NLRB DEVELOPMENTS UNDER THE NASCENT TRUMP ADMINISTRATION

2017 Labor and Employment Law Conference

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ROADMAP

- Setting the table
- NRLB rulings on the chopping block
- Other “hot button” labor issues NLRB likely to see
- Dessert

SETTING THE TABLE

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SETTING THE TABLE

- NRLA applies in union AND non-union environments
- Union elections, strikes, unfair labor practices, concerted activity
- Employment handbooks, workplace policies
- Theoretical role as balanced neutral
- Role in reality

SETTING THE TABLE

Appointments:

- General counsel (Lafe Solomon; Richard Griffin; Peter Robb)
- Board members (rotating terms): Currently at full membership – three (R) and two (D):
  - Chair Philip Miscimarra (R) – Term expires December 16, 2017
  - Mark Pearce (D) – Term expires August 27, 2018
  - Lauren McFerran (D) – Term expires December 16, 2019
  - Marvin Kaplan (R) – Confirmed August 2, 2017
  - William Emanuel (R) – Confirmed September 25, 2017

RULINGS ON THE CHOPPING BLOCK

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RULINGS ON THE CHOPPING BLOCK

*Browning Ferris Industries (*2015*)*

- Case particulars:
  - Recycling facility BFI contracts with Leadpoint for sorters/others
  - Leadpoint recruits, tests and hires its employees
  - Leadpoint has own supervisors within BFI facility
  - BFI has contract power to reject Leadpoint people, but Leadpoint disciplines once employed
  - BFI sets hours and shifts, but Leadpoint picks people for those shifts

RULINGS ON THE CHOPPING BLOCK

*Browning Ferris Industries (*2015*)*

- Ruling:
  - Two or more companies are joint employers if they share/co-determine matters governing essential terms and conditions of employment
    - Hiring, firing, supervision, wages, hours, scheduling, seniority, discipline, number of workers, assignments, etc.
  - Joint employment no longer requires direct, immediate control, actually exercised
  - Right to control, whether direct/indirect, and even if not actually exercised, can be sufficient

RULINGS ON THE CHOPPING BLOCK

*Browning Ferris Industries (*2015*)*

- Aftermath:
  - Fundamentally expands responsibility for worker relationships
    - User/Supplier
    - Contractor/Subcontractor
    - Franchisor/Franchisee
  - Collective bargaining/ULP liability
  - Appeal pending before D.C. Circuit

RULINGS ON THE CHOPPING BLOCK

Banner Health System (2012/2015)

- Case particulars:
  - Employee complained to HR about a particular working condition
  - Employer commences investigation, using interview form provided by corporate to HR departments for use in internal investigations
  - Employer asks employee to refrain from discussing matter with co-workers during investigation, consistent with form directive

RULINGS ON THE CHOPPING BLOCK

Banner Health System (2012/2015)

- Ruling:
  - To justify prohibiting employee discussion of ongoing investigations, an employer must have legitimate business reason outweighing employee Section 7 rights
  - General assertion of protecting integrity of investigation not enough
  - Legal to ensure confidentiality only if:
    - Witnesses need protection
    - Evidence was in danger of being destroyed
    - Testimony was in danger of being fabricated
    - There was a need to prevent a cover up

RULINGS ON THE CHOPPING BLOCK

Banner Health System (2012/2015)

- Aftermath:
  - On appeal, D.C. Circuit refused to enforce Board Order because of deficiencies in the record (2017)
  - Court did say employer must show that confidentiality is necessary based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality
  - Other, similar rulings from Board restricting confidentiality in investigations

RULINGS ON THE CHOPPING BLOCK

Specialty Healthcare (2011)

- Case particulars:
  - Nursing home employer subject to union organizing
  - In dispute was composition of unit
  - Union sought unit of 53 CNA's; Employer sought larger group, comprised of additional job categories
  - Board signaled they were considering broadening a prior rule which had applied a particular test in healthcare that authorized more fragmented units for stabilization of sector

RULINGS ON THE CHOPPING BLOCK

Specialty Healthcare (2011)

- Ruling:
  - Board held that employer challenging composition of proposed bargaining unit on basis that it improperly excludes certain employees must show the excluded workers share “an overwhelming community of interest” with those included
  - As long as unit contains a clearly identifiable group of employees, its presumed valid
  - Result was that unions could organize in much smaller groups
    - E.g.: female shoe department salespeople at Macy’s

RULINGS ON THE CHOPPING BLOCK

Specialty Healthcare (2011)

- Aftermath:
  - 6th Circuit upheld Board's determination
  - 7 other federal appellate courts have, too

RULINGS ON THE CHOPPING BLOCK

Lutheran Heritage Village-Livonia (2004)

- Case particulars:
  - Various employer work rules contained in an employee handbook provided to workers when hired were at-issue
  - Rules included those regarding the use of profane language, harassment, solicitation and other subjects

RULINGS ON THE CHOPPING BLOCK

Lutheran Heritage Village-Livonia (2004)

