing negotiations, impasse, and re-implementation of the no-match policy.

4. Direct Dealing

In *El Paso Electric Co.*, 355 N.L.R.B. No. 95 (Aug. 18, 2010) the Board found that the employer engaged in direct dealing with unit employees during negotiations and thereby violation section 8(a)(5) of the Act. During negotiations, El Paso Electric's CEO Gary Hedrick passed the building where negotiations were occurring and outside of which union members were gathered to support their team. When the members began chanting Hedrick's name, he approached them and discussed a particular proposal regarding an employee's insurability for driving on the job. Hedrick told a union member that he would check into the proposal. Hedrick later received a phone call from the same employee on the driving proposal and agreed that the language was too ambiguous. He further stated that he had told the employer's negotiating team to tighten up the language and resubmit the proposal. *Id.* at *1.

Noting that Hedrick had twice communicated with a union employee to the exclusion of the Union, the Board found a violation of section 8(a)(5) because "Hedrick invited unit employees' comments about what they wanted and responded to . . . suggestions for modification of a proposal that the Union had already rejected at the bargaining table." *Id.* at *3. Member Schaumber dissented, emphasizing that the communication was largely initiated by the employees and that the conduct "falls far short of '[g]oing behind the back of the exclusive bargaining representative to seek the input of employees on a proposed change in working conditions.'" *Id.* at *4 (quoting *Allied-Signal, Inc.*, 307 N.L.R.B. 752, 753 (1992)).

5. Employer Withdrawal of Recognition

During 2010, the Board addressed the issue of union recognition in multiple cases. One was on remand from the Ninth Circuit's decision in *Local 872 v. NLRB*, 323 F. App'x 523 (9th Cir. 2009). In that case, the Ninth Circuit overturned an NLRB decision holding that an employer legally withdrew recognition from the union. Below, the Board had held that six months of bargaining was a "'reasonable period of time'" to negotiate before withdrawing recognition given that the parties had previously negotiated a new contract for nearly eight months before walking away, therefore, the parties did not "start from scratch" when they bargained for only six months. *See id.* at 524. While the Court "assume[d] that the Board correctly concluded that the parties' earlier negotiations could be relevant under *Lee Lumber* [*& Building Material Corp.*, 334 N.L.R.B. 399 (2001)] in determining whether a 'reasonable period of time' for post-remedial bargaining had elapsed," the record before the Board was devoid of any evidence concerning the prior negotiations. *Id.* at 525. Accordingly, the Court found the Board lacked a basis in substantial evidence for its decision, and granted the Union's petition for review, and remanded the case to the Board.

On remand, the Board found that a reasonable amount of time had not elapsed when the employer withdrew recognition. *See Am. Golf Corp. (Badlands Golf Course)*, 355 N.L.R.B. No. 42 (June 10, 2010). The Ninth Circuit's holding that there was no evidence concerning prior bargaining was the law of the case and, as such, the Board could no longer give the time factor determinative weight, which in turn increased the importance of the fact that the parties were bargaining a first contract. *Id.* at *3. As a result, the Board found that the parties had not bargained for a reasonable period of time before withdrawal, meaning the employer violated the Act by withdrawing recognition and failing and refusing to provide bargaining information. *Id.*

The issue of union recognition also arose in *Crete Cold Storage*, where the Board adopted the ALJ's finding that Crete Cold Storage violated section 8(a)(5) and (1) of the Act by withdrawing union recognition and failing to provide the Union with information. *Crete Cold Storage, LLC*, 354 N.L.R.B. No. 114 (Dec. 9, 2009). Crete Cold Storage presented evidence that the Union's collective bargaining agreement covered five or six employees, but only one employee, Garcia, had union dues deducted from his paycheck. Cold Crete Storage received information leading it to believe that Garcia no longer wanted to be represented by the Union. With that knowledge, Crete Cold Storage announced its intent to withdraw recognition from the Union.

The Board rejected Crete Cold Storage's assertion that the evidence demonstrated a decrease in union membership, making withdrawal permissible. The Board noted that the determination of majority support turns on whether a majority of the unit employees wish to be represented by that Union, not on whether the unit employees choose to become union members or pay union dues. *Id.*

Finally, the Board again held that an employer violated section 8(a)(1) of the Act by soliciting employees to sign affidavits, which the employer initiated, prepared, distributed, and collected, stating that the employee no longer wanted to be represented by their union. *See Vincent/Metro Trucking, LLC*, 355 N.L.R.B. No. 50 at *n.2 (July 13, 2010). Applying *Caterair International*, 322 N.L.R.B. 64 (1996), the Board issued an affirmative bargaining order as a remedy for the 8(a)(5) violation. *Id.* at *1.

E. Developments in Procedural Issues

1. Remedy Issues

a. Electronic Posting and Compounding Backpay

In May 2010, the Board asked for briefing in two remedial matters: electronic posting and compounding interest on backpay. *See NLRB invites amicus briefs in pending cases* (May 14, 2010) available at http://www.nlrb.gov/shared_files/Press%20Releases/2010/R-2744.pdf (last visited Nov. 14, 2010). And, on October 22, it issued its decision in both cases.

(1) Electronic Posting

In the request for briefing regarding electronic posting of notices, the Board asked whether "remedial notices should be posted electronically, such as via a company-wide email system, and if so, what legal standard should apply." *Id.* The invitation noted that requiring the electronic posting of remedial notices would require reversal of *Nordstrom, Inc.*, 347 N.L.R.B. 294 (2006), which required "concrete fact[s]" to justify the "unprecedented step of requiring intranet or other electronic posting." *Id.* at 294. In a footnote in *Nordstrom, Inc.*, Member Liebman wrote that she "would hold that the Board's current notice-posting language, which unequivocally references *all* places where notices to employees customarily are posted, is sufficiently broad to encompass new communication formats, including electronic posting which is now the norm in many workplaces." *Id.* at fn.5.

In its decision on the matter, the Board found "that given the increasing prevalence of electronic communications at and away from the workplace, respondents in Board cases should be required to distribute remedial notices electronically when that is a customary means of communicating with employees or members." *J&R Flooring, Inc.*, 356 N.L.R.B. No. 9 (Oct. 22, 2010). And, as previewed in Member Liebman's footnote, the Board modified its current notice-posting language, "which requires posting in all places where notices to employees or members are customarily posted, to expressly encompass electronic communication formats." *Id.* at *1.

The Board's decision echoes Chairman Liebman's dissent in *Guard Publ'g Co.*, 351 N.L.R.B. 1110, 1111 (2007) ("*Register-Guard*"), to the extent that the workplace has changed, with the internet and e-mail replacing the telephone and posting board. *See* 356 N.L.R.B. No. 9 at *2 ("The ubiquity of paper notices and wall mounted bulletin boards . . . has gone the way of the telephone message pad and the interoffice envelope."). The Board's opinion even requires that "notices should be distributed by email if the respondent customarily uses email to communicate with its employees or members, and by any other electronic means of communication so used by the respondent." *Id.* at *3. Thus, while the decision is significant for its requirement of electronic posting, its true impact may be felt when the Board inevitably reconsiders access to an employer's e-mail, now with Board precedent recognizing the prevalence of the electronic workplace.

(2) Daily Compounding Backpay

While the Board's opinion on electronic posting is an important one, the other October 22, 2010 decision issued by the Board—allowing for daily compounding of backpay in every case—stole the trade headlines. *See Jackson Hosp. Corp.*, 356 N.L.R.B. No. 8 (Oct. 22, 2010) ("*Kentucky River Medical Center*"). When the Board requested briefing on the backpay issue, it inquired as to whether it "should routinely order compound interest on back pay and other monetary awards in unfair labor practice cases, and if so, what the standard period should be for compounding (daily, quarterly, annually?)." *NLRB invites amicus briefs in pending cases*, *supra*. Given the range of possibilities, the Board adopted the most aggressive remedy contemplated by the request for briefing. The new policy adopted by the Board, in a unanimous four-Member opinion, requires backpay be calculated using the current methods for computing the backpay, except that it will also include interest compounded on a daily basis. *Jackson Hosp. Corp.*, 356 N.L.R.B. at *1. The Board rejected requests that the policy apply on a case-by-case basis, instead deciding that the "policy appl[ies] categorically wherever a backpay award is appropriate." *Id.* at *3.

The Board stressed that "compound interest better effectuates the remedial policies of the Act than does the Board's traditional practice of ordering only simple interest. . . ." *Id.* And, because the Board's "primary focus clearly must be on making employees whole," it decided that daily compounding "will lead to more fully compensatory awards of interest and thus come closest to achieving the make-whole purpose of the remedy. . . ." *Id.* at *3, *4. Interestingly, the General Counsel advocated for quarterly compounding for administrative reasons. *Id.* at *5. However, the Board placed primacy in the importance of making the employee as whole as policy, finding that it outweighed any administrative burden. *Id.*

(3) The Remedy Decisions and What They Mean For Rulemaking

One interesting aspect of the Board's decisions on remedies is that some observers of the Board thought that remedies might be a candidate for rulemaking. Respondent in *Kentucky River Medical Center* affirmatively argued to the Board that the issue should be decided through rulemaking, rather than adjudication. The Board rejected that argument, stating that the General Counsel had sought compounded interest since the beginning of the charge and had done so under a policy announced in a General Counsel memorandum. *Id.* at *2.

