

The NLRB Today:

What Every Employer Should Know

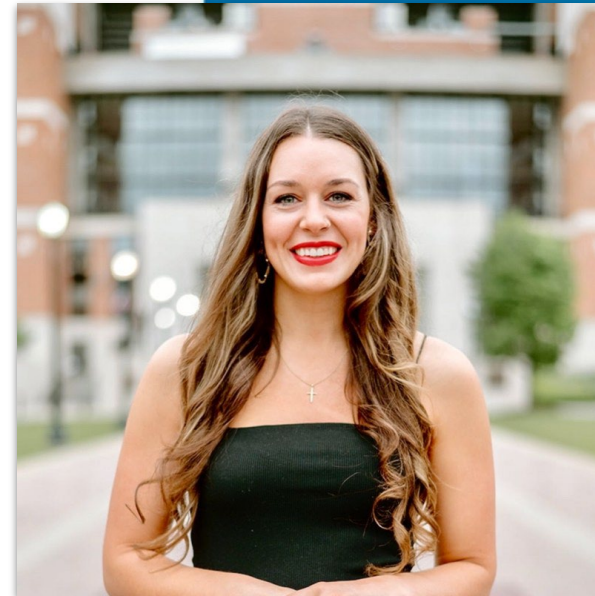
March 29, 2023

Today's Webinar Host

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Who We Are



- Artificial Intelligence
- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

What we do:
Deliver expert guidance in a
fraction of time and cost vs
traditional methods

Simplify the complexity of employment law



PolicySmart™

Create and maintain an up-to-date and legally compliant employee handbook



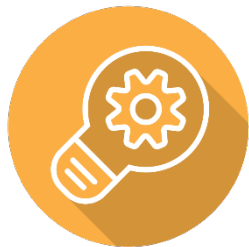
Navigator Independent Contractor

Remove risk in determining Independent Contractor status



Navigator Overtime

Determine if an employee is exempt or non-exempt



The Reference Center

A Comprehensive Solution for Employment Law and Common HR Compliance Questions



Navigator Onboarding

Assemble and produce legally compliant onboarding documents



Navigator Leave

Reduce the risk and administrative burden of leave management

Why an updated, compliant handbook is essential

An employee handbook communicates:

- Company culture
- Standards of conduct
- Compliance policies
- Organizational procedures
- Benefits
- Safety protocols



PolicySmart provides you with:

