UPDATE FOR COX, BOK, AND GORMAN'S

LABOR LAW (17th ed.)

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by

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Page 75.

In *Pacific Lutheran Univ.*, 369 NRR 1404 (2014), the Board held that non-tenure track faculty some of whose members participated in faculty governance were statutory employees where the subgroup so participating did not compose a majority of the non-tenure track faculty. That rule was rejected by the D.C. Circuit and the Board concurred in the court's view. Elon Univ., 370 NLRB No. 91 (2021).

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In his second day in office, President Biden terminated the Board's General Counsel and his next in command. Mr. Peter Ohr, the Board's Regional Director in Chicago, was made Acting General Counsel. President Biden nominated Jennifer Abruzzo to be General Counsel. On July 21, the Senate confirmed her 51-50, with Vice President Harris casting the tie-breaking vote. The President also nominated two candidates for Board membership: Gwynne Wilcox, to the existing vacancy; David Prouty to succeed a Republican incumbent whose term ends in August. The Senate confirmed both nominees on July 28 in relatively close votes (52-47 and 53-46 respectively). The new members are well-known attorneys on the union side.

In the interregnum, the Board had announced that two current proposals for legal change were placed on hold: to allow employers to restrict access of union organizers to employer property, and to restrict union access to voter eligibility lists.

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In *Stabilus, Inc*., 355 NLRB 836 (2010), the Board reiterated its rule that an employer must show "special circumstances" to warrant its enforcement of a policy that forbids the

wearing of union insignia on company-required uniforms. In *Tesla, Inc.*, 370 NLRB No. 88 (2021), the Board's two-member Republican majority requested *amicus* briefs on the correctness of that standard. On "special circumstances," see *Constellation Brands U.S. v. NLRB*, 992 F.3d 642 (7th Cir. 2021).

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On how *Boeing* applies to confidentiality and social media policies, see *Medic Ambulance Service, Inc.*, 370 NLRB No. 65 (2021).

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Baylor Med. Center was followed in *Nichelson Terminal*, 369 NLRB No. 147 (2020), and *Int'l Game Technology*, 370 NLRB No. 50 (2020).

Page 135.

On June 23, 2021, the Supreme Court handed down *Cedar Point Nursery v. Hassid*, ___ U.S. ___, 141 S. Ct. 2063 (2021). California's Agricultural Labor Relations Act of 1975 allows unions a right of access by two union organizers on the employer's premises, subject to crew size, for an hour before and after work and a one hour lunch break for a total of 30 days in a calendar year and subject to other restrictions. The Court held, 6 to 3, this access rule to be an unconstitutional "taking" of property without compensation. The majority distinguished *Babcock & Wilcox* as a "highly contingent access right" allowed in a case where "taking" was not argued. It also distinguished a "trespass" from a "taking": when the former is merely occasional it is not a "taking" and it distinguished cases concerning "longstanding background restrictions on

property rights" and "traditional common law privilege to access private property." It opined that none of these categories apply to the vindication of the public policy affording workers a right to form, join, or assist a labor organization. Justices Breyer, Sotomayor, and Kagan dissented.

Page 145.

On how to demonstrate discriminatory application of employer email policies under the approach set forth in *The Register-Guard*, see *Communications Workers v. NLRB*, No, 20-1186, __ F.4th ___, 2021 WL 3120816 (D.C. Cir. July 23, 2021) (finding the Board erred in relying on its own post hoc distinction between permissible and impermissible employee conduct to reject the evidence of disparate treatment).

Page 168.

The Hearing Officer considering objections to the Amazon Bessemer election has recommended that a second election be ordered. Hearing Officer's Report on Objections, Amazon.com Servs. LLC, 10-RC-269250 (August 2, 2021), *available at* https://www.nlrb.gov/case/10-RC-269250. The Officer found that Amazon interfered with the election by polling employees through distribution of vote no paraphernalia in the presence of supervisors and managers, and by causing the Postal Service to install a generic unlabeled mail collection box near main entrance to its facility, immediately beneath visible surveillance cameras mounted on the entrance. In the Officer's view, the installation of the mail receptacle usurped the Board's exclusive role in administering union elections and destroyed the laboratory conditions necessary to conduct a fair election.

Page 196.

An employer may engage in coercive interrogation into non-protected activity. But what of the non-protected activity – a strike in violation of a no-strike provision in a collective bargaining agreement – that is intertwined with protected protest? The Board had adopted a two-pronged requirement: that the questioning must "focus closely" on the unprotested activity; and must intrude only "minimally" into protected activity. The Second Circuit affirmed the first limb, but remanded the second. Time Warner Cable v. NLRB, 982 F.3d 127 (2d Cir. 2020).

Additionally, in interrogating employees regarding events that have given rise to an unfair labor practice charge the Board in *Johnnie's Poultry Co*., 146 NLRB 770 (1964), *inf'd den*. 344 F.2d 617 (8th Cir. 1965), set out a set of conditions governing the conduct of the questioning. Several courts of appeals have disagreed. The Board has asked for amicus briefs on the matter in *Sunbelt Rentals, Inc*., 370 NLRB No. 94 (2021).

Page 209.

The District of Columbia Circuit remanded to the Board to clarify what group activity ("dealing") was requisite to render an employee participation group a labor organization. Communications Workers v. NLRB, 994 F.3d 653 (D.C. Cir. 2021).

