

2021 US Labor & Employment Webinar Week
Insights and Compliance Strategies for a New World

February 1 – 4, 2021

**NLRB Update for Union
and Non-Union
Employers:**

***Employer-Friendly in
2020, But Changes
Loom in 2021***

February 3, 2021

Presenters



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Agenda

Developments in NLRB Decisions in 2020

- Employee Conduct Cases
- Other Work Rule and Policy Developments
- Collective Bargaining
- Other Relevant Decisions

Other Hot Topics

- Status of Joint Employer Standard
- Procedural Changes, Including COVID-19 Related

What's Ahead in 2021

- The New NLRB
- The PRO Act
- Other Potential Changes to Existing Precedent under a Biden Board

A photograph of a car body on an assembly line. The car's hood is open, and the interior is visible. The car is on a yellow-painted floor. In the background, there are industrial structures, including overhead beams and lights. A purple semi-transparent box is overlaid on the right side of the image, containing white text. The text reads "Developments in NLRB Decisions in 2020".

Developments in NLRB Decisions in 2020

Employee Conduct

- **Addressing employees' inappropriate conduct during protected concerted activity.**
 - Previously applied three different tests to determine if employee's misconduct was so severe as to lose protection under the NLRA. This standard often protected racial or lewd comments.
 - Board replaced the prior standard with the established Wright-Line burden shifting framework.
 - General Counsel must show that the protected activity was a motivating factor in the discipline.
 - Employer can still prevail if it shows it would have taken the same action regardless of the employee's protected activity.
 - General Motors LLC, 369 NLRB No. 127 (July 21, 2020).

Employee Conduct

- **Employer policies regarding civility, inappropriate behavior, and prohibiting behavior that reflects negatively on the employer in a facially neutral manner.**
 - Board has further illustrated the application of the new test for “facially neutral” work rules and policies under The Boeing Company, 365 NLRB No. 154 (2017).
 - Board held that a policy prohibiting certain inappropriate communications did not unlawfully interfere with employees’ Section 7 rights (“Inappropriate communications, even if made on your own time using your own resources, may be grounds for termination.”)
 - Medic Ambulance Service, Inc. and United Emergency Medical Service Workers, Local 4911, AFSCME, AFL-CIO, 370 NLRB No. 65 (January 4, 2021)
 - Board held likewise for rules requiring employees to “demonstrate respect for the Company” and “not engage in behavior that reflects negatively on the Company.”
 - BMW Manufacturing Co., 10-CA-178112 (Dec. 10, 2020).

Other Work Rule and Policy Developments

No Recording Rules. Board reaffirmed that facially neutral no-recording rules are generally lawful, upholding a rule barring employees from using personal recording devices within certain manufacturing facilities, and not use business recording devices within the facilities. BMW Manufacturing Co., 10-CA-178112 (Dec. 10, 2020).

Confidentiality Rules Concerning “Personal Information” and “Financial Information.” Board reaffirmed that such facially neutral rules are lawful. BMW Manufacturing Co., 10-CA-178112 (Dec. 10, 2020).

Confidentiality Rules Concerning Internal Investigations. Board reaffirmed that such facially neutral rules are lawful, when they are limited to the duration of the investigation. Securitas Security Services USA, 369 NLRB No. 57 (Apr. 14, 2020).

Rules Prohibiting Employees from Using Employer’s Email Systems for Non-Business Purposes. Board reversed an Obama-era decision, holding that such facially neutral rules are lawful. Caesars Entertainment, 368 NLRB No. 143 (Dec. 16, 2019).

Union Insignia. Board reiterated employees’ *general* right to wear union insignia in the workplace, and employers’ burden to establish “special circumstances” sufficient to justify a narrowly tailored prohibition. American Medical Response West, 20–CA–229397 (Dec. 10, 2020).

February 1, 2021 General Counsel Memorandum re: Boeing Guidance. Raised some questions about the future of Boeing by rescinding prior Memorandum instructing Regions on Boeing. However, the General Counsel simply characterized the rescinded Memorandum as “no longer necessary,” because the Board now has issued several decisions interpreting Boeing.

A close-up photograph of a person's hands in a white shirt. The left hand holds a silver pen, pointing it at a document on a clipboard. The right hand is pointing at the same document. The background is softly blurred, showing a window with light coming through. A red rectangular overlay is positioned on the right side of the image, containing the text 'Collective Bargaining'.

Collective Bargaining

Developments in Collective Bargaining

Board further clarifying the past practice defense following Raytheon. ABF Freight System, Inc., 369 NLRB No. 107 (June 19, 2020).

