Labor & Employment Issues
In Focus
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For Clients and Friends
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FRONT-LINE NURSES IN 12 NYC HEALTHCARE FACILITIES AUTHORIZE UNION TO STRIKE BEGINNING NEXT WEEK

On December 22, 2022, the New York State Nurses Association ("NYSNA") announced that 14,000 out of 17,000 nurses employed at NYC hospitals and nursing homes submitted strike authorization votes, with 98.8% of the nurses responding authorizing a strike if a successor collective bargaining agreement is not reached before the December 31, 2022 expiration. The twelve affected facilities include, but are not limited to, New York Presbyterian, Mount Sinai, Montefiore, Maimonides Medical Center, Brooklyn Hospital Center, One Brooklyn Health (Kingsbrook and Interfaith), Flushing Hospital Medical Center, Wyckoff Heights Medical Center, and Ozanam Hall of Queens Nursing Home. If implemented, it may be the largest healthcare strike in history.

The most prominent issue stalling negotiations is unsafe patient staffing ratios. In recent weeks, registered nurses have been speaking out publicly and on social media platforms, including Instagram and TikTok, sounding the alarm about the short-staffing crisis putting patients at risk, especially during a tripledemic of COVID, RSV and seasonal flu. In one case, a video posted on TikTok of a nurse speaking to a hospital administrator about what plan is in place to address the fact that she is the only nurse scheduled to care for 50-plus patients in a comprehensive emergency psychiatric program at ECMC Hospital in Buffalo, New York went viral. The staffing shortage at ECMC caught the ire of the New York State Health Department, as spokesperson Monica Pomeroy said in a statement on December 16, 2022 that the Office of Mental Health and Department of Health "launched an investigation into this matter." NYSNA has been negotiating on behalf of nurses throughout the State, including 1,300 nurses at ECMC, for better contracts that would address staffing and other issues. For example, NYSNA nurses employed in Westchester recently ratified a five-year agreement that raises pay by over 27% during that period.

Other health care professionals have reported both publicly and anonymously about the staffing crisis that has left caregivers burnt out and at their breaking point. Additionally, the video calls for help have detailed how chronic understaffing in hospitals is unsafe for patients and nurses in that patients suffer and experience worse health outcomes when nursing care is rushed or delayed due to "acuity" based staffing. However, NYSNA reported that some facilities have engaged in unfair and unlawful behavior by surveilling nurses, attempting to silence them from speaking out about unsafe staffing, and questioning front-line workers about the union and its advocacy. If

submitted to the National Labor Relations Board, this behavior may constitute unlawful interference with union rights and discrimination and retaliation against union members.

NYSNA also took its fight beyond the emergency rooms and secured a victory on the floor of the New York State Legislature by securing landmark hospital and nursing home staffing legislation. In 2020 and 2021, the State passed laws modifying Article 28 of the New York Public Health Law to require public and private health care facilities to set and enforce staffing standards effective January 1, 2023. Aside from safe staffing, NYSNA is seeking to secure fair wages to recruit and retain nurses, protect nurse healthcare and retirement benefits, and respond to community health needs.

NLRB LOOSENS THE ACCESS STANDARD FOR OFF-DUTY EMPLOYEES OF ONSITE CONTRACTORS

When it comes to an employer's right to exclude people from its property, the National Labor Relations Board ("NLRB" or "Board") recognizes a distinction between union organizers who are also company employees and those who are solely union representatives. The Board also recognizes the difference between employees and contractors; but what about the off-duty employees of onsite contractors? The Board revisited this question in *Bexar County II*, a decision issued December 16, 2022, which, as Board decisions have recently done, tipped the labor relations scale back to a more worker-friendly standard. 372 NLRB No. 28.

Bexar County II arose from a dispute involving the San Antonio Symphony ("Symphony") and the Tobin Center for the Performing Arts ("Tobin Center"), with which the Symphony has a "Use Agreement" allowing the Symphony to perform and rehearse 22 weeks each year and subjecting it to certain rules. The Symphony is also party to a collective bargaining agreement with its employees. In 2017, Symphony employees learned that Ballet San Antonio, which also uses the Tobin Center, had opted to use recorded music instead of a live orchestra for its performance. Symphony employees then tried to hand out leaflets outside the auditorium, alerting the ballet patrons that they would be hearing a recording and urging them to demand live music. At the Tobin Center's request, San Antonio police officers forced the leafletting Symphony employees to relocate across the street and off the Tobin Center's property. The issue before the Board was whether the Tobin Center had a right to exclude off-duty employees of its contractor, Symphony.

In rendering its decision, the majority reinstated an access standard established by a case called *New York New York Hotel & Casino*. 365 NLRB 907 (2011). There, the Board concluded that contractor employees fall into a special category: on one hand, contractor employees do not have a direct employment relationship with the property owner the way employee organizers do. On the other, however, contractor employees differ from non-employee union organizers because contractor employees' activity is indisputably protected under Section 7 of the National Labor Relations Act as protected concerted activity. Moreover, contractor employees are not total strangers to the property because they work there regularly. In the end, the Board in *New York New York* concluded that the interests of contractor employees, though not identical to those of

employee organizers, are more closely aligned with the interests of a property owner's own employees than those of nonemployee union organizers. Accordingly, under this test, a property owner may not exclude contractor employees unless it can show that allowing access would significantly interfere with its use of the property or that it has another legitimate business reason for denying access.

