American workplace norms and expectations were shattered last year as a result of the global pandemic, which only increased the visibility of issues related to economic inequality, workplace safety, and racial justice. These experiences have spurred renewed interest in the rights afforded to employees under the National Labor Relations Act (“NLRA”). For instance, the Biden Administration has vowed to pass the Protecting the Right to Organize (“PRO”) Act, which not only amends the NLRA but stands to dramatically transform federal labor law, including inter alia, affording increased rights for employees engaged in collective actions while also making it easier for labor unions to launch organizing efforts. There is no question that the PRO Act will radically change the American workplace. But what else is in store? What exactly will these changes look like? What should non-labor practitioners in particular be aware of?

Hear labor practitioners, National Labor Relations Board officials, and in-house counsel have a candid discussion about the (1) NLRA’s relevance to a post-pandemic workplace; (2) proposals to amend the NLRA and what it means for practitioners; and (3) the staying power of lasting changes to federal labor law in light of a politically polarized environment.

Speakers:
Daniel Kim, Associate, Littler Mendelson P.C.
Sul Kim, Partner, Akerman LLP
Eddie Clopton, Associate General Counsel, Verizon
Iva Choe, Regional Attorney (Region 8), National Labor Relations Board
Peter Ohr, Deputy General Counsel, National Labor Relations Board
SESSION NAME:

Session 102 | The NLRA and a Post-Pandemic Workplace: Is it Broken, and Do We Need To Fix It?
Speakers

- Daniel Kim, Associate, Littler Mendelson P.C.
- Sul Kim, Partner, Akerman LLP
- Eddie Clopton, Associate General Counsel, Verizon
- Iva Choe, Regional Attorney, National Labor Relations Board
- Peter Ohr, Deputy General Counsel, National Labor Relations Board
Agenda

- The National Labor Relations Act
- The National Labor Relations Board and its Structure
- Section 7 Rights Under the NLRA
- Employee Activism in a Post-Pandemic Workplace
- The NLRB Under The Biden Administration
- The PRO Act
- Lasting Changes to The NLRA?
The National Labor Relations Act

- Passed in 1935
- Amended by the Labor Management Relations Act of 1947 (the “Taft-Hartley” Act)
- Does not apply to federal/state employees, the airline/railway industry, domestic workers, and agricultural workers.
- Generally applies to both union and non-unionized employees and employers.
The National Labor Relations Board

- The National Labor Relations Board (“NLRB” or “Board”)
  - The National Labor Relations Act
- Regions (26 Regional Offices)
  - Board Agents
    - Field Examiners
    - Attorneys
  - Compliance Officers
  - Regional Attorneys
  - Regional Directors
Structure of the Board

National Labor Relations Board:
• 5 members, appointed by the president, to which appeals are taken from the Board’s Administrative Law Judges (ALJ).

Division of Judges
• Conduct the Board’s evidentiary hearings on unfair labor practice charges and election issues.

General Counsel’s Side:
• General Counsel is the prosecutorial arm of the agency.
• The Regional Offices investigate unfair labor practice charges filed by unions, companies and individuals.
• If the Regional Office issues a Complaint, the case goes before an ALJ for adjudication
• Division of Advice
Key Members of the Board

Current Board Members
• Chair Lauren McFerran (D) – term expires on December 16, 2024
• Gwynne A. Wilcox (D) – term expires on August 27, 2023
• David Prouty (D) – term expires on August 28, 2026
• John F. Ring (R) – term expires on December 16, 2022
• Marvin Kaplan (R) – term expires on August 27, 2025

General Counsel’s Office
• Jennifer A. Abruzzo – General Counsel
• Peter Ohr – Deputy General Counsel
Labor Relations in 2021

• Private sector union membership at 6.3%
• 7.1 million workers in private sector belong to unions
• Over half of union members in U.S. (both public and private sector) live in just seven states: CA, NY, IL, PA, MI, NJ, and OH.