- Employer must show that its “actions did not materially vary in kind or degree from the parties’ past practice.”
- Where employer previously had not installed cameras in areas that “violated employee’s right to privacy,” but had installed cameras in all other locations, employer did not act consistently with past practice by installing cameras in break/locker room.



Developments in Collective Bargaining (continued)

Board reinstates prior standard for employers unilaterally disciplining employees before a first CBA with a new union. Care One at New Milford, 369 NLRB No. 109 (2020).

- Employers no longer must bargain before issuing discipline that is materially consistent with established policies or practices.

Board clarifies how it will address union information requests that seek confidential information. Oncor Electric Delivery, LLC, 369 NLRB No. 40 (Mar. 6, 2020)).

- When an employer has a legitimate and substantial interest in keeping the information and offers to bargain for accommodations, union must participate in such bargaining.



A photograph of a person walking away from the camera on a set of railroad tracks. The scene is bathed in the warm, golden light of a sunset or sunrise. To the left, a yellow train is visible. The tracks lead towards a bright horizon. A teal-colored rectangular overlay is positioned on the right side of the image, containing white text.

Other Hot NLRB Topics

Joint Employer Standard

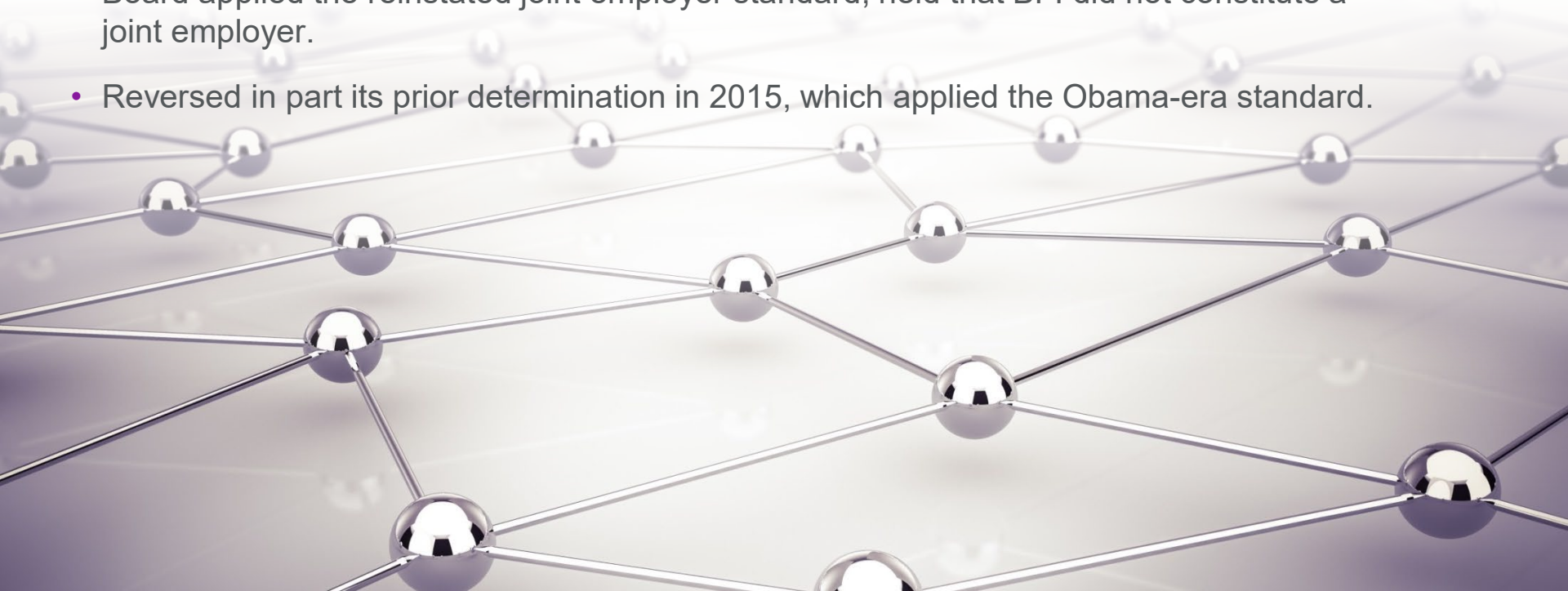
New joint employer standard became effective April 28, 2020.