In reinstating this test, the majority overruled *Bexar County I*, where the Trump-era Board opined that *New York New York* went too far and gave too much weight to employees' Section 7 rights and too little weight to an employer's right to exclude. 368 NLRB No. 46 (2019). The *Bexar County I* Board also accused the *New York New York* decision of failing to heed the well-settled distinction between the access rights of employees and those of non-employees. As such, in *Bexar County I*, the Board created a two-step standard for analyzing the rights of contractor employees. The first step asked whether contractor employees work "regularly" and "exclusively" on site. If so, under the second step, the employer would still be allowed to exclude them if it could show that the contractor employees had "one or more reasonable nontrespassory alternative means to communicate their message." The D.C. District Court struck down parts of this new access standard and found it to be arbitrarily applied to the case at hand. *Musicians Local 23 v. NLRB*, 12 F.4th 778 (D.C. Cir. 2021). In so doing, the Court remanded the case to the Board to either "decide whether to proceed with a version of the test it announced . . . [or] develop a new test altogether." *Id.*

The current Board opted for the second option and reinstated the *New York New York* test. In applying the test, they found that the Tobin Center had violated the contractor employees' Section 7 rights when it prevented Symphony employees from leafletting across the street from the ballet. In their dissent, the Republican Board members argued that the majority was effectively equating contractor employees with a property owners' employees and "prioritizing off-duty contractor employees' Section 7 rights above the rights of property owners." 372 NLRB No. 28 (members Kaplan and Ring, dissenting).

RING OUT THE OLD AND BRING BACK JOHNNIES' POULTRY

As 2022 sped to a close, the National Labor Relations Board ("NLRB" or the "Board") raced to ring out the old and, bring back the older. In *Sunbelt Rental, Inc*., 372 NLRB No. 24 (Dec. 15, 2022), Board Democratic Chair McFerran, joined by Biden appointees Wilcox and Prouty, blocked the prior Trump majority Board's proposed rule that would have facilitated employer questioning of employees in investigating NLRB charges. Instead, they reasserted the 58-year-old *Johnnies' Poultry* rule that prescribes exact procedures for such questioning, absent which the employer commits a *per se* unfair labor practice. Republican Members Ring (term expiring) and Kaplan dissented, arguing for the proposed rule's rebuttable presumption test rather than *per se* liability.

Since 1964, the *Johnnies' Poultry* rule required employers seeking to interview employees in order to defend unfair labor practice charges to engage in the following protocols prior to the interviews: (1) inform the employee of the purpose; (2) assure the

employee there would be no retaliation; (3) obtain a voluntary consent; (4) act in a context free of anti-union animus; and (5) limit questioning as needed for the defense.

In February 2020, Sunbelt's attorneys interviewed two employees to defend against unfair labor practice charges. One attorney failed to assure one of the employees there would be no retaliation. Another attorney failed to advise the other employee that participation was voluntary. Relying on *Johnnies' Poultry*, the Regional Director issued, and the Administrative Law Judge found a *per se* violation of section 8(a)(1) of the National Labor Relations Act (the "NLRA" or "Act").

In 2021, the Republican Majority Board began rulemaking to replace *Johnnie's Poultry* with a rebuttable presumption test. Under that test, the *Johnnies' Poultry* protocols were only one factor among many in considering whether the employer violated the Act, such as employer history, who questioned, and where the questioning occurred. However, in 2022 the NLRB regained a Democratic majority, halting the rulemaking. In *Sunbelt Rentals*, the Board killed it.

In reviving *Johnnies' Poultry*, the Board Majority meticulously detailed its merit and the deficiencies of the alternative "totality of the circumstances" and "rebuttable presumption" tests. The Majority stressed the need for the *Johnnies' Poultry* protocols because of the uniquely coercive nature and effects of employer questioning that threatens both the employees' rights and the NLRB's own proceedings. On the other hand, *Johnnies' Poultry* allows the employer to engage in interviews for its defense after following clear and easily implemented safeguards not uncommon at law. *Johnnies' Poultry* thus strikes a fair balance of interests, as endorsed by its 58-year durability, concluded Chair McFerran and Members Wilcox and Prouty.

The Majority then set about refuting critical court decisions and the Board's dissenters. First, while several Circuit Courts of Appeals had criticized the Board's *per se* rule, the Majority stressed that establishing rules was the Board's prerogative, not the courts'. Substantively, the Majority explained that the totality of the circumstances test favored by the courts would increase litigation and encourage employers to take their chances with possibly coercive interviews because that test requires complicated subjective balancing after the suspected violation had already occurred. The Majority rejected the contention from the Eighth Circuit Court of Appeals that *Johnnies' Poultry* infringed on employer free speech rights guaranteed by Section 8(c) of the Act because those rights do not apply to coercive speech. Similarly, the Majority dismissed the dissent's contention that the Act does not authorize a *per se* rule, and rejected the rebuttable presumption test on the same grounds as totality of the circumstances.

Accordingly, the Board held 3:2 that Sunbelt had *per se* violated Section 8(a)(1) of the Act by interfering with employee rights because it did not meet all of the *Johnnies' Poultry* protocols. The new year thus begins with a revitalized old rule and a new NLRB, both courtesy of the Biden 2020 election victory.

All the Best

For the New Year!