Back To The Future For The NLRB

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The National Labor Relations Board overturned several fairly short-lived, Obama-era precedents during the last week of outgoing Chairman Philip Miscimarra's tenure. The board's 3 to 2 Republican majority has made it possible for the Trump administration to revisit some of the Obama board's more dramatic shifts in the playing field, and it has aggressively restored the stability to board law that existed for decades prior to the upheaval of the past eight to 10 years.

The Democrat-controlled Obama board had handed down a number of decisions and implemented rules designed to turn the tide of organized labor and make it easier for unions to win elections. The percentage of the American workforce that is unionized has dropped precipitously for decades, and unions saw the past presidential administration as their best chance to reconfigure the labor law landscape to their liking. Of these Obama-era decisions, two stood out: Specialty Healthcare and DuPont. Both have been overturned, and election rules favoring unions are being reconsidered.

Specialty Healthcare

In 2011, the board for the first time permitted so-called "micro-units" — small groups of employees within a single workforce that unions would seek to represent separate from the rest of the workforce. In Specialty Healthcare, the board rejected the longstanding "community of interests" standard it applied when deciding an appropriate bargaining unit in a particular workplace. Under the Specialty Healthcare approach, the board would permit unions to organize smaller groups of employees as long as it was a "readily identifiable" group, based on job classifications, departments, work duties, skills and related factors. Once that minimal showing was made, the burden shifted to the employer to demonstrate that other employees should be included in the unit because they shared an "overwhelming community of interest" with the employees in the union-selected subgroup of employees. In practice, this was virtually an impossible standard for employers to meet, resulting in bargaining units chosen at the union's discretion, usually because the chances of successfully organizing a smaller group of employees was greater than taking on all of the employees in a workplace.

Tactically, these micro-units were a boon to unions trying to gain a foothold in a company with a large workforce. Rather than have to exhaust extensive resources in an "all-or-nothing" battle for hundreds of employees, a union could strategically identify a smaller group that might be more receptive to the union's organizing message. Unions usually found that labor board elections for

these smaller units were easier to win, and with a victory under its belt, subsequent battles over additional units might be more susceptible to union organizing efforts. Saying it another way, with one collective bargaining agreement under its belt, the union could find itself able to win over the rest of the workforce in bits and pieces, until ultimately the union represented the entire workforce.

But the "overwhelming community of interest" standard overturned 20 years of board precedent and essentially required the board to abdicate its statutory responsibility to determine appropriate bargaining units. In PCC Structurals, the board, in rejecting the Specialty Healthcare approach, noted that the "overwhelming community of interest" approach virtually placed the determination of what group of employees is "appropriate" in the organizing union's hands, regardless of whether the excluded employees in fact were virtually indistinguishable from the included employees. This tended to disenfranchise employees outside the micro-unit who might have expressed an interest in maintaining a nonunion status.

Rather than continue with a standard that amounted to "rubber-stamping" any petitioned-for unit, in its Dec. 15 PCC Structurals decision, the labor board abandoned the "overwhelming community of interest standard" and has returned to its traditional community of interest standard: "the Board in each case [is] to determine whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment and are separately supervised." The renewed standard will likely eliminate the possibility of a "ladies' shoes" unit in a department store, which had been permitted since Specialty Healthcare.

DuPont

On the same day it issued the PCC Structurals decision, the board revisited its 2016 DuPont decision, which itself had disrupted board precedent by holding that certain employment decisions made after the expiration of a collective bargaining agreement were impermissible even when such decisions were allowed under the terms of the recently expired union contract. The board also held that any post-contract employment action requiring the exercise of "discretion" would require bargaining with the union.

In Raytheon Network Centric Systems, the employer had the right under the terms of its contract to make certain changes to its health plan. In 2012, Raytheon did just that, making changes after the CBA had expired that it had made several times over the course of a decade without objection or request to bargain from the union. The union filed an unfair labor practice charge, alleging that Raytheon's unilateral health care changes violated the NLRA.

But the GOP-majority board took the opportunity in Raytheon to reject DuPont, which had essentially held that all past practices were "extinguished" once a CBA expired. The board reiterated

held that all past practices were "extinguished" once a CBA expired. The board reiterated longstanding board law requiring employers to provide notice and the opportunity to bargain before implementing any change in a mandatory subject of bargaining (such as health care benefits). The question faced by the Miscimarra board was, what is a "change" that would trigger a duty to bargain? Before DuPont, the board had consistently held that employers did not violate the National Labor Relations Act when the employer did not alter the status quo. But if the status quo was that the employer regularly made changes to health care benefits, did following that same pattern after the expiration of the CBA result in an unfair labor practice?

The board answered "no," reinstating the pre-2016 standard under which an employer's past practice constituted a term and condition of employment, meaning that following the past practice was not an impermissible unilateral "change" to those terms and conditions.

"Quickie Election" Rule Reconsidered

In another attempt to stem the tide of union losses in representation elections, the Obama labor board issued a rule in 2014 dramatically reducing the amount of time between a union's petition to represent employees and the secret-ballot election to determine whether the union would indeed represent the employees in the appropriate bargaining unit. The significantly shortened election cycle (cut nearly in half by the rule) placed employers at a serious disadvantage — unions could try to convince employers for months prior to filing a petition, but employers would have only a couple of weeks to communicate with employees about its position on union representation.

But on Dec. 12, the Republican-majority board announced that it was seeking comments from the public on the rule mandating "quickie" elections. It will receive input through this process through Feb. 12, 2018. In particular, the labor board intends to evaluate a number of options, including scrapping the rule entirely and going back to the previous procedure; keeping the rule as-is; and keeping part of the new rule but eliminating the rest. It's an opportunity to revisit entirely how union elections are held in the United States, and it may result in another case of labor law "time travel," taking employers back a few years.

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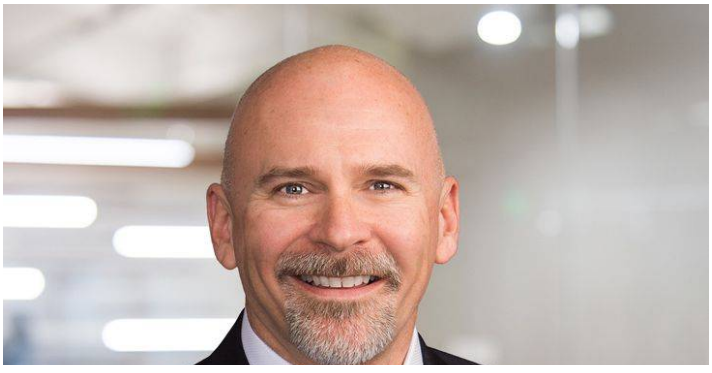

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