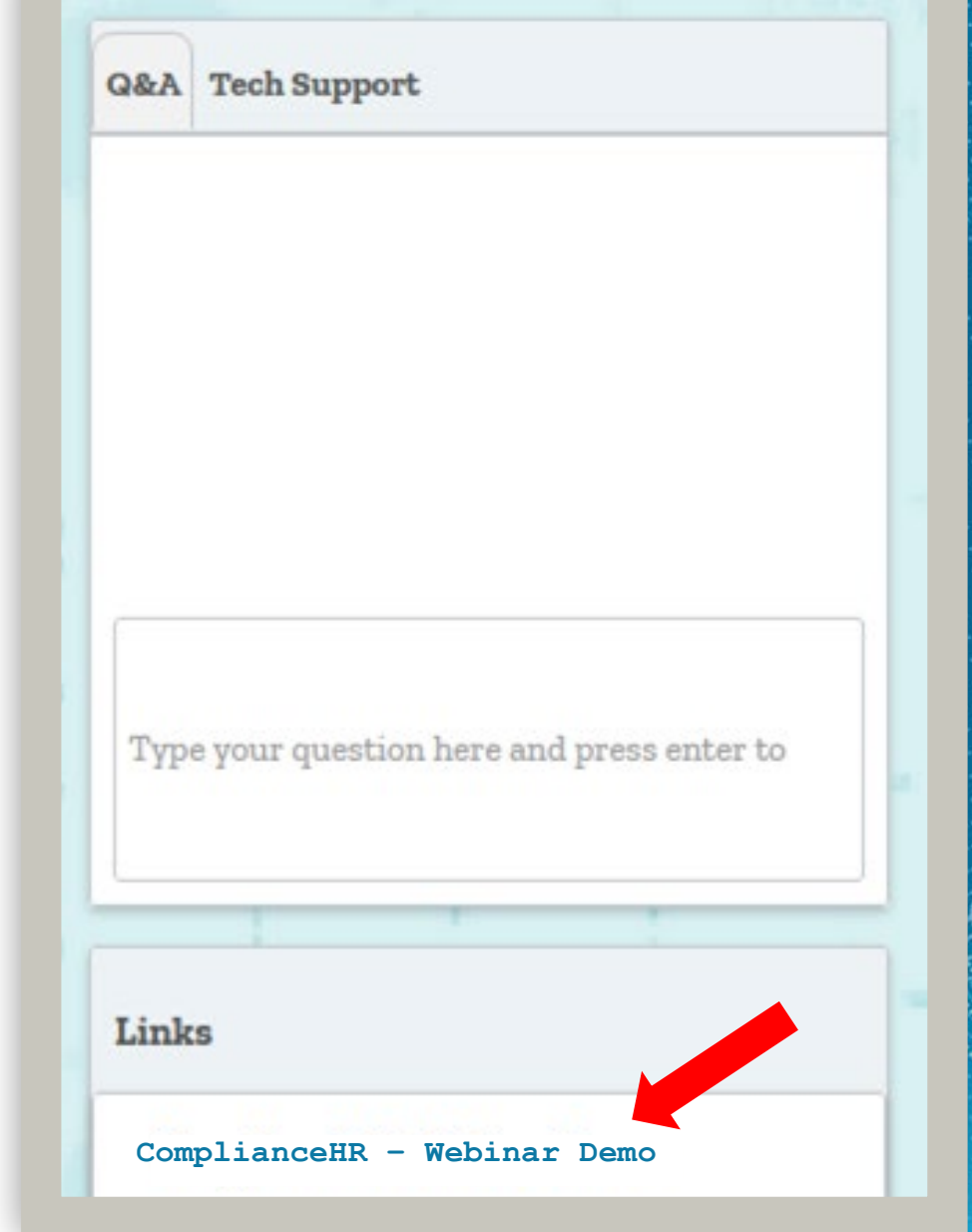
- Federal and state-compliant templates
- Innovative compliance timeline
- Handbook policy checklists
- Automated twice monthly legal update emails

Get a head start on your employee handbook with policies from PolicySmart.

Register for a Navigator Suite Demonstration

