LABOR RELATIONS LAW

Fourteenth Edition

2023 CUMULATIVE SUPPLEMENT

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Preface

This Supplement updates the fourteenth edition through the end of the 2022-23 Supreme Court term and includes relevant Labor Board and lower court decisions through July 2023. We thank our students and Casebook users for their helpful suggestions. The bold page numbers indicate the place in the Casebook affected by the supplemental materials.

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Part One

Introduction and Historical Background

Section I. Historical Background

C. The Period Since 1933

6. Organized Labor from the 1970s to the Present

Page 24.

There have been a number of successful union organizing campaigns over the last few years. Since 2021, workers at over three hundred Starbucks stores from across the country have voted for union representation. *See* Michael Sainato, *"The Law Is Finally Catching Up": The Union Contract Fight at Starbucks*, GUARDIAN, May 12, 2023. At the same time, thousands of graduate teaching and research assistants at a number of universities—including Yale, Northwestern, Chicago, Johns Hopkins, Boston University, and the University of Southern California—won representation elections, often by historic margins (the Boston University vote was 1,414 - 28 in favor of unionization). *See* Dave Kamper, *What's Fueling the Graduate Worker Union Upsurge*, LAB. NOTES, Mar. 22, 2023. Workers at several other well-known retail establishments such as Apple, Trader Joe's, and REI also voted to unionize.

Despite these high-profile union victories, and the fact that unions now enjoy their highest rate of public approval in over fifty years, *see* Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, Gallup (Aug. 30, 2022), the percentage of the workforce who belong to unions continues its downward trajectory. The overall share of union membership declined from 10.3% in 2021 to 10.1% in 2022, the lowest on record. While the number of workers belonging to unions actually increased by 273,000 in 2022, the total number of wage and salary workers grew by over 5.3 million, swamping the union gains. *See* Union Members Summary, U.S. Bureau of Labor Statistics (Jan. 19, 2023), https://www.bls.gov/news.release/union2.nr0.htm.

Section II. Introductory Materials

A. Coverage of the National Labor Relations Act

3. Exclusions from Coverage

a. Independent Contractors

Page 29, after second full paragraph.

In *FedEx Home Delivery*, 361 N.L.R.B. 610 (2014) (*FedEx II*), the Obama Board rejected the D.C. Court of Appeals' approach elevating entrepreneurial opportunity as the "animating principle" of the test, and asserted that it would continue to be guided by the non-exhaustive common-law factors enumerated in the Restatement (Second) of Agency, Section 220 (1958), with no single factor being decisive. Although the Trump Board reversed course five years later in *SuperShuttle DFW, Inc*., 367 N.L.R.B. No. 75 (2019), making the opportunity for entrepreneurial gain the core of its common-law test, the Biden Board returned to form in *The Atlanta Opera, Inc.*, 372 N.L.R.B. No. 95 (2023), where it overruled *SuperShuttle* and reinstated the *FedEx II* standard. The *Atlanta Opera* majority found strong support for its multifactor approach in the Supreme Court's 1968 decision *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968), where the Court noted that "there is no shorthand formula or magic phrase that can be applied to find the answers, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."

B. Organization and Procedure of the National Labor Relations Board

3. Organization of the Board and the General Counsel

Page 39.

The President's power to remove the General Counsel was recently put to the test when President Biden, on his first day in office, removed General Counsel Peter Robb ten months prior to the expiration of his term. Shortly thereafter, Robb's replacement, Then-Acting General Counsel Peter Ohr, issued an unfair labor practice complaint against an office services company for failure to bargain with its newly certified union. The company claimed that the issuance of the complaint was beyond Ohr's powers because the President unlawfully removed Robb. While the Board declined at that point to rule on the President's removal powers, *Exela Enter. Sols., Inc*., 370 N.L.R.B. No. 120 (2021), the Fifth Circuit, on review, found that the President's power to remove derives from Article II of the Constitution and that no provision of the NLRA curbed that power with respect to the General Counsel. *Exela Enter. Sol., Inc. v. NLRB*, 32 F.4th 436 (2022). The court found the Presidential power to remove the General Counsel to be in stark contrast to Congress's clear provision of removal protection for NLRB Board Members. *Id.*; *accord Aakash, Inc*., 371 N.L.R.B. No. 46 (2021) (finding that the Supreme Court's recent decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), had foreclosed any reasonable argument that the President lacked authority to remove General Counsel Robb).

Part Two

The Right of Self-Organization and Protection against Employer Unfair Labor Practices

Section I. Employer Interference, Restraint, or Coercion

A. Limiting Organizational Activities on Employer's Premises

Page 59, New Note between Notes 2 and 3—Constitutional Restrictions on Organizer Access.

In *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), the Supreme Court restricted the ability of any future Board (or Congress) to expand organizer access to the premises of private employers. While agricultural laborers are expressly excluded from coverage under the NLRA, the state of California grants them organizational rights and makes it an unfair labor practice under California state labor law for employers to interfere with those rights. In furtherance of those aims, the state labor board promulgated a regulation that grants labor organizations the right to access the premises of an agricultural employer "for the purpose of meeting and talking with employees and soliciting their support." Cal. Code Regs., tit. 8, §20900(e). The regulation allows organizers, with written notice to the state labor board and the property owners, to access the premises up to three times a day for 120 days a year to speak with workers before or after work or on their lunch breaks. *Id*. In a 6-3 decision along party lines, the Supreme Court found that the state access regulation involved an "appropriation" of private property, and thus declared it a *per se* physical taking without compensation in violation of the Fifth and Fourteenth Amendments. The case is significant for federal labor law as well, since any potential expansion of the rights of organizer access under the NLRA will have to confront this new interpretation of the Takings Clause. While the *Lechmere* limitations on organizer access were presented as questions of statutory interpretation, the *Cedar Point Nursery* restrictions actually constitutionalize a key aspect of an employer's ability to resist efforts to organize its employees.

