

Insights, News & Events

LABOR BOARD ANNOUNCES RULEMAKING AGENDA: SHOULD EMPLOYERS PAY ATTENTION?

Insights
May 22, 2019

The National Labor Relations Board announced today in its spring 2019 regulatory agenda that it intends to consider rulemaking in the following substantive areas arising under the National Labor Relations Act:

- Current representation-case procedures;
- Current standards for blocking charges, voluntary recognition, and the formation of Section 9(a) bargaining relationships in the construction industry;
- The standard for determining whether students who perform services at private colleges or universities in connection with their studies are “employees” under the NLRA; and
- Standards for access to an employer’s private property.

Along with the [previously announced joint-employer standard](#), the representation-case procedure is listed on the Board’s agenda as a “[long-term action](#),” while the other topics are identified as “[short-term actions](#).” Short-term actions are generally expected to occur within the coming year, while long-term actions are generally expected to take longer. What do employers need to know about today’s announcement?

BACKGROUND AND RECENT RULEMAKING

Federal administrative agencies such as the Labor Board establish legal principles through either adjudication (i.e.,

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case law) or rulemaking (i.e., regulations). Historically, the Board has relied almost exclusively on adjudication to enforce the NLRA. That is, when the Board has decided important substantive legal principles (like the standard for establishing a joint-employment relationship or the definition of an “employee” under the NLRA), it has done so through a decision issued by its members, who frequently disagree along party lines as to the result and/or the rationale leading to the result.

In 2011, the Board broke stride with its historical practice and promulgated a rule requiring employers to post a notice of employee rights under the Act. The Board adhered to the process required by the Administrative Procedures Act (APA) and issued a notice of the proposed rulemaking followed by a period for public comments before promulgating it. Nevertheless, two appellate courts struck the rule down on grounds that it violated employers’ free speech rights and exceeded the Board’s rulemaking authority under the APA.

In 2014, the Board promulgated another rule, this time concerning the Board’s union election procedures. Despite legal and political challenges to this rule, it was ultimately upheld by the appellate courts and remains the governing law in representation cases.

WHY RULEMAKING?

Proponents of rulemaking tout it as having a number of significant advantages over adjudication. First, the rulemaking process allows the public an opportunity to read and issue comments on proposed rules before they are promulgated, which theoretically should lead to better decision-making by the Board. Second, rulemaking allows the Board to regulate an area of law without being confined to the often-peculiar facts presented to it as an adjudicative body. Third, rulemaking offers a clear set of directives (again, in theory) that employers, employees, and unions alike can understand and follow.

Another commonly perceived advantage of rulemaking is its efficiency over adjudication. However, challenges to the 2014 representation-case procedures prove that is not always true. The Board initiated the rulemaking process leading to those procedures in 2011, but the rules did not go into effect until 2015. In most cases appellate courts do not

take near that long to affirm or reverse a Board decision on appeal.

Finally, the rulemaking process, which must comply with the strictures of the APA, including its requirements for a public notice and comment period, arguably leads to more stable agency policy than that established through adjudication. Because reversal of Board decisions only requires a majority vote, agency policy established through adjudication is more susceptible to change based on the Board's political composition.

SHOULD EMPLOYERS PAY ATTENTION?

Employers should certainly pay attention to the substantive areas of the law the Board is seeking to regulate through rulemaking. Many of these areas, such as joint-employment, representation-case procedures, and private property access standards affect virtually every employer subject to the NLRA. However, as with adjudication, final rules could take upwards of a year or longer to be promulgated, and even longer with judicial or political challenges.

We will continue to monitor further developments and provide updates as these rules are issued and finalized, so you should ensure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, or any attorney in our [Labor Relations Practice Group](#).

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