While the Board has the authority to engage in rulemaking, it is reasonable to conclude that the Board will take advantage of the opportunities presented to it—such as these cases—to make meaningful changes to the current state of labor law, without engaging in the more onerous rulemaking process. It is also reasonable to conclude the decisions may signal the Board's returning from "administrative exile" *see* Section III.C.4, *supra*, and embracing the incorporation of labor policy into decisions between private parties. And, while the decisions are significant decisions that have a far-reaching impact, the Board deserves credit for placing the labor community on notice that it was considering the issue and inviting public comment through amicus briefing.

b. Cease and Desist Orders

In *Ampersand Publishing*, 2010 WL 3285398, an ALJ granted the General Counsel's request for a broad cease-and-desist order against the Santa Barbara News-Paper. In a lengthy page opinion, the judge found numerous violations of the Act and, after finding that "the employer displays 'an attitude of opposition to the purposes of the Act to protect the rights of employees generally,'" the judge directed that the cease-and-desist order apply. Rather than the normal remedial order prohibiting "like or related violations," this broader order prohibited violations "in any other manner." *Id.* slip op. at *147. Further, the judge ordered other "special remedies" discussed *infra*, Section V.E.3.d.

c. Backpay Orders

Resolving an issue that has been at the Board since 1999, Chairman Liebman and Members Becker and Pearce issued an opinion requiring an employer to pay backpay for each hour worked by the 1995 discriminatees from 1995 to their last day of employment. *See Aluminum Casting & Eng'g Co., Inc.*, 355 N.L.R.B. No. 190 (Sept. 22, 2010). Aluminum Casting unlawfully withheld a 1995 pay increase that would have resulted in each employee receiving an increase of $0.25 per hour. *Id.* In 1996, the employer lawfully abandoned across-the-board wage increases in favor of a merit- and training-based compensation adjustment system. *Id.* As a result, the ALJ found that the backpay period was limited to the calendar year of 1995. The Board affirmed. 349 N.L.R.B. 178 (2007). After the Board issued its remedial Order, the Union petitioned the Seventh Circuit for review, and prevailed. *See United Elec., Radio & Mach. Workers of Am. (UE) v. NLRB*, 580 F.3d 560 (7th Cir. 2009). On remand, the Board held that "in order to make the discriminatees' [sic] whole, the proper backpay award in this case cannot be limited to 1995. It must also reflect that the unlawfully withheld pay increase would have been incorporated into the discriminatees' 'base wage' for each year thereafter,

continuing until each discriminatee's last day of employment with the Respondent." 355 N.L.R.B. No. 190 at *2.

One additional backpay case deserves mention. In another three-Member affirmance of a prior two-Member decision, the Board rejected reasons for avoiding backpay in *Jackson Hospital Corp.*, 355 N.L.R.B. No. 114 (Aug. 24, 2010); *see also Jackson Hosp. Corp.*, 354 N.L.R.B. No. 42 (July 9, 2009) (two-Member decision). The Board rejected the employer's argument that its backpay should be cut off because the employee was later convicted of a felony, left an interim job because of problems with child care, and took an eight-month medical leave. The Board found that the employer could not prove that the former employee's felony would have ended her employment because the employer continued to employ other felons. Nor could the hospital prove that it would have terminated her for taking an eight-month leave. Finally, the Board held that the employee acted reasonably in leaving a job for child care reasons, making her entitled to backpay for that period. The Board did affirm the ALJ's decision not to award backpay for an eight month period in which the employee was living in another state and did not seek work.

d. Other Remedies

As discussed *supra*, Section V.E.3.b, an ALJ found that Ampersand Publishing, including its highest officials, had committed violations of the Act "in a wide ranging and significant manner." *Ampersand Publishing*, 2010 WL 3285398 at *147. As a result, the judge directed the "special remedy" of requiring a high-ranking official to read the notice of violation aloud to employees or be present at its reading to employees by a Board agent. *Id.* The employer retained the option of having the notice read by a Board agent or a high-ranking company official.

Further, the General Counsel requested that Union's certification year be extended to ensure that the employees received the benefit of the representative they selected. The judge granted the request, in part because the unfair labor practices in the representation case remained unremedied. The judge also noted that because the employer had bargained in bad faith from the onset, "the good-faith braining which was intended to occur in the certification year has not yet begun." *Id.* at *147-48. Accordingly, the judge ordered that the certification year would begin "at the moment of commencement of the first face-to-face bargaining in good faith *after* the unfair labor practices found herein have been fully remedied." *Id.* at *148 (emphasis added).

2. Appropriate Units

In a case that found Chairman Liebman and Member Schaumber writing the majority opinion with Member Becker in the dissent, the Board addressed what constituted an appropriate unit of casino employees. *Wheeling Island Gaming, Inc.*, 355 N.L.R.B. No. 127 (Aug. 27, 2010). The majority affirmed the Regional Director's finding that a unit of only poker dealers was not an appropriate unit because it was not a sufficiently distinct community of interest from employees who worked craps, roulette, or blackjack games. In a rather lengthy dissent, Member Becker stressed that the Board does not have the statutory authority to determine that a unit is "too narrow," and must only "decide if the proposed unit is *an* appropriate unit." *Id.* at *3. Chairman Liebman and Member Schaumber recognized that the analysis began by asking whether the unit was *an* appropriate unit, but added that the Board must also ask "whether the

interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit. *Id.* at *n.2 (citing *Newton-Wellesley Hospital*, 250 N.L.R.B. 409, 411-412 (1980)). Where, as here, the unit is too narrow in scope, rather than size, the Board will hold that it is not an appropriate unit. *Id.*

3. Elections

In a case relating to the Board's *Dana Corp.* decision, discussed *supra* at Section III.C.3.a, the NLRB Regional Director for Region 19 directed a decertification election among 140 AT&T Mobility employees. *AT&T Mobility LLC*, No. 19-RD-3854, slip op. (N.L.R.B. Jan. 22, 2010). The new election was directed after the Regional Director determined that employees did not receive proper notice of the 45-day window to file a decertification petition. *See Dana Corp.*, 351 N.L.R.B. 434.

In September 2009, AT&T Mobility voluntarily recognized the Communications Workers of America as the exclusive representative for 140 employees in 11 locations throughout Washington State. On October 9, 2009, AT&T Mobility posted a *Dana* notice in several locations, and October 12, 2009, it posted the notices at the remaining locations. The 45-day notice period was to elapse on November 26, 2009. By November 2, 2009, however, the *Dana* notice was no longer posted on the bulletin board at three AT&T Mobility locations. The company representative that posted the notice admitted that he did not check the notice after he posted it, until December 31, 2009, when he realized the notice had disappeared and replaced it. Some of the AT&T Mobility employees filed a petition for decertification on December 22, 2009, well after the notice period was to elapse. The Union objected to the petition as untimely. The Regional Director determined that the *Dana* notice was not posted for the required 45-day notice period. As a result, the Regional Director rejected the Union's objection to the petition and ordered a decertification election. On February 4, Communication Workers of America appealed the decision to the NLRB in Washington, D.C., asking the Board to review the Regional Director's factual determination that the notice was inadequate and to reconsider its 2007 decision in *Dana Corp.* Given that the Board has agreed to review *Dana Corp.* in *Lamons Gasket Co.*, 355 N.L.R.B. No. 157, the result in *AT&T Mobility* may be delayed until the *Dana* issue is resolved.

Beyond issues related to *Dana Corp.*, the newly reconstituted NLRB has been especially active in the areas of elections, recently issuing three opinions regarding the validity of elections and election procedure. First, in *First Student, Inc.*, 355 N.L.R.B. No. 78 (Aug. 9, 2010), a 2-1 panel decided to set aside an election where the employer used a trainer and substitute bus driver as its election observer. Chairman Liebman and Member Pearce found that the driver was "closely identified with management," in part because she was the only employee who sits in an enclosed office that she shares with a supervisor and, in some instances, she was "the only representative of the Employer with whom applicants deal during their application and training process, and therefore they could reasonably believe that she plays a role in deciding whether they are ultimately hired. . . ." *Id.* at *1. Dissenting, Member Schaumber noted that "[i]t is one thing . . . to set aside elections because an observer was a supervisor who actively participated in the employer's antiunion campaign; it is another to set aside an election because an observer was an employee with routine administrative or technical responsibilities," as he viewed the observer in this case. *Id.* at *3.

Another Board opinion produced the odd result of having an August 7, 2009 election set aside because the laboratory conditions were so disturbed without any finding of wrongdoing by any person or party. *Fred Meyer Stores, Inc.*, 355 N.L.R.B. No. 93 (Aug. 18, 2010). The employer and union agreed that, effective July 1, 2009, weekly employee contributions for medical coverage would increase. Because of problems resulting from the transfer of payroll functions from one Kroger division to another, the increased contributions, which were taken as deductions from employees' paychecks, were not taken for the first four weeks. To remedy the uncollected contributions, the employer's payroll decided to take double deductions beginning on July 31, just one week before the scheduled election. While employees were not informed of the error in advance of July 31, the employer attempted to explain the issue on August 5 and 6, before the election.

The three-Member panel of Chairman Liebman and Members Becker and Schaumber recognized that the deductions were not objectionable because the employer had a legitimate business reason and the deductions were not intended to influence the election. *Id.* at *4. Further, the employer made attempts to provide employees and explanations. Nonetheless, the Board found that reasonable employees would be upset by the deductions and might, as some did, blame the Union. In deciding to set aside the election and order a new election, the Board was "sensitive to the fact that the election was an extremely close one, and a change in just a few votes would have resulted in a different outcome." *Id.* Accordingly, a new election was ordered.

In yet another election case from the Board, a three-Member majority rejected an employer's claims that a New York state law impacted its ability to communicate during the election and warranted setting the results aside. *Independence Residences, Inc.*, 355 N.L.R.B. No. 153 (Aug. 27, 2010). New York Labor Law Section 211-a was passed in late 2002 and prohibited employers from using state funds to discourage union organizing or participation or to hire others to engage in such activity. *Id.* at *1. The state statute was subsequently found to be preempted by the NLRA. *See Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 388 F. Supp. 2d 6 (N.D.N.Y. 2005). However, prior to its preemption, an election was held at Independence Residences and the petitioning union prevailed. *Id.* at *2.

