



Labor Board Poised To Even Playing Field Once Again

JOHN RING'S CONFIRMATION GIVES NLRB 3-2 REPUBLICAN MAJORITY

Insights

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With the Senate's confirmation of John Ring to the National Labor Relations Board on April 11 and the administration's subsequent announcement on April 12 that he will be designated as the agency's Chair, the Board is once again in a position to restore balance to the nation's labor laws. During most of the eight years of the Obama administration, the Board was stocked with a majority of Democratic appointees, and the NLRB issued decision after decision tilting the playing field decidedly in favor of unions and workers. However, now that the NLRB has a full complement of five members, three of whom were nominated by President Trump, changes are soon to follow. What do employers need to know about this latest development?

How Did We Get Here?

Although Republicans have controlled the White House and Senate for well over a year, the process of installing a new Board has been a slow—and at times arduous—process. It wasn't until the fall of 2017 that the current administration enjoyed a three-member majority on the Board. The Senate approved the nominations of Marvin Kaplan (August 10, 2017) and William Emmanuel (September 26, 2017), joining holdover Philip Miscimarra to form the first Republican majority since 2007.

That majority was short-lived, however, because Miscimarra had already announced that, after four years of service, he would retire at the conclusion of his term on December 16. But that didn't stop the Board from taking action. Over the weeks that followed, the Board issued a flurry of decisions to begin the process of restoring balance. This included issuing a new test for determining whether workplace handbook rules violated the National Labor Relations Act (NLRA), restoring stability for employers attempting to maintain the status quo following the expiration of a collective bargaining agreement, striking down the pro-union use of micro-units (a tool used to more easily organize a workplace), and, perhaps most famously, scrapping a troublesome joint-employer test adopted in 2015 and reaffirming its prior reasonable standard for determining joint-employer status.

Since Miscimarra's term concluded in December, however, the Board has been stuck with a split complement of just four members, rendering any chance of significant movement extremely unlikely. This became problematic in late February when the Board announced it would vacate its joint employer ruling due to allegations that Emmanuel was ethically compromised in weighing in on the matter due to his former law firm's involvement in a related case.

But now that the Senate has confirmed Ring and he is due to soon be sworn in as the fifth member, the Board can once again turn its attention to leveling the playing field for the nation's employers. Ring's background—he has served as a management-side labor and employment lawyer at a large D.C. firm for 30 years—leads most to conclude that he will help the Board reestablish a welcome sense of equilibrium when it comes to interpreting the NLRA.

What's On Tap?

In forecasting the types of topics that Ring and the newly formed Board will likely address in the coming months and years, there are a few matters that are ripe for attention. Most assume that the Board will start by **revisiting the joint employment issue** in an attempt to once again resurrect a common sense approach to the matter. It doesn't appear likely that Ring will be able to weigh in on the specific case that was vacated several months ago; a more probable course of action would be for the Board to select another case addressing the same issue and using that set of facts to re-establish the common-sense test.

Also likely high on the Board's priority list: a revision to the agency's representation election regulations, often known as the "**quickie election**" rule. During the brief window in time when the Board had a Republican majority in December, it began the process of soliciting public comment on the controversial regulations. Once Ring is in place, the Board could decide to retain portions of the rule but make modifications to the structure of the election process, or scrap the rule altogether and revert to the old system that had been considered more fair by employers (or, in fact, rescind the rule and create an entirely new structure from scratch).

Employers should be crossing their fingers hoping that the Board decides to overturn 2014's Purple Communications, which held that employers—whether unionized or not—generally must allow **employees to have corporate email systems made available to them during non-work time** to engage in concerted and protected activity under Section 7 of the NLRA. The NLRB could restore a test that had been in place since at least 2007 by ruling 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*).

Another controversial decision put into place by the Obama-era Board was 2016's Miller & Anderson decision, where the NLRB reinstated a union-friendly standard for **unionizing temporary workers** and ruled that mutual employer consent was no longer necessary for bargaining units that combine regular employees and temporary workers jointly employed by another employer. It seems like a natural progression for the Board to first address the underlying joint employer issue and then tackle this subject once again. If the Board resurrects the common-sense joint employer standard, look for it to address this issue soon thereafter.

Conclusion

These are just a few of the issues we expect the Board to revisit in the coming months now that a 3-2 majority has been reestablished. To ensure you receive timely updates regarding any such

developments, make sure you are [subscribed to our labor alerts](#). For more detailed information about any of these issues, contact any member of the Fisher Phillips [Labor Relations Practice Group](#).

This Legal Alert provides an overview of specific developments at the NLRB. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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