Section 7 of the NLRA

Employees shall have the right to self-organization, to form, to join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 7 Rights

“Concerted Activities”
• Activities engaged in with or on the authority of other employees and not solely on behalf of a single employee.

“Mutual Aid or Protection”
• Activities aimed at improving the terms and conditions of employment.
Section 7 Is Not Unlimited...

No protection for activity that is:

- Unlawful
- Violent
- In breach of a collective bargaining agreement
- Otherwise indefensible based on time, place, manner restrictions.
Section 8 of the NLRA

Section 8(a)(1) – Unlawful for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed” in Section 7.

Section 8(a)(3) – Unlawful for an employer to discriminate against employees engaged in union activities or to discourage membership in a labor organization.

Also unlawful for labor organizations to restrain or coerce employees in exercise of their Section 7 rights.
Rise in Worker Activism

- #MeToo
- Immigration
- Pay Inequality
- Racial Equity
- Health and Safety re COVID
- Climate Justice
- Minority unions
Section 7 in a Post-Pandemic Workplace

- Complaints, demands, and grievances
- Social media
- Video of working conditions
- Solicitation and Distribution
- Messaging on buttons, shirts, hats, and PPE
- Picketing, handbilling, strikes, and refusals to work
Changing Views?

- 68% of Americans approve of labor unions, highest since 1965.
- Growth in organizing activities at restaurant chains, tech companies, and essential businesses.
The NLRB Under The Biden Administration

“[E]mployee advocacy can have the goal of ‘mutual aid or protection’ even when the employees have not explicitly connected their activity to workplace concerns. This includes employees’ political and social justice advocacy when the subject matter has a direct nexus to employees’ ‘interests as employees.’”

GC 21-03, Effectuation of the National Labor Relations Act Through Vigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines (Mar. 31, 2021) at p. 2.
“[T]here are many other issues that also should be carefully considered to determine whether current law ensures that employees have the right to exercise their fundamental Section 7 rights both fully and freely.”

The NLRB Under The Biden Administration

“In sum, it is my position that the scholarship football players at issue in *Northwestern University*, and similarly situated Players at Academic Institutions, are employees under the Act. I fully expect that this memo will notify the public . . . that I will be taking that legal position in future investigations and litigation under the Act.”

GC 21-08, *Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act* (September 29, 2021) at p. 9.
Basis for Expansive View of Section 7 Rights?

“We also find no warrant for petitioner’s view that employees lose their protection under the ‘mutual aid or protection’ clause when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.”

Legislative Changes to the NLRA

The PRO Act
- Civil Penalties of $50,000 to $100,000 per violation
- Personnel liability for directors and officers for ULPs
- Secondary Boycotts
- Private Right of Action
- Codifies “ABC” test in determining “employee” under the Act
- Expanded Definition of “Joint Employer”
Lasting Changes to Federal Labor Law?

• Will the next Republican-maj ority Board simply undo Democratic-maj ority Board decisions?
• Structural Changes to the NLRB?
• Rulemaking?

• What are the costs?
The following list of materials provide additional background for the panel discussion and are intended to supplement the presentation included above.

**Cases Discussing “Concerted Activity” under Section 7 of the NLRA**

“Concerted” means that the activity must affect the rights of other employees and relate to matters of common concern. For example, a non-union employee, acting alone in making an individualized complaint to his or her employer would generally not be protected by Section 7. Conversely, employees participating in a group protest in the workplace to complain about working conditions, hiring practices, employee discharge, work assignments, or other terms or conditions of employment are generally protected by Section 7. This distinction is illustrated in the cases below is that the employee must be engaged in with or on the authority of other employees and not solely for their own benefit.

