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LABOR RELATIONS

Expert Analysis

NLRB Developments: Expanded Remedies, Micro Units and More

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In the final month of 2022, the National Labor Relations Board (Board) issued several employee-friendly decisions. The decisions largely followed political party lines and looked to reinstate or strengthen pre-Trump-era Board rulings. This column addresses several recent Board rulings that have a significant impact for all U.S. employers, including those without a unionized workforce.

Make-Whole Remedies

On Dec. 13, 2022, the Board ruled 3-2 to significantly expand the remedies available to employees as a result of an unfair labor practice (ULP) or other labor violation under the National Labor Relations Act (NLRA). Historically, the Board limited its "make-whole" remedies to restoring the actual lost wages caused by a ULP, such as back pay and/or payment of union dues and union fines. In *Thyv*, 372 NLRB No. 22 (2022), after finding the respondent violated the NLRA, the Board expanded the definition of "make-whole" to include all direct or foreseeable pecuniary harms suffered as a result of a ULP—in addition to lost wages.

The Board rejected the idea that the expanded remedies constitute "consequential damages" as used in common law tort or contract law. Instead, the Board explained that the expanded relief is statutory in nature rooted in the make-whole principles of the NLRA. Specifically, the Board relied on the broad language of the NLRA that empowers the Board to take affirmative action to reinstate employees with or without backpay, finding that this language also empowered the Board to issue remedies necessary to make an employee whole beyond traditional reinstatement and backpay.

In coming to its decision, the Board relied on several prior decisions to support the proposition that direct or foreseeable harms resulting from labor law violations were necessary for employees to fully be made whole. For example, in *Voorhees Care & Rehabilitation Center*, 371 NLRB No. 22 (2021), the Board listed a "myriad" of examples of "unredressed pecuniary harms" that may be necessary to make an affected employee whole, including interest and late fees on credit cards, penalties associated with early withdrawals from retirement accounts and costs associated with the inability to pay for transportation, home, childcare or mortgage payments. There, the Board ordered the employer to reimburse the employees for "any increases in premiums, copays, coinsurance and deductibles and for other out-of-pocket expenses, plus interest." In *Thyv*, the Board also referenced medical expenses or the costs needed simply to make ends meet.

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This definition will be applied retroactively to cases currently pending before the Board. To recover, petitioners must demonstrate (1) the amount of pecuniary harm, (2) the direct or foreseeable nature of the harm and (3) why the harm is due to the ULP. To prove causation, petitioners must demonstrate that the specific defined costs would not have incurred but for the unlawful conduct or was a foreseeable consequence of the conduct. The burden then shifts to the respondent to present evidence disputing the claimed damages.

Bargaining Units

In *American Steel Construction*, 372 NLRB No. 23 (2022), the Board, in another 3-2 decision, found that employers seeking to broaden a union's petitioned-for bargaining unit must show that the workers outside the proposed unit have an overwhelming common interest with employees included in the proposed unit.

In *American Steel*, the Board considered whether to retain the Trump-era Board's community-of-interest standard set forth in *PCC Structurals*, 365 NLRB No. 160 (2017) and *The Boeing Company*, 368 NLRB 67 (2019) (the *PCC-Boeing* standard) or revert to the "micro-unit" overwhelming common interest standard articulated in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011). The primary difference between the *PCC-Boeing* standard and the *Specialty Healthcare* overwhelming common interest standard lies in the determination of what makes a petitioned-for unit "sufficiently distinct" from the remainder of the workforce. Under the *PCC-Boeing* standard, the Board considers a petitioned-for unit sufficiently distinct only if the employees excluded from the petitioned-for unit have meaningfully distinct interests in the context of collective bargaining that outweigh the similarities with employees in the unit. By contrast, under *Specialty Healthcare*, the Board considers a unit sufficiently distinct unless the excluded employees share an "overwhelming community of interest" with the employees in the unit that would require adding the excluded employees to the unit. In *American Steel*, the Board overruled *PCC Structurals* and *Boeing* and reinstated the "overwhelming community of interest" standard set forth in *Specialty Healthcare*.

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In returning to the *Specialty Healthcare* standard, the Board stated that the traditional community-of-interest standard, compared to the overwhelming common interest standard, was vague, confusing and had no support in Board precedent. The Board majority also noted that the *PCC-Boeing* standard undercut workers' rights to organize as they see fit and provided no compelling reason for why the Board would add employees to units that otherwise share sufficiently mutual interests to bargain collectively.