The Board characterized the objection as being based on the actions of the State of New York, rather than the Union or any union agents. Thus, the Board applied a third-party interference analysis, stating that "we will not overturn election results unless the third party's conduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Id.* at *8 (internal quotation omitted). Because the Board found that, despite the law, the employer "engage[d] in a vigorous campaign to defeat" the Union, the Board found that the atmosphere was not so tainted as to require overturning the election. *Id.* at *10. Accordingly, the objections were denied.

Finally, in a brief opinion the Board reiterated that the standard for determining whether an employee is a part-time employee eligible to vote in an election depends on the number of hours worked in the "last quarter prior to the eligibility date," which means the 13-week period immediately before the eligibility date. *Woodward Detroit CVS, LLC*, 355 N.L.R.B. No. 181 (Sept. 16, 2010). The Board found merit to an employer's exception to a hearing officer's use of the "calendar quarter," rather than the 13-week period. *Id.*

VI. Areas for Potential Developments in Board Law

As exhibited by the quick movement on bannering, *Dana*, and *MV Transportation*, the Board has shown that it has no trepidation in quickly altering the legal landscape. Given the number of significant issues that the Board will consider within its current backlog of cases, labor practitioners should expect a steady stream of important decisions in the coming months. Though doubtful that the Board will resolve all of these issues within the next year, we can expect to see decisions on a large number of important topics such as access issues, the proper standard for discrimination charges, independent contractor and supervisor status, and organizing of temporary employees.

A. Access, E-mail, and Employer Property Rights

As discussed *supra* regarding the Board's solicitation for briefing on electronic posting of notices, the Board appears to view e-mail and internet as an integral part of the work place. As a result, the Board may revisit its decision in *Register-Guard.*

In *Register-Guard*, a closely divided Board held that an employer did not violate the NLRA by maintaining a workplace rule prohibiting the use of its e-mail system for "non-job related solicitations" and enforcing that policy when an employee/union president sent two e-mails to employees urging that they support the Union. *Register-Guard*, 351 N.L.R.B. at 1111. The Board majority reasoned that employers have a basic property right to regulate and restrict employees' use of company computer systems, servers, and e-mail, and, therefore, it did not violate the Act to restrict use of such property to business purposes. On appeal to the D.C. Circuit, the Union did not challenge the lawfulness of a company policy that bars union access to e-mail on a neutral basis. *See Guard Publ'g Co. v. NLRB*, 571 F.3d 53, 58 (D.C. Cir. 2009) ("*Register-Guard*").

In its decision, the Board also modified the standard used to determine whether an employer discriminatorily enforced a workplace policy against union activity. Adopting the analysis used by the Seventh Circuit in *Fleming Co., Inc. v. NLRB*, 349 F.3d 968 (7th Cir. 2003), the Board explained that to be unlawful "discrimination must be along Section 7 lines." 351 N.L.R.B. at 1118. The majority explained that "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7 protected status." *Id.* Further describing the Seventh Circuit analysis, the Board stated:

> [A]n employer may draw a line between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature (*e.g.*, a car for sale) and solicitations for the commercial sale of products (*e.g.*, Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business-related use.

Id. In a dissenting opinion, Members Liebman and Walsh criticized that "by focusing on what types of activities are 'equal' to Section 7 activities, the majority misses the point." *Id.* at 1129. The dissenters suggested that "[i]n [section] 8(a)(1) cases, the essence of the violation is not

'discrimination.' Rather, it is interference with employees' Section 7 rights." *Id.* In their opinion, "[d]iscrimination, when it is present, is relevant simply because it weakens or exposes as pretextual the employer's business justification [for the interference]." *Id.* Relying heavily on the view that e-mail has replaced the watercooler discussion as the "'natural gathering place' for employees to communicate in the workplace," the dissent concluded that "[w]here, as here, the employer has given employees access to e-mails in the workplace for their regular use, we would find that banning all non-work related 'solicitations' is presumptively unlawful, absent special circumstances." *Id.* at 1124, 1127.

On appeal, the D.C. Circuit dodged most of these questions based on the facts of the case, stating that "[w]hatever the propriety of drawing a line barring access based on organizational status, the problem with relying on that rationale here is that it is a post hoc invention." *Register-Guard*, 571 F.3d at 60. While noting that both August 2000 e-mails sent through the company system by the union president were solicitations for employees to take part in activities in support of the Union, the Court rejected the Board's rationale that it was not discriminatory to discipline her for those e-mails because they were solicitations on behalf of a group or organization, rather than on behalf of an individual. *Id.* at 59-60. The Court noted that the non-solicitation policy banned "*all* 'non-job-related solicitations,'" not just those on behalf of organizations, and that when the union president was disciplined, she was told to "'refrain from using the Company's systems for union/*personal* business,' . . . the reference to 'personal' making it clear that the offense did not depend on whether an organization was involved." *Id.* at 60. Accordingly, the Court rejected the organizational rationale and set aside the Board's determination that Register-Guard did not violate the Act.

In other portions of the opinion, the D.C. Circuit affirmed the Board's determination that Register-Guard violated the Act for disciplining the union president for sending a third, but non-solicitous, e-mail "setting it straight" regarding a union rally occurring around the facility. *Id.* at 55-56, 58-59. The Court found that disciplining her for the e-mail could not have been a neutral application of the Company's e-mail policy because this third e-mail was not a solicitation, and thus was not prohibited by the policy. *Id.* at 58-59. The Court also affirmed the Board's finding that Register-Guard violated the Act by requesting an employee to stop wearing an arm band indicating union support. The Court rejected Register-Guard's argument that it was maintaining a public image by regulating employees who interact with the public, but the Court noted that "customer exposure to union insignia alone is not a special circumstance allowing an employer to prohibit display of union insignia by employees." *Id.* at 61.

On the property question that was not presented to the D.C. Circuit, the current Board may find that employees who regularly use e-mail for work may also use it to communicate about unions, particularly where employers provide an exception for incidental personal use—exceptions that are provided in recognition of the reality that a complete ban simply cannot be enforced as a practical matter. And with respect to discrimination, the Obama Board can be expected to return to the rule of *Republic Aviation*, 324 U.S. 793, which adopted a Board rule applying a presumption that broad bans restricting oral solicitation on nonworking time were unlawful, absent special circumstances. Given the ever-increasing importance of e-mail communications in today's workplace, and the limited effort with which they will allow unions to communicate with employees that they wish to organize, it is unlikely that *Register-Guard* will be the last word on the subject.

One other area regarding union access to e-mail could be a reversal of *Trustees of Columbia University*, 350 N.L.R.B. 574, in which the Board held that an employer was not required to provide work e-mail addresses as part of an *Excelsior* list, even though the targeted employees were at sea on a research vessel for long periods of time. While the majority opinion found no violation, it did so in part because no Board had ever found an employer was not in "substantial compliance" for failing to provide e-mail addresses as part of the *Excelsior* list. The Board added that it was not wiling to make such an extension without the benefit of amicus briefing and a fully developed record. But, as the Board has shown, it is now willing to call for amicus briefing when it believes the issue warrants.

B. Access to Employer Property for Organizational Activities by Off-Duty Employees or Employees of Contractors

In a matter that has bounced between the Board and courts for over eight years, the full Board should address the rules regarding consumer hand-billing activities on an employer's property by off-duty employees and whether an employer may prohibit those activities. *See New York New York Hotel, LLC*, 334 N.L.R.B. 762 (2001); *New York New York, LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002). The Board's prior opinion drew a distinction between (1) "individuals who do not work regularly and exclusively on the employer's property" and who "may be treated as trespassers," and (2), as involved in this case, employees of contractor Ark, who operated a restaurant on New York New York's ("NYNY") premises, "who work regularly and exclusively in the Respondent's facility," and therefore "may engage in protected solicitation and distribution [when off-duty] in nonwork areas of the owner's property unless the owner can show that prohibiting that sort of activity is necessary to maintain production and discipline." 334 N.L.R.B. at 762-63.

On review, the D.C. Circuit reversed and remanded for further consideration, given that "[t]he Supreme Court has never addressed the § 7 rights of employees of a contractor working on property under another employer's control, and the Board's *New York New York* decisions shed little light on the important issues this factual pattern raises." 313 F.3d at 588. The court noted that a number of questions were left unanswered, including:

- "[w]ithout more, does the fact that the Ark employees work on NYNY's premises give them *Republic Aviation* rights [to engage in organizing activity on the employer's premises in non-work areas during off-duty hours] throughout all of the non-work areas of the hotel and casino?"

- whether the Ark employees are "invitees of some sort but with rights inferior to those of NYNY's employees?"

- whether the Ark employees should "be considered the same as nonemployees when they distribute literature on NYNY's premises outside of Ark's leasehold?", etc.

See 313 F.3d at 590. These matters remain unresolved before the Board. If employees of contractors are held to have the equivalent of *Republic Aviation* rights, or anything more than the rights of non-employee union organizers under *Lechmere*, 502 U.S. 527, employers will need to

carefully reconsider the ways in which they police their property for union activity, given the expanded range of permissible activity by individuals not directly employed by the property owner.

C. NLRA Coverage of Graduate Student Teaching and Research Services

On October 25, 2010, Members Becker and Pearce reversed a Regional Director's order dismissing a representation petition without a hearing where the Regional Director dismissed the petition on the basis of the Board's 2004 decision in *Brown University*, 342 N.L.R.B. 483. *See N.Y. Univ.*, 356 N.L.R.B. No. 7. In *Brown University*, the Board overturned a prior *New York University* decision, 332 N.L.R.B. 1205, and held that graduate students performing teaching and research services are not employees within the meaning of section 2(3) of the Act. *See* 342 N.L.R.B. 483.