- To be found a joint employer, a business must both possess and actually exercise substantial direct and immediate control over at least one essential term and condition of employment of another employer's employees.
- “Essential terms” include wages, benefits, work schedules, hiring, or cessation of employment.
- No longer sufficient for the purported joint employer to exercise indirect control, or merely unexercised but “reserved rights” to control.
- Not sufficient for employer to exercise the control on rare occasions or in minor ways.

Joint Employer Standard (continued)

[Browning-Ferris Industries of California, Inc., 369 NLRB No. 139 \(July 29, 2020\).](#)

- Board applied the reinstated joint employer standard, held that BFI did not constitute a joint employer.
- Reversed in part its prior determination in 2015, which applied the Obama-era standard.





Changes in NLRB Procedure

Board Procedure Developments

- New NLRB election procedures were set to become effective May 31, 2020.
- AFL-CIO v. NLRB, No. 20-CV-0675 (D.D.C.) (May 30, 2020). Federal district court blocked certain portions of the new election rules, *i.e.*, rules that:
 - Allowed parties to litigate, pre-election, certain issues concerning the composition of the bargaining unit and employee voting eligibility; requiring at least 20 business days between the order directing the election and the conduct of the election;
 - Extended from 2 days to 5 days the time within which the employer must provide the union with the list of eligible voters;
 - Restricted who could serve as election observers; and
 - Prevented the Board from certifying election results until the Board resolved a request for review (or the deadline for requesting review passes).
 - Decision is currently on appeal before the U.S. Court of Appeals for the D.C. Circuit.



Uncertainty regarding Board's defense and interim policies, given termination of former General Counsel Peter Robb and current General Counsel Peter Sung Ohr's recent decision to cease certain other litigation initiated by Robb.

A blurred office environment with several people working at desks with computer monitors. The scene is brightly lit with overhead fluorescent lights. A large teal rectangular box is overlaid on the right side of the image, containing white text.

What's Ahead at the NLRB in 2021

The NLRB Until January 19, 2021

Board Members

- John Ring, Chairman (R) – through 12/16/2022
- Marvin Kaplan (R) – through 8/27/2025
- William Emanuel (R) – through 8/27/2021
- Lauren McFerran (D) – through 12/16/2024
- Vacant

General Counsel

- Peter Robb (R) – through 11/16/2021



The Current and Future NLRB

Democrat-appointed majority as of late August 2021

Board Members

- Lauren McFerran, Chair (D) – through 12/16/2024
- New Democrat appointee (D) – starting 8/28/2021, then through 8/27/2026
- New Democrat appointee (D) – through 8/27/2023 (filling current vacant seat)
- John Ring (R) – through 12/16/2022
- Marvin Kaplan (R) – through 8/27/2025

General Counsel

- Peter Robb (R) – **FIRED 1/20/21**
- Alice Stock, Acting NLRB GC – **FIRED 1/21/21**
- Peter Sung Ohr named Acting General Counsel 1/25/21 - new Biden appointee forthcoming?

Here Comes the PRO Act

Legislation will make union organizing substantially easier



- “Protecting the Right to Organize” Act
- One version was passed by House of Representatives in February 2020 (H.R. 2474)
- Identifies changes supported by Congressional Democrats, and highlights potential upcoming changes
- President Biden has stated that he will go “beyond” the PRO Act

Areas to Watch

	Covered by PRO Act?	Area of Recent Change to Board Authority?
Micro bargaining units	✓	✓
Joint employer standard	✓	✓
Employee use of employer emails for organizing?	✓	✓

Areas to Watch

	Covered by PRO Act?	Area of Recent Change to Board Authority?
“Quickie” election rules	✓	✓
Employee use of employer emails for organizing?	✓	✓
ABC test for contractor status	✓	*

Other Potential Developments

- **Other potential changes via a PRO Act**
 - Discussed prohibition on right-to-work laws
 - Changes to persuader rules
 - Increased penalties for NLRA violations
 - NLRA notice posting requirement
 - Reduced flexibility to address strikes and secondary picketing
- **Uncertainty regarding defense of “Trump Board” rules currently in litigation**
 - Invalidated portions of new election rules
- **Potential expansion of mail voting during COVID-19 (and thereafter)**
- **Filing of election petitions that were withheld during COVID-19 outbreak**
- **Additional Memoranda from new General Counsel Peter Sung Ohr**
 - February 1, 2021 Memorandum noted that “[f]uture memoranda setting forth additional *new policies* will issue in the near future.” (Emphasis added.)
- **Notable union organizing efforts at Amazon, Google**



Questions? Please let us know.



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