Benefits of a custom demonstration:

- Discuss your organization's requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies
- Provide free trial in Navigator Suite sandbox



Presented by:

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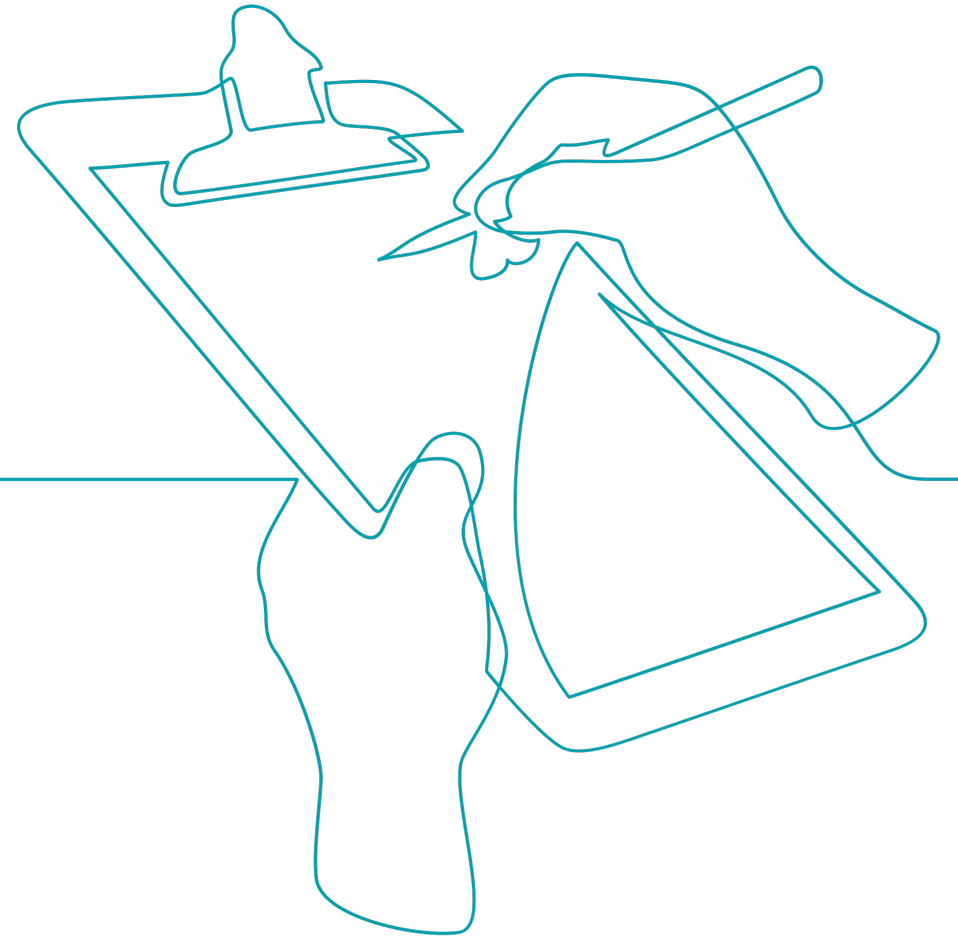
Agenda

