A New Era For Labor Relations? Fisher Phillips Lawyers Predict Fate Of Top 10 Key Issues

Insights
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Among the most crucial federal agencies undergoing a transformation under the new presidential administration is the National Labor Relations Board (NLRB). During the eight years of the Obama administration, with the Board stocked with a majority of Democratic appointees, the NLRB issued decision after decision tilting the playing field decidedly in favor of unions and workers. However, the five-member NLRB is poised to soon be led by a majority of Republican appointees, and we expect changes to soon follow.

We polled some of our firm's foremost thought leaders to discuss 10 specific topics that we expect to evolve for the better in the near future. Employers – both unionized and non-unionized – should pay particular attention to these topics.

Use Of Company Email

Perhaps no Board decision of the recent past has been derided more than 2014's *Purple Communications*, which held that employers – whether unionized or not – generally must allow employees to use corporate email systems during non-work time to engage in concerted and protected activity under Section 7 of the National Labor Relations Act (NLRA). As San Diego attorney Chris Conti puts it, "this decision opened the floodgates for organizing activity through corporate email servers." It also resulted in most employers having to rewrite solicitation policies and rules governing email use, particularly those that restricted email use to "business reasons only," and created a Catch-22 for employers that want to legitimately monitor email activity but also want to avoid engaging in unlawful surveillance.

In early 2017, the Board once again upheld the decision. But once it has a majority of Trump appointees, Conti expects the Board will eventually issue a decision overturning *Purple Communications*. "Overturning this decision would bring about a return to normalcy that employers had come to expect since at least 2007," he says. That year, the Board explicitly held that employees have no statutory right to use their employers' email servers to engage in protected activity, based predominantly on the employer's property interest in its own information technology (*Register Guard*). If *Purple Communications* is overturned as Conti expects, employers would regain the right to restrict corporate email use for business purposes only, and would be freer to monitor email activity for legitimate reasons without facing unfair labor practice charges.

Mandatory Class Waivers

Beginning with 2012's infamous *D.R. Horton* decision, the Board has repeatedly struck down arbitration agreements that contain mandatory class and collective action waivers. Todd Lyon, a partner in the Portland office, explains: "The Board has reasoned that requiring employees to enter into such agreements violates Section 7 of the NLRA, preventing them from engaging in protected concerted activity." Employers have been faced with uncertainty ever since, as the Board continued to strike down mandatory waivers even after they had been overturned by several circuit courts. But in 2016, Lyon explains, a circuit split emerged, when both the 7th Circuit (in *Lewis v. Epic Systems Corp.*) and 9th Circuit (in *Morris v. Ernst & Young LLP*) struck down class and collective waivers.

Lyon says there is reason for optimism, even without the pending transformation at the NLRB. "There is a strong likelihood that this circuit split will be resolved by the end of the year," he says, "because the Supreme Court has agreed to hear arguments on this issue in October. Although employers should be cautiously optimistic after the appointment of Justice Neil Gorsuch, there is no guarantee he will strike down the decisions by the NLRB." The decision will ultimately decide the question of Section 7's applicability to class and collective action waivers, and will be binding on the Board. "It's impossible to predict what the Board will do after the Court issues its decision, as the ruling could take many forms," says Lyon, "but its new political composition will certainly mean a change from the last eight years of union-friendly precedent."

Joint Employment Doctrine

Another recent controversial decision from the NLRB came in 2015's *Browning-Ferris Industries* (*BFI*), where the Board vastly broadened the definition of "joint employer" for purposes of collective bargaining and union organizing. A business may now be considered a joint employer if it exercises even "indirect control" over working conditions of another company's employees, or if it merely reserves the right to do so. As New Jersey's Alvaro Hasani says, "to be sure, the decision has arguably jeopardized long-standing business models and created a great deal of uncertainty regarding liability risks that companies may not be able to control."

