



# WHAT THE HECK IS GOING ON AT THE NLRB?



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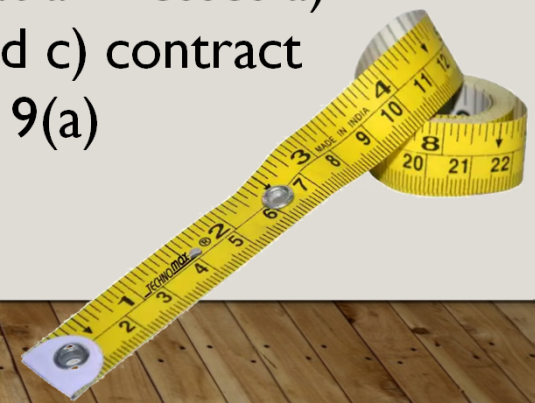
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# RULEMAKING INITIATIVES



- Chairman Ring has indicated publicly on a number of occasions that he believes the Board should engage in more rulemaking—he characterizes the Board’s rulemaking capacity as an “underutilized muscle”
- So far, the significant rulemakings are an NPRM on the joint employer standard and a “representation” NPRM that addresses a) the blocking charge rule, b) voluntary recognition, and c) contract language as a basis for converting 8(f) agreements to 9(a) agreements in the construction industry.





# RULEMAKING – JOINT EMPLOYER

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- The Board established the current joint employer standard in *Browning-Ferris Industries of California, d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015)—putative joint employer must co-determine essential terms and conditions of employment—when reviewing whether an entity is a joint employer, the Board takes into account indirect control and potential (unexercised) control of essential terms and conditions, also looks at routine and regular exercise of such control—multi-factor common law test examining all the facts and circumstances with no one factor controlling.
- After Republicans gained a majority of Board Members in 2017, the Board overruled *Browning-Ferris* in *Hy-Brand Industrial Contractors, Inc.*, 365 NLRB No. 156 (2017) — however, *Hy-Brand* was subsequently vacated, 366 NLRB No. 26 (2018), because of a determination that one Board member in the majority should have recused himself from the case and not participated.





# RULEMAKING – JOINT EMPLOYER

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- Subsequently, on September 14, 2018, the Board issued an NPRM on the joint employer standard—the proposed rule would essentially adopt the rule enunciated in *Hy-Brand* and, under it “to be deemed a joint employer...an employer must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer’s employees in a manner that is not limited and routine.”
- Fly in the ointment—DC Circuit opinion in *Browning-Ferris*, (issued December 28, 2018) affirming the articulation of the joint employer test as including consideration of the employer’s reserved right of control and its indirect control over employees’ terms and conditions of employment
- Joint employer rule still pending.

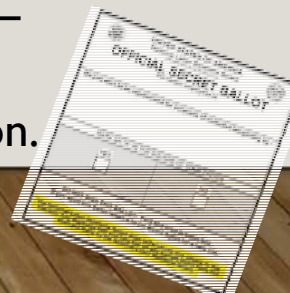






# RULEMAKING – REPRESENTATION MATTERS

- NPRM issued August 12, 2019, allegedly to protect employee free choice—three components to the proposal:
  1. **Blocking Charge Policy:** The NPRM proposes replacing the current blocking charge policy with a vote-and-impound procedure. Elections would no longer be blocked by pending unfair labor practice charges, but the ballots would be impounded until the charges are resolved.
  2. **Voluntary Recognition Bar:** The NPRM proposes returning to the rule of *Dana Corp.*, 351 NLRB 434 (2007). For voluntary recognition under Section 9(a) of the Act to bar a subsequent representation petition—and for a post-recognition collective-bargaining agreement to have contract-bar effect—unit employees must receive notice that voluntary recognition has been granted and a 45-day open period within which to file an election petition.





# RULEMAKING – REPRESENTATION MATTERS

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- NPRM issued August 12, 2019, allegedly to protect employee free choice—three components to the proposal:
  3. Section 9(a) Recognition in the Construction Industry: The NPRM proposes that in the construction industry, where bargaining relationships established under Section 8(f) cannot bar petitions for a Board election, proof of a Section 9(a) relationship will require positive evidence of majority employee support and cannot be based on contract language alone, overruling *Staunton Fuel*, 335 NLRB 717 (2001).