Organizing Trends, Risk Factors,
Proactive Steps

The Biden NLRB and General Counsel
Abruzzo

Major NLRB Decisions Affecting
Unionized and Non-Unionized Employers

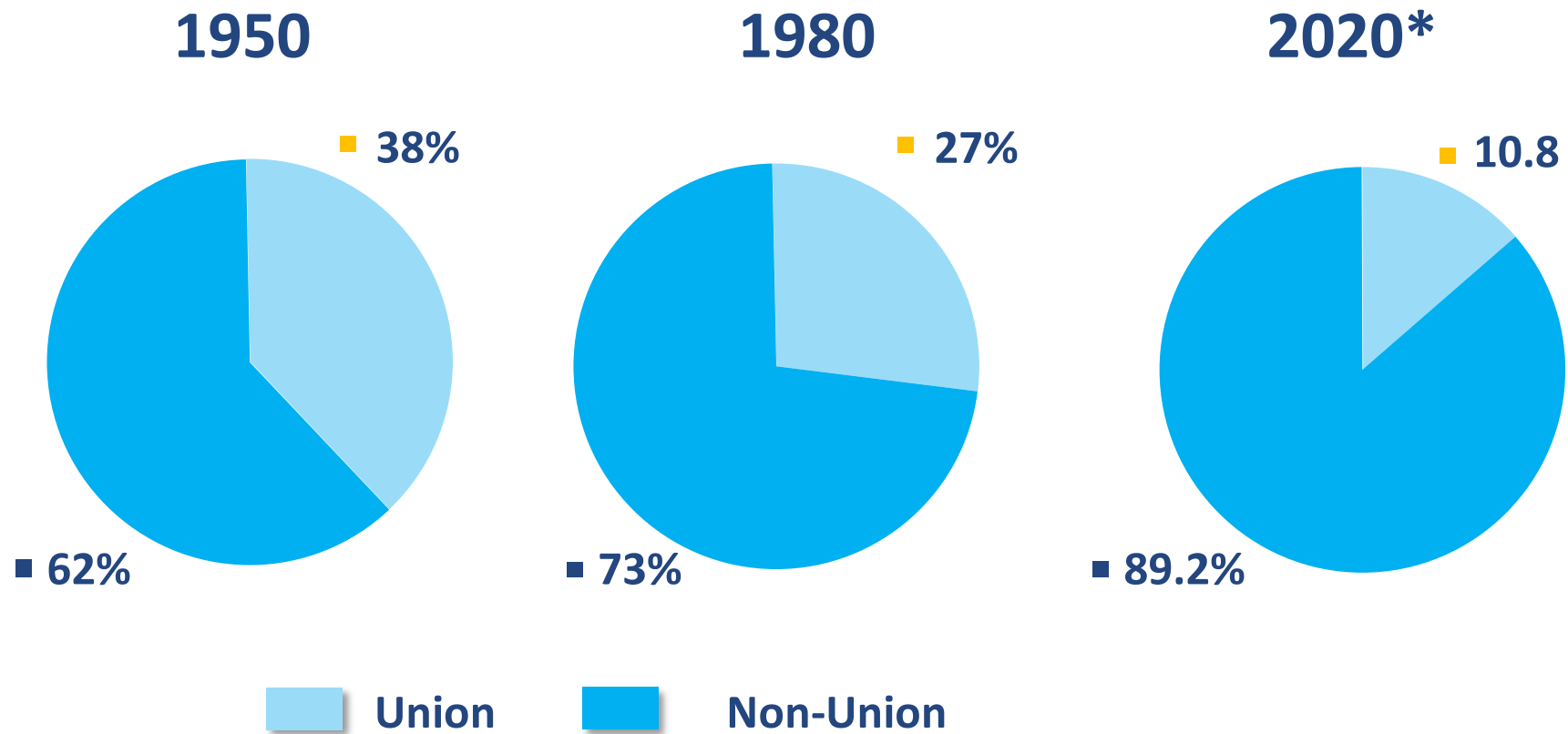
What's Next For the NLRB



Organizing Trends

1

Rate of Unionization in the U.S.



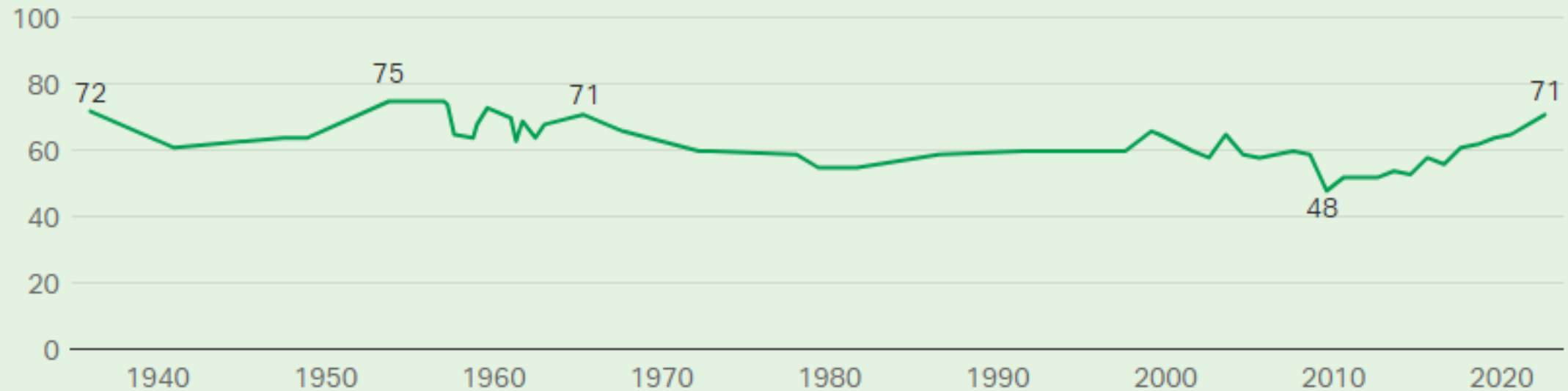
*Private sector now at 6.0%

Support for Labor Unions at Highest Level in Half a Century

Americans' Approval of Labor Unions, 1936-2022

Do you approve or disapprove of labor unions?

— % Approve



Election Petitions Up 53%, Board Continues to Reduce Case Processing Time in FY22

Office of Public Affairs

202-273-1991

publicinfo@nrlb.gov✉

www.nrlb.gov

October 06, 2022

In Fiscal Year 2022 (October 1, 2021-September 30, 2022), 2,510 union representation petitions were filed with NLRB's 48 Field Offices—a 53% increase from the 1,638 petitions filed in FY2021. This is the highest number of union representation petitions filed since FY2016.

Unfair labor practice (ULP) charges filed with NLRB Field Offices also increased 19%, from 15,082 charges in FY2021 to 17,988 charges in FY2022.

