UPDATE FOR COX, BOK AND GORMAN'S

LABOR LAW (17th ed.)

From August 3, 2021 to January 7, 2022

by

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Page 70.

On December 27, 2021, in a notice issued on December 27, 2021 in *The Atlanta Opera, Inc.* 371 NLRB No. 45 (2021), the Board invited parties and amici to submit briefs addressing whether the Board should reconsider its standard for determining the independent contractor status of workers articulated in *SuperShuttle*. Chairman McFerran and Members Wilcox and Prouty issued the notice and invitation, and Members Kaplan and Ring dissented. The news release linking to the notice is available here: https://www.nlrb.gov/news-outreach/news-story/nlrb-invites-briefs-regarding-independent-contractor-standard.

Page 75. Add following *Pacific Lutheran*:

In *University of So. Cal*. v. *NLRB*, 918 F.3d 126 (D.C. Cir. 2019), the court rejected the Board's decision that contingent faculty were not managerial because the contingent faculty participating in policy committees did not constitute a majority on such bodies. It is enough, the court opined, that they are "structurally included."

Page 76. *Students on Athletic Scholarship:*

On September 29, 2021, General Counsel Abruzzo issued Memorandum GC 21-08, reinstating GC 17-01 (Jan. 31, 2017), which had stated the scholarship football players of Northwestern University and those similarly situated are employees with section 7 rights, that misclassifying them should be submitted to the GC for advice as part of its decision to reconsider Velox Express, Inc., 368 NLRB No. 61 (2019) (in which the Board refused to find a violation based on the employer having misclassified drivers as independent contractors), and that these players have the right to engage in concerted activity for mutual aid or protection. GC 21-08 and

other recent GC memoranda are available here: https://www.nlrb.gov/guidance/memos-research/general-counsel-memos.

Page 95.

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 then 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.

On August 12, 2021, General Counsel Abruzzo issued Memorandum GC 21-04, setting out a long list of cases and subject matter areas that would be subject to the Office's "initiative" for change.

Page 105.

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).

Page 125.

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

Page 125.

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

Page 125.

In a notice issued on January 6, 2022, in *Stericycle, Inc.* 371 NLRB No. 48 (2021), the Board invited parties and amici to submit briefs addressing, among other things, whether the Board should 1) continue to adhere to the standard adopted in *Boeing Co.*; 2) modify existing law to better ensure that the Board interprets work rules in a way that accounts for the economic dependence of workers and the potential chilling effect of a work rule on Section 7 rights, properly allocates the burden of proof in cases challenging the maintenance of a work rule, and appropriately balances employees' rights and employers' legitimate business interests; and 3) continue to hold that certain categories of work rules are always lawful to maintain. The three Democratic Members of the Board joined in issuing the notice and invitation while the two Republican members dissented. The news release linking to the notice can be found here:

https://www.nlrb.gov/news-outreach/news-story/nlrb-invites-briefs-regarding-work-rules-standard.

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 136. Add at End of Problem 5:

The *Tobin Center* decision was denied enforcement on the ground of the manner of application of the new test in the case. Local 23, AFM v. NLRB, 12 F.4th 778 (D.C. Cir. 2021). The court allowed that the Board may wish to proceed with the test afresh or "develop a new test altogether."

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 156. Add after *Caesars Entertainment*:

The Communication Workers Union was organizing the workers at a T-Mobile call center. A union supporter emailed her coworkers from her company email address encouraging them to join the union's organizational efforts. She wrote, "Feel free to contact me with any questions, but please do so outside of working hours." She was disciplined for it. A charge of unfair labor practice ensued. The General Counsel argued *inter alia* the Company's purported application of its no solicitation policies was applied discriminatorily. The Board found no unfair labor practice, applying *Caesars Entertainment's* analysis that wrongful discrimination could occur only when there was disparate treatment of communications "of a similar character because of [the communicator's] union or other section 7-protected status," and reiterating the proposition in *Register Guard* that discrimination would be found if the employer allowed anti-union communications, but not pro-union ones. T-Mobile USA, Inc., 369 NLRB No. 90 (2020). The District of Columbia Circuit disagreed, noting its rejection of that approach in *Register Guard* itself. Communications Workers v. NLRB, 6 F.4th 15 (D.C. Cir. 2021). The court stated that, in this case, as there, the Company's policies did not draw the distinction the Board applied:

> [T]he consistency of an employer's responses to union-related and nonunion employee conduct is measured not by whether the employer or Board can identify a legitimate,

> union-neutral distinction after the fact that the employer might lawfully have drawn, but by reference to the policies the employer actually had in place and the reasons on which it in fact relied for the action challenged as discriminatory. Because *Guard Publishing* itself, like this case, involved use of company email, speculation as to whether the Board might apply a different standard in cases not involving "the use of employer equipment" is of no moment here.