Page 62, End of Note 3c—Buttons and Other Union Paraphernalia.

Despite longstanding precedent that employees have a Section 7 right to wear union insignia on their employer's premises absent a showing of "special circumstances" justifying employer restrictions, *see Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945), the Board continues to struggle with basic applications of that standard. For example, in *Wal-Mart Stores, Inc*., 368 NLRB No. 146 (2019), a divided Board declined to apply the "special circumstances" test to evaluate the lawfulness of an employer's dress code policy that only partially restricted the display of union buttons and insignia. Wal-Mart's policy granted employees the right to wear "small, non-distracting logos or graphics . . . no larger than the size of your [employee] name badge." Pursuant to the policy, Wal-Mart allowed smaller union buttons that met its size restrictions but disallowed a 3.5-inch diameter union button. Instead of analyzing this application of the dress code policy under the "special circumstances" standard, the Board chose to apply the new, less-demanding test announced in *Boeing Co*., 365 NLRB No. 154 (2017). That test applies more generally to any facially neutral employer rule that may nevertheless, reasonably interpreted, potentially interfere with section 7 rights. It requires the Board to weigh "(i) the nature and extent of the potential impact on NLRA rights [from the employees' perspective], against (ii) legitimate [business] justifications [associated with the rule's requirements]," and strike the proper balance between them. Just three years later, however, the Biden Board overruled *Wal-Mart* and returned to its "special circumstances" test when employers interfere "in any way" with their employees' right to display union insignia. *Tesla Inc*., 371 N.L.R.B. No. 131 (2022).

Page 63, End of Note 3e—Off-Duty Employees.

Upon review, the D.C. Circuit found both the first step and the application of the second step of the Board's new access standard in *Bexar County* arbitrary, and invited the Board to "decide whether to proceed with a version of the test it announced and sought to apply in this case or to develop a new test altogether." *Local 23, American Federation of Musicians v. NLRB*, 12 F.4th 778 (D.C. Cir. 2021). On remand, the Biden Board abandoned the revised access standard adopted in *Bexar County* and returned to the previous test announced and approved by the circuit court in *New York New York Hotel & Casino*, 356 N.L.R.B. 907 (2011), *enforced*, 676 F.3d 193 (D.C. Cir. 2012), *cert. denied*, 568 U.S. 1244 (2013). *Bexar County Performing Arts Center Foundation*, 372 N.L.R.B. No. 28 (2022) (*Bexar County II*).

B. Anti-Union Speeches and Publications

Page 71, New Note 3—Captive Audience Speeches.

Employers frequently capitalize on their property rights by holding so-called "captive audience" meetings that employees are required to attend, and making anti-union speeches, showing anti-union videos, and engaging in other strategies to dissuade union organization. Recent years have seen legislative activity in several states seeking to ban captive audience meetings in which an employer expresses its views on religious or political matters, including the right to union organizing. Connecticut, Minnesota, New York and Oregon have enacted such statutes, and similar measures are pending in other states. Some of the statutes create a civil right of action for equitable relief, damages, and attorneys' fees and costs. *See, e.g.*, *An Act Protecting Employee Free Speech and Conscience*, amending CONN. GEN. STAT. §§ 31-51q. An open question remains whether the statutes are preempted by the NLRA under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), since such state legislation arguably trenches upon NLRA section 8(c)'s protection for employer speech. A challenge to the Connecticut statute on that basis is pending in federal court. Alternatively, the legislation may violate employers' First Amendment rights under the Constitution. *See Chamber of Commerce v. Bartolomeo*, Civ. Action No. 3:22-cv-1373 (Nov. 1, 2022).

Page 76, End of Note 1—Distinguishing Threats from Predictions

The Board has recently confronted a number of cases involving potential threats by employers communicated through social media platforms. Tesla CEO Elon Musk, for example, used his personal Twitter account to tweet about Tesla's business plans, personnel matters, and breaking news. When the workers at Tesla's Fremont, California production facility began an organizing campaign, Musk was asked "How about unions?" by another Twitter user. In response, Musk tweeted:

> Nothing stopping Tesla team at our car plant from voting union. Could do so tmrw if they wanted. But why pay union dues & give up stock options for nothing? Our safety record is 2X better than when plant was UAW & everybody already gets healthcare.

In *Tesla, Inc.*, 370 N.L.R.B. No. 101 (2021), *enforced*, 63 F.4th 981 (5th Cir. 2023), the Board found that Musk's tweet was an unlawful threat that employees would lose their stock options if they selected the union as their representative. In its opinion enforcing the Board's order, the Fifth Circuit specifically rejected Tesla's argument that Musk's tweet was protected by Section 8(c) of the Act. 63 F.4th at 991-92. Citing *Gissel Packing*, the court explained that "a statement implying that unionization will result in the loss of benefits, without some explanation or reference to the collective-bargaining process, economic necessity, or other objective facts, is a coercive threat, while such a statement is not a threat if made in the context, for example, of explaining that existing benefits may be traded away during the bargaining process." *Id*. at 992. The court also emphasized the importance of judging speech in its broader context, noting that "Tesla's history of labor violations supports the NLRB's finding that employees would understand Musk's tweet as a threat to commit another violation by rescinding stock options as retaliation." *Id*. at 993.

