

## Top Five Labor Law Developments for June 2021

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July 16, 2021

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1. *The U.S. Supreme Court held California's union access regulation constitutes an unconstitutional taking of an employer's property. Cedar Point Nursery v. Hassid*, 141 S.Ct. 891 (June 23, 2021). The California Agricultural Labor Relations Board (ALRB) maintained a regulation allowing unions to file notices with the ALRB to gain access to agricultural employers' property for up to three hours per day, 120 days per year. Members of the United Farm Workers Union sought access to property owned by Cedar Point Nursery and Fowler Packing Company pursuant to the regulation. Cedar Point Nursery filed a charge against the union for not giving proper notice, and Fowler Packing Company blocked the union from entering altogether. To prevent future access attempts, the growers sued several ALRB members in their official capacity. The growers argued that the access regulation effected an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments and requested declaratory and injunctive relief prohibiting the ALRB from enforcing the regulation against them. The trial court denied the growers' motion for a preliminary injunction and granted the ALRB's motion to dismiss. The Supreme Court reversed, finding the California regulation constituted a *per se* taking and was unconstitutional. The Court distinguished its precedent recognizing property access rights under the National Labor Relations Act (NLRA) under *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). It clarified that the NLRA "did not require employers to allow organizers onto their property, at least outside the unusual circumstance where their employees were otherwise 'beyond the reach of reasonable union efforts to communicate with them.'" (In *Lechmere*, where they resided off company property, employees are presumptively not beyond the reach of the union's message.) Further, the Court's holding in *Cedar Point* expressly does not disturb National Labor Relations Board (NLRB) holdings allowing union access to privately owned public spaces such as shopping malls.
2. *The NLRB's Acting General Counsel announced a large budget request and reaffirmed the Board's new direction.* According to a June 2 tweet by Acting General Counsel Ohr, "[T]he NLRB's Fiscal Year 2022 Congressional Budget Justification requests \$301.9 million in funding to help revitalize NLRB's mission to promote collective bargaining and protect workplace rights." The request is over \$50 million, or 10 percent more than the previous year's budget. Part of the total (\$2.1 million) has been earmarked for programs to inform workers about their rights under the NLRA, including the right to form unions and request that an employer address workplace grievances. The additional funding, coupled with the Acting General Counsel's comments on the purpose of the increased budget, has been viewed by many to signal an increasingly pro-union outlook for the Board. The U.S. Chamber of Commerce, criticizing the funding request, pointed out the 28-percent drop in unfair labor practice filings in 2011-2020 and 32-percent fall in representation petitions in the same period. It stated the workload does not appear to justify an increase and called the funding request outsized as the share of union workers in the U.S. private sector has declined to 6.3 percent in 2020 compared to 17 percent in 1983.
3. *The NLRB held a Regional Director should have determined the impact of Board-adjudicated unfair labor practice violations prior to directing an election. Wendt Corp.*, 03-RD-276476 (June 25, 2021). The NLRB granted a union's request to overturn a Regional Director's decision certifying a decertification election. In July 2020, the Board issued a decision in *Wendt Corp.*, 369 NLRB No. 135 (2020), finding the employer violated the NLRA in numerous ways, including laying off employees, interrogating a worker, and failing to bargain with the union. The employer appealed the Board's finding, filing a petition for review in the U.S. Court of Appeals for the D.C. Circuit. In May 2021, a bargaining unit employee filed a petition to decertify the union, and the Regional Director scheduled an election, stating the Board's recent changes to its blocking-charge policy "do not contemplate deferring any election until the final adjudication of the unfair labor practices at issue." However, the Board disagreed, holding its blocking-charge policy was not relevant where it had issued its final disposition with respect to the charges at issue. The Board, therefore, ordered the Regional Director to determine the impact of the verified unfair labor

practice allegations before the vote could proceed.

4. *President Joe Biden plans to nominate David Prouty, a top union-side attorney, to the NLRB.* On June 22, President Biden announced he will nominate top union lawyer David Prouty to serve on the NLRB. Since 2018, Prouty has served as general counsel for the Service Employees International Union (SEIU) Local 32BJ, the nation's largest union for property service workers, with more than 175,000 members. Prior to working at SEIU, Prouty was general counsel for the MLB Players Association and worked for the UNITE HERE union, which is comprised of industrial and textile employees and hotel and restaurant workers. Prouty would replace William Emanuel, a Trump appointee whose five-year term is set to expire at the end of August. In May, Biden also nominated union lawyer, Gwynne Wilcox, to fill another vacant seat on the Board. Wilcox, a partner at Levy Ratner, P.C., also serves as associate general counsel of 1199SEIU United Healthcare Workers East. Both nominees must be confirmed by the Senate. If they are confirmed, Democrats will assume control of the five-member NLRB.

5. *The NLRB promoted nine officials into regional leadership positions.* The NLRB Acting General Counsel announced the promotion of nine staff members to positions of Regional Attorney and Assistant to the Regional Director. According to the statement, "After years of many promotions going unfilled and staffing in decline, especially in the field offices, I'm pleased to announce the well-deserved appointments of these dedicated career servants." The NLRB's 26 regional offices have seen a 33-percent reduction in total field staff from fiscal year 2010 to fiscal year 2019, according to a Government Accountability Office report published in March 2021. As for the agency's Washington D.C. headquarters, the staff decreased by 8 percent during that time.

Please contact a Jackson Lewis attorney if you have any questions about these developments.

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