Page 168.

Following the closely watched representation election at Amazon's warehouse in Bessemer, Alabama, in which a majority of employees had voted against representation by the union, the union contested the (mail ballot) election claiming that Amazon had engaged in objectionable conduct. The Hearing Officer considering the union's objections recommended that a second election be ordered. Hearing Officer's Report on Objections, Amazon.com Servs. LLC, 10-RC-269250 (August 2, 2021). 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. On November 9, 2021, the Regional Director issued an opinion ordering the second election, *available at* https://www.nlrb.gov/case/10-RC-269250.

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), *enf'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 266. Add at Close of Note on Remedies:

General Counsel Abruzzo has issued two memoranda expanding on the remedies that office intends to seek in order to achieve greater "make whole" relief. GC Mem. 21-06 and 21-07 (2021).

Page 270.

In its settlement agreement with the Board, Amazon has agreed to post the agreed upon notice at all of its fulfillment, sortation, and receive) centers, as well as delivery stations, nationwide. The agreement is available here: https://foiaonline.gov/foiaonline/action/public/submissionDetails?trackingNumber=NLRB-2022-000336&type=Request

Page 278.

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

Page 288. After discussion of *PCC Structurals*:

On December 7, 2021, the Chairman and the two Democratic Members of the Board invited *amicus* briefs in *American Steel Construction, Inc.*, 370 NLRB No. 41, to address Board standards for determining the appropriateness of bargaining units. The two Republican Members dissented.

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 307. Add at End of Text:

On December 10, 2021, the Labor Board posted a notice that it will "engage in rulemaking on the standard for determining whether two employers…are a joint employer under the Act."

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 535. Add to Problems for Discussion:

5. Betsy Ross is an activities coordinator in rehabilitative services at Memorial Hospital in Lower Lothian (MHLL). The hospital's nursing staff is unionized; the other staff members including Ms. Ross are not. MHL has been acquired by Middle American Healthcare (MAH). In the months after the acquisition, the nurses' union petitioned hospital management complaining about a reduction in nursing staff, claiming overwork and a lack of patient care, and demanding a return to the prior staffing level. The local newspaper, the *Lower Lothian Intelligencer*, has given extensive coverage to the dispute.

Ms. Ross submitted a letter to the editor of the *Intelligencer*. In her letter, she referenced previous newspaper articles and expressed support for the nurses in their dispute. She applauded the nurses for submitting their petition, urged management to heed the nurses' staffing demands, and opined that they were rightly concerned about risks to patient safety posed by understaffing. She also criticized management as unduly allegiant to MAH and out of touch with patient care, arguing that these shortcomings negatively affected hospital staff and the local community. Young did not discuss her letter with any other employee prior to submitting it.

Ms. Ross has been given a five-day suspension without pay for "a grievous act of disloyalty to MHLL tending to tarnish its image in the community and to disparage the quality of patient care." Has MHLL violated section 8(a)(1) of the Labor Act? NLRB v. Maine Coast Regional Health Facilities, 999 F.3d 1 (1st Cir. 2021).

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 the Federal Arbitration Act and requiring confidentiality on that violated the Labor Act.

Page 598. Add to Problems for Discussion:

8. The workers at Kellogg's Nabisco plants have been on strike at four locations nationally. They voted overwhelming to reject the collective agreement the union's leadership had negotiated and to continue the strike. Nabisco announced it was accepting applications for permanent strike replacements. A posting on Reddit encouraged readers to clog Kellogg's application process by pretending to be a local resident applying for the job and provided a link on which applications could be made. According to a press account, almost 60,000 such applications have been made. Assuming that it would be possible to connect the union to the Reddit posting, would it have committed any unfair labor practice?

Page 601 (and Page 834, Problem 1(d)):

On remand, *Constellium Rolled Pdts., LLC*, 371 NLRB No. 16 (2021), the Board reaffirmed its decision that the General Counsel had satisfied his initial burden under *Wright Line*, reiterating that animus "may be established by circumstantial evidence." Analysis accordingly turned to the Company's argument that the discharge was motivated by its efforts to comply with antidiscrimination law. The Board rejected the claim. The Company permitted the common use of the term "whore board" in its workplace to refer to the overtime signup sheets.

The Respondent's lack of enforcement of its obligations under antidiscrimination laws allowing wide use of the term persisted for some 6 months, until Williams [the employee] alone was singled out for discipline and discharge for use of the term.