The Board took a similar position in *FDRLST Media, LLC*, 370 N.L.R.B. No. 49 (2020), *enforcement denied*, 35 F.4th 108 (3d Cir. 2022). There, the executive officer of an online media company that published *The Federalist* reacted to a walkout by employees of another, unionized media company by tweeting, "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." In finding that statement to be an unlawful threat, the Board affirmed the ALJ's finding that "[i]n viewing the totality of the circumstances surrounding the tweet, this tweet had no other purpose except to threaten the FDRLST employees with unspecified reprisal, as the underlying meaning of 'salt mine' so signifies." The Sixth Circuit disagreed and refused to enforce the order, finding that a reasonable employee would not view the tweet as a plausible threat of reprisal. The court believed that Board erred by viewing the tweet in isolation, and that a combination of factors—including the employer's claim that the tweet was intended to be satirical and the lack of evidence that any FDRLST employee actually perceived the tweet as a threat—militated against its finding of an unlawful coercion. 35 F.4th at 122-25. Interestingly, the court also found that the medium itself—Twitter—weighed against a finding of coercion because the platform "encourages users to express opinions in exaggerated or sarcastic terms." *Id*. at 126.

Section III. Employer Discrimination

B. Discrimination to Encourage Union Membership

4. State "Right-to-Work" Legislation

Page 144.

In March 2023, Michigan became the first state in decades to repeal its "right-to-work" law, *see* MICH. COMP. LAWS § 423.14 (2023), leaving twenty-six states with constitutional or statutory prohibitions on union security arrangements.

C. Which Activities Are Protected Under Section 7?

1. Concerted Activity on Social Media

Page 150.

In *Lion Elastomers LLC*, 372 N.L.R.B. No. 83 (2023), the Board expressly overruled *GM LLC and Charles Robinson*, 369 N.L.R.B. No. 127 (2020), rejecting application of the *Wright Line* test and returning to its setting-specific standards for determining whether employers have unlawfully disciplined employees engaged in abusive conduct in connection with protected concerted activity. In the context of concerted activity on social media posts, this means a return to the totality-of-the-circumstances test applied in *Pier Sixty* and other earlier cases.

The Trump Board's *Boeing* standard is under review in *Stericycle*, 04-CA-137660, now pending before the Biden Board.

2. Employer Work Rules and Policies Potentially Restricting § 7 Activity

Page 152.

In August 2023, the Biden Board overturned the *Boeing* standard applicable to employer work rules, finding that it gave too little weight to the chilling effect that overbroad work rules could have on employees' exercise of section 7 rights. In *Stericycle, Inc.*, 372 N.L.R.B. No. 113 (2023), the Board rejected *Boeing's* categorical approach to work rules, and adopted the following test, which it characterized as building on and revising the *Lutheran Heritage Village* test. First, the General Counsel must establish that a challenged rule has a reasonable tendency to chill employees from exercising section 7 rights. If the General Counsel does so, the rule is presumptively unlawful. The employer may rebut the presumption by proving that the rule advances a legitimate and substantial business interest and that a more narrowly tailored rule would not advance that interest. The Board explained:

To begin, the current standard fails to account for the economic dependency of employees on their employers. Because employees are typically (and understandably) anxious to avoid discharge or discipline, they are reasonably inclined both to construe an ambiguous work rule to prohibit statutorily protected activities and to avoid the risk of violating the rule by engaging in such activity. In turn, *Boeing* gives too little weight to the burden a work rule could impose on employees' Section 7 rights. At the same time, *Boeing's* purported balancing test gives too much weight to employer interests. Crucially, *Boeing* also condones overbroad work rules by not requiring the party drafting the work rules—the employer—to narrowly tailor its rules to only promote its legitimate and substantial business interests while avoiding burdening employee rights.

The standard we adopt today remedies these fundamental defects. We adopt a modified version of the basic framework set forth in *Lutheran Heritage*, which recognized that overbroad workplace rules and polices may chill employees in the exercise of their Section 7 rights and properly focused the Board's inquiry on NLRA protected rights. . . . However, although *Lutheran Heritage* implicitly allowed the Board to evaluate employer interests when considering whether a particular rule was unlawfully overbroad, the standard itself did not clearly address how employer interests factored into the Board's analysis. The modified standard we adopt today makes explicit that an employer can rebut the presumption that a rule is unlawful by proving that it advances legitimate and substantial business interests . . . . Because we overrule *Boeing*, *LA Specialty Produce*, and the work rules cases relying on them, including those that placed rules into an "always lawful" category based simply on their subject matter, we reject Boeing's categorical approach, instead returning to a particularized analysis of specific rules, their language, and the employer interests actually invoked to justify them. As under *Lutheran Heritage*, our standard requires the General Counsel to prove that a challenged rule has a reasonable tendency to chill employees from exercising their Section 7 rights. We clarify that the Board will interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity. Consistent with this perspective, the employer's intent in maintaining a rule is immaterial. Rather, if an employee could reasonably interpret the rule to have a coercive meaning, the General Counsel will carry her burden, even if a contrary, noncoercive interpretation of the rule is also reasonable. If the General Counsel carries her burden, the rule is presumptively unlawful, but the employer may rebut that presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule. If the employer proves its defense, then the work rule will be found lawful to maintain.

Id. at 1-2.

Page 153.

