

# The NLRB in 2022

*New Challenges for Private Employers*

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**HORTON**  
Management Law



# Topics

- ▶ Agency Background
- ▶ People
- ▶ Policy Shifts
- ▶ Workplace Rules
- ▶ Unionization

# National Labor Relations Board

- ▶ Federal agency
- ▶ Enforces the National Labor Relations Act
- ▶ Policy set by 5-member Board in Washington, D.C.
- ▶ 26 Regional Offices
- ▶ Processes unfair labor practice charges and representation petitions

# Jurisdiction

- ▶ Private sector employers, employees, and labor organizations (with exclusions for agricultural workers, interstate railroads, and airlines)
- ▶ NLRB has discretion not to assert jurisdiction over all businesses “affecting commerce”
- ▶ Coverage standards vary by industry
- ▶ Annual revenue thresholds range from \$50,000 to \$1,000,000

# Section 7 Employee Rights

- ▶ To self-organization
- ▶ To form, join, or assist labor organizations
- ▶ To bargain collectively through representatives of their own choosing
- ▶ To engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection
- ▶ To refrain from any and all such activities . . . . .

# Marvin Kaplan

- ▶ Position: Board Member
- ▶ Affiliation: Republican
- ▶ Appointed: August 10, 2017
- ▶ Term Expires: August 27, 2025
- ▶ Former Positions:
  - ▶ Counsel to Occupational Safety and Health Review Administration
  - ▶ Counsel for House Committees
  - ▶ Private Practice

# John Ring

- ▶ Position: Board Member
- ▶ Affiliation: Republican
- ▶ Appointed: April 16, 2018
- ▶ Term Expires: December 16, 2022
- ▶ Former Positions:
  - ▶ NLRB Chair
  - ▶ Private practice representing employers

# Lauren McFerran

- ▶ Position: Board Chair
- ▶ Affiliation: Democrat
- ▶ Appointed: August 10, 2020
- ▶ Term Expires: December 16, 2024
- ▶ Former Positions:
  - ▶ Counsel for Senate Democrats
  - ▶ Private practice representing labor unions



# Gwynn Wilcox

- ▶ Position: Board Member
- ▶ Affiliation: Democrat
- ▶ Appointed: August 4, 2021
- ▶ Term Expires: August 27, 2023
- ▶ Former Positions:
  - ▶ Private practice representing labor unions
  - ▶ Associate General Counsel of  
1199SEIU United Healthcare Workers East

# David Prouty

- ▶ Position: Board Member
- ▶ Affiliation: Democrat
- ▶ Appointed: September 22, 2021
- ▶ Term Expires: August 27, 2026
- ▶ Former Positions:
  - ▶ General Counsel of SEIU Local 32BJ
  - ▶ General Counsel of MLBPA
  - ▶ Counsel to other labor unions

# Jennifer Abruzzo

- ▶ Position: General Counsel
- ▶ Affiliation: Democrat
- ▶ Appointed: July 22, 2021
- ▶ Term Expires: July 21, 2025
- ▶ Former Positions:
  - ▶ Special Counsel for Communications Workers of America
  - ▶ NLRB – various counsel positions, including Deputy General Counsel and Acting General Counsel

# PRO Act

- ▶ Multifaceted legislation aimed to protect workers and unions
- ▶ Gives more workers right to unionize
- ▶ Restricts employers' ability to resist unionization
- ▶ Imposes new penalties on employers
- ▶ Pres. Biden's support embodied in his "American Jobs Plan": "It has never been more important for us to invest in strengthening our infrastructure and competitiveness, and in creating the good-paying, union jobs of the future."
- ▶ Unlikely to pass in current Senate

# General Counsel Memos

- ▶ Rescinded numerous guidance memos from previous General Counsel
- ▶ Reviewing Board “Doctrinal Shifts”
- ▶ Over 50 categories of cases identified for “Advice” review in a single August 12, 2021 memo



# “Doctrinal Shifts”

- ▶ Employer handbook rules
- ▶ Confidentiality provisions in separation agreements, arbitration agreements, and workplace investigations
- ▶ Protected concerted activity
- ▶ Remedies in settlement agreements
- ▶ Union access to employer property
- ▶ Union dues
- ▶ Independent contractor status
- ▶ Jurisdiction over student athletes and religious institutions
- ▶ Permanent replacements of striking workers

# Rulemaking

- ▶ Virtual hearings
- ▶ Joint employer standard
- ▶ Election procedures



# Requests for Briefing

- ▶ Union insignia on employee uniforms
- ▶ Damages for unlawful layoffs/terminations
- ▶ Determining appropriate bargaining units
- ▶ Independent contractor test
- ▶ Mandatory arbitration clauses
- ▶ When work rules interfere with Section 7 rights



# Generally Lawful Work Rules

- ▶ Civility Rules
- ▶ No-Photography/Recording Rules
- ▶ Prohibitions of Insubordination, Non-Cooperation, & Conduct Negatively Affecting Operations
- ▶ Disruptive Behavior Rules
- ▶ Protections of Confidential, Proprietary, and Customer Information
- ▶ Prohibitions of Defamation or Misrepresentation
- ▶ Limits on Use of Employer Logos and Intellectual Property
- ▶ Restrictions on Who Speaks on Behalf of Company
- ▶ Bans on Disloyalty, Nepotism, and Self-Enrichment

# Union Organizing

- ▶ Election rules
- ▶ Card Check recognition
- ▶ Expanded remedies for failure to bargain
- ▶ Unfair labor practices
- ▶ Unilateral change
- ▶ Strikes/picketing

# Interagency Cooperation

- ▶ NLRB, U.S. DOL, and EEOC announced joint initiative to protect workers against retaliation
- ▶ DOL and NLRB signed a partnership agreement to enhance information sharing, enforcement, training, and outreach



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# Questions?



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