- **Meyer industries, Inc., 268 NLRB 493, 497 (1984)** (truck driver who was discharged after he refused to drive his assigned truck after voicing complaints about the unsafe condition of the truck to state authorities and his supervisor, was not engaged in concerted activity which requires that the activity “be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.”).
- **National Specialties Installations, 344 NLRB 191 (2005)** (non-unionized employer violated the NLRA when it discharged employees who had complained about their paychecks bouncing. The Board found that the employee’s actions constituted concerted activity for mutual aid and protection because it concerned a term and condition of employment that impacted all employees);
- **NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962)** (in a non-union workplace, several employees were held to have engaged in a protected concerted activity and were entitled to reinstatement after they were discharged for leaving work without permission to protest the temperature in their shop);
- **Alstate Maintenance, LLC, 367 NLRB No. 68 (Jan. 11, 2019)** (finding complaints about customers’ tipping habits by employee in presence of other employees not concerted, noting “the fact that a statement is made at a meeting, in a group setting, or with other employees present will not automatically make the statement concerted activity.”).
  - General Counsel memorandums have indicated an interest in revisiting the definition of “concerted activity” and “mutual aid or protection” that was applied in *Alstate*.

**Cases Discussing “Mutual Aid or Protection” under Section 7 of the NLRA.**

“Mutual Aid or protection” is generally broader than concerted activities and includes an employee’s activities aimed at improving the terms and conditions of employment. This distinction is illustrated by the cases below.

- **Waters of Orchard Park, 341 NLRB 642 (2004)** (nurse who called state agency to report concerns about patients at a health care facility was not engaged in an activity for mutual aid or protection because the nurse’s report was not to “improve their lot as employees.”);
• *Salisbury Hotel*, 283 NLRB 685 (1987) (employee who called the Department of Labor to complain about her employer’s lunch hour policy was engaged in an activity for mutual aid or protection because the call was a continuation of the employees’ grievance against the Company’s lunch hour policy);

• *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (distribution of newsletter advocating for minimum wage legislation and opposing right to work legislation was for mutual aid or protection and thus protected under Section 7);

• *Alstate Maintenance, LLC*, 367 NLRB No. 68 (Jan. 11, 2019) (finding complaints about customers’ tipping habits by employee in presence of other employees not for mutual aid or protection because customer tipping habits are a matter between customers and the employees, not the employees and the employer);

  o Recent General Counsel memorandums have indicated an interest in revisiting the definition of “concerted activity” and “mutual aid or protection” that was applied in *Alstate*.

• *Amnesty International of the USA, Inc.*, 368 No. 112 (Nov. 12, 2019) (finding employees’ petition advocating for financial compensation for employer’s unpaid interns was not for employees’ mutual aid or protection because advocating for nonemployees does not qualify for the Act’s protection).

  o Recent General Counsel memorandums have indicated an interest in revisiting the definition of “mutual aid or protection” that was applied in *Amnesty International*.

**Materials Discussing the Rise of Worker Activism Since 2020**

These materials provide background to our discussions concerning the rise of employee activism since 2020 and the application of Section 7 of the NLRA to these situations. Specifically, these articles discuss employee concerns that has animated the rise in workplace activism such as economic inequality, workplace safety, and racial justice.


**Materials Discussing Priorities Under Democratic-Majority Board**

The news articles cited below provide background on the priorities for the NLRB, which now has a Democrat-majority and is poised to reexamine some of the changes to federal labor law made by the prior Republican-majority Board. The General Counsel memorandums will be specifically referenced in our panel discussion which includes Peter Ohr, the Deputy General Counsel for the NLRB, and Iva Choe, a Regional Attorney with the NLRB, as panelists. Specifically, the General Counsel memorandums discuss a more expansive view of “concerted activities” for “mutual aid or protection” than what was applied in *Alstate Maintenance, LLC*, 367 NLRB No. 68 (Jan. 11, 2019) and *Amnesty International of the USA, Inc.*, 368 NLRB No. 112 (Nov. 12, 2019), which are cited above.


**Materials Discussing the PRO Act**

As will be discussed in the presentation, the PRO Act is poised to radically transform the NLRA and related-federal labor laws. These materials provide background materials on the PRO Act, including the text of the actual bill itself, as well as demonstrating arguments both for and against its passage. These materials will helpful for non-labor practitioners as they listen to the panelists discuss the impact PRO Act will have on federal labor law in ways not seen since the passage of the NLRA in 1935.