While the Trump Board decided against applying its *Boeing* standards to the terms found in severance agreements, it independently expanded the types of provisions that employers could lawfully include in those agreements. In *Baylor University Medical Center*, 369 N.L.R.B. No. 43 (2020), the Board found that an employer's offer of severance agreements with "No Participation in Claims" and "Confidentiality" clauses did not reasonably tend to interfere with, restrain, or coerce employees in the exercise of their rights under the Act. The ALJ in the case had found both clauses unlawful under the new *Boeing* test: the "No Participation" clause banned individuals from voluntarily assisting the Board in its investigations of unfair labor practices and was unsupported by any legitimate employer rationale; the "Confidentiality" clause could be construed as prohibiting protected discussions of wages, hours, and working conditions without a significant countervailing employer interest in confidentiality. On review, the Board generally rejected application of *Boeing* to severance agreements because such agreements were not mandatory and only applied to post-employment activities. It then upheld the legality of both contested provisions, and distinguished its approach from earlier decisions on the legality of severance agreements such as *Shamrock Foods Co*., 366 N.L.R.B. No. 117 (2018), by explaining that they had all involved employees who had been unlawfully discharged or involved other coercive circumstances. *Accord IGT*, 370 N.L.R.B. No. 50 (2020).

This new approach to severance agreements was short-lived. In *McLaren Macomb*, 372 N.L.R.B. No. 58 (2023), The Biden Board overruled *Baylor* and *IGT*, and found a severance agreement that both prohibited employees from making statements that could disparage the employer and further barred them from disclosing the terms of the agreement to be unlawful. The Board explained that it was returning to "the prior, well-established principle that a severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and that employers' proffer of such agreements to employees is unlawful." Shortly after the decision, General Counsel Jennifer Abruzzo issued a memorandum giving guidance on the impact of the case on severance agreements. Gen. Couns. Memo. GC 23-05 (March 22, 2023). A few months later, the General Counsel issued a memorandum on a related issue, taking the position that, generally speaking, the proffer, maintenance, and enforcement of non-compete agreements that prohibit employees from accepting certain types of jobs or operating certain types of businesses after the end of their employment also violate Section 8(a)(1) of the Act. Gen. Couns. Memo. GC 23-08 (May 30, 2023). Her memo reasoned that non-compete agreements interfere with employees' efforts to improve working conditions by blocking their ability to concertedly resign, carry out concerted threats to resign, concertedly seek or accept employment with local competitors to obtain better working conditions, solicit coworkers to work for local competitors as part of a broader course of concerted activity, or to seek employment in order to engage in concerted activity elsewhere. The Board has yet to weigh in on the General Counsel's approach to non-compete agreements.

6. Loss of Protection Due to Unlawful Objective, Unlawful Means, or Means Against Public Policy

Page 177, New Note between Notes 2 and 3—Property Damage

A number of cases over the years have confronted the issue of whether employees can withhold their labor when doing so risks damage to their employer's property. In an early case involving a sit-down strike, the Supreme Court made clear that the plant seizure at issue was unprotected, but then opined more broadly:

> [I]n its legal aspect, the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company, or the seizure and conversion of its goods, or the despoiling of its property, or other unlawful acts in order to force compliance with demands. To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force, instead of legal remedies, and to subvert the principles of law and order which lie at the foundations of society.

NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 253 (1939). Over the ensuing decades, the Board shaped a requirement that striking employees must take "reasonable precautions" to protect against foreseeable injury to people, premises, or equipment that might be caused by their sudden work stoppage. *See, e.g.*, *Marshall Car Wheel & Foundry Co.*, 107 N.L.R.B. 314 (1953), *enforcement denied on other grounds*, 218 F.2d 409 (5th Cir. 1955) (strike not protected when employees at a foundry walked off the job leaving a foundry furnace full of molten iron, threatening to cause severe damage to the employer's equipment as it solidified); *General Chemical Corp*., 290 N.L.R.B. 76 (1988) (strike not protected when employees at a chemical plant walked off the job without turning off the equipment, potentially threatening employees and others living in the vicinity with exposure to hazardous materials). At the same time, the Board repeatedly found that employees have no duty to prevent the loss of perishable goods or, more broadly, to time their work stoppages in a way that avoids economic harm to their employers. *See, e.g.*, *Lumbee Farms Coop.*, 285 N.L.R.B. 497 (1987) (strike protected when employees at a poultry plant walked off the job at the time when the largest number of chickens were being processed, threatening loss of its product on the line); *Leprino Cheese Co.*, 170 N.L.R.B. 601 (1968) (strike protected when employees at a cheese manufacturer walked off the job at a time that created a risk of spoilation of the cheese).

The Supreme Court recently revisited the issue of potential damage to employer property in an important case involving NRLA preemption (discussed more fully below in Part Four VII.A). *Glacier Northwest, Inc. v. Teamsters Local No. 174*, 143 S. Ct. 1404 (2023). Glacier Northwest delivered concrete to customers using trucks with rotating drums that prevent the concrete from hardening during transport. Concrete is perishable in the sense that if not promptly poured it will harden and damage the vehicles in which it is stored as well as render the concrete itself unusable. A union representing the delivery truck drivers called for a strike on a morning it knew the company was making deliveries of substantial amounts of concrete. Many of the drivers ignored the company's request that they finish their deliveries and instead returned to the facilities with their fully loaded trucks. While the company took steps to keep its vehicles from sustaining significant damage, all of the concrete mixed that day hardened and became useless.

