



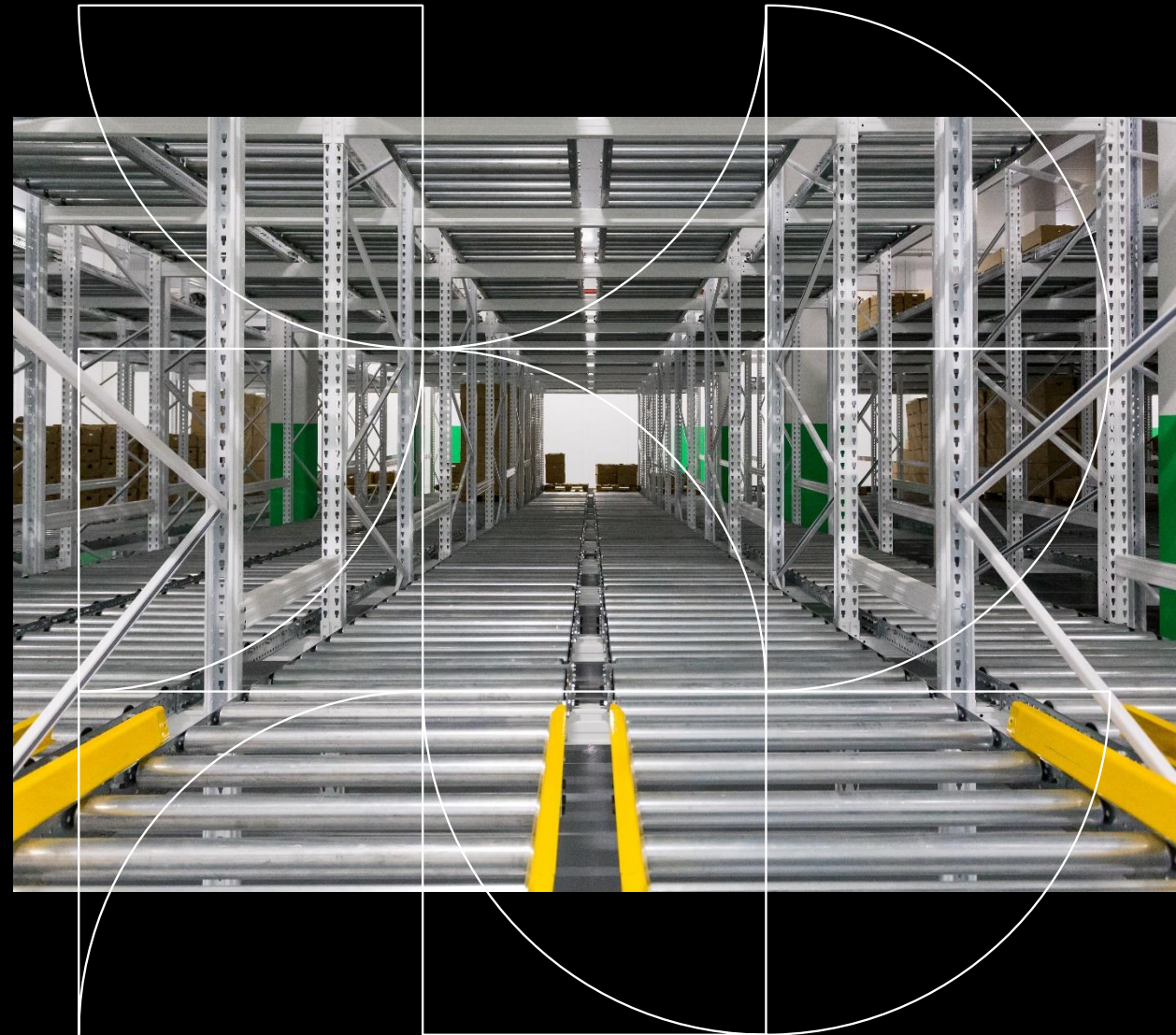
# Don't Let the Pendulum Hit You as It Swings

How Employers Can Prepare for the Biden NLRB

October 6, 2021

**Seyfarth Shaw LLP**

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).  
©2021 Seyfarth Shaw LLP. All rights reserved. Private and Confidential





# Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

## **Seyfarth Shaw LLP**

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).  
©2021 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

# Speakers

---



**Jennifer L. Mora**  
Senior Counsel | San Francisco  
Seyfarth Shaw LLP  
jmora@Seyfarth.com



**Paul H. Galligan**  
Partner | New York  
Seyfarth Shaw LLP  
pgalligan@Seyfarth.com

“

***I want you to know I'm a union guy.  
Unions are going to have increased power.***

- President-Elect Joe Biden (11/16/2020)

”

“

***[I will c]reate a cabinet-level working group that will solely focus on promoting union organizing and collective bargaining . . . .***

THE BIDEN PLAN FOR STRENGTHENING WORKER ORGANIZING, COLLECTIVE BARGAINING, AND UNIONS (<https://joebiden.com/empowerworkers/>)

”

# National Labor Relations Board

---



## Biden Board

- Lauren McFerran, Chair (D)
  - Term expires December 2024
- John Ring (R)
  - Term expires December 2022
- Gwynne Wilcox (D)
  - Term expires August 2023
- Marvin Kaplan (R)
  - Term expires August 2025
- David M. Prouty (D)
  - Term expires August 2026

# General Counsel Jennifer Abruzzo

---

- Sworn in July 22, 2021
  - Formerly the Special Counsel for Strategic Initiatives for CWA
  - Former Acting GC and Deputy GC at NLRB
  - Four-year term
- *“I believe that vigorous enforcement of the Act will help level the playing field for workers and their freely chosen representatives, bring much needed equity to the historically underserved members of our communities, engender safe and productive workplaces, which is particularly critical right now as we fight a pandemic, and build a better economy for workers, families, and communities in this country.”*

# Several GC Memos in Two Short Months

---

- August 12, 2021
  - Mandatory Submissions to Advice
    - Cases and subject matter areas where the Trump Board overruled legal precedent
    - Other initiatives and areas she wants to carefully examine
    - Other casehandling matters traditionally submitted to the Division of Advice
- August 19, 2021
  - Utilization of Section 10(j) Proceedings
- September 8, 2021
  - Seeking Full Remedies
- September 15, 2021
  - Full Remedies in Settlement Agreements
- September 29, 2021
  - Student-Athletes





***[I]t is critical that the NLRB vigorously protect the rights of workers to freely associate and act collectively to improve their wages and working conditions...***

- NLRB GC Jennifer Abruzzo (08/12/2021)



# Trump Board Standard for Handbooks and Policies

---

- *Boeing Co.* (2017)
  - The NLRB should balance (i) the nature and extent of the potential impact on Section 7 rights and (ii) legitimate justifications associated with the rule
  - The application of this balancing test resulted in one of the following three classifications:
    - Category 1. These rules are always lawful because either (a) based on a reasonable interpretation, the rule does not interfere with NLRA rights, or (b) the justification for the rule outweighs any negative impact on employee rights
    - Category 2. These rules require individualized scrutiny regarding potential interference with Section 7 rights; the NLRB must determine whether any adverse impact on Section 7 rights outweighs the employer's justification for the rule
    - Category 3. These rules are always unlawful because they negatively impact Section 7 rights and the employer cannot sufficiently justify the rule

