Buchanan Ingersoll & Rooney PC

Recent Labor Law Developments and Expected Changes

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NLRB CHANGES

Makeup of NLRB

- The National Labor Relations Board is the nation's federal labor law enforcement agency.
- Quasi-judicial body that decides cases on basis of formal records in administrative proceedings.
- Presidentially appointed Board Members; 5-year terms.
- Five member board currently has only four members: Lauren McFerran (D), Marvin Kaplan (R), William Emanuel (R), and Chairman John Ring (R).
- McFerran's term ends on December 16th.
- Replacement of McFerran's seat (or filling of currently vacant seat) not likely to be a priority for Senate—will be a three-member board going forward for a time.
- Flurry of decisions are expected because otherwise NLRB would need to restart review of cases McFerran was involved in but which were not decided.

REGULATORY CHANGES

Strong Interest in Continued Rulemaking

- Unified Agenda released in May 2019 disclosed that the Board—in addition to proceeding with rulemaking regarding the joint-employer standard—intended to consider the following:
  - The Board's current representation-case procedures;
  - The Board's current standards for blocking charges and voluntary recognition;
  - The standard for determining whether private college or university teaching assistants are "employees" within the meaning of the NLRA; and
  - Standards for union access to an employer's private property.

Short-Term Agenda: Access to Employer Property

- The NLRB will engage in rulemaking to establish the standards for access to an employer's private property.
- Employer-friendly board likely to reverse Obama-era standards and provide additional guidance on the complicated set of current rules.
- Access to employer property has historically been a litigation hotbed.
  - Litigation centers around NLRA language providing employees "the right to form or join unions; engage in protected, concerted activities to address or improve working conditions; or refrain from engaging in these activities."

New Standards for Property Access Taking Shape

- Employers' rights to regulate their workspace is increasing.
- According to a June 2019 ruling, employers can ban union representatives from promoting a union in an employer's public space if the representatives are not employees.
  - Decision involved a PA hospital, the University of Pittsburgh Medical Center Presbyterian Shadyside, which kicked out non-employee union organizers from its public cafeteria.
- The key is for the employer to treat union representatives the same as other non-workers.
  - In other words, employers can exercise uniform control over non-employee facility use regarding promotional/organizational activities.
- Previously, union representatives could rely on a "public space exception" to solicit membership or otherwise promote their union, as long as they weren't being "disruptive."

New Standards for Property Access Taking Shape

- According to an August 2019 ruling, contract workers cannot stage labor protests unless they work "regularly and exclusively" on the property.
  - Decision involved the Bexar County Performing Arts Center Foundation, which blocked symphony members, who were not employees but performed on the property, from protesting on its property.
- Additionally, an owner can block a protest if it shows that workers have a "reasonable non-trespassory alternative" for protest.
  - Alternatives could include leafleting on adjacent public property or using social media and the press.
- Ms. McFerran (D) dissented, arguing that property owners will always win under new test.

Long-Term Agenda: Representation-Case Procedures

- Procedures come into play when a petition is filed to have the NLRB conduct an election to determine if employees wish to be represented for purposes of collective bargaining with their employer.
- In most instances, parties agree on the voting unit and other issues.
- If parties do not agree, the NLRB's regional office holds a pre-election hearing to determine whether an election should be conducted.
- Intent is to remove barriers to expeditious resolution of representation questions by modernizing / streamlining procedures.
- There's also an intent to backtrack the union-friendly amendments to representation-election procedures, such as the "Quickie Election" amendments, which decreased time from filing a representation petition and having the election.
  - NLRB published a Request for Information asking for public input on these rules, laying the groundwork for a potential rollback.

Long-Term Agenda: Representation-Case Procedures

- NLRB published a notice of proposed rulemaking in August 2019 to address three policy changes:
  - "Blocking Charge" Policy. Intent to establish a vote and impound procedure for processing representation petitions when a party has requested blocking the election based on a pending unfair labor practice charge.
    - Attempt to curb union's ability to indefinitely postpone a Board-supervised decertification vote.
  - "Dana" Policy. Intent to re-establish a policy where employees have a 45-day "disapproval window" in cases in which a union and employer agree to voluntary recognition.
  - Policy requiring evidence of majority status for a Section 8(f) contract to become a 9(a) agreement.
    - In construction industry, NLRA allows employers and unions to enter into Section 8(f) agreements before union achieves majority status. Significance is that, unlike in a Section 9(a) agreement, either party may unilaterally terminate relationship at end of contract.

Long-Term Agenda: Joint Employer

- The NLRB has proposed a rule revising the Obama-era "joint employer" standard that expanded the definition of joint employer (and prompted OSHA to consider new guidelines for determining whether businesses should be treated as joint employers with respect to OSHA enforcement).
- This revised rule would raise the standard for determining when contractors, franchisors, and other entities are considered joint employers by limiting the definition of joint employer to only those companies that "actually exercise and centrally direct an immediate control" over the terms and conditions of employment of another company's workers.
- If this rule is implemented, expected to affect OSHA's policies and procedures.