Accounting for both ULP and representation petitions, total case intake at the Field Offices increased 23%—from 16,720 cases in FY2021 to 20,498 cases in FY2022. This increase of 3,778 cases is the largest single-year increase since FY1976 and the largest percentage increase since FY1959.

Fertile Environment for Union Organizing

- Many factors contribute to the flurry of union organizing
- Pandemic-related fears and uncertainty Safety concerns for front-line workers
- The Great Resignation
- Union alignment with social justice issues
- Gen-Z affiliation for movements and causes
- Inflation
- Biden Administration's pro-union stance
- Mail ballot election



Virtual Organizing Makes it Easier

- Low cost and effective in reaching mass groups of employees quickly and getting our attention quickly – especially remote workers!
 - Capitalizing on today's concerns and fears
 - Consistent with “social distancing” climate
 - Websites to educate workers on their rights
 - Recruitment of labor leaders and member activists
 - Texting and QCR codes
 - Union specific apps and sites
 - Webcasts, telecasts, and town halls
- Unitworkers.com
 - Facebook
 - Twitter
 - LinkedIn
 - Yelp
 - Reddit
 - Flickr
 - Whatsapp
 - Instagram
 - Union Connect
 - Coworker.org

*“I think the overall communication points, the ability to have communication on cell phones, through social media, through video, through Zoom meetings, [is] a lot of the ways that we were able to overcome the challenge of Covid.” - Organizer,
<https://labornotes.org>*



Inside-Out Organizing

- Historically, traditional unions drove campaigns (“outside-in”)
- Recently, employee organizers are driving campaigns from within the company, with or without traditional union backing (“inside-out”)
- Methods include
 - Virtual organizing
 - Social media
 - Support of labor-friendly politicians
 - Salts

Paid Union Organizers and Salts

- “Training camps” for organizers
 - Ex: union summer – paid summer internship in labor organizing
- “Salts” apply for jobs with or without announcing their intent to organize while working



Sympathetic Supervisors

- Recently promoted employees still feel aligned with employees
- Experienced pandemic difficulties themselves
- Likely don't know the consequences of unionization, given decline of unions for decades
- Not understanding how a third party would impact their work lives



What Can My Organization Do Now?



First, breath! Put the stats in perspective.

Define your organization before a union defines it for you.

Train management in maintaining an issue free workplace.

Develop a campaign plan.

The Biden Agenda and NLRB



2



President Biden
pledged to be “*the
strongest labor
president you’ve
ever had.*”