# What Does Chair McFerran Think About *Boeing*?

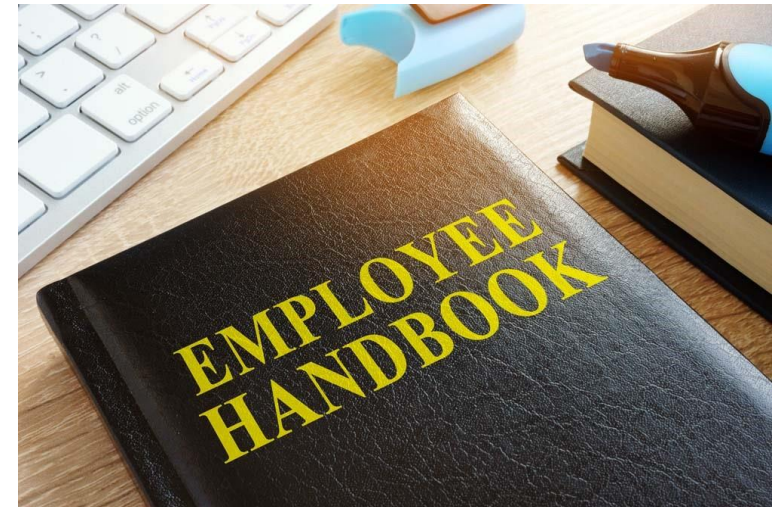
---

- *AT&T Mobility* (recording of conversations)
  - Stating *Boeing* should be rejected as being “so forgiving to employers that it cannot be reconciled with the Act’s guarantees to employees”
- *LA Specialty Produce* (confidentiality and media rules)
  - “Until *Boeing*, an employer was required to tailor workplace rules so that workers would understand that they were free to engage in activity protected by the NLRA without subjecting themselves to discipline or discharge. After *Boeing*, workers must not only be brave enough to engage in protected activity, but they must also be brave enough to knowingly violate workplace rules and so subject themselves to the threat of discipline. A clearer recipe for stifling protected activity is hard to imagine.”  
(Emphasis in original)

# Handbooks and Policies Under the Biden Board

---

- GC wants to reconsider numerous types of policies (e.g., confidentiality, non-disparagement, social media, media communication, civility rules, respectful and professional manner rules, offensive language rules, cameras at work, etc.)
- Chair McFerran espouses a return to the analytical framework in *Lutheran Heritage Village-Livonia*
  - The mere maintenance of a neutral work rule will violate the Act if employees would reasonably construe the rule to prohibit union and other protected concerted activity
- Any policy or practice modified or implemented under *Boeing* is up for challenge



# Confidentiality Rules

---

- Confidentiality
  - *LA Specialty Produce*
- Investigative Confidentiality
  - *Apogee Retail* (confidentiality in investigations)
  - *Alcoa Corp.* (oral confidentiality instructions given to employees)



# More on Confidentiality

---

- Confidentiality in Settlement Agreements
  - *Baylor University Medical Center*
    - Held that an employer could lawfully include confidentiality and no-disparagement clauses, as well as clauses prohibiting employees from participating in claims brought by any third party against the employer in a separation agreement, in exchange for severance payments
  - *International Game Technology*
    - Applying *Baylor* to a separation agreement requiring the departing employee not to make any public statements “detrimental to the business or reputation” of the employer
- Confidentiality in Arbitration Agreements
  - *Dish Network, LLC*
    - Chair McFerran – the holding requires employees to “suffer in silence at work”



***Rank and file employees do not generally bring law books to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint***

- Chair McFerran (*Alcoa*)



# Protected Concerted Activities

---

- Social Media Rules
  - *Medic Ambulance Services*
- Workplace Civility Rules
  - *Constellium Rolled Products*
- Disparagement Rules
  - *BMW Manufacturing*
- Solicitation Rules
  - *Wynn Las Vegas* (overruling the standard for distinguishing solicitation from mere “union talk”)





# Access and Email

---

- Third Party Access to Property
  - *UPMC and Kroger* (redefining discrimination to allow an employer to exclude union representatives from, inter alia, access to public spaces on employer property)
  - *Tobin Center for the Performing Arts* (holding that a property owner may exclude off duty contractor employees seeking access to engage in Section 7 activity unless they work both regularly and exclusively on the property and the property owner fails to show they have one or more reasonably non-trespassory alternative means of communication)
- Use of Employer Email Systems
  - *Caesars Entertainment*
    - Held employers can lawfully limit employee's personal use of company email, including for union purposes

# Recordings and Media Contact

---

- No Cell Phone / Camera Rules
  - *Boeing Co.*
- No Recording Rules
  - *BMW Manufacturing*
  - *AT&T Mobility*
- No Media Contact Rules
  - *LA Specialty Produce*



# Will Your Policy Pass Muster?

---

- Does your policy, practice or agreement implicitly or explicitly...
  - Restrict employee access to the NLRB?
  - Prohibit employee discussions with the NLRB or others?
  - Prohibit employees from discussing terms and conditions of employment (e.g., wages, benefits, safety, etc.)?
  - Prohibit employee discussions about settlements or arbitral proceedings with the NLRB or their union?



