

**SUMMARY OF RECENT SIGNIFICANT  
NATIONAL LABOR RELATIONS BOARD  
CASES AND OTHER DEVELOPMENTS**

**The University of Texas School of Law  
31st Annual Labor and Employment Law Conference  
AT&T Conference Center, Austin, TX  
May 30-31, 2024**

**John F. Ring  
Partner, Morgan Lewis  
Former Chairman, National Labor Relations Board**

## Table of Contents Page

<i>BOARD DECISIONS</i> .....	1
<i>Home Depot USA, Inc., 373 NLRB No. 25 (Feb. 21, 2024) (Protected Concerted Activity)</i> .....	1
<i>United Parcel Service, Inc., 372 NLRB No. 158 (Nov. 21, 2023) (Deference to Joint Grievance Panel Decisions)</i> .....	2
<i>American Federation for Children, Inc., 372 NLRB No. 137 (Aug. 26, 2023) (Protected Concerted Activity)</i> .....	2
<i>Wendt Corporation and Shopmen’s Local Union No. 576, 372 NLRB No. 135 (Aug. 26, 2023) (Status Quo and Past Practice)</i> .....	3
<i>Tecnocap LLC, 372 NLRB No. 136 (Aug. 26, 2023) (Status Quo and Past Practice)</i> .....	4
<i>Cemex Construction Materials Pacific, LLC, 372 NLRB No. 130 (Aug. 25, 2023) (Union Recognition and Bargaining Orders)</i> .....	5
<i>Intertape Polymer Corp., 372 NLRB No. 133 (Aug. 25, 2023) (Wright Line Standard)</i> .....	7
<i>Miller Plastic Products Inc., 372 NLRB No. 134 (Aug. 25, 2023) (Protected Concerted Activity)</i> .....	8
<i>Stericycle, Inc., 372 NLRB No. 113 (Aug. 2, 2023) (Employer Handbook Rules)</i> .....	9
<i>The Atlanta Opera, Inc., 372 NLRB No. 95 (June 13, 2023) (Independent Contractor Status)</i> .....	10
<i>Lion Elastomers, 372 NLRB No. 83 (May 1, 2023) (Setting-Specific Standards for Evaluating Employee Misconduct During Protected Concerted Activity)</i> .....	11
<i>Noah’s Ark Processors, LLC d/b/a WR Reserve, 372 NLRB No. 80 (Apr. 20, 2023) (Potential Remedies for Repeated or Egregious Labor Violations)</i> .....	12
<i>McLaren Macomb, 372 NLRB No. 58 (Feb. 21, 2023) (Severance Agreements)</i> .....	13
<i>Bexar County Performing Arts Center Foundation, 372 NLRB No. 28 (Dec. 16, 2022) (Off-Duty Workplace Access for Employees of Contractors)</i> .....	14
<i>Sunbelt Rentals, Inc., 372 NLRB No. 24 (Dec. 15, 2022) (Assurances for Employee Participation in Unfair Labor Practice Investigations)</i> .....	15
<i>American Steel Construction, Inc., 372 NLRB No. 23 (Dec. 14, 2022) (Standard for Determining Appropriate Bargaining Unit)</i> .....	16
<i>Thryv, Inc., 372 NLRB No. 22 (Dec. 13, 2022) (Consequential Damages)</i> .....	16

Valley Hospital Medical Center, Inc., 371 NLRB No. 160 (Sept. 30, 2022) (Post-expiration Dues Checkoff) .....	17
PG Publishing Co., Inc., 371 NLRB No. 1 (Sept. 21, 2022) (Waiver of Post-Expiration Status Quo) .....	18
Tesla, Inc., 371 NLRB No. 131 (Aug. 29, 2022) (Dress Code and Uniform Policies) .....	19
<b>NLRB RULEMAKING</b> .....	20
NLRB Issues Final Rule on Joint-Employer Status (Oct. 27, 2023).....	20
NLRB Issues Final Rule Amending Its Procedures Governing Representation Elections (Aug. 24, 2023) .....	21
NLRB Issues Notice of Proposed Rulemaking on Fair Choice and Employee Voice.....	22
<b>GENERAL COUNSEL MEMORANDUM</b> .....	23
GC Memo 24-04 “Securing Full Remedies for All Victims of Unlawful Conduct” (April 8, 2024).....	23
GC Memo 24-02 “Guidance Memorandum on 2023 Updated Representation Case Procedures” (Dec. 8, 2023) .....	24
GC Memo 24-01 “Guidance in Response to Inquiries About the Board’s Decision in Cemex” (Nov. 2, 2023) .....	26
NLRB General Counsel Issues Memorandum on Non-Compete Agreements That Violate the National Labor Relations Act (May 30, 2023).....	27
NLRB General Counsel Issues Memorandum with Guidance to Regions on Severance Agreements (Mar. 22, 2023).....	28
NLRB General Counsel Issues Memorandum on Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights (Oct. 31, 2022) .....	30
NLRB General Counsel Issues Memorandum on the Right to Refrain from Captive Audience and Other Mandatory Meetings (Apr. 7, 2022).....	30

## BOARD DECISIONS

### ***Home Depot USA, Inc., 373 NLRB No. 25 (Feb. 21, 2024) (Protected Concerted Activity)***

The Board ruled that Home Depot violated Section 8(a)(1) of the NLRA by directing an employee (Morales) to remove “BLM” (for Black Lives Matter) from their orange Home Depot work apron and by constructively discharging the employee by conditioning the employee’s return to work on removing the BLM marking from their work apron.

