NLRB UPDATE

34th Annual Labor & Employment Law Conference

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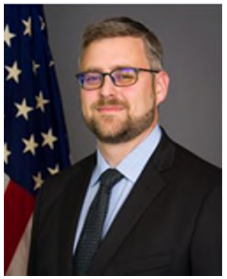
THE PENDULUM SWINGS BACK

- New Board
- Board and Court Cases
- New General Counsel Advice Memorandum
- Election issues

CURRENT BOARD

John Ring (R) Chairman, (Term Ends December 16, 2022)

Mark Gaston Pearce (D) (Term Ends August 27, 2018)



Marvin Kaplan (R) (Term Ends August 27, 2020)

Lauren McFerran (D) (Term Ends December 16, 2019)

William Emmanuel (R) (Term Ends September 25, 2022)

New GC – Peter Robb (R) (Term Ends November 17, 2022)

EMPLOYER POLICIES

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EMPLOYER POLICIES – OBAMA BOARD V. TRUMP BOARD

- Obama Board
  - Test: Could *employee* reasonably read the rule to prohibit Section 7 activity?
  - The Obama Board did not consider the interest of the employer when determining whether an employer's policy violated the Act
  - Employee terminations and policies that "touched on," "interfered with" or "chilled" Section 7 rights were held unlawful
  - Example: *T-Mobil USA, Inc*., 363 NLRB No. 171 (2014)
- Trump Board requires an evaluation and balancing of:
  - The rule's potential impact on NLRA rights
  - The employer's legitimate justifications associated with the rule
  - Example: *The Boeing Company*, 365 NLRB No. 154 (2017)

THE BOEING COMPANY, 365 NLRB NO. 154 (2017)

- The Board created three categories of employment rules and policies:
  - *Category 1 -- Lawful Rules*: (i) the rule does not prohibit or interfere with NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by business justifications
    - Examples: Boeing's no-camera requirement; the "harmonious interactions and relationships" rule at issue in *William Beaumont Hospital*; rules requiring employees to abide by basic standards of civility
  - *Category 2 -- Individualized Scrutiny*: balancing whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact is outweighed by legitimate justifications
    - Example: Social media policy that prohibits employee posting that criticize or disparage the employer or the employer's product. *MikLin Enterprises, Inc*., 209 LRRM 3209 (July 3, 2017).
  - *Category 3 – Unlawful Rules*: that prohibit or limit protected conduct in a way not outweighed by legitimate justifications
    - Example: A rule that prohibits employees from discussing wages or benefits with one another

COMMON EMPLOYER HANDBOOK RULES FOUND UNLAWFUL BY THE OBAMA BOARD

- Rules prohibiting cameras and other recording devices (*The Boeing Company*, 365 NLRB No. 154 (2017))
- Civility rules prohibiting "disrespectful" conduct (*William Beaumont Hospital*, 363 NLRB No. 162 (2016))
- Confidentiality rules (*Schwan's Home Service, Inc*., 364 NLRB No. 20 (2016))
- Rules prohibiting use of employer trademarks and logos (e.g., *Boch Honda*, 362 NLRB No. 83 (2015))
- Rules prohibiting criticism of the company (*Goodman Logistics, LLC*, 363 NLRB No. 177; 206 LRRM 1248 (2016))
- Rules requiring employees to maintain the confidentiality of workplace investigations (e.g., *Banner Estrella Medical Center*, 362 NLRB No. 137 (2015))
- Media rules (*Schwan's Home Service*, 364 NLRB No. 20; 206 LRRM 2033 (2016))

SOCIAL MEDIA

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CONDUCT MUST BE BOTH PROTECTED AND CONCERTED

- Under Section 7 of the Act employees are allowed "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"
  - Conduct must be **protected** by the NLRA
  - Conduct must involve **concerted activity**

PIER SIXTY, LLC, 362 NLRB 59 (3/31/15)

- Union organizing campaign underway at catering company
- Two days before the election, Supervisor Bob told servers waiting on patrons to "stop chitchatting," "spread out," and "move, move"
- An employee, upset with Bob's statements, went outside and posted on his personal Facebook page:

  *"Bob is such a NASTY M***** F****** don't know how to talk to people!!!!!!!!! F*** his mother and his entire F****** family!!!! What a loser!!!! Vote YES for the UNION!!!!!"*

- The employee was discharged after the company investigated the Facebook posting
- Obama Board held the Facebook post was protected by Section 7
  - Eight point test used by the majority

BOARD DISSENT

- The dissent's argument (Member Harry Johnson):
  - Under the totality of the circumstances, the employer was entitled to discipline the employee for posting this rant, and the General Counsel did not establish that employee was terminated for union or protected activity
  - Offensive online rant, which were fraught with insulting and obscene vulgarities directed toward his manager and his manager's mother and family, was an individualized griping episode and not protected activity. Such blatantly uncivil and opprobrious behavior is not within the Act's protection.

