

# Top Five Labor Law Developments for April 2023

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Labor Relations

1. *The National Labor Relations Board returned to its prior standard for analyzing the legality of disciplining employee misconduct related to protected concerted activity.* [Lion Elastomers LLC II](#) 372 NLRB No. 83 (May 1, 2023). The Board overruled *General Motors*, 369 NLRB No. 127 (2020) and reverted to its pre-2020 “setting-specific” standard for determining whether an employer lawfully disciplines employees whose protected concerted activity crosses the line into abusive conduct. While *General Motors* applied the three-part *Wright Line* standard — under which the employer can lawfully discipline an employee if it can show it would have taken the same action absent the employee’s protected activity — in all “abusive conduct” circumstances, following its latest decision, the Board will apply one of three different standards. The standard to be applied would depend on whether the conduct relates to outbursts to management, social media posts or conversations among employees, or abusive picket-line conduct. As a result, employers must evaluate different standards in determining whether it can lawfully impose discipline based on the context in which the misconduct occurred.
2. *The Board again reported significant increases in unfair labor practice charges and representation petitions.* According to a Board [press release](#), union activity is still on the rise, with both unfair labor practice charges and election petitions increasing at the highest levels in decades. In the first six months of Fiscal Year (FY) 2023 (which began Oct. 1, 2022), the Board received 1,317 more unfair labor practice charges than during the same period last year, a 16 percent increase. Representation election petitions also increased, from 1,174 in the first six months of FY2022 to 1,200 during the same period in FY2023. Organizing activity has particularly skyrocketed in quick-service restaurants in recent years, largely due to low wages and younger workers more eager to use social media to quickly mobilize workers nationwide.
3. *The Board outlined expansive remedies for repeat violators of the National Labor Relations Act.* [Noah’s Ark Processors, LLC d/b/a WR Reserve](#) 372 NLRB No. 80 (Apr. 20, 2023). The Board’s decision discusses potential remedies it will consider following a party’s numerous or egregious unfair labor practices, specifically, when the Board has issued a cease-and-desist order against the party. The list of extraordinary remedies includes, but is not limited to, adding a more comprehensive explanation of employees’ rights, requiring a supervisor or official to participate in the reading and distribution of employees’ rights, mailing the same to employees’ homes, and reimbursement of the union’s bargaining expenses and employees’ lost wages. While these are not new remedies, the Board’s decision further exemplifies the General Counsel’s push to expand the use of extraordinary remedies against employers that violate the Act.
4. *A Department of Labor proposed rule will require additional disclosures for employers that use consultants to persuade employees against unionizing.* The rule requires employers to disclose their federal contractor or subcontractor status on Form LM 10 from the Office of Labor-Management Standards regarding persuader activities. Filing employers also would be required to report additional information,

including the federal agencies with which they contract. The rule was previously suggested by a Biden Administration panel created to encourage union organizing. President Joe Biden is expected to approve the rule, which will take effect after its publication in the Federal Register.

5. *The Board's General Counsel (GC) continues push of aggressive agenda to overturn precedent.* Board prosecutors filed a brief requesting that the Board overrule several cases involving captive audience meetings, the definition of solicitation, and access to property of nonemployee union representatives. *Garten Trucking LC*, 10-CA-279843. Prosecutors also asked the Board to expand employees' right to use company emails and other electronic communication platforms in the workplace for non-business purposes, including for union activity. The brief expands on Board GC Jennifer Abruzzo's previous memoranda outlining her initiative to overhaul current Board precedent by urging the Board to revisit more than 50 labor law precedents.

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

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