Significantly, a return to the *Specialty Healthcare* test will empower unions to once again petition for "micro-units," consisting of small subsets of employees within an employer's facility. This shift will make it easier for union organizers to establish a foothold in a business where only a small group of employees are seeking union representation. The *American Steel* "overwhelming common interest" test will be applied retroactively to pending Board cases.

Employer Interrogations

On Dec. 15, 2022, the Board in *Sunbelt Rentals*, 372 NLRB No. 24 (2022), reaffirmed a nearly 60-year-old decision that established safeguards that employers must follow when interviewing workers regarding a ULP. In *Johnnie's Poultry*, 146 NLRB 770 (1964), the Board held that (1) the employer must inform the employee of the purpose of the interview, assure that no reprisal will take place and obtain voluntary participation; (2) the questioning must be free from hostility union organizing and must not be coercive and (3) the questions must not exceed what is necessary to carry out the purpose of the meeting. Failure to adhere to these safeguards renders an interview per se unlawful.

Since the Board established the safeguards provided in *Johnnie's Poultry*, there has been a mix in authority regarding the necessity

and effectiveness of the restrictions as a bright-line, per se standard imposed on employers seeking to interview employees as part of a ULP investigation. The Board and the D.C. Circuit court have consistently upheld the *Johnnie's Poultry* test, but several other circuit courts (i.e., the Second, Fifth and Seventh Circuits) have rejected the test in favor of a totality of the circumstances approach. As a result, in March 2021, the Board certified a review of *Johnnie's Poultry*. At the time, the expectation was that the then-Republican majority Board would reject or modify the test in favor of the approaches adopted by the circuit courts. However, in *Sunbelt Rentals*, the newly appointed Democratic majority Board voted 3-2 to uphold *Johnnie's Poultry* and maintain the safeguard requirements.

The Board reasoned that the *Johnnie's Poultry* test struck the best balance between workers' rights and the employer's ability to prepare a defense in a ULP action. The Board emphasized that the test is simple and predictable allowing for administrative ease and protects against the inherent coercion that would otherwise exist during an employer's interview of workers regarding a ULP. Accordingly, employers should take care to follow the *Johnnie's Poultry* safeguards when questioning employees about a ULP.

Non-Employee Rights

On Dec. 16, 2022, the Board walked back a 2019 Trump-era Board decision and restored a 2011 Obama-era Board ruling regarding the rights of employers to exclude non-employees from their property. In *Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts*, 372 NLRB No. 28 (2022) (*Bexar II*), the Board considered whether property owners could lawfully bar non-employees from accessing their property to engage in protected activity, even if the non-employees worked for an on-site contractor. The Board found that owners may only remove off-duty employees of an on-site contractor from their property (1) when the workers' activities "significantly interfere" with the use of the property or (2) where the owner has another legitimate business reason to remove them, including maintaining production and discipline. This standard was first articulated in *New York, New York Hotel & Casino*, 356 NLRB 907 (2011).

In *Bexar II*, a group of unionized musicians employed by the San Antonio Symphony protested a performance of the San Antonio Ballet using recorded, rather than live, music. The San Antonio Symphony and the San Antonio Ballet lease performance space owned by Bexar County Performing Arts Center Foundation. The Foundation sought to prohibit the San Antonio Symphony employees' ability to protest on its property. The Board found that although the off-duty contractor employees do not fit within any of the categories of individuals afforded rights under Section 7 of the NLRA, they were not outsiders to the property and should not be denied the right to engage in Section 7 activity on the property where they regularly work. At the same time, the Board recognized the interest of property owners in controlling access and use of their property. The Board found that the *New York New York* test properly balanced these two competing interests.

In doing so, the Board abandoned the standard set forth in *Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts*, 368 NLRB No. 46 (2019) (*Bexar I*), which prohibited non-employee workers from protesting on an employer's property unless (1) the workers regularly and exclusively work on the property and (2) the property owners can show the workers have other reasonable non-trespassory means to protest. *Bexar I* was quickly criticized by the D.C. Circuit Court of Appeals, which called the decision arbitrary and noted it undermined the rights of off-duty contractors to protest for reasoning completely unconnected to a property owner's interest in protecting its property.