Members Becker and Pearce noted that because, in opposing the present petition, New York University claimed that certain graduate students were covered by a unit of adjunct faculty, the Regional Director erred in dismissing the petition without a hearing. However, the majority did not miss the opportunity to comment on *Brown University*, plainly stating that "there are compelling reasons for reconsideration of the decision in *Brown University*." 356 N.L.R.B. No. 7 at *2. The Union claimed that "the decision in *Brown University* is based on policy considerations extrinsic to the labor law [the Board] enforce[s] and thus not properly considered in determining whether the graduate students are employees." *Id.* Members Becker and Pearce also noted the argument that *Brown University* was simply wrongly decided and inconsistent with prior Board precedent, Supreme Court precedent, and the Act. *Id.*

In dissent, Member Hayes suggested that the lack of hearing was pretense for remand, particularly given that the Petitioner's "request for review is based solely on . . . urging that there are 'compelling reasons for reconsideration of the Board's *Brown* decision.'" *Id.* at *3. Because Member Hayes finds no "compelling" reason for reconsideration of *Brown*, he would deny the request.

Members Becker and Pearce have effectively breathed new life into a matter that will, eventually, work its way to the Board and allow them a vessel to reconsider *Brown*. As discussed with the remedies decisions issued by the Board, *see* Section V.E.1.a, *supra*, the Board's desire to resolve this issue through adjudication may signal an unwillingness to engage in rulemaking, despite Chairman Liebman's identification of the employment status of graduate students as one area that might be appropriate for rulemaking. *See* 69 DAILY LAB. REP. (BNA) B-1.

D. Definition of Independent Contractor Status

In remarks delivered at Cornell University, Chairman Liebman indicated that one area that should be revisited is the definition of independent contractors, an issue that has developed in Federal courts, Congress, and various administrative agencies, such as the DOL and the Department of Treasury. The Board's concern primarily relates to the D.C. Circuit's opinion in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009), where the Court reversed a Board decision that FedEx Home Delivery ("FedEx Home") violated sections 8(a)(1) and (5) by

refusing to bargain with unions certified as bargaining representatives, based on the Board's finding that the employees in the units were employees, not independent contractors. *Id.*

In reversing the Board, the Court found that the drivers were independent contractors and emphasized the proper weight and focus that should be given to the entrepreneurial opportunity factor in the common law test. *See id.* at 496-97, 502-03. The Court acknowledged that the independent contractor test initially operated "in terms of an employer's right to control" but that eventually "a verbal formulation emerged that sought to identify the essential quantum of independence that separates a contractor from an employee." *Id.* at 496, 497. The development became "as explicit as words can be," *id.* at 497, when the Court "'shift[ed the] emphasis' away from the unwieldy control inquiry in favor of a more accurate proxy: whether the 'putative independent contractors have "significant entrepreneurial opportunity for gain or loss."'" *Id.* (quoting *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002) (quoting *Corp. Express Delivery Sys.*, 332 N.L.R.B. 1522, 1527 (2000))).

As the Court explained the law after *Corporate Express*, "while all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism." 563 F.3d at 497. Given that FedEx Home drivers, among other things, work multiple routes or hire their own employees for their single routes, make use of their vehicles for other commercial or personal uses, set their own hours of work and breaks, and assign contractual rights to routes, the Court reversed the Board, finding that because "the indicia favoring a finding the contractors are employees are clearly outweighed by evidence of entrepreneurial opportunity, the Board cannot be said to have made a choice between two fairly conflicting views." *Id.* at 498-500, 503-04. Accordingly, because the employees were independent contractors and thus not covered by the Act, the Court reversed the Board's decision that FedEx Home violated the Act by refusing to bargain.

While *FedEx Home Delivery* is an important case for independent contractor status under the Act, it is not clear to what degree *FedEx Home Delivery* actually changed the test. While the dissent suggests that entrepreneurial opportunity is given a sense of primacy for the first time, *see id.* at 509-10, 518-19 (Garland, dissenting), the role of entrepreneurial opportunity clearly existed and received increased emphasis in *Corporate Express*. *See id.* at 502-03; *see also* 292 F.3d 777. Accordingly, application of *FedEx Home Delivery* in subsequent cases—both at the Board and in the courts—will determine how large of a role entrepreneurial opportunity will play in balancing other factors recognized at common law.

Despite the D.C. Circuit's attempt to provide more guidance on this topic, the decision may have little impact on cases not under the NLRA. In a non-labor case, the Seventh Circuit noted the variety of tests for determining independent contractor status. *See Estate of Suskovich v. Anthem Health Plans of Va.*, 553 F.3d 559 (7th Cir. 2009). There, the Court applied the 10-factor test from the Restatement (Second) of Agency, but noted that claims were also made under ERISA, which uses a 12-factor common law standard, and the FLSA standard that "determine[s] whether an arrangement is an employment or independent contractor relationship with a six-factor test to determine the 'economic reality' of the situation." *See id.* at 565. Entrepreneurial opportunity was not a factor in any of these tests. Yet another test is the 20-factor test applied by the IRS, also termed the "right-to-control test," but different from either the 10-factor

Restatement test, the 12-factor ERISA test, or the six-factor FLSA test. And, despite the inclusion of twenty factors, entrepreneurial opportunity is not considered under the test commonly used by the IRS. So, while *FedEx Home Delivery* may cast itself as an application of *Corporate Express* in the context of NLRA coverage, it appears that this development may significantly affect the independent contractor test only under the NLRA.

E. Expanding the Definition of Supervisors

In response to the Supreme Court's criticism of the manner in which the Board had previously defined the term "supervisor" and its interpretation of the phrase "independent judgment," *see NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706 (2001), the Bush Board issued *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006) and its companion cases, *Golden Crest Healthcare Ctr.*, 348 N.L.R.B. 727 (2006), and *Croft Metals, Inc.*, 348 N.L.R.B. 717 (2006), which expanded the number of individuals classified as "supervisors" under the NLRA. Specifically, in the *Oakwood* cases, the Board reexamined and clarified its interpretation of the phrase "independent judgment," as well as the section 2(11) terms "assign" and "responsibly to direct." The Board defined "assign" as the act of "designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, *i.e.* tasks, to an employee." 348 N.L.R.B. at 689. The Board defined "responsibly to direct" with the following example: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both responsible . . . and carried out with independent judgment." *Id.* at 691. And, consistent with the Supreme Court's direction in *Kentucky River*, the Board adopted an interpretation of "independent judgment" that "applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical experience." *Id.* at 692. The Board defined "independent judgment" in relation to two concepts: first, independent judgment cannot be effectively controlled by any other person, and second, the degree of discretion must rise above the "routine or clerical." *Id.* at 693. Taken together, these definitional clarifications expanded the number of individuals who may be deemed supervisors under the Act, and concomitantly narrowed the pool of workers who may potentially be organized.

These decisions, which did not move the compass very far, are unlikely to survive for long. In a dissenting opinion, then-Member Liebman and Member Walsh argued that the majority's definition of "assign" was improper. According to the dissent, the term "assign" should not include the act of assigning overall tasks to employees because assigning employee tasks is a "quintessential function of the *minor supervisors* whom Congress clearly did *not* intend to cover in Section 2(11)." *Id.* at 702 (emphasis added). Accordingly, "assign" should be defined as "designating work site" or "work hours." *Id.* Members Liebman and Walsh also argued that the majority incorrectly defined the term "responsibly to direct," because, in the dissent's opinion, section 2(11) is intended to cover only those "persons who were effectively in charge of a department-level work unit, even if they did not engage in the other supervisory functions identified in Section 2(11)." *Id.* (emphasis omitted).

The dissenting opinion filed by Members Liebman and Walsh may well foreshadow the approach likely to be taken by the current Board. Beyond simply increasing the number of individuals who could be organized, the dissent's contemplated exclusion of "minor supervisors"

from the Act's definition of supervisor has further implications in the organizing context. In *Harborside Healthcare, Inc.*, 343 N.L.R.B. 906 (2004), the Board set forth the test for when a supervisor's speech regarding organizing—either prounion or antiunion—justifies setting aside an election. In *Harborside*, the majority noted that the "proper inquiry . . . is whether supervisory prounion [or antiunion] conduct reasonably tends to have a coercive effect on or is likely to impair an employee's choice." *Id*. at 909 (internal quotation marks and alterations omitted). More specifically, the inquiry includes "consideration of the nature and degree of supervisory authority possessed by those who engage in the [challenged] conduct," and "an examination of the nature, extent, and context of the conduct in question." *Id.* The Board then went on to hold that a supervisor's speech to three employees—one of whom the supervisor directed for one day, and two of whom she never specifically supervised—was sufficiently coercive, in part because of the possibility that the supervisor might someday supervise those employees and the "three employees could reasonably fear that [the supervisor] would eventually exercise charge nurse authority over them." *Id*. at n.13.

Member Liebman dissented, noting that the Board's definition of supervisor "sweeps in many workers whose authority is quite limited and whose legal status is highly debatable." *Id.* at 916. She then noted that "[t]o the extent that it inhibits workers who fall near, but not over, the supervisory line, the majority's approach threatens to deprive unions of their natural leaders in the workplace." *Id.* The dissent criticized the majority opinion for shifting the focus away from a showing of coercion, and ignoring an employer's anti-union stance in assessing a supervisor's pro-union conduct. *Id.*

Limiting the definition of "supervisor" to exclude those whom now-Chairman Liebman characterized as "minor supervisors" would have the additional consequence of permitting these "minor supervisors" to influence employee choice by speaking in favor of unionization without fear that doing so would be considered supervisory coercion. It would thus severely limit the impact of *Harborside*'s limitations on pro-union supervisory speech. As with many of the other areas that may change, altering the definition of "supervisor" is likely to have consequences beyond those immediately intended. Accordingly, careful consideration should be given to not only whether a change is necessary, but also to the less-obvious ramifications of such a change.