RECENT COURT CASE — A FORESHADOWING

- *MikLin Enterprises, Inc*., 209 LRRM 3209 (July 3, 2017)
  - Employees were disciplined and discharged after they distributed posters suggesting that their employer's "Jimmy John's" sandwiches posed a health risk to consumers because they were being made by sick workers
  - The Board held that this activity was protected since it was done in the context of a labor dispute over a demand for additional sick days and without a malicious motive
  - The Appellate Court reversed the Board, holding that even though the statements were made in the context of a labor dispute, the statements lost their protection since they constituted a "sharp, public, disparaging attack upon the quality of the company's product and its business policies"
  - "The inquiry is whether employee public communications reasonably targeted the employer's labor practices, or indefensibly disparaged the quality of the employer's product or services"
  - The court found that statements were materially false and disloyal, and were calculated to harm the company's reputation and reduce its income

WHAT ISN'T PROTECTED AND CONCERTED?

- Purely personal gripes
- Action taken by one employee who isn't acting on behalf of others
- Conduct in violation of the law (e.g., harassment, discrimination or violence)
- Defamatory or disparaging statements
- Violation of lawful work rules, threats, violence, insubordination, breach of confidentiality, disclosure of trade secrets, sabotage etc. (*be very careful if the misconduct is in connection with other protected activity*)
- Conduct in violation of a legitimate employer policy that is justified by business reasons

JOINT EMPLOYMENT

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OBAMA BOARD JOINT EMPLOYER ANALYSIS

- *Browning Ferris Industries*, 362 NLRB No 186 (2015)
  - Obama Board held that contractor and subcontractor were joint employers where contractor had "indirect control" by virtue of making payments to the subcontractor
  - Joint employment liability found even though two entities never exercised joint control over essential terms and conditions of employment, and joint control was not "direct and immediate"
  - New test opened door to finding that any contractual relationship between companies would cause one company to be responsible for the employment practices of the other

TRUMP BOARD *HY-BRAND* DECISION

- *Hy-Brand Industrial Contractors, Ltd*., 365 NLRB No 156 (Dec 2017)
  - Trump Board reversed the *BFI* decision
  - The Board returned to the traditional joint employment test which requires that a company exercise actual, direct and immediate control over terms and conditions of employment, as opposed to control that is indirect or limited
  - However, the Board found that under the traditional joint employment test Hy-Brand and Brandt were joint employers
  - In a highly controversial decision issued on February 26, 2018, a panel controlled by Obama appointees vacated the *Hy-Brand* decision based on allegations that one of the Republican members of the *Hy-Brand* panel should have recused himself for ethical reasons
  - Prediction: More to follow

FACTORS BOARD CONSIDERS IN JOINT EMPLOYMENT CASE

- Boards and the courts balance the following factors to determine if there is joint employment:
  - Hiring
  - Determining individual employee rates of pay
  - Determining individual employee benefits
  - Day to day supervision of employees
  - Assigning individual work schedules, positions, and tasks
  - Common employment policies
  - Discipline
  - Termination

BARGAINING ISSUES

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EMPLOYER CHANGES AFTER CBA EXPIRES

- Obama Board
  - *E.I. du Pont de Nemours*, 364 NLRB No. 113 (2016)
    - Where a CBA expires, the employer may not make changes to employment practices, even if the changes were based on long standing practice, without giving notice of the change and an opportunity to bargain to the union. Bargaining is always required where the employer's action involves some type of discretion.
- Trump Board
  - *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017)
    - The employer's modifications were a continuation of its past practice of making similar changes at the same time every year from 2001 through 2012. Therefore, the employer did not make any "change" when it made the challenged modifications, and accordingly it lawfully implemented these modifications without giving the Union prior notice and opportunity to bargain. Because the 2013 modifications were lawful, we also find that the employer's 2012 announcement of those modifications was lawful.

OBAMA BOARD CHANGED WELL ESTABLISHED LAW

- After termination of CBA
  - Obama Board found obligation to collect dues survives expiration of the CBA. *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015) overruling *Bethlehem Steel*, 136 NLRB 1500, 50 LRRM 1013 (1962).
- Duty to bargain discipline before parties have a CBA
  - Obama Board established a duty to bargain before imposing discretionary discipline where parties have not executed initial collective bargaining agreement. *Total Security*, 364 NLRB No. 106 (2016).
- Duty to provide witness statements to union
  - Obama Board found that witness statements must be disclosed if that would be appropriate under the *Detroit Edison* balancing test. *Piedmont Gardens*, 362 NLRB No. 139 (2015), overruling *Anheuser-Busch*, 237 NLRB 982 (1984).
- Trump Board Prediction: Board is likely to restore prior precedent on all these issues at its first opportunity

GENERAL COUNSEL'S KEY ISSUES

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EMPLOYEE ACCESS TO E-MAIL SYSTEM

- The Board's General Counsel will seek review of *Purple Communications*, 361 NLRB No. 126 (2014):
  - Seven Year Old Standard: Employees have no statutory right to use an employer's email system for Section 7 purposes (*Register Guard*, 351 NLRB 1110 (2007))
  - Obama Board Standard: Employee use during non-work time of an employer's email system for Section 7 purposes must be presumptively permitted for those employees whom the employer has given access to the email system. A total ban on non-work use is permitted only if the employer can demonstrate special circumstances that make a total ban necessary to maintain production and discipline (*Purple Communications, Inc*., 361 NLRB No. 126 (2014)).
  - The Board's new General Counsel wants to reexamine *Purple* and has indicated he will not seek to extend *Purple* to other electronic systems (internet, phones, instant messaging) if employees use those regularly on the course of their work. *Memorandum GC 18-02* December 1, 2017.