**I’m a union president and I
made no bones about that.**

NLRB: Current Makeup



Chair Lauren McFerran (D)
Term ends
December 16, 2024



Member David Prouty (D)
Term ends
August 27, 2026



Gwynne Wilcox (D)
Term ends
August 27, 2023



Member Marvin Kaplan (R)
Term ends
August 27, 2025



The General Counsel



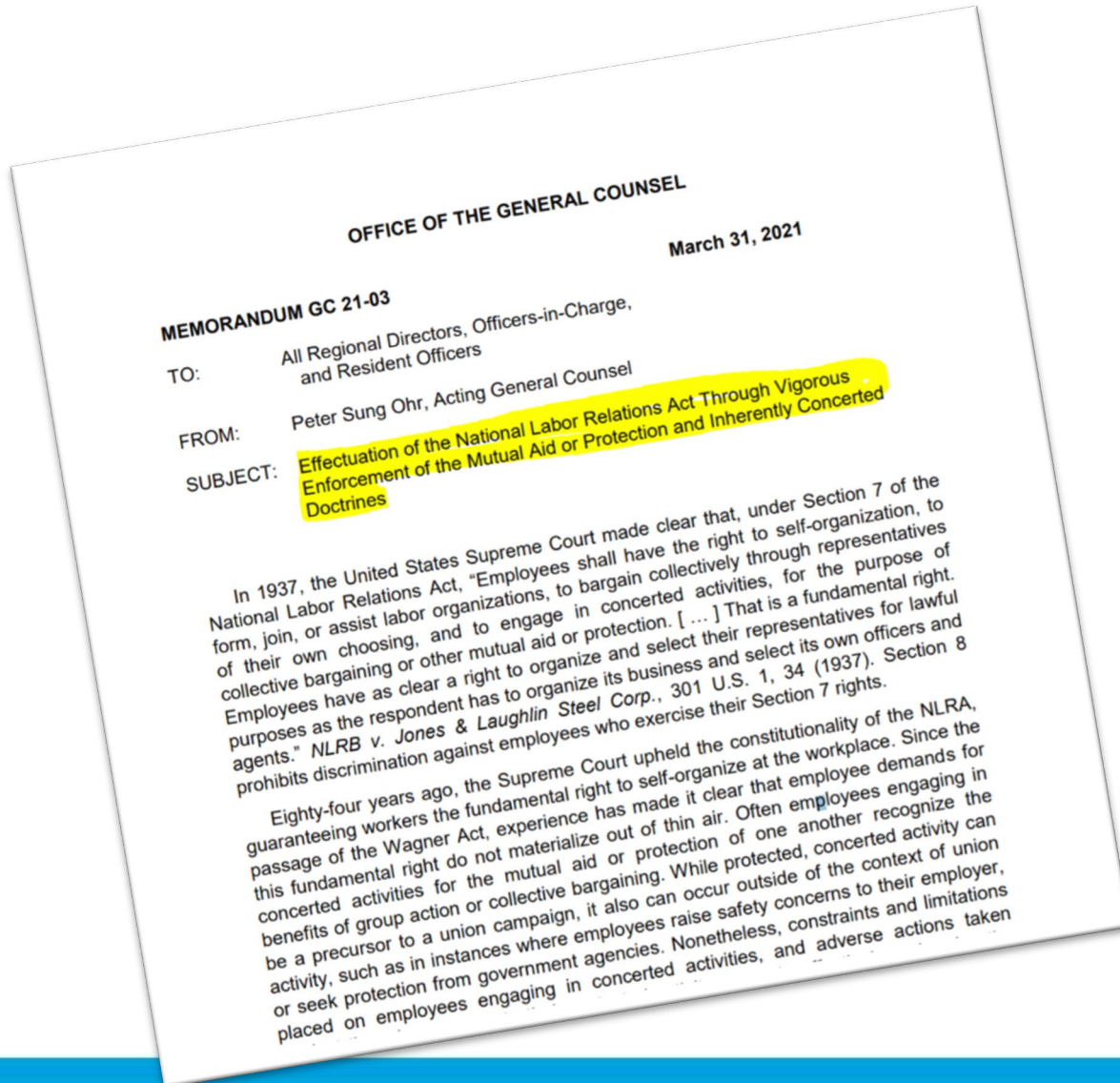
- In January, President Biden fired former General Counsel Peter Robb (R)
- General Counsel Jennifer A. Abruzzo (four-year term beginning July 22, 2021) – long career at NLRB; most recently Special Counsel for Strategic Initiatives at Communications Workers of America (CWA)
 - Ratified actions of Acting General Counsel Peter Sung Ohr
 - Issued Several Guidance Memoranda outlining a robust agenda



“It is so important that we utilize every possible tool we have to ensure that those wronged by unlawful conduct obtain **true justice.**”

- General Counsel
Jennifer Abruzzo

Ohr Memo on “Vigorous Enforcement” of PCA



- Takes very expansive view of protected concerted activities
- Includes “political and social justice advocacy” even when activity is not explicitly connected to the workplace
- Example: “Solo” strike by a pizza shop employee to attend a “fight for \$15” demonstration
- This memo and Ohr’s rescission of Boeing GC Memo signal return to Obama-era war on handbooks
- Littler Insight:
<https://www.littler.com/publication-press/publication/are-you-prepared-return-war-employee-handbooks>

Abruzzo Memo on Mandatory Advice Submissions

OFFICE OF THE GENERAL COUNSEL

August 12, 2021

MEMORANDUM GC 21-04

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Mandatory Submissions to Advice

Thanks to the strength of Regional staffs across the country, the vast majority of cases can and should be processed without guidance or excessive oversight from Headquarters. Ensuring that Regions have all the necessary resources to process their cases and provide the public with the highest quality service is something I hope to make a hallmark of my term as General Counsel. However, there are some areas that I believe compel centralized consideration.