- Ruling:
  - Work rules, including those in handbooks, violate the NLRA if they explicitly restrict Section 7 activity, have been promulgated in response to Section 7 activity, are enforced in such a way that they restrict Section 7 activity, or employees would "reasonably construe" the rules or provisions to interfere with Section 7 rights
  - As applied to the case at-hand, some rules were in violation and others were not

RULINGS ON THE CHOPPING BLOCK

Lutheran Heritage Village-Livonia (2004)

- Aftermath:
  - Rule has been applied by the Obama board to restrict a wide range of typical and common-sense provisions in employee handbooks which had never before been invalidated
  - GC Memorandums issued in 2011, 2012, 2015
  - U.S. Chamber white paper: “Theater of the Absurd

RULINGS ON THE CHOPPING BLOCK

Lutheran Heritage Village-Livonia (2004)

- Aftermath (cont.):
  - Examples of invalidated rules or handbook provisions:
    - Be respectful to the company, other employees, customers, partners and competitors
    - Any conduct which impedes harmonious interactions and relationships
    - Disclosure of confidential or proprietary company information
    - Do not make insulting, embarrassing, hurtful or abusive comments about other company employees online

RULINGS ON THE CHOPPING BLOCK

Quickie or 'Ambush' Elections

- Rulemaking in 2015 for representation cases:
  - Electronic notice of petition to employer
  - Faster representation election hearing (eight days from petition filing), and more limited issues heard there
  - Reduced time from petition filing until election
    - 38 days in 2014; 23 days in 2016
  - Eligibility challenges deferred until post-election
  - Expanded voter list now required

RULINGS ON THE CHOPPING BLOCK

Quickie or 'Ambush' Elections

- Aftermath:
  - Increase in number of elections
  - More union election victories
  - Upheld challenge before 5th Circuit

"HOT BUTTON" ISSUES NEW BOARD LIKELY TO SEE

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THE CONSEQUENCES OF SOCIAL MEDIA

Background:

- 2010—Board began receiving charges related to employer social media policies and discipline, including termination, for social media postings
- After investigation, Board found some employer policies and disciplinary actions violated employee Section 7 rights
- Three separate GC Memorandums issued between August 2011 and May 2012

THE CONSEQUENCES OF SOCIAL MEDIA

Summary of GC Memorandum findings (cont.):

- Memorandums focused largely on employers' social media, blogging and/or internet posting policies prohibiting employees from making disparaging remarks when discussing their employer
- Employers' policies requiring disciplinary action against employees for comments about terms and conditions of employment or wage discrepancies found to be unlawfully broad
- Employees' comments on social media were generally not protected if considered mere "gripes not made in relation to group activity among employees"

THE CONSEQUENCES OF SOCIAL MEDIA

Recent NLRB decision: *Butler Medical Transport, LLC* (2017)

- NLRB reviewed the terminations of two employees for comments made on Facebook
  - Employee 1—terminated by Butler Medical Transport after suggesting on Facebook that another employee get a lawyer and contact the labor board following her termination
  - Employee 2—terminated by Butler Medical Transport after posting on Facebook about being broken down again "BECAUSE THEY DON'T WANTA BUY NEW S---!!! CHA_CHINNNGGGGG"

THE CONSEQUENCES OF SOCIAL MEDIA

Butler Medical Transport, LLC (2017) ruling:

- Employer's policy: "I will refrain from using social media sights [sic] which could discredit Butler Medical Transport or damages [sic] its image"
- Board made two different findings:
  - Employee 1—Board majority held that termination for the discussion was unlawful because it contained advice about "potential avenues of redress"
  - Employee 2—Board majority held that comments were unprotected because Employee 2 indicated he was not referring to his employer's work vehicle

THE CONSEQUENCES OF SOCIAL MEDIA

Moving forward:

- Cannot limit discussions about wages and other terms and conditions of employment
  - Can even apply to a single post if it arose from a discussion
- Avoid sweeping policies that are overbroad and could prohibit protected conduct
- Use specific definitions in social media policies
  - Employers should refrain from prohibiting “disparaging remarks” about the company or ones that may harm the company’s reputation
  - Employers may, however, prohibit “disparaging” remarks about the company’s customers, clients etc.

USING EMPLOYERS' EMAIL SYSTEM FOR PROTECTED ACTIVITY

Background:

- 2007—Board held in *Register-Guard* that employers could prohibit employees from using employers' email systems to engage in Section 7 protected activity
  - Employers relied on *Register-Guard* in adopting "business use" only technology policies prohibiting employees from using employer technology for non-business purposes
- 2014—In *Purple Communications*, Board reversed *Register-Guard* and broadly expanded employee rights to use company email for union organizing and other protected activity in *Purple Communications*

USING EMPLOYERS' EMAIL SYSTEM FOR PROTECTED ACTIVITY

Purple Communications (2014):

- Board examined Purple Communications' policy that expressly prohibited employees from "engaging in activities on behalf of organizations or persons with no professional or business affiliation with the company"
- Based on its view of the role email plays in employee's work communications, Board adopted new means of evaluating similar employment policies:
  - The presumption that employees who have rightful access to their employer's email system have a right to use the email system to engage in protected activity during non-work times
  - To overcome the above presumption, the employer must rebut "by demonstrating that special circumstances necessary to maintaining production or discipline justify restricting its employees' rights"

USING EMPLOYERS' EMAIL SYSTEM FOR PROTECTED ACTIVITY

The silver lining for employers?