F. Expanding Opportunities for Organizing Temporary Employees

Temporary workers remain a key segment of the American workforce. *See, e.g., United States Department of Labor Bureau of Labor Statistics Career Guide to Industries: Employment Services, available at* http://www.bls.gov/oco/cg/cgs039.htm (last visited Oct. 14, 2010). As U.S. businesses struggle to compete in a global economy and face the often seasonal ups and downs of business, they turn to agencies that are able to supply workers for short periods when needed, rather than constantly adjusting the size of their permanent workforce. The conditions under which these individuals work present unique organizing challenges, because they are formally employed by the temporary agency, but may do work in a number of different employers' worksites. Organizing the temporary agency makes little sense when the employer at the worksite controls many of the day-to-day working conditions. And the Board has held that these individuals cannot be included in an appropriate collective bargaining unit with permanent employees of the host employer even where a joint employer relationship exists, absent the consent of both employers. *H.S. Care LLC*, 343 N.L.R.B. 659 (2004) ("*Oakwood Care Center*").

Specifically, in *Oakwood Care Center*, the Board considered a proposed collective bargaining unit made up of permanent employees of a long-term residential care center, and employees of a personnel staffing agency who also worked at the center. The Board held that the latter group of employees was jointly employed by the center and by the staffing agency because the center and the agency jointly determined pay and benefits, while the center supervised their work on a day-to-day basis. Existing Board law at the time the case arose suggested that a unit comprised of employees solely employed by the center and jointly employed by the center and the agency was nonetheless a "single employer" unit that could be maintained without the consent of both employers. *See M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000), *overruled by* 343 N.L.R.B. 659 (2004). In *Oakwood*, the Board suggested that the *Sturgis* decision applied a "novel definition of 'employer' fashioned for the purpose of deciding the case," when it held that the two groups of employees worked only for a single employer. *Oakwood*, 343 N.L.R.B. at 660. The *Oakwood* majority thus reasoned that because one of the groups was jointly employed, the proposed unit was a multiemployer unit that could not be entered into without consent. *Id.* at 662-63.

As with numerous other cases discussed in this section, then-Member Liebman and Member Walsh dissented, accusing the majority of barring "yet another group of employees – the sizeable number of workers in alternative work arrangements – from organizing labor unions, by making them get their employers' permission first." *Id.* at 663. Describing the case as "involving the rights of temps, part-timers, and other contingent workers to improve their working conditions through union representation," and calling the majority's opinion "mistaken in every critical respect," the dissent accused the majority of ignoring the context in which such arrangements have been created, which purportedly includes companies' "strategic decision to pursue a low-wage, low-skill, high-turnover path to profit-making." *Id.* at 664-65 (internal quotation marks omitted). In the dissent's view, the existence of a joint employer and a single employer makes for an appropriate unit so long as the employees share an appropriate community of interest, inasmuch as such units "facilitate . . . collective bargaining." *Id.* at 665, 667-68.

While the U.S. economy struggles to recover, business continue to rely heavily on temporary workers, meaning that efforts to organize these employees are likely to continue. It is equally clear that the current Board will likely seek ways to facilitate organizing these workers, whether based in the language of the statute or in those Members' views of appropriate social policy. Should the Board move back to *Sturgis*, it will then face a number of important and unanswered questions. How is an employer, for example, to negotiate a contract with a group of employees that may have vastly different interests? Permanent employees may be interested not only in wages, but in longer term benefits such as a retirement plan and/or health insurance and may be willing to accept lower wages in exchange for richer benefits in these areas. Temporary employees, on the other hand, are not likely to be employed long enough at any one host site to take full advantage of these programs (and, indeed, may be better served by participating in any such programs offered by the temporary agency itself), and thus will be less willing to compromise wage rates and non-economic terms and conditions of employment in exchange for such programs. And these problems exist not just for employers, but for unions as well. Unions, after all, owe a duty of fair representation to *all* unit employees; substantial conflicts among

employee interests often place the union in an untenable position. (Indeed, in *Sturgis* it was the union, not the employer, that opposed including temporary employees in the collective bargaining unit). And finally, conflicts among the permanent employer and the temporary agency are also possible. Unlike traditional multiemployer bargaining units, which typically focus on obtaining uniform terms and conditions of employment for an industry, these employers operate in two vastly different businesses, with differing cost and competitive structures, and are thus likely to have very different bargaining objectives.

Regardless of these concerns, the current Board is likely to revisit this issue. And, should it seek to return to the *Sturgis* rule, the Board should address and resolve these issues, which were raised in but disregarded by the majority in *Sturgis*. *See Sturgis*, 331 N.L.R.B. at 1307 (noting, in response to concerns about its holding, that the Board is "confident that the collective-bargaining process encouraged by the Act . . . is capable of meeting the changing conditions and challenges posed by bargaining in these units.").

G. Union Salts: Definition of "Employee" and Backpay Rules

The Board is also likely to revisit issues relating to the protection of union organizers, known as "union salts," who pose as job applicants for the purpose of organizing a workplace. For instance, the Board may alter the proper definition of "employee" in the union salting context. The Board in *Toering Electric Co.*, 351 N.L.R.B. 225 (2007), held that union salts may not always be considered employees within the meaning of the Act, noting that "a Section 2(3) employee is someone genuinely interested in seeking to establish an employment relationship with the employer." *Id.* at 228. For this reason, the Board abandoned the previous implicit "presumption that any individual who actually applies for a job is entitled to protection as a Section 2(3) employee." *Id.* at 231. Prior to *Toering Electric*, the Board presumed that an individual who submitted an application for employment was a section 2(3) employee and thus entitled to protection against discriminatory hiring practices. *See, e.g.*, *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 551-53 (D.C. Cir. 2006), *enforcing* 344 N.L.R.B. 426 (2005). Finally, the Board imposed on the General Counsel the ultimate burden of proving an individual's "genuine interest in seeking to establish an employment relationship with the employer" in order to establish a valid discrimination claim.

Dissenting, Members Liebman and Walsh claimed that *Toering Electric* "continues the Board's roll-back of statutory protections for union salts who seek to uncover hiring discrimination by non-union employers and to organize their workers." 351 N.L.R.B. at 238. The dissent characterizes *Toering Electric* as contrary to the NLRA, its policies, and Supreme Court precedent. *Id.* Revisiting the issue decided in *Toering Electric* is likely given the dissent's statement that "[t]he Board, with the approval of the courts, has long treated salting as a legitimate tactic. But that era seems to be ending." *Id.* Thus, it is unlikely that *Toering Electric* is the final word on the definition of "employee" under section 2(3) in the salting context.

Additionally, the Board may revisit its prior opinion in *Oil Capitol Sheet Metal, Inc.*, 349 N.L.R.B. No. 118 (May 31, 2007), which held that "the traditional presumption that the backpay period should run from the date of discrimination until the [employer] extends a valid offer of reinstatement" would, in the context of union salts, "resul[t] in backpay awards that bear no rational relationship to the period of time a salt would have remained employed with a targeted

nonunion employer." *Id.* Accordingly, the Board "decline[d] to apply a presumption of indefinite employment and instead . . . require[d] the General Counsel, as part of his existing burden of proving a reasonable gross backpay amount due, to present affirmative evidence that the salt/discriminate, if hired, would have worked for the employer for the backpay period claimed." *Id.* On appeal to the D.C. Circuit, the court rejected the appeal as unripe for review, given that the compliance proceedings in which the new rule would apply had not yet taken place, so that the court "d[id] not know whether the new rule will have any impact on the ultimate remedy." *Sheet Metal Workers Int'l Ass'n, Local 270 v. NLRB*, 561 F.3d 497, 501 (D.C. Cir. 2009); *see also Int'l Bhd. of Boilermakers, AFL-CIO, v. NLRB*, 377 F. App'x 125 (2d Cir. 2010) (dismissing challenge to *Oil Capitol Sheet Metal* as unripe). Considering the likely difficulty in meeting that burden, and the Board's interest in backpay as evidenced by its *Kentucky River Medical Center* decision, *see* 356 N.L.R.B. No. 8, the current Board may revisit the rule in *Oil Capitol Sheet Metal*.

H. Expanding the Definition of Protected Concerted Activity

An additional area the Board may revisit is the area of "protected concerted activity" under the NLRA. Section 7 guarantees that employees may engage in concerted activity for mutual aid and protection. *See* 29 U.S.C. § 157. This area of law could be expanded in at least two ways.

First, the Fourth Circuit in 2009 reversed a Board decision involving protected concerted activity in *Media General Operations Inc. v. NLRB*, 560 F.3d 181 (4th Cir. 2009). The Fourth Circuit stated that the employee's conduct "skirt[ed] the outer bounds of that which can be considered concerted activity under the Act's auspices." However, the Board's decision was reversed on the basis that the conduct, even though protected concerted activity, lost its protection based on its egregious and flagrant nature. Thus, one way the Board could expand the activities considered as protected concerted activity would be to use the behavior in *Media General Operations* as the "outer bounds" of the Act's protections for determining what other conduct would be protected.

A second and broader manner in which the Board may be poised to expand the definition of protected concerted activity is to return to the *Alleluia Cushion* doctrine. *See Alleluia Cushion Co., Inc. & Jack G. Henley*, 221 N.L.R.B. 999 (1975), *overruled by Meyers Indus. (Meyers II)*, 281 N.L.R.B. 882 (1986). *Alleluia Cushion* involved the termination of an employee who complained to both management and California OSHA about alleged safety violations at his place of work. Addressing the employer's arguments that the employee was not representing other employees, the Board noted that "the absence of any outward manifestation of support for [the employee's] efforts is not, in our judgment, sufficient to establish" that other employees did not support him or share his concerns. The Board concluded that in raising OSHA safety and health concerns, "the consent and concert of action emanates from the mere assertion of such statutory rights." 221 N.L.R.B. at 1000. As a result, the Board held that "where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted." *Id.*

This doctrine was reversed by the Board, first in *Meyers I*, 268 N.L.R.B. 493 (1984), and, on remand, *see Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), and reversed again in *Meyers II*. 281 N.L.R.B. 882 (1985), *aff'd*, 835 F.2d 1481 (D.C. Cir. 1987). As the Board explained in *Meyers II*, in order for activity to be protected concerted activity, it is not enough for an employee to assert a statutory right; rather, the employee must be acting "with or on the authority of" fellow workers. 281 N.L.R.B. at 885. The Board noted that the single employee acting on behalf of fellow workers, or based on discussions with fellow workers, seeking to bring about group action, or raising group concerns would be engaged in protected concerted activity, even under their revised definition. *Id.* at 887. However, *Meyers II* would not recognize an individual's activity as protected concerted activity simply because he or she asserted statutory rights; while "invocation of employee contract rights is a continuation of an ongoing process of employee concerted activity . . . invocation of statutory rights is not." *Id.* at 888.