As part of its preemption analysis, the Court determined that the conduct of the striking drivers was not even arguably protected under the NLRA. While the Court, in theory, stuck with the Board's existing standard—that the NLRA does not protect strikers who fail to take "reasonable precautions" to protect their employer's property from foreseeable, aggravated, and imminent danger due to the sudden cessation of work—its application of that standard appears to narrow the range of protected conduct. For example, the Court distinguished earlier Board opinions on perishable products by noting that the truck drivers here had "prompted the creation" of the perishable product by reporting for duty and "pretending" as if they would deliver the concrete. *Id*. at 1414 (emphasis in first quotation removed). Then, by waiting to walk off the job until the concrete was mixed and poured in the trucks, the strikers not only destroyed the concrete but also put employer's trucks in harm's way. *Id*. at 1414-15.

Page 178, Note 3—Opprobrious Conduct.

In *Lion Elastomers LLC*, 372 N.L.R.B. No. 83 (2023), the Board overruled *GM LLC and Charles Robinson*, 369 N.L.R.B. No. 127 (2020), rejecting application of the *Wright Line* test and returning to its setting-specific standards for determining whether employers have unlawfully disciplined employees engaged in abusive conduct in connection with protected concerted activity. In the context of employee conduct towards management in the workplace, this means a return to the longstanding four-factor *Atlantic Steel* test discussed above. In the context of picket-line conduct, this means reversion to the standard in *Clear Pine Mouldings*, Inc., 268 N.L.R.B. 1044 (1984), *enforced mem.* 765 F.2d 148 (9th Cir. 1985), where the Board considers, under all the circumstances, whether non-strikers reasonably would have been coerced or intimidated by the picket-line conduct.

E. Remedial Problems

Page 231, New Note—Make-Whole Remedies.

The Board recently examined and clarified the scope of its power to order make-whole relief. In typical cases, offending employers have been required to make wrongfully terminated employees whole through backpay and reinstatement. But in *Thryv, Inc*., 372 N.L.R.B. No. 22 (2022), the Board made clear that its standard remedy for make-whole relief should compensate employees for all direct *or foreseeable* pecuniary harms they suffered as a result of the employer's unfair labor practices. This additional consideration of consequential damages was thought to more fully account for the harms incurred by the victims of unfair labor practices and restore them to where they would have been but for the unlawful conduct. The Board further instructed that such relief must be specifically calculated: the General Counsel must present evidence "demonstrating the amount of pecuniary harm, the direct or foreseeable nature of that harm, and why that harm is due to the respondent's unfair labor practice. The respondent, in turn, will have the opportunity to present evidence challenging the amount of money claimed, argue that the harm was not direct or foreseeable, or that it would have occurred regardless of the unfair labor practice." While the Board did not detail the specific categories of such consequential damages, employers who fire employees in violation of the Act may now be liable for employee job search and interim employment expenses, out-of-pocket medical expenses, interest or late fees on credit cards incurred to cover living expenses, penalties incurred by having to prematurely withdraw money from a retirement account to cover living expense, and loss of a car or a home because of an inability to keep up with loan payments. *See id.*; Gen. Couns. Memo. GC 21-07 (Sept. 15, 2021) (detailing the types of consequential damages suffered by victims of unlawful conduct); Gen. Couns. Memo. GC 21-06 (Sept. 8, 2021) (same).

Page 233, Note 3—Extraordinary Remedies.

In *Noah's Ark Processors, LLC*, 372 N.L.R.B. No. 80 (2023), the Board adopted the Administrative Law Judge's conclusion that the employer violated Sections 8(a)(5) and 8(a)(1) by bargaining in bad faith and implementing its final offer in the absence of a valid impasse. The Board further determined that a broad ceased-and-desist order was warranted and, more generally, reaffirmed its power to impose a wide range of potential remedies in cases involving parties who "have shown a proclivity to violate the Act or who have engaged in egregious or widespread misconduct." It then provided a non-exhaustive list of such remedies, including an explanation of rights, a reading of rights aloud to the employees, an explanation of rights mailing, the presence of managers or supervisors at the reading of rights, a notice signing by responsible representatives of the offending party, the publication of notices and explanations-of-rights in local publications, an extended posting of notices and explanations of rights, and visitation by the Board to inspect bulletin boards to ensure that the required postings are in place.

Part Three

Representation Questions

Section I. Establishing Representative Status through NLRB Elections

B. Defining the Appropriate Unit

Page 253, Note 3—Non-Acute Healthcare Facilities, Retail Settings, Universities, and Other Contexts.

The Trump Board changes in this area were short-lived. In *American Steel Construction, Inc*., 372 N.L.R.B. No. 23 (2022), the Biden Board overruled the collective standard laid out in *PCC Structurals* and *Boeing* and reinstated *Specialty Healthcare*. The Board explained that the *PCC-Boeing* standard discounted the rights of employees seeking representation by making it too easy to invalidate a petitioned-for unit based on the supposed interest of excluded employees. The *Specialty Healthcare* standard's focus on "an appropriate" unit rather than "the optimal" one better fit with the statutory language and policy goals of the Act, in which unit determination "is to determine whether the petitioned-for unit is appropriate *for the purposes of collective bargaining*—an inquiry that focuses on whether the petitioned-for employees share a sufficient mutuality of interests, and which does not implicate the interests of the excluded employees."

Section II: Establishing Representative Status Through Unfair Labor Practice Proceedings

Page 298, End of the Note.