# Will Your Policy Pass Muster?

---

- Does your policy, practice or agreement implicitly or explicitly...
  - Prohibit employee witnesses from talking about internal investigations?
  - Prohibit employees from talking to the media?
  - Regulate what employees can post in social media?
  - Deny third-parties access to company property?



# Other Issues on the GC's Agenda

---

- Misclassification
  - *SuperShuttle*
    - Changed the legal standard for employment status by creating a new framework which applied the common-law agency test with consideration of the individual's "entrepreneurial opportunity."
  - *Velox Express*
    - The memo suggests the simple act of misclassifying a worker as an independent contractor can be an unfair labor practice
- *Weingarten* rights
  - Pre-disciplinary interview right to information
  - Non-union settings

# Division of Advice

---

- Why cases go to the Division of Advice
  - Strategy dictated from D.C.
- Most cases to be referred to Division of Advice relate to bargaining
  - Return to the “clear and unmistakable waiver” standard
  - Overturn the standard allowing employers to unilaterally change terms and conditions of employment where the modifications were a continuation of a past practice
  - Lower the standards for an “inability to pay” claim
  - Post-contract expiration wage and benefits increases
  - Bargain pre-first contract discretionary discipline
- Strikes and Picketing
- Other Section 7 Issues

# Card Check?

---

- Memo targets 50+ year old standards for obtaining a representation election
- Since 1969
  - An employer presented with an alleged majority of signed union authorization cards does not have to take them at face value and recognize the union. Instead, it may insist on an election to determine the employees' wishes and need not make any independent inquiry into the validity of the cards
- GC seeks to return to the 1949 standard
  - Good faith doubt regarding majority status in order to refuse a demand for recognition and move to a Board election
  - If not, or if engaged in ULPs, face a bargaining order



***Regions should request from the Board the full panoply of remedies available to ensure that victims of unlawful conduct are made whole for losses suffered as a result of unfair labor practices***

- NLRB GC Jennifer Abruzzo (09/08/2021)





# Remedies and Enforcement

---

- Unlawful terminations
  - consequential damages, front pay, and liquidated backpay
    - for undocumented workers – remedies designed to avoid unjust enrichment
- Failure to bargain cases – requiring an employer to:
  - submit to a bargaining schedule
  - submit status and progress reports to the NLRB
  - reimburse the other party’s collective-bargaining expenses
  - reinstate unlawfully withdrawn proposals
  - submit to other broad cease-and-desist orders

# Remedies and Enforcement

---

- Unlawful conduct during organizing drivers
  - granting unions contact information for and access to employees, including bulletin boards and equal time during an employer’s “captive audience” meeting
  - requiring employers to reimburse unions for costs incurred as part of their organizing effort, including costs associated with any re-run election
  - requiring an employer to read (with the union present) the “Notice to Employees and Explanation of Rights”, or possibly a video recording of the reading of the Notice, with the recording being distributed to employees by electronic means or by mail
  - requiring an employer to publish the Notice in newspapers and other news media (including social media) at the employer’s expense
  - requiring employers to provide management and supervisor training on the NLRA

# Section 10(j) and Settlement Agreements

---

- Section 10(j)
  - Injunctive relief to address serious unfair labor practice charges
  - The GC intends to “aggressively seek” Section 10(j) relief
- Settlement Agreements
  - Regions directed to include the remedies (previous slides) in settlements
  - “Letters of Apology”
  - Non-admissions clauses to be the exception
  - Total capitulation
  - Might result in more litigation

# Now What?

---

- Consider a vulnerability assessment
- Review all handbook policies and other employment policies
  - Does the policy, in fact, interfere with Section 7 activities?
  - Would a reasonable employee read the policy as interfering with Section 7 activities?
  - Consider clear and repeated disclaimers with examples
- Develop strategy for responding to recognition requests
- Revisit any current campaign strategies

# Questions?

---

**Thank You for  
Attending**