In this regard, over the past several years, the Board has made numerous adjustments to the law, including a wide array of doctrinal shifts. These shifts include overruling many legal precedents which struck an appropriate balance between the rights of workers and the obligations of unions and employers. At the same time, there are many other issues that also should be carefully considered to determine whether current law ensures that employees have the right to exercise their fundamental Section 7 rights both fully and freely. Submissions of these topics to Advice will allow the Regional Advice Branch to reexamine these areas and counsel the General Counsel's office on whether change is necessary to fulfill the Act's mission.

This memo is divided into three sections. The first section identifies cases and subject matter areas where, in the last several years, the Board overruled legal precedent; the second section identifies other initiatives and areas that, while not necessarily the subject of a more recent Board decision, are nevertheless ones I would like to carefully examine; and the third section identifies other casehandling matters traditionally submitted to Advice.

No list such as this will be exhaustive.¹ The Board's issuance of decisions often raises new questions. In addition, other yet-to-be-considered policy issues will undoubtedly arise. Regions should be sensitive to the need to submit such issues to Advice. Regions should

- Aggressive “Hit List”
- Divided into 3 sections, GC signals Board to reverse notable Trump Board precedent, return to key Obama Board decisions and more radical doctrines
- Littler Insight:
<https://www.littler.com/publication-press/publication/nlrbs-new-general-counsel-issues-first-guidance-memorandum>
- Updated GC 23-04 targets 15 items

Biden NLRB Decisions

3



The Return of “Micro-Units”

- In *American Steel Construction* the NLRB returned to unit determination standard of *Specialty Healthcare*
- As long as a union’s petitioned-for bargaining unit consists of a clearly identifiable group of employees who share a community of interest, the Board will presume the unit is appropriate
- Burden is on the employer to show unit is *inappropriate* by demonstrating that the excluded workers “share an overwhelming community of interest” with workers in the proposed unit
- Decision could lead to a proliferation of micro-units



See <https://www.littler.com/publication-press/publication/american-steel-micro-units-are-again-likely-possibility>

Expansion of Remedies for ULPs



- In *Thryv, Inc.*, the Board expanded the scope of “make-whole” remedies available to workers who allege unfair labor practices
- Employees may now recover more than reinstatement or backpay; they may request that the Board hold an employer responsible for *any* “direct and foreseeable” financial harm they allege to have suffered as a result of an employer’s actions
- Could lead to major economic penalties and protracted litigation

See <https://www.littler.com/publication-press/publication/national-labor-relations-board-expands-make-whole-remedy>

Unlawful Provisions in Separation Agreements



See <https://www.littler.com/publication-press/publication/nlrb-decision-addresses-interaction-between-confidentiality-and>;
<https://www.littler.com/publication-press/publication/nlrb-general-counsel-provides-guidance-non-disparagement-and>

- In *McLaren Macomb*, the NLRB overturned two decisions that had permitted employers to include confidentiality and non-disparagement provisions in severance agreements
- “Mere proffer” of a severance agreement that conditions receipt of benefits on the “forfeiture of statutory rights” violates NLRA
- 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
- Interpretive guidance issued in GC 23-05

Takeaways from *McLaren*



Does not apply to agreements with executives, managers, supervisors, or independent contractors

Decision is not limited to separation agreements

Not all confidentiality and non-disparagement provisions violate the NLRA

Approach depends on the employer's business objectives, culture, brand sensitivity legal risk tolerance

Options include: (1) no change; (2) remove risky language; (3) revise provisions consistent with Board precedent; and/or (4) include robust disclaimer provision(s). Also consider severability language.

What's Next for the NLRB?