Hasani explains there are three possible avenues for this decision to be reversed. The case has already been appealed to the D.C. Circuit Court of Appeals, which will likely have the first say on whether the decision should be reversed. However, even if the court upholds the NLRB's decision, it is likely a newly Republican-controlled NLRB will revert the current broad "indirect control" standard to the more exact "direct control" standard that preceded the *BFI* decision. A yet faster repudiation may come by way of legislation, such as the "Save Local Business Act" introduced in July. Given the current makeup of Congress and the Trump administration's announced intention of rolling back joint employer expansions, Hasani believes it is only a matter of time before the *BFI* decision is repudiated for a more even-handed formulation.

Temporary Worker Organizing

Hand-in-hand with *BFI* comes 2016's *Miller & Anderson* decision, where the NLRB reinstated a union-friendly standard for unionizing temp workers. "The Board ruled that employer consent is no longer necessary for bargaining units that combine regular employees and temporary workers

jointly employed by another employer," explains Hasani. The combined impact of these two decisions means that an entity is more likely to be deemed a joint employer and will be forced to bargain with employees whose terms and conditions of employment are controlled by another entity.

Hasani predicts this decision is likely to be changed by the Republican-controlled Board in the near future. To reverse the decision the Board will have to wait for another similar case to come before it, but Hasani thinks it will be worth the wait for employers. "Given the business necessity for using temporary employees," he says, "employers would no longer need to engage in a risk-benefit analysis to determine if they should rely on this type of work."

Confidentiality In Internal Investigations

While the aforementioned cases achieved a certain amount of notoriety, there have been several less prominent decisions that flew under the radar in recent years, but still had a significant impact on labor relations. One such case, identified by Tampa Managing Partner Steve Bernstein, is the Board's 2015 ruling in *Banner Healthcare*. "The upshot of this case is that it effectively precludes all employers, union and non-union alike, from compelling employees to maintain a modicum of confidentiality over information exchanged in the course of internal investigations, including those conducted in response to allegations of workplace harassment," he explains. This works at cross-purposes with years of experience telling employers that complainants are less likely to come forward if their concerns are at risk of dissemination by fellow witnesses during the pendency of the investigation.

Although the D.C. Circuit Court of Appeals recently had an opportunity to rule on the lawfulness of a general confidentiality policy, it instead chose to overturn the decision on narrower grounds and left the underlying doctrine intact. Bernstein is hopeful, however; "A reconstituted NLRB will soon have the opportunity to reexamine that doctrine in light of broader legal implications, and I hope the new Board preserves the integrity of open-door and EEO policies that are important to all of our clients," he says.

Workplace Civility Rules

Under the current Board interpretation of *Lutheran Heritage*, the seminal 2004 decision on workplace civility rules, an employer handbook rule or policy will be held unlawful if employees "would reasonably construe" the rule to prohibit protected Section 7 activities. "This interpretation has led to reasonable rules implemented with the purpose of creating a respectful and well-managed workplace being struck down as illegal," explains Atlanta's Josh Viau.

The best predictor of the approach that Trump's Board will take on workplace rules can be found in the frequent dissents authored as of late by its minority members, says Viau. They included strong disagreements about the way the Obama Board analyzed and decided cases involving employee civility rules. "I would expect the Trump Board, once the opportunity presents itself through the appropriate challenge, to adopt some form of the balancing test that would take into account employers' legitimate justification for the rule or policy," he concludes.

Confidentiality And Other Handbook Provisions

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Another little-known landmine in many company handbooks is the typical confidentiality policy, restricting employees from discussing certain topics among each other or with members of the public. "Currently, many employer policies run afoul of what the Board considers to be an illegal restriction preventing employees from engaging in protected concerted activity," explains Danielle Garcia, an attorney in the San Diego office. Board decisions on this topic and several other common handbook policies are all based on the 2015 memo issued by the General Counsel (also known as the "Wendy's Memo").

Once a new General Counsel is in place at the NLRB, Garcia says, we can expect new directives regarding how polices are interpreted. "I'd expect the new Board to interpret handbook policies, including confidentiality provisions, in a less restrictive manner for employers," she predicts. The changes will come not only from a new directive memo from the incoming General Counsel, but also through the federal courts which are now starting to scrutinize the Board's recent decisions. Garcia's prediction: "Current Board precedent forbidding policies that restrict workplace recordings, among other things, will likely be overturned, giving employers more say in their workplaces and more control over their policies and handbooks."