- Limitations of the *Purple* standard:
  - The Purple standard only applies to company email systems
  - The Purple standard only applies to employee use of employer email system during non-work times
  - The Purple standard only applies to employees with rightful access to company email systems in the course of their work

USING EMPLOYERS' EMAIL SYSTEM FOR PROTECTED ACTIVITY

What's new?

- On March 24, 2017, Board affirmed its 2014 decision that Purple Communication, Inc.'s "business use only" policy unlawfully stifled employees' Section 7 rights
- Purple Communications, Inc. likely to appeal Board's affirmation of its 2014 ruling to Ninth Circuit
- The union, Communications Workers of America now urges the Ninth Circuit to uphold the Board's landmark ruling that workers can use work email for protected concerted activity
  - Also requests that the Ninth Circuit take the Board's ruling a step further by ordering Purple Communications Inc. to post notice of the Board's order companywide

USING EMPLOYERS' EMAIL SYSTEM FOR PROTECTED ACTIVITY

Moving forward:

- Given the recent expansion of technology provided to employees, there is a possibility that the Board could clarify the limits of the *Purple* standard in future cases
- Employers can assume that the *Purple* standard could be extended "beyond email to any kind of employer communication network that employees have access to as part of their jobs"
- In the meantime, employers are advised to review current policies governing employee use of technological resources to ensure compliance with the *Purple Communications* decision

NLRB ASSUMES WORKER MISCLASSIFICATION

Background:

- Worker misclassification is classifying workers as independent contractors when they should be employees can be costly for a business
- 2009—the U.S. Government Accountability Office (GAO) reported that worker misclassification contributes to the 'tax gap' (the difference between the revenue the federal government collects and what is legally owed)
- Misclassification of independent contractors was a major focus of the Department of Labor during President Barack Obama's presidency
  - The DOL's FY2016 Budget set aside $277 million for misclassification-specific initiatives
  - DOL partnered with 19 states and issued grants of more than $10 million to "enhance states' ability to detect incidents of worker misclassification"

NLRB ASSUMES WORKER MISCLASSIFICATION

What's new?

- June 7, 2017—Secretary of Labor Alexander Acosta announced the withdrawal of the DOL's 2015 and 2016 informal guidance on independent contractors and joint employment
- The DOL's rescission of its aggressive enforcement of its prior worker misclassification initiative can be considered a win for employers
- However, employers should expect that independent contractor classifications may be scrutinized by the current Board instead
  - Board likely to apply its rationale—*that worker misclassification has a chilling effect on a worker's exercise of Section 7 rights*—to all cases involving independent contractors, regardless of whether the employer uses the independent contractor classification as a shield

NLRB ASSUMES WORKER MISCLASSIFICATION

Why is the NLRB launching efforts to combat worker misclassification?

- While the DOL and the IRS aim to extend minimum wage and overtime protections and to collect employment taxes, the Board wishes to extend the protections of the NLRA to as many workers as possible
- December 2015 Advice Memorandum:
  - GC opined that an employer's misclassification of employees as independent contractors in and of itself is a violation of Section 8(a)(1) of the NLRA
    - Rationale: Misclassification interferes with and restrains the employees' right to engage in protected concerted activity, such as seeking union representation

NLRB ASSUMES WORKER MISCLASSIFICATION

Why is the NLRB interested? (cont.)

- March 2016 Advice Memorandum
  - GC voluntarily released a published a list of "initiatives or policy concerns," including "[c]ases involving the question of whether the misclassification of employees as independent contractors violates Section 8(a)(1)
  - This memorandum was released just nine months after GC released the December 2015 Advice Memorandum, which stated that worker misclassification is a per se violation of the NLRA
    - This signals that the NLRB will join the DOL and the IRS in widespread initiatives to reduce employers' use of independent contractors

NLRB ASSUMES WORKER MISCLASSIFICATION

Moving forward:

- Companies that utilize independent contractors need to be aware of the nature and degree of control exercised over independent contractors
- Companies who decide to classify their workers as independent contractors should document the relationship just as it would any other business entity
- Companies should have written contracts that clearly define the independent contractor relationship
- Companies should maintain records of services performed by contractors:
  - All invoices received from the independent contractors; and
  - All contracts, agreements and relevant tax information

DESSERT

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CLASS WAIVERS

- On January 13, 2017, the U.S. Supreme Court agreed to review the following issue:
  - Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. § 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. § 157, and are therefore unenforceable under the savings clause of the Federal Arbitration Act, 9 U.S.C. § 2.
  - Three consolidated cases (5th, 7th, and 9th Circuits)
  - Oral argument heard October 2, 2017; decision expected spring of 2018
  - Regardless of ruling, new Board may still tackle issue

QUESTIONS?

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THANK YOU

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