Under the current Board, a return to *Alleluia Cushion* is not out of the question. The doctrine's roots were founded in the objectives and protective purposes of section 7, and based on dissents in other cases discussed in this article. Given the potentially wide-reaching effect of a return to the *Alleluia Cushion* doctrine, reversing *Meyers II* would allow the Board to quickly increase the Act's protection of concerted activity.

VII. Executive Orders and Administrative Agency Developments

Given Labor's dashed hopes for a Congress that would pass labor law reforms, Labor looked to the Executive Branch and its Administrative Agencies for changes through Executive Orders, new regulations, and increased enforcement of existing regulations.

A. Executive Orders and Related Rules

Early in the Obama Administration, Labor reaped quick rewards through Executive Orders that either reversed Executive Orders of the Bush Administration or gave Labor some foothold in the workplace. In the nearly two years since those orders were issued, however, the agencies responsible for implementing the orders are only beginning to issue Final Rules. While the Executive Orders only apply to federal contractors, as discussed *infra*, the Office of Federal Contractor Compliance Programs ("OFCCP") appears to be expanding the roster of employers who are considered to be federal contractors under the law.

On February 6, 2009, President Obama issued Executive Order 13496, "Notification of Employee Rights Under Federal Labor Laws," which requires federal contractors holding contracts in excess of $100,000.00 to post a notice of employees' rights under the National Labor Relations Act. On May 20, 2010, the Office of Labor-Management Standards issued its Final Rule, which requires that covered employers post a notice of rights under the NLRA in "conspicuous" places where NLRA-covered employees work, where employee notices are customarily placed, and where any work related to the federal contract or subcontract is performed. Further, employers are required to post the notice electronically if they regularly post employee notices electronically. *See* 75 Fed. Reg. 28,368 (May 20, 2010).

Also on February 6, 2009, President Obama signed Executive Order 13502, entitled "Use of Project Labor Agreements for Federal Construction Projects," which encourages federal

agencies to "consider requiring the use of project labor agreements in connection with large-scale construction projects in order to promote economy and efficiency in Federal procurement." "Large-scale construction projects" are defined in the Order as construction projects having a total cost to the federal government of $25 million of more. As used in the Order, a project labor agreement is a "pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project. . . ." The Federal Acquisition Regulation (FAR) Council issued its Final Rule implementing the Order on April 13, 2010. *See* 75 Fed. Reg. 19,168 (Apr. 13, 2010). The Final Rule largely tracks the language of the Order, only stating that "agencies are *encouraged* to *consider*" requiring the use of a project labor agreement. *Id.* at 19,178 (emphasis added). However, in a departure from the proposed rule that only required the parties to "bargain in good faith" over an agreement, "[i]f an agency decides that permitting execution of the project labor agreement after award is the best approach [as opposed to when offers are due or prior to award], the contractor will be required to submit an executed copy of the agreement to the contracting officer." *Id.* at 19,174.

The third Executive Order issued on February 6, 2009—Executive Order 13494, entitled "Economy in Government Contracting"—prevents federal contractors from being reimbursed for costs associated with the contractor's efforts to "persuade employees . . . to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively through representatives of the employees' own choosing." Section 4 of the Order sets forth a non-exhaustive list of costs that are not reimbursable when undertaken to persuade or deter organizing activities, including "hiring or consulting legal counsel," and "planning or conducting activities by managers, supervisors, or union representatives during work hours." The FAR Council issued a Proposed Rule on April 14, 2010, *see* 75 Fed. Reg. 19,345, that simply tracked the language of the Order regarding costs that would be unallowable.

Finally, President Obama's Order titled "Nondisplacement of Qualified Workers Under Service Contracts," E.O. 13495, requires that successor federal contractors performing the "same service . . . at the same location" offer the predecessor federal contractor's employees (excluding managerial and supervisory personnel) a "right of first refusal of employment under the contract in positions for which they are qualified." The Department of Labor issued a Notice of Proposed Rulemaking on E.O. 13495 on March 19, 2010. *See* 75 Fed. Reg. 13,382. The Notice indicates that the Department is contemplating implementing rules similar to those applicable to a Clinton Executive Order on nondisplacement, but notes that the Obama Order is broader in scope than the Clinton Order. *See id.* at 13,384. Comments were due for submission on May 18, 2010. *See* Docket No. DOL-2010-0001, *available at* http://www.regulations.gov (last visited Nov. 14, 2010).

B. Administrative Agencies

Administrative agencies have announced various initiatives that coincide with Labor's requests for greater regulatory enforcement of existing workplace laws and enhanced regulations. For instance, agencies have worked together to create initiatives on employee misclassification and worker safety. Further, the agencies have engaged in rulemaking on other topics supported by Labor, such as consultant reporting, executive pay, and organizing election rules.

1. Targeting Employee Misclassification

Across the Administration, as well as in Congress, the last two years have seen a large push on issues related to the proper classification of a worker as an employee or an independent contractor. Department of Labor Deputy Secretary Seth Harris testified before the U.S. Senate in June of 2010 to address worker misclassification. *See Statement of Seth D. Harris, Deputy Secretary U.S. Department of Labor, Before the Committee on Health, Education, Labor, and Pensions, U.S. Senate* (June 17, 2010), *available at* http://www.dol.gov/_sec/newsletter/2010/20100617-2.htm (last visited Nov. 14, 2010). Harris explained that misclassification is more than a "technical violation" but is about "workers being illegally deprived of labor and employment law protections." *Id.*

As a result, the Department is implementing a "broad" compliance strategy called "Plan/Prevent/Protect" that will require employers to (1) create a plan made available to employees to monitor, identify, and remedy violations; (2) implement the plan in a manner that prevents violations; and (3) monitor the plan to ensure that it actually protects workers' rights. *Id.* Harris indicated that the strategy is Department-wide, and that OSHA and the OFCCP will consider similar rules in coming years. *Id.*

Harris also indicated that the DOL's Wage & Hour Division is targeting misclassification in enforcement, including a multi-agency initiative with the Department of Treasury and Department of Labor. *Id.* As part of the misclassification enforcement initiative, President Obama's Fiscal Year 2011 budget proposed $25,000,000 for the joint initiative. And, as the DOL recently announced, the initiative is a key part of the agency's five year strategic plan. *See U.S. Department of Labor Strategic Plan, Fiscal Years 2011-2016, available at* http://www.dol.gov/_sec/stratplan/StrategicPlan.pdf (last visited Nov. 14, 2010). In seeking to address misclassification, the Wage & Hour Division "will raise its directed investigation level and increase its presence" in key industries including "construction; janitorial; home health care; child care; transportation and warehousing; meat and poultry processing; and other professional and personnel service industries." *Id.* at 32.

2. Rulemaking on Consultant Reporting and LMRDA Issues

The Department's Office of Labor-Management Standards ("OLMS") has indicated that it plans to publish a notice of proposed rulemaking regarding the required disclosure of payments to labor relations consultants under section 203 of the Labor-Management Reporting and Disclosure Act ("LMRDA"). In addition to obligations imposed on unions and labor consultants, the LMRDA requires employers to report and disclose any agreement or arrangement under which a consultant attempts to persuade employees regarding their rights to organize, bargain collectively, or obtain information concerning the activities of employees or labor organization in connection with a labor dispute. *See* 29 U.S.C. § 433. However, under the "advice exemption," an employer is not required to report arrangements under which a person is:

> giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such

> employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

29 U.S.C. § 433(c). The Department's Spring Regulatory Agenda Fact Sheet for 2010, *available at* http://www.dol.gov/regulations/factsheets/olms-fs-advice-exemption-nprm.htm (last visited Nov. 14, 2010), states that the current application of the "'advice exemption' is overbroad and that a narrower application would better allow for the employer and consultant reporting intended by the LMRDA." *Id.*

3. OSHA – Focusing on Worker Safety

Since being appointed Secretary of the Department of Labor, Hilda Solis has stressed the need for "good jobs for everyone," and, as the Department said in its Five Year Strategic Plan, "[c]entral to Secretary Solis' vision of *good jobs for everyone* are workplaces that are safe and healthy." *See Five Year Strategic Plan*, *supra*, at 38. Undoubtedly, OSHA will be a large part of this goal. First, the DOL has indicated that OSHA will implement National Emphasis Programs (NEPs) that will target hazardous industries such as those dealing with crystalline silica, lead, combustible dust, oil refineries, trenching hazards, amputations, and shipbreaking operations. *Id.* at 40. But the NEPs will also be expanded in the coming years to include review of the accuracy of injury and illness reporting data; define procedures and guidelines for inspection of facilities where hazardous chemicals are at or above permissible levels; and to target Hexavalent Chromium, which is contained in paints and coatings using chromates and is used in welding or metal cutting jobs, among others. *Id.* In addition to the targeting of hazardous industries, OSHA has also completed a review of its penalty structure "to ensure that penalties imposed are consistent with the seriousness of the violation and act as effective deterrents to violators." *Id.*

Beyond the NEP expansion, the Office announced plans to divert resources from voluntary and cooperative programs, such as the Voluntary Protection Program, to enforcement programs. OSHA's FY 2011 budget request further emphasized this shift by including a 2.7% increase in total funding, to $573 million, but also a 4.1% cut in compliance assistance programs. Assistant Secretary of Labor for Occupational Safety and Health Dr. David Michaels explained that OSHA "recognize[s] that Voluntary Protection Program companies do an excellent job," but that "OSHA resources need to be focused on employers who don't understand the importance of protecting their workers, particularly small employers." *Obama Proposes $573 Million for OSHA in 2011, with Cut for Voluntary Program*, 20 DAILY LAB. REP. (BNA) AA-4 (Feb. 2, 2010). The FY 2011 budget also allows for increased enforcement even over FY 2010 levels. OSHA expects to conduct 42,250 investigations in FY 2011, 6,250 of which will be done by agency new hires. *Id.*

In addition to increased targeted investigations, higher penalties, and more enforcement, OSHA has also engaged in rulemaking. For instance, the Agency is taking steps to move a number of long-pending rules—such as those relating to crystalline silica—forward and is working on several other high profile issues, such as combustible dust and diacetyl.