CONCERTED ACTIVITY FOR MUTUAL AID AND PROTECTION

- The Board's General Counsel will seek review of the following issues:
  - Finding conduct was for mutual aid and protection where only one employee had an immediate stake in the outcome (e.g., *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 (2014) – (individual sexual harassment claim)
  - Finding no loss of protection despite obscene, vulgar, or other highly inappropriate conduct (e.g., *Pier Sixty, LLC*, 362 NLRB No. 59 (2015))

Memorandum GC 18-02 December 1, 2017

OFF-DUTY EMPLOYEE ACCESS TO PROPERTY

- The Board's General Counsel will seek review of the following issues:
  - Applying *Republic Aviation* to picketing by off-duty employees (e.g., *Capital Medical Center*, 364 NLRB No. 69 (2016), equating picketing with handbilling despite greater impact on legitimate employer interest (including patient care concerns))
  - Finding that access must be permitted under *Tri-County* unless employees are excluded for all purposes, including where supervisor expressly authorized access (e.g., *Piedmont Gardens*, 360 NLRB No. 100 (2014)

Memorandum GC 18-02 December 1, 2017

RULINGS THAT CONFLICT WITH OTHER STATUTORY REQUIREMENTS

- The Board's General Counsel will seek review of the following issues:
  - Finding racist comments by picketers protected under *Clear Pine Moldings* because they were not direct threats (*Cooper Tire & Rubber Co*., 363 NLRB No. 194 (2016))
  - Finding social media postings protected even though employee's conduct could violate EEO principles (e.g., *Pier Sixty, LLC*, 362 NLRB No. 59 (2015))

Memorandum GC 18-02 December 1, 2017

WEINGARTEN RIGHTS

- The Board's General Counsel will seek review of the following issues:
  - Expanding range of permissible conduct by union representatives in *Weingarten* interviews (e.g., *Fry's Food Stores*, 361 NLRB No. 140 (2015); *Howard Industries*, 362 NLRB No. 35 (2015))
  - Application of *Weingarten* in the drug testing context (e.g., *Manhattan Beer Distributors*, 362 NLRB No. 192 (2015))

Memorandum GC 18-02 December 1, 2017

REMEDIES

- The Board's General Counsel will seek review of the following issues:
  - Search for work and interim employment expenses recoverable regardless of whether discriminatee had interim earnings (*King Soopers*, 364 NLRB No. 93 (2016))
  - Employer required to remit dues unlawfully withheld without being able to recoup them from employees (*Alamo Rent-a-Car*, 362 NLRB No. 135 (2015))

Memorandum GC 18-02 December 1, 2017

ELECTIONS

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AMBUSH ELECTIONS

- The Obama board enacted regulations to "streamline" the Representation Election procedures which have shortened the time from the filing of an RC petition to the date of the election from 35 days to 24 days
- It is unlikely that the current board will make wholesale changes to the regulations but might attempt to make some changes
- Until any changes are made, employers should not wait to receive the petition before preparing for a possible union organization drive. We suggest that employers take the following steps:
  - Conduct a union vulnerability audit
  - Ensure that lawful policies to prevent union access, non-solicitation and non-distribution rules are in place
  - Train managers and supervisors to spot and report union organizing activity
  - Train managers and supervisors in what they can and cannot do during a campaign

MICRO UNITS – OBAMA BOARD

- *Specialty Healthcare*, 357 NLRB 934 (2011)
  - The Board held that small and discrete units could be organized, excluding similarly skilled workers
  - *Specialty Health* de-emphasized "community of interests" test
  - Result: Unions could target small groups to organize and "Balkanize" a department or functional area
  - Smaller group could be a "beachhead" for future organizing
  - Rival unions could represent different groups within a single department

MICRO UNITS – TRUMP BOARD

- *PCC Structural, Inc*., 365 NLRB No. 160 (2017)
  - Board rejects *Specialty Health Care*, 357 NLRB 934 (2011) community of interest approach to determining the appropriate bargaining unit
  - The community interest test looks to whether employees proposed to be excluded:
    - Have distinct terms and conditions of employment
    - Are separately supervised
    - Are in a separate department
    - Have distinct skill and training
    - Have distinct job functions
    - Perform distinct work
    - Do not overlap with other classifications
    - Are functionally integrated with other employees
    - Have frequent contact or interchange with other employees

QUESTIONS?

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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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