The Board majority found that the employee’s refusal to remove the BLM marking was protected concerted activity because it was a logical outgrowth of prior protected concerted activity in which Morales and other employees at the store complained about a co-worker’s racially discriminatory conduct towards employees and customers. Morales also complained about two instances in which Black History Month posters and materials in a break room were vandalized and destroyed. When Morales was told that wearing the BLM marking was a violation of Home Depot’s dress code policy and needed to be removed in order to return to work, Morales resigned.

The Board majority rejected Home Depot’s arguments that special circumstances justified prohibiting the employee from wearing the BLM marking on their work uniform. Citing its decision in *Tesla*, the Board majority held that Home Depot had the burden of proving that the prohibition on the BLM marking was justified by special circumstances.

The Board majority rejected Home Depot’s argument that the prohibition of the BLM marking was justified by concerns about Home Depot’s public image and its desire to remain neutral on controversial issues. The Board majority found that Home Depot “encourages employees to personalize their aprons” and has permitted “LGBTQ Pride symbols, Pan-African flag colors, holiday symbols, and insignia and slogans of professional or college sports teams.” 373 NLRB No. 265, slip op. at 11. The Board majority also rejected arguments that the prohibition on the BLM marking was justified by safety concerns about customers who might object to them (the store was located seven miles away from the site where George Floyd was murdered). And the Board majority rejected the argument that prohibiting the BLM marking was justified in order to prevent employee dissension and division.

### **Member Kaplan’s Dissent**

Member Kaplan disagreed with the majority, believing that Morales “did not engage in concerted activity by their individual act of displaying ‘BLM’ on their work apron.” *Home Depot USA, Inc.*, 373 NLRB No. 25, slip op. at 21. Member Kaplan noted that Morales’s decision to wear the BLM marking was not preceded by any protected concerted activity. Member Kaplan also found that the BLM marking was for the purpose of protesting police violence and George Floyd’s murder, and not to improve the terms and conditions of employment at the Home Depot store.

Home Depot filed a petition for review in the Court of Appeals for the Eighth Circuit on February 27, 2024.

***United Parcel Service, Inc., 372 NLRB No. 158 (Nov. 21, 2023) (Deference to Joint Grievance Panel Decisions)***

After a remand from the Third Circuit, the Board majority found that joint grievance panel proceedings upholding the Charging Party's discharge were not entitled to deference because the proceedings were not "fair and regular." In its prior decision, *United Parcel Service*, 369 NLRB No. 1 (2019), the Board overruled the deferral standard in *Babcock & Wilcox*, 361 NLRB 1127 (2014), and reverted to the *Spielberg/Olin* standard. Because "fair and regular" is an element of both standards, the Board did not change the deferral standard on remand.

The Board majority found that the joint grievance panel proceedings in this case were not fair and regular due to apparent conflicts of interests among the panel members concerning the Charging Party's efforts to campaign against ratification of the Teamsters' national and local agreements with UPS.

Because the Board found that deferral was not appropriate, the Board analyzed the discharge decisions under the *Wright Line* standard. The Board found that UPS's reasons for discharging the Charging Party were pretextual and, in any event, found that UPS failed to prove that it would have discharged the Charging Party even in the absence of his protected concerted activity.

**Member Kaplan's Dissent**

Member Kaplan disagreed with the Board majority's finding that the joint grievance panel proceedings were not fair and regular because the majority "failed to identify anything unfair or irregular that occurred during the joint grievance panel proceedings that would suggest an actual conflict." Slip op. at 23. Member Kaplan pointed to the adequacy of Atkinson's representation, the fact that standard procedures were followed, and the lack of evidence that the grievance panel members' involvement in the contract negotiations influenced their decision-making.

***American Federation for Children, Inc., 372 NLRB No. 137 (Aug. 26, 2023) (Protected Concerted Activity)***

In *American Federation for Children*, the Board expanded the scope of protected concerted activities under Section 7 of the NLRA to include advocacy on behalf of non-employees, overruling the prior holding of *Amnesty International*, 368 NLRB No. 112 (Nov. 12, 2019).

The Board found that an employee (Raybon) was engaged in protected concerted activity when she advocated for her employer to rehire a former co-worker (Ascencio) whose work authorization had lapsed. The Board found that Ascencio was an employee

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

## Title search: Summary of Recent Significant National Labor Relations Board Cases and Other Developments

Also available as part of the eCourse

[2024 Labor and Employment Law eConference](#)

First appeared as part of the conference materials for the  
31<sup>st</sup> Annual Labor and Employment Law Conference session

"NLRB: An Inside the Beltway Perspective on the New Direction of Federal Labor Policy"