The *Gissel* decision noted that the Board had announced at oral argument that it had essentially abandoned the doctrine in *Joy Silk Mills, Inc. v. NLRB*, 85 N.L.R.B. 1263 (1949), *enforced* 185 F.2d 732 (D.C. Cir. 1950). That doctrine permitted an employer to lawfully refuse to bargain with a union claiming representative status based upon authorization cards only where the employer could demonstrate a basis for a "good faith doubt" as to the union's majority status. If the employer was unable to demonstrate a good faith doubt, the Board could enter a bargaining order on the basis that the employer's independent unfair labor practices were evidence of bad faith, and thus that the employer was seeking time to dissipate the union's majority. Alternatively, the Board could enter a bargaining order upon a direct finding that the employer was rejecting the bargaining demand in bad faith. After the Court's decision in *Linden Lumber*, it was clear that the Court agreed that employers could refuse to bargain on the basis of authorization cards and insist upon an election, without any basis for doing so, as long as they had not committed serious unfair labor practices warranting a *Gissel* bargaining order. Employer good faith, or lack of it, thus became irrelevant to refusals to recognize and bargain with a union claiming rights based upon authorization cards.

Early in her term, President Biden's General Counsel signaled that she would seek to revive the *Joy Silk* doctrine. *See* Gen. Couns. Memo. GC 21-04 (August 12, 2021). In a recent case, she filed a brief arguing for the reversal of *Linden Lumber* and reinstatement of the *Joy Silk* doctrine. *See Cemex Construction Materials Pacific, LLC*, 28-CA-230115 (2023). The practical effect of reviving the *Joy Silk* doctrine would be to make organizing easier for unions by giving them a tool to avoid elections and obtain authorization card-based recognition more easily, placing the burden on employers to demonstrate their good faith. For a good analysis of this effort, see Brooke Baledge, *Back to the Bargaining Table: The Joy Silk Doctrine's Potential to Revive Union Organization*, 101 N.C. L. REV. 569 (2023).

Section III: Duration of the Duty to Bargain

Page 304. End of Note 4—Successor Employers.

In *Hospital Menonita de Guayama, Inc.*, 371 N.L.R.B. No. 108 (2022), the Biden Board rejected a challenge to the successor bar doctrine established in *St. Elizabeth Manor, Inc.,* 329 N.L.R.B. 341 (1999). Even where the employer claims it has objective evidence that the union has lost majority support, incumbent unions maintain an irrebuttable presumption of majority status for a reasonable period of time sufficient to allow the collective bargaining relationship "a fair chance to succeed," typically defined as at least six months after a change in employer ownership. The Board reasoned that the expansion over the last decade of mergers and acquisitions leading to changes in ownership in the U.S. economy provides further justification for rules like the successor bar doctrine that facilitate smooth transitions and avoid unnecessary disruptions in the labor market. Accordingly, the Board reaffirmed the Obama Board's decision in *UGL-UNICCO Service Co.*, 257 N.L.R.B. 801 (2011).

Part Four

Union Collective Action

Section VII: National Labor Relations Act Preemption

A. *Garmon* Preemption

Page 480. End of Note 2—State Common Law Tort Claims

In *Glacier Northwest, Inc. v. Teamsters Local No. 174*, 143 S. Ct. 1404 (2023), the Court considered whether the NLRA preempts an employer's state tort claim against a union for property damage stemming from workers' failure to take reasonable precautions to protect the employer's property from harm as the result of a strike. Glacier sold concrete and delivered it in ready-mix trucks with rotating drums that prevent the concrete from hardening during transport. Concrete is perishable in the sense that if not promptly poured it will harden and damage the vehicles in which it is stored as well as rendering the concrete itself unusable. The union called a strike on a morning that it knew the company was mixing batches of concrete and pouring it into trucks for delivery, telling drivers of already-loaded trucks to ignore the employer's instructions to finish the deliveries; 16 drivers returned fully loaded trucks. Although Glacier took steps to keep the vehicles from significant damage, all of the concrete mixed that day hardened and became useless. Glacier filed tort claims in state court for common law conversion and trespass to chattels, arguing that the union had intentionally destroyed its property during the labor dispute. The union sought to dismiss the claims as preempted, citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and asserting that the question was "arguably subject to the NLRA" and thus within the primary jurisdiction of the NLRB. The union also filed unfair labor practice charges with the NLRB asserting that Glacier had punished striking drivers for protected concerted activity by disciplining drivers for striking and by filing the lawsuit in state court; the Board's General Counsel subsequently issued a complaint on these charges and proceedings before the Board ensued.

The Court ruled that the NLRA did not preempt the employer's state law tort claims. The Court reasoned that although the right to strike is protected, the NLRA does not shield strikers who fail to take "reasonable precautions" to protect their employer's property from foreseeable, aggravated, and imminent danger due to the sudden cessation of work. Glacier's tort claims alleged that the union took affirmative steps to endanger its property rather than making reasonable attempts to mitigate damage. Where the union fails to mitigate, as it did here—and indeed, executes the strike in a manner designed to destroy the employer's property--the NLRA does not "arguably protect" the strike, and thus there is no *Garmon* preemption. Concurring Justices Thomas and Gorsuch advocated reconsidering *Garmon's* "unusual" preemption regime in a future case, worrying that the Board's constantly waxing and waning precedents in developing its "carefully insulated common law of labor relations" could leave many issues "arguable," divesting state courts of jurisdiction over state claims. Justice Jackson filed a strong dissent, observing that the Board's General Counsel had filed a complaint with the Board after a thorough factual investigation alleging that the NLRA protects the strike conduct at the center of the state tort claim. Under *Garmon*, it should be clear on this basis alone that the strike conduct was arguably protected under the NLRA and thus that the NLRB should have primary jurisdiction over the case in the first instance. This does not ultimately preclude the state tort suit, she explained; it simply "requires state courts to take a 'jurisdictional hiatus' while the Board considers the dispute in the first instance."