## BOARD DECISIONS – BEYOND THE PALE.

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- Precedent, Schmeshident.
- Too numerous to describe here – The following are a representative sampling.





# INDEPENDENT CONTRACTOR – SUPERSHUTTLE AND VELOX

- Background—after the Supreme Court decided, in *NLRB v. Hearst Corporation*, that newspaper “boys” were statutory employees with rights under the NLRA using an “economic realities” analysis, Congress amended the NLRA’s definition of employee to exclude independent contractors and made clear in the legislative history that the common law agency test should be applied in determining whether a worker was an employee or independent contractor
- In recent years, the Board had been fencing around with the DC Circuit in cases involving FedEx Home delivery about what role the potential for entrepreneurial opportunity played in the analysis of the common law factors—the Board said actual exercise of entrepreneurial opportunity was one factor to be considered, while the DC Circuit said the potential for entrepreneurial opportunity was the animating principle of the entire inquiry.







# INDEPENDENT CONTRACTOR – SUPERSHUTTLE AND VELOX

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- In *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), the Board reversed its prior FedEx precedent and essentially adopted the DC Circuit's view, thereby narrowing the number of workers able to exercise rights under the Act
- Given that independent contractors have no rights under the Act and with misclassification of employees as independent contractor rampant, the NLRB's General Counsel in 2015 issued complaints on the theory that misclassification of employees as independent contractors violated section 8(a)(1). The theory was initially articulated in an Advice memo in *Pacific 9 Transportation, Inc.*, Case 21-CA-150875 (December 18, 2015), a case growing out of the Teamsters organizing initiative with the Los Angeles port drivers.





# INDEPENDENT CONTRACTOR – SUPERSHUTTLE AND VELOX

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- Upon Republicans achieving a Board majority in 2017, the majority sought briefing on this issue in Velox Express, Inc., wherein the underlying Administrative Law Judge decision, the ALJ had found a violation based on the Pac 9 theory.
- Recently, the Board issued its decision in Velox and held that misclassification does not violate Section 8(a)(1), 368 NLRB No. 61 (August 29, 2019).
- The other significant NLRB development in this area is the Advice memo in *Uber Technologies, Inc.*, Cases 13-CA-163062 et al. (April 16, 2019), applying SuperShuttle to find that Uber drivers are independent contractors.





# UNILATERAL CHANGE – MV TRANSPORTATION



- Adopting the “contract coverage” standard for determining whether unilateral changes are permissible, replacing the “clear and unmistakable” waiver standard and overruling *Provena St. Joseph Medical Center*.
- Clear and Unmistakable Waiver – unilateral changes only permitted if contract specifically and unequivocally waived the union’s statutory right to bargain over the issue.
- Contract Coverage – if the change is within the scope of the contract’s provisions, then the employer may act unilaterally without violating the Act.
- D.C. Circuit had previously rejected “clear and unmistakable” waiver.
- Is a broad management rights clause enough now? Probably.
- McFarren in dissent: “If a management-rights provision in a collective-bargaining agreement is sufficiently general, it will permit an employer to act unilaterally with respect to any specific term or condition of employment that plausibly fits within the general subject matters of the provision.”





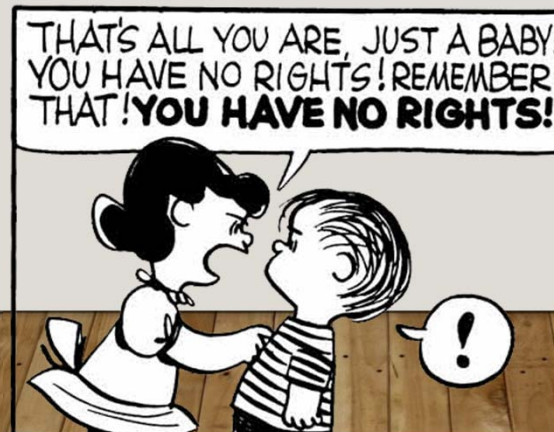
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# UNILATERAL CHANGE – *E.I. DU PONT DE NEMOURS*

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- Unilateral change charge dismissed because Board found union waived its right to bargain over changes to dental and medical benefits
- Because Union did not protest prior similar changes, it waives right to bargain over currently proposed/implemented similar changes.