SIGNIFICANT DECISIONS

NLRB Not A Forum for Misclassification Disputes

- In August 2019, NLRB held that employee misclassification (*i.e.*, independent contractor vs. employee) is not a violation of the NLRA.
  - *Velox Express, Inc.*, 15-CA-184006, 368 NLRB No. 61
- By way of background, classifications such as "supervisors" and "independent contractors" are excluded from coverage and protections of the NLRA.
- Holding: Erroneously communicating to workers that they are independent contractors does not, in and of itself, contain any "threat of reprisal or force or promise of benefit" so as to interfere with organizing rights.
  - Instead, it's merely a privileged legal opinion.

NLRB Not A Forum for Misclassification Disputes

- By way of example, an employer can require workers to sign an "Independent Contractor Agreement" stating that the signatory worker is an independent contractor.
  - This alone would not be considered "coercive" under NLRA, even if a Court later holds that the workers are actually employees instead of independent contractors.
  - This is distinguishable from a "yellow-dog" contract, where a worker agrees not to join a union as a condition of employment, which would be coercive.
- Later, workers may disagree with employer and take position that they are employees and may seek to engage in protected concerted activities.
- If employer responds with threats to workers' concerted effort, then it would be deemed to have violated the NLRA at that point, but not before.

Unilateral Changes Easier Than Before

- New ruling issued September 10th.
  - *M.V. Transportation Inc.*, Case No. 28-CA-173726.
- Issue: When can a unionized business make changes to working conditions without bargaining with the union?
  - At issue in the case was an employer's changes to bereavement leave and pay policies.
  - However, precedent could effect wide variety of terms and condition of employment: wages, hours, benefits, job duties, safety practices, disciplinary rules, etc.

Unilateral Changes Easier Than Before

- "Clear and Unmistakable Waiver" – Old test required employer to avoid making a unilateral change unless there was a CBA provision specifically allowing the action.
- "Covered by the Contract" – New, less-restrictive test requires an analysis of the CBA to determine the scope of an employer's authority to act unilaterally.
  - Intent is to give effect to the plain meaning of the CBA.
  - Majority found that the previous test stemmed from hostility toward management's rights.
- In her dissent, Ms. McFerran warned that the ruling was a threat to collective bargaining and gave "wide berth" for employers to sidestep unions.
  - Majority countered that the new test is not a mechanism for employers to do anything they wish.

Arbitration – Board Access Needs to be Preserved

- Arbitration agreements – along with other waivers of rights – need to preserve employees' access to the Board and its processes.
- NLRB recently ruled that a facially neutral waiver in an arbitration agreement stating that the parties "hereby consent to the resolution by binding arbitration of all claims or controversies for which a federal or state court would be authorized to grant relief" was too broad and needed to have an exclusion for Board charges—otherwise an employee could interpret it as prohibiting the employee from filing charges with the Board.
  - Decision is *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10.
- In analyzing issue, NLRB considers whether the arbitration agreement interferes with the exercise of NLRA rights and, if so, whether the potential interference outweighs the employer's legitimate business justification.

Arbitration – But Class Action Opt-Ins Can be Barred

- By way of background, in 2018 the Supreme Court held that agreements containing class-action waivers—and stipulating that disputes need to proceed to individualized arbitration—did not violate the NLRA.
  - Right to pursue class or collective relief is not a protected concerted activity under Section 7 of the NLRA.
- These waivers are an increasingly effective tool for employers to stem the tide of class actions.
  - In a typical class action today, although the named plaintiff may have worked at company prior to implementation of a class-action waiver, more recent employees may have signed on to one.
  - This could affect the scope of class action, as many employees could be barred from proceeding in class action.

Arbitration – But Class Action Opt-Ins Can be Barred

- NLRB recently expanded on this idea, holding that the NLRA (i) doesn't prohibit employers from promulgating such agreements in response to employees opting in to a class action, and (ii) doesn't prohibit threats to fire employees who won't sign.
  - Decision is *Cordua Restaurants, Inc.*, 368 NLRB No. 43, where a supervisor distributed individual arbitration agreements while threatening employees, telling them "not to bite the hand that feeds them."
  - Premised on idea that requiring an employee to arbitrate neither restricts nor chills employee from exercising rights.
  - **Note:** Employers still must ensure that they are not firing or disciplining an employee for filing a class action or otherwise engaging in "concerted legal activity."
- Although it may be easier with new precedent to implement across-the-board policies, employers should consider the benefits and drawbacks in requiring that employees execute arbitration agreements.

Another Example of Pro-Business Shift

- Another recent decision involved Care One, a nursing home in NJ, which disciplined (*i.e.*, suspended/discharged) four workers for misconduct.
  - The case is *800 River Road Operating Company, LLC d/b/a CareOne at New Milford* and *1199 SEIU United Healthcare Workers East*, case number 22-CA-204545.
- At the time, the Service Employees International Union (SEIU) had been certified as the workers' representative but a CBA had not yet been hashed out.
- Previous precedent, established in 2016 by a Democratic Board, held that an employer must give a union a chance to bargain over serious worker discipline, even with no CBA in place.

