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The NLRB as an Agency in Transition
### The NLRB as an Agency in Transition

#### The Obama NLRB (mid-2015)

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<tr>
<th>Republicans</th>
<th>Democrats</th>
<th>Democrat</th>
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<tr>
<td>Philip A. Miscimarra</td>
<td>Kent Hirozawa</td>
<td>Richard Griffin Jr.</td>
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<td>(end of term 12/16/2017)</td>
<td>(end of term 8/27/2016)</td>
<td>(end of term 10/31/2017)</td>
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<td>Harry I. Johnson III</td>
<td>Lauren McFerran</td>
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<td>(end of term 8/27/2015)</td>
<td>(end of term 12/16/2019)</td>
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<td>Mark Pearce</td>
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<th>Board Members</th>
<th>General Counsel</th>
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The NLRB as an Agency in Transition

The Obama NLRB (late 2016)

Republicans

Philip A. Miscimarra
(end of term 12/16/2017)

Vacant
(end of term 8/27/2020)

Democrats

Vacant

Lauren McFerran
(end of term 12/16/2019)

Mark Pearce
(end of term 8/27/2018)

Chairman

Democrat

Richard Griffin Jr.
(end of term 10/31/2017)

Board Members

General Counsel
### The NLRB as an Agency in Transition

#### The Trump NLRB

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<td><strong>Philip A. Miscimarra</strong>&lt;br&gt;(end of term 12/16/2017)</td>
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<td><strong>Vacant</strong>&lt;br&gt;(end of term 8/27/2021)</td>
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- **Chairman**
- **General Counsel**
The NLRB as an Agency in Transition

The Trump NLRB

Republican

Chairman

Philip A. Miscimarra
(end of term 12/16/2017)

Vacant

(end of term 8/27/2020)

Vacant

(end of term 8/27/2021)

Republican

Board Members

Democrats

Lauren McFerran
(end of term 12/16/2019)

Mark Pearce
(end of term 8/27/2018)

Republican

Vacant on 11/1/2017

(four-year term)

General Counsel
Lots of Change, Across a Broad Range

1. Changes in nearly all election procedures affecting representation elections (the *Election Rule*).
2. Broad invalidation of neutral employee handbooks, policies and rules (*William Beaumont*).
3. Expanding the definition of “joint employer” (*Browning-Ferris Industries* and *CNN*).
4. Requiring mixed multi-employer/non-employer bargaining where two entities are “joint employers” of some employees but other employees have no “employee” relationship (*Miller & Anderson*).
5. More narrowly construing “independent contractor” status (*FedEx Corp.*).
6. Approving smaller bargaining units unless excluded employees have an “overwhelming community of interests” (*Specialty Healthcare* and *Macy’s*).
7. Permitting on-premises employee picketing/work stoppages (*Walmart* and *Capital Medical Center*).
8. Employer investigations...
   - A single employee complaint regarding an individual statutory right is protected concerted activity involving “mutual aid or protection” under the NLRA (*Fresh & Easy Neighborhood Markets*).
   - An employer cannot lawfully request confidentiality during investigative meetings, with only narrow case-by-case exceptions (*Banner Estrella*).
   - An employer must disclose confidential witness statements if requested by a union, with only narrow case-by-case exceptions (*Piedmont Gardens*).
9. Employees have a statutory right to use employer email systems for union organizing and other protected concerted activity (*Purple Communications*).
10. University graduate assistants (and other student assistants) are employees (*Columbia University*).
11. Non-NLRA class waiver agreements unlawfully interfere with NLRA rights (*Murphy Oil, D.R. Horton*).
12. Unionized employers must engage in discipline-bargaining before imposing discipline, with narrow case-by-case exceptions (*Total Security Management*, reinstating *Alan Ritchey*).
13. Unionized employers must engage in bargaining before continuing any “past practice” if the prior practice arose under a labor contract that has expired (*DuPont*).
14. Unionized employers must continue dues-checkoff after contract expiration (*Lincoln Lutheran*).
15. NLRB will not defer to arbitration in Sec. 8(a)(3) cases with narrow exceptions (*Babcock & Wilcox*).
**Difficult Standards, No Clear Answers**

1. What entities are **joint-employers** based on “reserved” authority? What happens when multiple “employer” entities disagree between themselves about bargaining issues? *(Browning-Ferris Industries)*

2. When the Board approves a **multi-employer/non-employer bargaining unit** under *Miller & Anderson*, what entities must bargain about what subjects? What happens when multiple “employer” entities disagree between and among themselves about bargaining issues?

3. What **employment policies, rules and handbook provisions** are lawful versus unlawful? *(William Beaumont and many more)*

4. What circumstances justify lawful case-by-case **requests for confidentiality during workplace investigation meetings**? *(Banner Estrella)*

5. What circumstances warrant lawful non-disclosure of **confidential employee witness statements**? *(Piedmont Gardens)*

6. When employees send **non-business emails** under *Purple Communications*, which non-business emails are “protected” and which are “unprotected”? How can an employer and employees know the difference when non-business emails are being sent?

7. Who constitutes a **supervisor**? *(Buchanan Marine, G4S Government Solutions and many more)*

8. When can **permanent replacements** be hired without an “independent unlawful purpose”? *(Piedmont Gardens)*

9. In the new type of **discipline bargaining** required under *Total Security Management* *(Alan Ritchey)* . . .
   - precisely when can discipline be implemented while bargaining remains under way, and
   - how can employers and unions have confidence that the Board will agree that an employee presented a “serious, imminent danger” warranting removal before bargaining occurs?

10. Under *DuPont*, when **past practices** span multiple years, multiple contracts and/or periods between contracts . . .
    - which past practices are “extracontractual” (meaning they must be continued without bargaining)?
    - which past practices must be disregarded and cannot be lawfully continued without bargaining?
Philip A. Miscimarra
@NLRBChairman
Chairman, National Labor Relations Board.
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