# LIMITING ACCESS TO EMPLOYER PROPERTY – *KROGER LIMITED PARTNERSHIP MID-ATLANTIC*, 368 NLRB NO. 64 (SEPT. 6, 2019)



- Board now allows employers to prohibit unions from distributing/soliciting on their property even if they allow other groups to do so.
- “An employer may deny access to nonemployees seeking to engage in protest activities on its property while allowing nonemployees access to a wide range of charitable, civic, and community activities that are not similar in nature to protest activities.”
- An employer may discriminate against union organizers while allowing other groups to engage in the same conduct if the groups’ purposes are not “similar in nature.”
- Previously, in *UPMC II*, the Board allowed an employer to prohibit nonemployees’ nondisruptive activity in public areas of employer property (overruling *Ameron Automotive Centers* and *Montgomery Ward*).



# LIMITING ACCESS TO EMPLOYER PROPERTY – BEXAR COUNTY PERFORMING ARTS CENTER FOUNDATION, 368 NLRB NO. 46 (AUG. 23, 2019)



- Board reversed *New York New York Hotel & Casino* and *Simon DeBartolo* governing right of off-duty employees to workplace access even if not owned by their employer.
- A property owner may now exclude off-duty contracted employees seeking access to its property to engage in Sec. 7 activities unless:
  - Employees work both regularly and exclusively on the property, and
  - The property owner fails to show other reasonable alternative means of communication.
- Board concluded symphony workers had no right to access concert hall off-duty where:
  - Workers spent 79-88% of work time on employer's property
  - Sidewalk across the street from employer's property was a "reasonable alternative."





## RETALIATION FOR UNION ACTIVITY - *ELECTROLUX*



- Finding that an employer did not unlawfully discharge an employee even though the stated reason for the discharge was pretextual.
- Where Management told a union activist to “shut up” when she advocated for unionization, and the employer gave a pretextual reason for discharging the employee, the NLRB held that there was not enough evidence to prove the discharge was motivated by anti-union hostility.
- “The real reason might be animus against union or protected concerted activities, but then again it might not . . . .”
- Puts into question whether the Board will continue to follow *Wright Line* mixed-motive test.

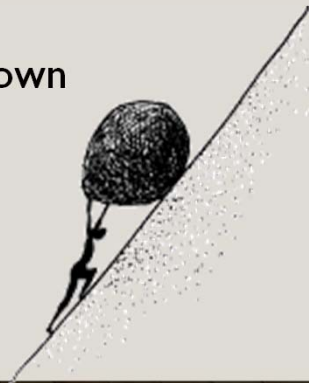


# DECREASING THE STABILITY OF CERTIFICATIONS – *JOHNSON CONTROLS*, 368 NLRB No. 20 (2019)

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- It is now easier for employers to withdraw recognition and refuse to bargain.
- When an employer receives evidence that a majority of unit employees no longer support the union within 90 days of CBA expiration...
- Previous standard (under *Levitz Furniture Co.*):
  - Employer could announce intent to withdraw recognition upon CBA expiration and refuse to bargain a new contract.
  - If employer actually withdraws recognition after expiration, union could use its own evidence to show majority support.
  - Upon union showing majority support, employer's continued withdrawal of recognition violated § 8(a)(5).





# DECREASING THE STABILITY OF CERTIFICATIONS *JOHNSON CONTROLS*, 368 NLRB NO. 20 (2019)

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- New standard introduced in *Johnson Controls*:
  - Union can only re-establish its status as representative through a new NLRB election.
  - Union must petition for the election within 45 days of receiving notice from employer that it intends to withdraw recognition.
  - After withdrawing recognition, employer may make unilateral changes to terms & conditions of employment without violating § 8(a)(5).