Part Five

Collective Bargaining

Section III: Union Representation and Antidiscrimination Law

D. Areas of Tension Between Labor law and Antidiscrimination Law

Page 567, add new section.

3. Individual Requests for Accommodation of Religious Freedom Under Title VII

Tension between majority rights and individual rights protected by Title VII has also arisen in the context of requests for religious accommodations where rights protected under a collective bargaining agreement conflict with an individual's Title VII right to accommodation to observe religious holidays. Title VII prohibits discrimination because of religion, and the EEOC interpreted that to mean that employers are required to accommodate the reasonable religious needs of employees whenever that accommodation would not work an "undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1(a)(2) (1967); 29 C.F.R. § 1605.1 (1968). In 1972, Congress adopted that language, providing that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employees' religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (1970 ed., Supp. II).

In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the Court ruled that Title VII did not require a collectively bargained seniority system to yield to a junior employee's religious practices. *Id*. at 83 & n. 14. In that case, the plaintiff's religious faith required him to observe the Sabbath by not working from sunset on Friday until sunset on Saturday, but this conflicted with his work schedule and he lacked sufficient seniority under the collective bargaining agreement to avoid work during the Sabbath. Noting that Title VII expressly provides special protection for "bona fide seniority . . . system[s]," *id.* at 81-82, the Court concluded that the statute does not require an accommodation that involuntarily deprives other employees of seniority rights. *Id.* at 80. Since Hardison's co-workers were not willing to take his shift voluntarily, the Court found that compelling them to do so would have violated their seniority rights. And leaving Hardison's department short-handed would have adversely affected TWA's essential mission. *Id.* Although the Court briefly considered other accommodations, it found them not feasible, although it did not determine at what point the increased costs associated with them might rise to level of an undue hardship. Instead, it concluded simply that "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." Id. at 84. Lower courts subsequently took this statement literally and tended to deny even requests for minor accommodations.

In *Groff v. DeJoy,* 143 S. Ct. 2279 (2023), a unanimous Court reaffirmed its ruling in *Hardison* but clarified the standard for a showing of undue hardship, rejecting the *de minimis* cost standard and offering a more flexible contextual standard that should make accommodations easier to obtain. A unanimous Court reaffirmed its ruling in *Hardison* but clarified the standard for a showing of undue hardship, rejecting the *de minimis* cost standard and offering a more flexible contextual standard that should make accommodations easier to obtain. Gerald Groff is an Evangelical Christian who believes that Sunday should be devoted to worship and rest. His employer, the US Postal Service, entered into an agreement with Amazon in which the US Postal Service undertook to facilitate deliveries on Sundays, which in turn led to a Memorandum of Understanding (MOU) between the US Postal Service and the union representing Groff, the National Rural Letter Carriers' Association. The MOU established how Sunday and holiday parcel delivery service would be handled. Groff fell into a category of workers required to perform work on Sundays on a rotating basis. When Groff refused, the US Postal Service redistributed Groff's work to other employees, some of whom complained and at least one of whom filed a grievance under the collective bargaining agreement. *Id.* at n.1. The Postal Service progressively disciplined Groff for refusing to work on Sundays and he eventually resigned.

The Court reviewed its decision in *Hardison*, including the language suggesting that anything more than a *de minimis* cost would relieve the employer of the obligation to accommodate the employee's religious needs. Brushing aside this earlier statement, the Court clarified that "undue hardship" requires an employer to show that "the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." This fact-specific inquiry should take into account "all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, 'size and operating cost of [an] employer.'" (quoting Brief for the United States). Coworker impacts that affect the conduct of the business are relevant, although a coworker's dislike of or animosity toward a particular religion or religious practices cannot in and of itself be considered "undue." The Court remanded the case for further proceedings consistent with this clarification.

From a labor standpoint, one of the most interesting aspects of the case was the question whether hardship imposed on coworkers as a result of a religious accommodation could by itself constitute undue hardship on the conduct of the employer's business—particularly where the accommodation conflicts with the terms of a collective bargaining agreement. In a concurring opinion, Justices Sotomayor and Jackson suggested that it could. The collective bargaining agreement in this case assigned work on the basis of rotation rather than seniority, however, which distinguished the case from *Hardison* and eliminated the *Hardison* rationale regarding the statutory significance of seniority systems under Title VII. Will lower courts interpret the majority's silence on this point to mean that individual requests for accommodation could trump collectively bargained rights other than those based upon seniority systems, or will they agree with the concurrence?

Section IV. The Nature of the Duty to Bargain

B. Bargaining Remedies

Page 632, Note 4—Extraordinary Remedies for Pervasive Unfair Labor Practices.