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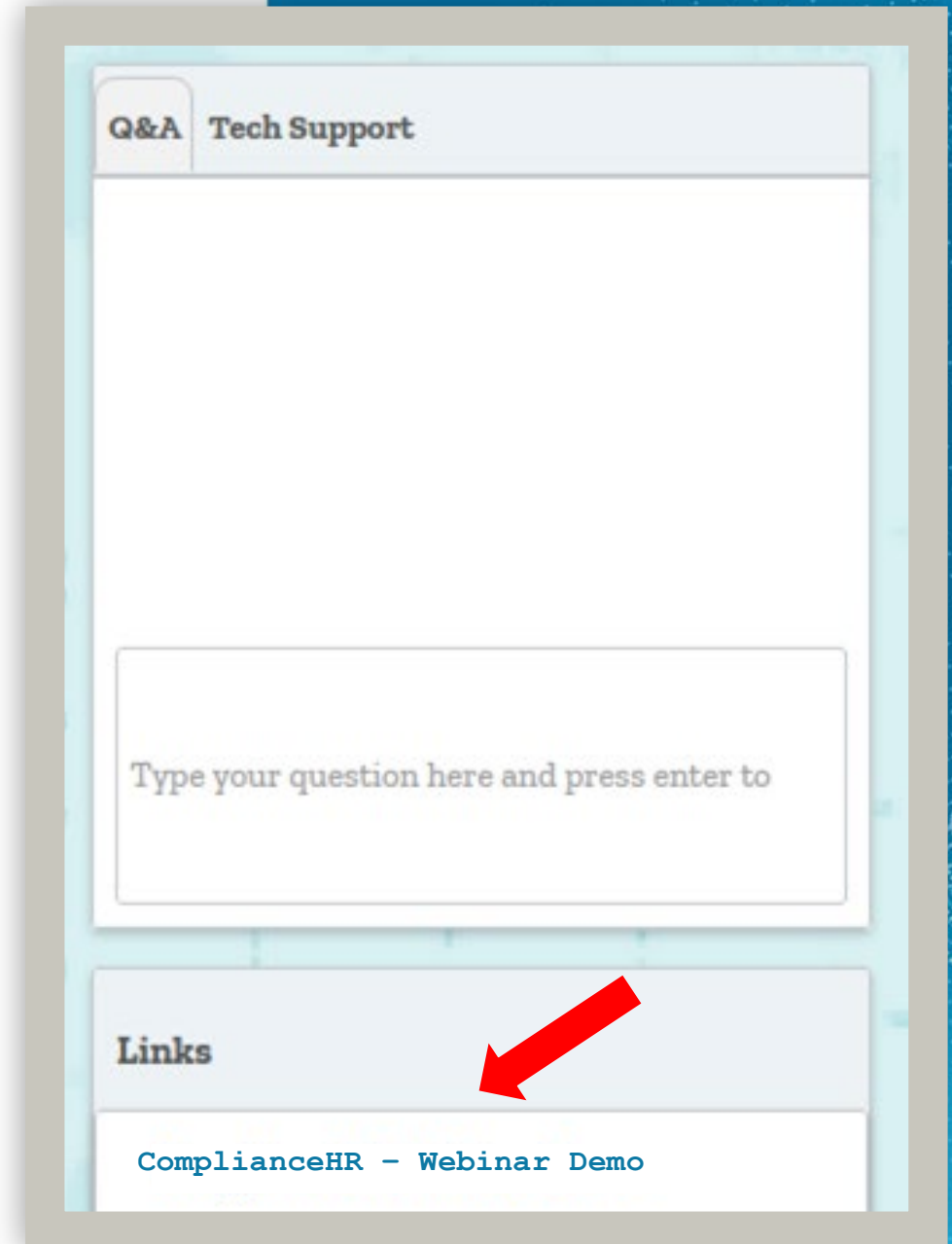
Looking forward...

- Board invited briefs on:
 - Standard for evaluating **lawfulness of work rules** - *Stericycle, Inc.*
 - Standard for determining **independent contractor status** - *The Atlanta Opera, Inc.*
 - Status of **confidentiality requirements in mandatory arbitration clauses** - *Ralph's Grocery Company*
- **Captive audience meetings** - GC thinks they are unlawful, will the Board agree?
- **Organizing by Card Check** (*Joy Silk* doctrine)
- **Joint employer rulemaking** – see <https://www.littler.com/publication-press/publication/nlrb-proposes-new-joint-employer-standard-would-dramatically-expand>

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Benefits of a custom demonstration:

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Questions?

Please add any additional questions to the Q&A box

Thank you!