## CHANGES TO BARGAINING UNIT COMPOSITION – PCC STRUCTURALS, INC., 365 NLRB NO. 160 (2017)

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- Under *Specialty Healthcare*, if the employees in a petitioned-for unit shared a community of interest, the burden shifted to the employer to show that employees excluded from the unit shared an “overwhelming” community of interest with included employees, such that there could be no legitimate basis for excluding them.
- In *PCC Structurals*, the Board overruled *Specialty Healthcare* and rejected a petitioned-for unit of welders based on assessing “whether the petitioned-for employees share a community of interest *sufficiently distinct* from employees excluded from the proposed unit to warrant a separate appropriate unit.”
- In footnote, Board returned to *Park Manor* standard for determining units in non-acute healthcare facilities, without relevant facts, public notice, or briefing. The Board recently granted an employer’s request for review of the unit approved in *Manor Care of Yeadon, PA*, and remanded to the Region in light of *PCC Structurals*.





## CHANGES TO BARGAINING UNIT COMPOSITION - *THE BOEING COMPANY*, 368 NLRB NO. 67 (SEPT. 9, 2019)

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- IAMU won an election for a unit of 178 mechanics (approved by Region under *PCC Structurals* standard). Boeing argued that 2700 production and maintenance employees from its aircraft production plant must be included in bargaining unit, and the Board agreed.
- Board introduced three-step analysis for determining whether a petitioned-for “micro unit” unit is appropriate:
  - Whether the members of the petitioned-for unit share a community of interest with each other;
  - Whether the employees excluded from the unit have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members; and
  - Guidelines the Board has established for appropriate unit configurations in specific industries.





# DUES ISSUES – DUES REVOCATION – GC MEMO 19-04

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- Concludes that revocation window period that requires an employee to revoke 60-75 days before contract expiration unlawfully restrict the right of an employee to effectuate revocation, seeking reversal of *Frito-Lay*.
- Continues to permit window periods associated with employee's anniversary date.
- Finds unlawful any procedural “impediments” to revocation (e.g., certified mail requirement, requirement that union signs for receipt).
- Region should find a union's failure to tell the employee of the specific next revocation period to be a breach of the duty of fair representation.







## DUES ISSUES – *BECK* – ADVICE MEMO – UFCW LOCAL 5 & SAFEWAY.

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- Argues that the Board should overturn 2014 *Kroger* ruling and require unions to tell employees the amount of the reduced agency fee in its *Beck* notice.
- Reiterates GC memo 19-04, which sought the same goal.
- “The Board should overrule *Kroger* and require that a union must provide the reduced amount of dues and fees for objectors in the initial *Beck* notice so that an employee can make an informed decision as to whether to become a *Beck* objector.”





## DUES ISSUES – *BECK* – REGIONAL CASE HANDLING & CHARGEABILITY ISSUES – GC MEMO 19-06.

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- Burden shift on chargeability claims from employee to the union:
  - “We will no longer require agency fee objectors to explain why a particular expenditure is nonchargeable and to provide evidence or promising leads to support that contention.”
- No more *de minimis* exception.





# BAD GENERAL COUNSEL INITIATIVES

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- Too numerous to catalogue comprehensively here—will hit a few of the low points on the General Counsel memorandum side here—really picked up the pace in fiscal year 2019:

GC 19-06	Beck Case Handling and Chargeability Issues in Light of United Nurses & Allied Professionals (Kent Hospital)
GC 19-05	General Counsel's Clarification Regarding Section 8(b)(1)(A) Duty of Fair Representation Charges
GC 19-04	Unions' Duty to Properly Notify Employees of Their General Motors/Beck Rights and to Accept Dues Checkoff Revocations after Contract Expiration



**BAD**

## BAD GENERAL COUNSEL INITIATIVES

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Still More:

GC 19-01	General Counsel's Instructions Regarding Section 8(b)(1)(A)
GC 18-06	Responding to Motions to Intervene by Decertification Petitioners and Employees
GC 18-04	Guidance on Handbook Rules Post-Boeing





OMG, OMG, WHAT DO WE DO NOW AND OTHER QUESTIONS?

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