Page 605. Add after *General Motors*:

On March 12, 2021, the Division of Advice issued an Advice Memorandum in Amazon.com, Case 19-CA-266977, stating the intention to have the Board limit *General Motors* to "profane ad hominem attacks, threats of violence, or conduct implicating Title VII discrimination." The Memorandum is available at https://www.nlrb.gov/case/19-CA-266977.

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 725.

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

Page 740. Add to Problem for Discussion:

The union representing the workers at Nabisco, producers of Oreo cookies, is on strike. Assume that a union agent has been stationed at the customer entrance of the Pioneer Food Market to hand out handbills urging customers not to buy Nabisco products. Pioneer is not

unionized. Pioneer retail clerk Delphine Katz was restocking the store's shelf of Oreo cookies when a customer, who'd been given a handbill at the entrance, gave the handbill to Katz. Katz placed an adhesive backing on the handbill and attached it to the Oreo display placard on the store's shelf, shown below. A store manager saw her do it. He photographed what she had done – shown below – and sent it to the corporation's human resources department. If Ms. Katz is discharged would that be an unfair labor practice? Assume, instead, that on her break time Ms. Katz stationed herself in front of the Oreo display holding the handbill up for customers to see. She was told to cease the display or move away and she declined. Would her discharge for that be an unfair labor practice?

[Thanks to Professor Steve Willborn for bringing this photograph to our attention.]

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 916. Add to Problems for Discussion:

5. The Noyes Toys Company is unionized. Its collective agreement sets out a lengthy management rights clause that reserves to the Company the power to "issue all rules it deems necessary to achieve efficient and safe production and delivery of its products," that "all members of the bargaining unit will be bound to observe the terms of the Employee Handbook." The Handbook's section on drivers provides that, "In the event of any accident involving physical injury or damage in excess of $100 a check on the driver's driving history including any and all moving violations will be made."

The collective agreement expired on December 31. The parties are in the process of negotiating a new collective agreement. On January 3, the Company announced that, as of January 10, checks on driving history will be made annually for each driver. The Union has filed a charge of violation of section 8(a)(5). The Company has responded that the change was consistent with its reservation of management rights. Should the General Counsel issue a complaint? NLRB v. Nexstar Broadcasting, Inc., 4 F.4th 801 (9th Cir. 2021).

Page 1013. Add to Problems for Discussion:

10. The State regulates the provision of home health services: home care aides must meet certain educational and training requirements and be state certified; a list of certified home care aides is maintained by the Department of Health; entities providing home health services are required to hire only state-certified home care aides.

The States has amended its Health and Safety Code by adding section 1792:

(1) The Department shall provide an electronic copy of a registered home care aide's name, telephone number, and cellular telephone number on file with the department, upon its request, to a labor organization which exists for the purpose, in whole or in part, of dealing with employers of home care aides concerning access to training, grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. The labor organization shall not use this information of any purpose other than employee organizing, representation, and assistance activities. The labor organization shall not disclose this information to any other party.
(2) The department shall establish a simple opt-out procedure by which a registered home care aide or registered home care aide applicant may request that his or her contact information on file with the department not be disclosed in response to a request described in paragraph (1).

Suit has been brought by the Home Care Association (HCA), an association of for-profit employers providing home health services, against the state to enjoin the law on grounds of preemption by the National Labor Relations Act. The HCA has been held to have standing. Is the law preempted? Home Care Ass'n v. Newsom, 525 F. Supp. 3d 1128 (E.D. Cal. 2020).

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 1068. Add to Problems for Discussion:

6. Illinois' Biometric Privacy Information Act, 740 ILCS 14/1 et seq., regulates the acquisition and use of biometric information, such as fingerprints, by employers. The employer must:

> (1) inform[s] the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;
>
> (2) inform[s] the subject or the subject's legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and
>
> (3) receive[s] a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative.

The Major Container Company has a collective agreement with the Paperworks Union governing the employees in Chicago, Illinois, identical to the one out the recognition clause (Art. II) in its collective bargaining agreement on page 107 of the Supplement. The Company has instituted a new timekeeping system that requires employees to press their thumbs on an electronic plate that records their fingerprint in order to enter and leave the faculty. None were asked to sign a written release.

Wally Cox is a Major Container production worker in Chicago. He has brought a class action on behalf of all Chicago employees – production, maintenance, and office clerical personnel – for violation of BIPA. The Company has moved to dismiss on grounds of section 301 pre-emption. How should the court rule? Fernandez v. Kerry, Inc., 14 F.4th 644 (7th Cir. 2021).

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).