However, the most high profile issue for Labor and businesses pending at OSHA is ergonomics and Safety and Health Program Standards. On January 29, 2010, the Agency issued

a Notice of Proposed Rulemaking seeking to require so-called musculoskeletal disorders to be separately accounted for on injury and illness logs. This is widely-viewed as a first step towards resurrecting the Clinton Administration's failed efforts to promulgate binding ergonomics standards. However, given that the Clinton-era rule was nullified under the little-used Congressional Review Act, which prevents the Agency from issuing a similar rule in the future, OSHA likely needs Congressional legislation to regulate the issue directly. It is more likely, therefore, that OSHA will attempt to regulate the issue indirectly via the proposed Injury and Illness Prevention Program rule, which will build upon the Safety and Health Program standard advocated by Dr. Michaels advocates. *See* DOL Spring 2010 Regulatory Plan, *available at* http://www.dol.gov/asp/regs/unifiedagenda/spring-2010-regulatory-plan.pdf (identifying Injury and Illness Prevention Program RIN 1218-AC48) (last visited Nov. 14, 2010).

The contours of the rulemaking process, which is currently in the pre-rule stage, are unclear at this point. The abstract for the rulemaking indicates that "[a]n injury and illness prevention rule would build on [the Safety and Health Program Management Guidelines] as well as lessons learned from successful approaches and best practices under OSHA's Voluntary Protection Program Safety and Health Achievement Recognition Program and similar industry and international initiatives. . . ." *Id.* at 38. The rule will also likely contain many of the same elements as the failed Clinton ergonomics rule, including management commitment and employee involvement, worksite analysis, hazard prevention and control, and training for employees, supervisors, and managers. But the standard likely would apply more broadly than the ergonomics rule, requiring remediation of all workplace hazards including those claimed to result in recorded musculoskeletal disorders. Such a rule would be enforced using the usual OSHA inspection procedure. Dr. Michael's has succinctly described what he sees as the value of such programs in discussing his experience at the Department of Energy: "[w]hen I sent inspectors out following a report of an accident . . . the first thing the inspector did was to determine whether the managers were meeting the facility's own plan. If not, they were in violation. End of discussion." Michaels, DOUBT IS THEIR PRODUCT: HOW INDUSTRY'S ASSAULT ON SCIENCE THREATENS YOUR HEALTH 259 (Oxford University Press, 2008). In other words, OSHA would hope to use such a standard as a broad enforcement tool, even for situations in which no specific OSHA standard exists. Organized labor will clearly support such a standard and, if promulgated, will use it to their advantage. The business community should be prepared to carefully review and response to the Notice of Proposed Rulemaking once it is issued.

Another OSHA issue worth mention is the proposed interpretation issued regarding the provisions for feasible administrative or engineering controls of occupational noise. *See* 75 Fed. Reg. 64,216 (Oct. 19, 2010). Under 29 C.F.R. §§ 1910.95(b)(1) and 1926.52(b), employers are required to implement feasible administrative or engineering controls to reduce workplace sound that exceeds permissible levels and, if those controls are ineffective, personal protective equipment such as hearing protectors are issued. *See* 75 Fed. Reg. at 64,216. Currently, OSHA only issues citations for failure to use engineering and administrative controls "when hearing protectors are ineffective or the costs of such controls are *less* than the cost of an effective hearing conservation program." *Id.* (emphasis added). Understandably, hearing protection is often less expensive than engineering the workplace to minimize the sound level. OSHA proposes to consider administrative or engineering controls economically feasible "when the cost of implementing such controls will not threaten the employer's ability to remain in business. . . ."

Id. at 64,217. As a result, employers would be forced to implement the much more expensive systemic changes.

Finally, OSHA has seen a significant increase in its jurisdiction as it has become increasingly involved in the investigation of whistleblower claims. In July 2010, OSHA unveiled a new website for the Whistleblower Protection Program. *See* www.whistleblowers.gov (last visited Nov. 14, 2010). Congress has increasingly included whistleblower protections in legislation it passes, including both the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, (Pub. L. No. 111-203, § 1057), and the Affordable Care Act, (Pub. L. No. 111-148, § 1558), and given OSHA responsibility for investigating whistleblower claims. In total, OSHA enforces whistleblower provisions in 20 statutes, including the OSH Act, the Surface Transportation Assistance Act, the Asbestos Hazard Emergency Response Act, the International Safe Container Act, the Safe Drinking Water Act, the Federal Water Pollution Control Act, the Toxic Substances Control Act, the Solid Waste Disposal Act, the Clean Air Act, CERCLA, the Energy Reorganization Act, AIR21, Sarbanes Oxley, the Pipeline Safety Improvement Act, the Federal Railroad Safety Act, the National Transit Systems Security Act, the Consumer Product Safety Improvement Act, and the Seaman's Protection Act.

4. OFCCP and Other Federal Contractor Initiatives

The OFCCP has become increasingly active in the past two years, again, both in enforcement and rulemaking. The Office has become particularly aggressive regarding enforcement and assertions of federal contractor jurisdiction throughout the healthcare industry. In *OFCCP v. UPMC Braddock*, ARB No. 08-048, 2009 OFCCP Lexis 2, (ARB May 29, 2009), the OFCCP successfully asserted jurisdiction over three University of Pittsburgh Medical Center ("UPMC") hospitals based on contracts the hospitals had with the UPMC Health Plan (an HMO). Even though the three UPMC hospitals did not directly contract with the federal government, the ARB nevertheless found the UPMC hospitals to be federal subcontractors subject to the OFCCP's jurisdiction.

The ARB first found that a direct government contract existed between the HMO and the federal government, through which the HMO provided a medical health plan to federal government employees. The HMO also had a contract with the UPMC hospitals, under which the hospitals provided medical products and services covered by the UPMC Plan. The ARB found that the contract between the UPMC Health Plan and the hospitals "clearly required the hospitals to furnish the services necessary for UPMC to meet its obligations" to the federal government. Thus, the ARB found that the hospitals were federal subcontractors and subject to the OFCCP's regulations. The ARB's decision in *Braddock* is currently on appeal in the U.S. District Court for the District of Columbia. *See UPMC Braddock v. Solis*, No. 1-09-CV-01210 (D.D.C filed June 30, 2009).

In a more recent and similar case, a Department of Labor Administrative Law Judge found that a hospital was a federal subcontractor by nature of its participation in the Department of Defense's TRICARE program. *See OFCCP v. Florida Hospital*, 2009-OFC-00002 (Oct. 18, 2010). The judge found that Humana, a regional administrator of TRICARE, agreed to provide a network of health care providers to active duty and retired U.S. military. Florida Hospital had an

agreement with Humana for the provision of health care services for TRICARE beneficiaries. As in *UPMC Braddock*, the judge found that Florida Hospital had undertaken to perform a portion of Humana's obligation to the federal government, and thus was a covered federal subcontractor. It is expected that this decision will be appealed.

In addition to enforcement, the Office has also engaged in rulemaking; most significantly the OFCCP will share enforcement responsibility for implementing the Executive Order requiring the posting of NLRA rights notices, as discussed in Section VII.A, *supra*. Obviously, Labor will benefit from this rule, which will require the ever-increasing number of federal contractors to post notices of federal labor rights throughout the workplace.

The OFCCP has indicated that it plans on publishing notices of proposed regulations regarding section 503 of the Rehabilitation Act and the Vietnam Era Veteran's Readjustment Assistance Act (VEVRAA) in December 2010. On section 503, the Office is seeking information on how federal contractors and subcontractors can conduct more substantive analyses and fully monitor their recruitment and placement efforts on behalf of individuals with disabilities. There is some speculation that the rule could lead to availability and utilization analyses for disabled individuals similar to those currently required for minorities. Regarding the Vietnam Era Veterans' Readjustment Assistance Act, the OFCCP intends to revise the regulations implementing the affirmative action requirements of VEVRAA to require that federal contractors and subcontractors conduct more substantive analyses of recruitment and placement of veterans and use numerical targets to measure affirmative action efforts.

5. National Mediation Board – Changes to Election Rules

Finally, Labor has exhibited a willingness to go beyond the NLRA and traditional federal agencies of the Board, Department of Labor, and OSHA to achieve labor reform. In late 2009, at the request of the Transportation Trades Department of the AFL-CIO, the National Mediation Board, an administrative agency responsible for facilitating labor-management relations in the railroad and airline industries, issued a proposed rule that would amend its current representation election procedures. And, on May 11, 2010, the NMB adopted a final rule that differed little from the proposed rule. *See* 75 Fed. Reg. 26,062. Under the existing rule, which has been in place for the past seventy-five years, representation decisions in the railroad and airline industries have required a majority of eligible voters in the particular craft or class of employees to cast valid ballots in favor of representation in order for a representative to be certified; those who are eligible to vote but decline to do so are therefore deemed to oppose union representation. The new rule requires that elections be decided by a majority of the ballots cast, even if they represent only a small fraction of the total number of employees in a craft or class. According to the NMB majority, the new process will "more accurately measure employee choice in representation elections." *Id.* at 26,072.