Page 247.

On the showing of animus necessary under *Wright Line*, see Cordura Restaurants, Inc. v. NLRB, 985 F.3d 415 (5th Cir. 2021). On the showing of animus where an entire group, not only union supporters, is discharged, see Napleton 1050, Inc. v. NLRB, 976 F.3d (D.C. Cir. 2020).

Page 278.

Mountaire Farms, Inc., 370 NLRB No. 110 (2021). The Board decided not to modify the contract bar doctrine.

Page 289.

The Machinists Union petitioned for a unit of 87 tool and die makers at Nissan Motors in Tennessee. The Regional Director ordered an election for the "wall-to-wall" unit of all 4,300 workers at the plant which the Union did not seek to represent. The decision has been appealed to the Board. Bloomberg Law News (June 14, 2021).

Page 404.

Add to Problem 1:

Crozer-Chester Med. Center v. NLRB, 976 F.3d 276 (3rd Cir. 2020) (on whether an employer's entire Asset Purchase Agreement must be disclosed).

Page 425.

In *Stericycle, Inc*., 170 NLRB No. 89 (2021), the Republican majority held section 8(a)(5) was not violated by the Company's unilateral distribution of an employee handbook to all employees, unionized and not, that set out terms and conditions of employment that differed at points from the provisions of the collective bargaining agreement governing its unionized employees but that recited without more that "in some cases these policies may be impacted by collective bargaining agreements."

Page 584.

In *Dish Network, LLC*, 370 NLRB No. 97 (2021), the Board reaffirmed the validity of required confidentiality attached to arbitrations conducted under Company policies in application to hearings, discovery, and awards. However, "settlements" were held not to be swept into he Federal Arbitration Act and requiring confidentiality on that violated the Labor Act.

Page 684.

In *Lippert Components, Inc.*, 371 NLRB No. 8 (2021), the Board affirmed the ALJ's application of *Eliason & Knuth*. Chairman McFerran on the ground of *Elias & Knuth's* conformity with the Act, Members Kaplan and Ring on first amendment grounds. Member Emmanuel dissented.

Page 723.

On *Moore Dry Dock*, see SEIU Local 87 v. NLRB, 995 F.3d 1032 (9th Cir. 2021).

Page 879.

On the "clear and unmistakable" test, see *AC & S Inc. v. George*, 851 S.E.2d 495 (W. Va. 2020) (on the reach of a collective agreement to a retaliation claim under state law) and see *Wilson v. PBM, LLC*, 140 N.Y.S.3d 276 (App. Div. 2021) (on the substitution of labor arbitration for statutory discrimination claims).

Page 1015.

Google maintains a confidentiality policy binding on its employees and supervisors that bears on what they may say to competitors, to public agencies or outside parties, or to one another. Insofar as speech covered by §7 is concerned Google agreed to a settle an unfair labor practice charge by posting a notice informing employees of their §7 rights. Nevertheless, the policy was challenged as in violation of California's constitutional right of free speech that binds private entities as well as government. Doe v. Google, Inc., 268 Cal.Rptr.3d 783 (2020). For more on "local interest" see *Glacier Northwest, Inc. v. Teamsters No. 174*, 475 P.3d 1025 (Wash. App. 2020), *rev. granted* 483 P.3d 771 (Wash. 2021).

Is New York's Farm Laborers Fair Labor Practice Law preempted? N.Y.S. Vegetable Growers Ass'n, Inc. v. Cuomo, 474 F.Supp.3d 572 (S.D. N.Y. 2020).

Page 1044.

Add to Problem 6:

Columbia Sussex Mgmt., LLC v. City of Santa Monica, 482 F.Supp.3d 1002 (C.D. Cal. 2020).

Page 1045.

Add Problem 10:

New York has adopted a law "in relation to occupational exposure to an airborne infectious disease." It requires the adoption of health standards and the creation of joint employer-employee workplace health and safety committees. N.Y. Lab. L. § 27-d (2021): "Employers shall permit employees to establish and administer a joint labor-management workplace safety committee" to be composed of employee and employer designees. Where there

is a union the latter will be designated by the union. The committee is to be co-chaired by an employer representative and a representative of non-supervisory employees. Is this requirement preempted by § 8(a)(2)? On similar enactments see Matthew Finkin, *Employee Representation Outside the Labor Act: Thoughts on Arbitral Representation, Group Arbitrations, and Workplace Committees*, 5 U. Pa. J. Lab. & Emp. L. 75 (2002) ("group arbitration" now truncated by *Epic Sys*., casebook page 552).

Page 1068.

Melendez v. San Francisco Baseball Associates, LLC, 439 P.3d 764 (Cal. 2010) (wage payment laws not §301 preempted).

Page 1160.

The First Circuit held lobbying expenses were a political activity which could not be chargeable as an agency fee and that objectors were entitled to receive a signed report by an auditor verifying the financial disclosure. United Nurses & Allied Professionals v. NLRB, 975 F.3d 34 (First Cir. 2020).

Page 1166.

West Virginia's right to work law was sustained against attack under the state's constitution. Morrisey v. West Va. AFL-CIO, 842 S.E.2d 455 (W. Va. 2020).