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Potential Changes Under The Biden NLRB Impacting Retailers

President Biden recently announced that he will nominate two union attorneys—David Prouty and Gwynne Wilcox—for seats on the five-member National Labor Relations Board ("NLRB"), which could secure a Democratic majority at the agency as soon as August. If Prouty and Wilcox are confirmed, the Democrats would have a Board majority for the first time since 2017. It is safe to assume that the new Board will aim to roll back Trump-era precedent that was largely viewed as pro-employer, including measures that will impact retailers, both at their stores and their corporate offices. While this article cannot cover all of the possibilities, we highlight several potential developments of which retailers should be aware.

1. The NLRB could reverse a trio of 2019 decisions expanding employers' rights to prevent non-employee union organizers from soliciting on employer property.

In *UPMC Presbyterian Hospital*, 368 NLRB No. 2 (June 14, 2019), the NLRB held that employers are not required to allow non-employee union organizers to use their cafeterias or similar "public spaces" (semi-private areas on employer property that are also open to the public) for promotional or organizational activities. Under a previous standard created by *Ameron Automotive Centers*, 265 NLRB 511 (1982) and *Montgomery Ward & Co.*, 256 NLRB 800 (1981), employers typically had to allow such people to engage in organizing activities in public spaces, so long as the activity was not disruptive.

In *UPMC*, the Board adopted a narrowly tailored version of the standard previously set forth in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), which allows employers to restrict union access unless discrimination is shown. In other words, under the *Babcock* standard, in order to retain the right to prohibit union organizers from public spaces, employers must maintain a policy or practice of prohibiting distribution or solicitation on their property, and enforce the policy or practice in a non-discriminatory manner. Later in 2019, in *Kroger Limited Partnership I Mid-Atlantic*, 368 NLRB No. 64 (Sept. 6, 2019), the Board clarified that in order to show discriminatory enforcement, non-employee union organizers must show that the prior access involved the same nature of activity as that sought by the union.

In another case decided in 2019, *Bexar County Performing Arts Center Foundation*, 368 NLRB No. 46 (Aug. 23, 2019), the NLRB ruled that a property owner may exclude off-duty contractor employees from engaging in Section 7 activity (*i.e.* "concerted activities for the purpose of collective bargaining or other mutual aid or protection") on employer property, unless: (1) the contractor employees work "regularly" and "exclusively" on the property; and (2) the property owner fails to show the contractor employees have reasonable alternative means to communicate their message. In doing so, the NLRB overruled its previous standard set forth in *New York New York Hotel & Casino*, 356 NLRB 907 (2011), which held that off-duty contractor employees could engage in protected concerted activity on employer property unless the activity would "significantly interfere" with the employer's use of the property or the employer's ability to maintain production or discipline.

Thus, after *UPMC*, *Kroger*, and *Bexar County Performing Arts Center.*, employers gained (or had reinstated) significant rights to limit union activity on their property. Under the Biden administration, these property rights could be targeted for reversal by the new Board.

2. The Board could reinstate *Purple Communications* to allow employees to use employer email systems for union activity.

In *Purple Communications, Inc.*, 361 NLRB 1050 (2014), the Obama Board controversially held that employees have the right to use their employers' email systems for statutorily protected communications, including self-organization during non-working time. In December 2019, in *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (Dec. 16, 2019), the Trump Board overturned *Purple Communications* and held that employees have no statutory right to use employer emails systems for Section 7 purposes, except "in those rare cases where an employer's email system furnishes the only reasonable means for employees to communicate with one another." As with employer property rights, the new Board could reinstate the principles of *Purple Communications* to require that employers allow the use of their email systems for protected activity.

3. The Board could overrule *SuperShuttle* and reinstate the *FedEx* independent contractor test.

Another area that could see significant change under a Biden-controlled Board is the classification of workers as employees or independent contractors, which is a hot button issue across the country. In January 2019, in *SuperShuttle DFW, Inc.*, 367 NLRB

No. 75 (Jan. 25, 2019), the Trump Board overruled an Obama-era decision by reaffirming the Board's adherence to the traditional common-law agency test for determining independent contractor status, which the Board had applied for roughly 50 years prior to the 2014 decision, *FedEx Home Delivery*, 361 NLRB 610 (2014).

In *FedEx*, the Obama Board moved away from the traditional analysis by rejecting the significance of "entrepreneurial opportunity" when determining whether a worker was an independent contractor or employee. Although it was one of several factors, eliminating entrepreneurial opportunity from the analysis (and replacing it with whether the worker had an "independent business") significantly narrowed the scope of independent contractor classification under the NLRA.

Returning to the traditional common-law agency test, the Board in *SuperShuttle* concluded that the franchisees of a shuttle ride share company were independent contractors who were excluded from the National Labor Relations Act's coverage and not statutory employees pursuant to the independent contractor test previously articulated by the *FedEx* Board.

The Board in *SuperShuttle* found that the *FedEx* Board had impermissibly altered the long-standing precedent of the independent contractor test by fundamentally shifting it to one that selectively overemphasized the significance of "right to control" factors relevant to perceived economic dependency and diminished the significance of "entrepreneurial opportunity." The *SuperShuttle* Board held that the independent contractor status should be examined using common-law factors and explained that entrepreneurial opportunity is a principle to help evaluate the overall significance of the agency factors. The Board provided guidance that common-law factors that support a worker's entrepreneurial opportunity indicate independent contractor status and factors that support employer control indicate employee status.

Under this analysis, the Board found that the following factors weighed in favor of independent contractor status, which were analogous to those in the taxicab industry: that *SuperShuttle* did not exercise control over the manner or means by which the drivers conducted business, which signaled the existence of significant entrepreneurial opportunity since the franchisees had complete autonomy over their schedules and were free to choose where they work without set routes; the method of payment, traditionally given significant weight, also indicated entrepreneurial opportunity since the franchisees were entitled to all fares paid by customers and did not share the fare with *SuperShuttle* in any way; and the fact that the franchisees had full-time possession of their vans and were responsible for gas, tolls, repairs and other costs associated with their vans. Given that it is such a hotly-contested area of labor law (and other areas of the law impacting retailers, such as wage and hour), it seems likely that the Biden Board will get an opportunity to overturn *SuperShuttle* and reinstate *FedEx* if it sees fit to do so.

4. The Board could reinstate Obama-era election conditions, such as more union-friendly bargaining unit tests and "ambush election" rules.

Although an entire article could be devoted to these issues, it is worth briefly noting that the Biden Board likely will look to create opportunities, whether through administrative rulemaking or through case decisions, for unions to more easily prevail in union election campaigns. This includes, but is not limited to, a return to controversial Obama-era rules that provided unions with more latitude to seek to organize so-called "micro-units" and mandated expedited timelines that allowed unions to seek to organize under "ambush election" rules that provided employers with very little time to meaningfully respond to a union petition. Accordingly, we advise retailers to consult their labor counsel now to prepare for a potentially bumpy road ahead.

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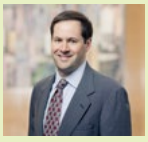

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