While decisions of the NMB are typically done on a consensus basis without dissent, Republican Chairman Elizabeth Dougherty dissented from the decision to implement the new rule. *See id.* at 26,083. Among other reasons, Chairman Dougherty dissented because she felt that "[t]he timing and process surrounding this rule change harm the agency and suggest the issue has been prejudged." *Id.* Specifically, she indicated her concern that the Board failed to follow its own standard and procedures for rulemaking "so soon after a majority-changing

Presidential election and in the midst of several large representation elections." *Id.* Dougherty also believed that there was no rational basis for the action and that the Board did not make similar changes to decertification and run-off procedures. *Id.* at 26, 084. The NMB recently received requests to commence representation proceedings involving 40,000 airline employees at two major airlines, which will be the largest group election proceedings in the NMB's history.

The rule was challenged in court shortly after it was published, leading the NMB to agree to delay implementation until June 30, 2010. 75 Fed. Reg. 32,273 (June 8, 2010). However, on June 28, 2010, the U.S. District Court for the District of Columbia dismissed the suit challenging the rulemaking. *See Air Transport Ass'n of Am. v. Nat'l Mediation Bd.*, --- F. Supp. 2d ----, 2010 WL 2572685 (D.D.C. June 28, 2010). The court found that the Board articulated a neutral and rational basis for the rule and rejected arguments that the process was arbitrary and capricious because two Board Members had "unalterably closed minds." *Id.* at *16. The rule became effective July 1, 2010. Details regarding the new voting procedure, including NMB Notices, and samples of telephone and internet voting instructions were published by the NMB on August 19, 2010, and are available at http://www.nmb.gov/representation/proposed-rep-rulemaking.html (last visited Nov. 14, 2010).

VIII. An Alternative to Washington – Labor Development in the States

Due to the likely congressional stalemate on labor issues that has developed, Labor has started to return to a piecemeal, state-by-state approach to labor law reform, moving one state at a time. While the results are not on the scale Labor hoped for two years ago, the reform is significant for employers in those states with receptive legislative bodies and governors. But even state law reforms of labor law will continue to be met with court challenges on constitutional or preemption grounds.

A. State Meeting Laws

In recent years, Labor has lobbied various state legislatures to pass bills frequently referred to as "Meeting Laws" or "Worker Freedom Acts" that prohibit an employer from requiring an employee to attend meetings that communicate opinions on religious or political matters. While the bills often do not include any reference to labor issues, the intent is to limit an employer's current right to require attendance at meetings in which the employer conveys its view on organizing, or so-called "captive audience" meetings. The Worker Freedom Act, allegedly drafted and circulated by the AFL-CIO, has been introduced into legislatures in several states, including Arizona, Massachusetts, Michigan, Minnesota, New Hampshire, Pennsylvania, Tennessee, Washington, and West Virginia.

Oregon, the first state to pass such a law, adopted ORS 659.785(1), which became effective January 1, 2010. The law prohibits an employer from taking adverse action against any employee who declines to attend or participate in an employer-sponsored meeting if the purpose of the meeting is to communicate the employer's position on religious or political matters. *See* ORS 659.(1). As defined, "political matters" includes the decision to join constituent groups, and constituent groups is defined to include a labor organization. *See* ORS 659.780(1), (5).

Before the statute went into effect, the Associated Oregon Industries and the U.S. Chamber of Commerce filed suit, claiming that statute was preempted by the NLRA and unconstitutional under the First Amendment. *See Associated Or. Indus. v. Avakian*, No. CV 09-1494-MO, 2010 WL 1838661 (D. Or. May 6, 2010). However, the suit was dismissed on procedural grounds of standing and ripeness. *Id.* However, it is likely that this law will be challenged again.

Wisconsin recently enacted a nearly identical law, 2009 Wisconsin Act 290., *available at* http://www.legis.state.wi.us/2009/data/acts/09Act290.pdf (last visited Nov. 14, 2010), which became effective May 12, 2010. Unsurprisingly, a nearly identical lawsuit was filed in U.S. District Court for the Eastern District of Wisconsin, alleging that the statute was preempted and unconstitutional. *See Metro. Milwaukee Ass'n of Commerce v. Doyle*, No. 2:10-cv-00760-CNC (filed Sept. 1, 2010). On November 4, 2010, the defendant state entities entered a stipulation providing that to the extent the Wisconsin Act makes it unlawful for an employer to take action against an employee because the employee declines to attend an employer-sponsored meeting or to participate in any communication with the employer or its agent in which the employer communicates its opinion about organization, the state law would be preempted by the NLRA. As such, the defendants stipulated that the Court could enter judgment permanently enjoining Wisconsin from enforcing the state law to the extent that it is preempted. *See id.* at Dkt. No. 4 (Nov. 4, 2010).

While several states are considering meeting laws, these laws will continue to be subject to challenge on preemption grounds. For instance, in the now-dismissed Oregon suit, the plaintiffs argued that the statute was preempted under both the *Garmon* doctrine, which prohibits States from regulating "activity that the NLRA protects, prohibits, or arguably protects or prohibits," and the *Machinists* doctrine, which forbids the State or NLRB from regulating "conduct that Congress intended be unregulated because left to be controlled by the free play of economic forces." *Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2412 (2008) (describing doctrines) (internal quotation and citation omitted); *see generally Machinists v. Wis. Employment Relations Commission*, 427 U.S. 132 (1975); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). A similar argument was successful in voiding a California law that restricted the use of state funds to assist, promote, or deter union organizing. *See Brown*, 128 S. Ct. 2408.

B. Executive Actions – Project Labor Agreements and Prevailing Wages

Labor organizations have also sought the assistance of state and local governments in obtaining labor peace agreements, which require employer cooperation with unions attempting to organize their workers, while Labor promises to refrain from taking job actions that would interrupt the flow of business. For example, both the Los Angeles World Airports and the Port Authority of New York & New Jersey adopted policies requiring concession vendors, as a condition precedent to operating within the airport, to enter into a labor peace agreement that recognizes a representative for the employees at that premises and, in return, promises that the employees will not engage in labor disruption including striking, picketing, work stoppages, and boycotts. Los Angeles World Airports, *Summary of Board of Airport Commissioners Resolution 23437*, *available at* http://www.lawa.org/welcome_LAWA.aspx?id=1796 (last visited Nov. 14, 2010); The Port Authority of New York & New Jersey, *Minutes of October 18, 2007 Meeting*,

available at http://www.panynj.gov/corporate-information/pdf/1007_minutes.pdf (last visited Nov. 14, 2010).

Some state and local governments have passed or considered statutes and ordinances allowing public entities (including legislatively created authorities and state agencies) with a proprietary interest in a project to insist on labor peace agreements between the employer and the representative organization. A bill previously proposed in New Jersey (Senate Bill S817, introduced Jan. 28, 2008), would have provided that a public entity could insist, on a project-by-project basis, on a labor peace agreement that includes provisions guaranteeing against strikes or lock-outs, promising employer neutrality, and providing for card check recognition on a showing that a majority of workers have signed authorization cards. A less drastic example is the February 3, 2010 Executive Order No. 22 signed by Iowa Governor Chet Culver (D), which requires all Iowa state departments and agencies to consider using project labor agreements on construction projects over $25,000,000.

New Jersey also used the regulatory process to guarantee prevailing wage rates and safety training for employees working on public utilities. In a regulation that took effect on January 19, 2010, the New Jersey Department of Labor and Workforce Development required that every contract between a contractor and public utility must include a provision setting forth the prevailing wage rate, a provision guaranteeing that workers would not be paid less than the prevailing wage, and a provision ensuring that the contractor would employ only individuals who had completed all OSHA-certified safety training. *See* 42 N.J.R. 492(a).

As Labor continues to look for ways to grow its numbers and achieve labor reform, one might expect that they will continue to seek these agreements from state and local entities. However, whenever state or local entities engage in regulation of labor relations and employer speech, employers should have the same preemption arguments that were successful in *Brown*. While preemption questions are complex and their outcome is often uncertain, it is clear that state and/or local legislation will remain a front in the battle between labor and management.

C. Obstacles to State Action – Preemption

As mentioned above, Labor's victories in achieving labor law changes at the state or local level are frequently subject to litigation and, recently, have resulted in a number of decisions striking down the state action. For instance, as discussed more fully *supra*, in *Grain Processing Corp. v. Culver*, 708 F. Supp. 2d 859, the court invalidated a provision of Iowa law that allowed Governor Culver to intervene in labor disputes and convene an arbitration board to render a decision on the dispute, finding that the NLRA "clearly" preempted the state law.[3]

Another potential preemption issue is whether state constitutional amendments to exempt employers in those states from issues such as card check are preempted by federal law. The

[3] In another decision, the California Court of Appeals held unconstitutional two state statutes that increased the burden for obtaining an injunction in a labor dispute, but not in other disputes. *See Ralphs Grocery Co. v. United Food & Comm. Workers Union Local 8*, 113 Cal. Rptr. 3d 88 (Cal. App. 3 Dist. July 19, 2010). However, the California Supreme Court has granted review and, as is its practice, vacated the opinion. *See Ralphs Grocery Co. v. United Food & Comm. Workers Union Local 8*, 116 Cal. Rptr. 3d 194 (Cal. Sept. 29, 2010).

November 2010 election saw a secret ballot state constitutional amendment pass in each of the states that offered the amendment: Arizona, South Carolina, South Dakota, and Utah. See *Save Our Secret Ballot*, www.sosballot.org, (last visited Nov. 14, 2010). The amendments passed with strong support of over 60% in Arizona and Utah, over 70% in South Dakota, and over 85% in South Carolina. *Id.* If EFCA or any form of card check should pass, either in this Congress or the next, those amendments would likely be challenged on preemption grounds.