The Board has flexed its muscle in cases of pervasive employer unfair labor practices during collective bargaining, authorizing an array of remedies in its effort to make the union and the workers whole. In *Noah's Ark Processors*, 372 N.L.R.B. No. 80 (2023), the ALJ concluded that the employer had bargained in bad faith during a series of contract negotiations, including engaging in regressive bargaining, repeatedly refusing to consider even the smallest concessions to the union; implementing its final offer before the parties reached overall impasse; and threatening, interrogating, and discharging workers in response to protected concerted activity. Worse, the employer had defied a previous federal court injunction related to previous bad faith bargaining and other unfair labor practice allegations. The Board upheld the ALJ's determination that bad faith bargaining had occurred and the remedies awarded, including bargaining costs, reading of a notice and explanation of rights to employees by the CEO or a Board agent in the CEO's presence. The Board then took the opportunity to announce a non-exhaustive list of potential remedies that the Board will henceforth consider in cases where employers have "shown a proclivity to violate the Act" or "have engaged in egregious or widespread misconduct" like that at issue in this case. The remedies include (1) an explanation of rights and notice to employees of the violation, which the Board may require a corporate official or other high-ranking member of management to read aloud to a group of employees, potentially with a Board agent or union representative present; (2) physical distribution of copies of the notice to employees present before the reading; (3) requiring supervisors to attend the reading and confirm their presence via a sign-in sheet; (4) requiring employers to mail the notice and explanation of rights to employees, both current and former; (5) requiring the employer to publish the notice in local publications of broad circulation; (6) requiring the employer to post the notice at the employer's facility for longer than the usual 60-day posting period; (7) requiring representatives of the union and management to sign the notice; and (8) visitation and inspection of the employer's facilities by a Board agent to assess compliance. In *Columbus Electric Cooperative, Inc.*, 372 N.L.R.B. No. 89 (2023), the Board subsequently ordered another employer that had demonstrated recalcitrance during bargaining and violated section 8(a)(5) to submit written progress reports every 30 days to the NLRB compliance officer for the region until the parties either reached agreement or came to impasse, ordered a 12-month extension of the union's certification year, and awarded make-whole compensation for backpay to employee negotiators for any earnings lost as well as reimbursement of bargaining expenses to the union.

Page 633, End of Note 5—Awards of Costs and Attorneys' Fees to Unions and the Labor Board.

In *NLRB v. Ampersand Publishing*, 43 F.4th 1233 (9th Cir. 2022), the Ninth Circuit enforced an NLRB order requiring the employer to reimburse the union for legal fees incurred by the union in collective bargaining as a result of the employer's unfair labor practices. The Board had found unusually aggravated misconduct by the employer sufficient to warrant more than a traditional remedy, including unilateral discontinuance of a merit pay raise program, transfer of bargaining unit work to nonunion temporary employees without notice, discharge of two employees, and bad faith bargaining. Accordingly, the Board ordered the employer to reimburse the union for costs and expenses incurred during the collective bargaining sessions, including legal fees for consultation with outside counsel during contract negotiations. The employer argued that D.C. Circuit precedent, specifically *HTH Corp. v. NLRB*, 823 F.3d 668 (D.C. Cir. 2016) [discussed in Note 5 at Page 633] establishes that the NLRB lacks authority to order reimbursement of legal fees. The court rejected this argument, finding those cases distinguishable because they dealt with awards of attorneys' fees in the litigation context rather than in the bargaining context. While awards of litigation expenses are punitive in nature, awards of bargaining expenses—including attorneys' fees incurred in connection with bargaining—are compensatory, "'designed to restore the economic status quo that would have obtained but for the Companies' wrongful acts,'" and thus lie within the NLRB's remedial power under section 10(c). *Id.* at 1237 (quoting an earlier decision drawing the same distinction, *Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085, 1094-95 (D.C. Cir. 2016)). This award was appropriate even though the parties were contemporaneously involved in ongoing litigation before the Board over the company's unfair labor practices during the union organizing campaign, and additional charges were filed during bargaining. *Id.* at 1239. The bargaining itself and the legal services rendered in connection with it were independent of those adjudication processes (even though the same lawyer and law firm represented the union in litigation before the NLRB). The court emphasized that the NLRB General Counsel prosecuted the pending NLRB charges, not the union, and the NLRB was not involved in the bargaining sessions. *Id.*

C. Unilateral Action

Page 645, End of Note 9—Changes in Mandatory Subjects of Bargaining After Contract Expires.

The NLRB's flip-flopping on the issue of the post-CBA expiration of dues checkoff clauses continues. The Biden Board reversed the Trump Board's decision in *Valley Hosp. Med. Ctr., Inc.*, 368 N.L.R.B. No. 139 (2019) (*Valley Hosp. I*), that dues checkoff clauses were creatures of contract akin to no-strike, arbitration, and management-rights clauses and thus did not survive the expiration of the collective agreement. On reconsideration following remand from the Ninth Circuit with direction to explain the Trump Board's departure from the Obama Board precedents, the Biden Board ruled 3-2 that dues checkoff clauses do survive the expiration of the collective agreement. *Valley Hosp. Med. Ctr., Inc*., 371 N.L.R.B. No. 160 (2022) (*Valley Hosp. II*), citing *NLRB v. Katz*, 369 U.S. 736 (1962) (holding that employers may not unilaterally alter employees' wages, hour, and terms and conditions of employment without first giving the union an opportunity to bargain over them). The Biden Board explained that dues checkoff clauses differ from other exceptions to the *Katz* rule: unlike union security clauses, dues checkoff arrangements do not require an agreement between an employer and the union, but instead rest upon an agreement between the employer and the employee; and unlike no-strike clauses, dues checkoff clauses do not involve a waiver of employee rights which is necessarily limited to the duration of the agreement. Further, dues checkoff clauses are similar to other provisions that survive contract expiration, including voluntary payroll deductions for union benefits funds—they are matters of administrative convenience and are subject to individual employee authorization and revocation. The Biden Board's ruling helps unions by ensuring that employers cannot starve them of resources during collective bargaining after the contract expires, and reduces the incentive for employers to delay negotiations until the contract expires. The decision is on appeal to the Ninth Circuit.