Micro-Units

"The NLRB's 2011 *Specialty Healthcare* decision altered the labor landscape by revisiting the way determinations are made about whether proposed bargaining units are appropriate," explains Louisville partner Ray Haley. In a two-step analysis, he says, the Board will first examine whether members of a petitioned-for unit share a community of interest and are "clearly identifiable as a group." If an employer should object, they can only enlarge the unit by showing that those excluded "share an overwhelming community of interest" with the petitioned-for group. Haley points out that the Board has long enjoyed substantial judicial deference in matters of unit determination, noting that every federal court of appeals called upon to review determinations made pursuant to the *Specialty Healthcare* analysis has affirmed the NLRB, including a very recent August 2017 decision by the D.C. Circuit.

Employers might now see a light at the end of the tunnel, however. Two 2016 decisions from the 2nd and 5th Circuit Courts of Appeal displayed a heightened degree of scrutiny when applying facts to the NLRB standard. Haley believes these decisions are a sign of good things to come, especially once the Board is fully reconstituted with a majority of Republican appointees.

"The roadmap for overruling *Specialty Healthcare* has been clearly laid out by these courts," Haley says, "and the mischief caused by rote-and-verse application of its test is soon likely to be ameliorated if not in its entirety, then at least in substantial part."

"Quickie Election" Rules

The adoption of accelerated election rules by the NLRB in April 2015 – dubbed "quickie elections" by disaffected employers and their counsel – has tipped the scales in favor of unions, according to Irvine partner Warren Nelson. The union success rate in elections has risen to 70 percent, no doubt due to the accelerated timeframe for elections that has seen the average campaign shrink from 42

due to the accelerated timeframe for elections that has seen the average campaign shrink from 42 days to between 23 and 25 days. Nelson says this new timeframe impacts both large and small employers, as "smaller employers do not have the administrative staff to gather and produce the required information in the fast-tracked timeframe, and large employers have a massive task of culling their records to accurately provide required information." He points to the "Draconian penalties" imposed for failure to meet these timelines as another example of how the scales are not presently in balance.

The good news? "I predict that the newly reconstituted Board will focus on the election schedule and shift it to a more manageable timeframe," says Nelson. Establishing this new procedure will take time, he says – "expect at least three to six months for formal rulemaking to be followed."

Student Organizing

The final issue to keep an eye on is of particular importance to institutions of higher education. As explained by Boston Managing Partner Joe Ambash, for decades the NLRB declined to find students who serve as teaching and research assistants at private universities to be employees under the NLRA, but all that changed in 2016.

In the now-infamous *Columbia University* decision, the Board ruled that such students were employees under the Act, and thus able to organize into unions. As Ambash says, "this decision, which was aggressively pursued by the unions for years, opened up a floodgate of graduate assistant organizing at private sector institutions across the country." The *Columbia* decision has since been expanded to cover undergraduate resident advisors, so it follows that under current Board logic, virtually any graduate student or undergraduate who performs services for a private college or university for compensation – including, presumably, free housing – could be considered an employee eligible to be represented by a union.

"This is expected to change under the Trump Board," says Ambash. "I anticipate that the newly formulated Board will eventually reverse the *Columbia* decision." The implications for higher education in this battle are significant, and could help shape the academic experience of private sector students for decades to come.

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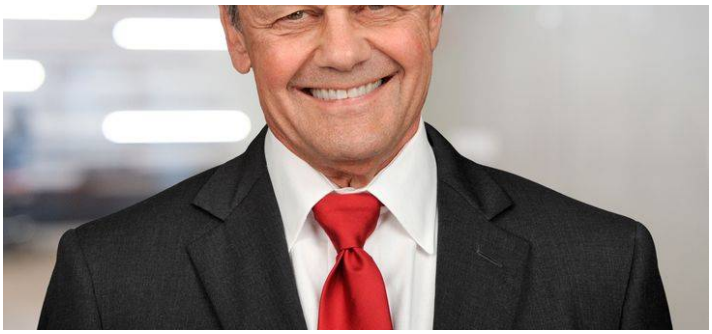

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