Another Example of Pro-Business Shift

- The nursing home, however, argued that an employer should not have to bargain over discipline that is consistent with status quo.
- Perhaps sensing that the NLRB was ready to change course on this issue, the SEIU attempted to withdraw its charge against the nursing home, stating that with "further investigation," it had determined that each employee had, in fact, engaged in misconduct and that the misconduct was the reason for the discipline.
- But last month the NLRB decided ***not*** to dismiss the allegations, noting that parties have already expended significant resources on litigation.
  - After a case is transferred to the Board, a charging party may withdraw only with the Board's consent.
  - According to the majority, "this case presents the Board with an opportunity to address significant issues of law under the [NLRA] involving the obligation of . . . Employers to engage in bargaining before imposing discipline on employees."
- Ms. McFerran dissented: "the majority's apparent desire to reverse precedent does not justify keeping this case alive artificially."

What to Expect

- Rats' Rights: Republican majority of NLRB likely to reverse decades of precedent regarding polarizing protest symbol, "Scabby the Rat."
- Issue is whether unions violate the NLRA when they use the Rat for "secondary protests"—*i.e.*, against employers the union doesn't have direct ties to.
- NLRB's General Counsel (*i.e.*, the agency's top enforcement officer) asserts that inflatables can be a form of intimidation against businesses.
  - Meanwhile, many unions view this as an innocuous inflatable animal.
- Previous rulings laid out a narrow view of illegal picketing: unions did not violate the NLRA by erecting large banners or staging mock funerals outside secondary employers.

What Else to Expect

- Ousting Unpopular Unions Getting Easier: rules making it difficult to decertify unions are in the NLRB's crosshairs.
  - Case is *Johnson Controls, Inc.*, 368 NLRB No. 20.
- Significant limit to decertification is the contract bar, which, outside of a short window near the end of the contract, prevents challenges to a union's majority status.
  - Intent behind rules is to give unions breathing room, so as not to be constantly fending off attempts at ouster.
- NLRB recently upheld employer's right to suspend bargaining and serve notice of desire to withdraw recognition from an incumbent union—which was based upon unequivocal evidence that the union has lost majority support—within 90 days prior to CBA expiration.
  - Previously, an employer did this "at its peril" because its anticipatory withdrawal was analyzed under "last in time" evidence rule.
  - In other words, if union mounted a reorganizing campaign and subsequently produced evidence (likely in the form of signatures) that a majority had changed its mind, employer was subject to unfair labor practice charges for refusing to bargain.
  - Now union needs to file a new representation election within 45 days following anticipatory withdrawal.

Other Areas to Watch in 2020

Increase In Employment Litigation

- Employment-related lawsuits can be complicated and represent a significant business risk in the U.S.
  - They are the fastest growing type of civil case in the U.S.
- According to statistics cited by CNA Insurance, studies show that an employer is more likely to have an employment-practices liability claim than a general-liability or property-loss claim.
  - 75% of all litigation against corporations today involve employment law disputes.
  - Over 40% of these lawsuits are filed against smaller employers (15-100 employees).
  - Average cost of out-of-court settlement is $40,000.
  - 6 out of 10 employers have faced an employee lawsuit within the last 5 years.

Equal Pay

Equal Pay Issues on the Rise

- **In the news**: World Cup Champion U.S. Women's National Team sued the U.S. Soccer Federation with a proposed class and collective action.
  - Alleging that the Federation is paying female athletes significantly less than male athletes – despite greater international success – due to their gender.
  - For example, in 2016 women players earned $15,000 each for making the World Cup roster; men earned $55,000.
  - Apples to oranges comparison? The Federation argues that men's and women's teams can't be compared because they are "physically and functionally separate organizations."
- Mediation has broken down.
  - Trial set for May 2020.

Equal Pay Issues on the Rise

- **EEOC**: addressing gender-based pay discrimination has been a recent priority.
- Former EEOC acting chair, Victoria Lipnic, attempted to broker a compromise on pay data disclosures between the business community and workers, but there was "not a lot of common ground" on the issue of pay equity.
- Various new bills brewing in Congress that could one day see the light of day.
  - Equal Pay Equity Act – Would make employers with pay gaps between men and women liable for damages unless they show non-gender, business reasons for the differences.
  - Currently unlikely to pass Republican Senate.
- As mentioned previously, EEOC is now collecting data to help identify pay differences.

Equal Pay Issues on the Rise

- Former associates of law firm Jones Day recently sued the firm for $200 million on a proposed class action, alleging women received lower pay, fewer opportunities, and unwanted sexual remarks.
- Jones Day known for “black-box culture,” with a general lack of transparency and pay secrecy.
  - The suit alleges generally that pay, raise and promotion decisions are made with little explanation.
- According to a former EEOC commissioner, Jenny Yang, pay transparency can reduce compensation bias.
  - On the other hand, black-box compensation can cut down on tensions and drawn-out, time- and energy-consuming disputes over origination credit and pay.

Questions?

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Thank you

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