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The Winds of Change are Upon Us: Developments at the NLRB

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Our path for today…

- The players (NLRB and GC)
- Caselaw developments
- Enforcement developments
- What to expect from organized labor

The Starting Lineup for Your NLRB

- Mark Gaston Pearce (D)
- Lauren McFerran (D)
- William Emanuel (R)
- Marvin Kaplan (R), Chairman
- 5th Member TBD

- General Counsel
  - Peter Robb (R)

Caselaw Developments

- Republican majority in place for a few months
- Lasted until December 16
- Dramatic decisions issued during the last few days of Chairman Miscimarra's term

Handbooks/rules

- Out with the old…
  - *Lutheran Heritage* – "would" reasonably construe had morphed into "could" reasonably construe
    - Big difference analytically
    - Resulted in head-spinning body of law
- In with the new…
  - *Boeing*
    - New test for reviewing facially neutral work rules will consider
      - Impact of the rule on Section 7 rights
      - Employer's reason(s) for the rule

Handbooks/rules

- The path to clarity…
  - Category 1 includes rules that the Board will "designate as lawful" because
    - The rule, when reasonably interpreted, does not interfere with employee rights, or
    - The rule's justification outweighs the potential adverse impact
  - Category 2 includes rules that "warrant individual scrutiny"; and
  - Category 3 includes rules that are unlawful.

Handbooks/rules

- So how does this work?
  - Will develop over time
- *Boeing* involved a no-camera rule
  - Lawful Category 1 rule
    - Significant security and other business reasons
- Board gave other examples
  - "Harmonious interactions and relationships"
    - Lawful Category 1
  - "Can't discuss wages with co-worker"
    - Unlawful Category 3
- Don't forget the difference between having the rule and enforcing it

Unit Determination

- Out with the old…
  - *Specialty Healthcare* – "overwhelming community of interest" test
    - Allowed unions to unilaterally set the voting unit
    - Fostered micro units
- In with the new…
  - *PCC Structurals* – restored traditional test

Unit Determination

- Impact
  - Balanced review of proposed units
  - Should diminish opportunity for cherry-picked micro units

- Out with the old…
  - *DuPont* – Even where an employer continues to do exactly what it had done previously, taking the same action constitutes a "change" that must be preceded by notice to the union and an opportunity to bargain, even if the employer's actions were permitted under the terms of a CBA that is no longer in effect
  - In the absence of a CBA, any employer action involving "discretion" requires bargaining

Change, Past Practice, and the Dynamic Status Quo

- In with the new…
  - *Raytheon Network Centric Systems* – unilateral employer actions consistent with past practices are lawful, even when the practice may have developed while a prior CBA was in effect
  - Rejected *DuPont's* holding that any decision involving employer discretion is automatically a change to the status quo.

- Impact
  - Restored stability for employers attempting to maintain the *status quo* following the expiration of a collective bargaining agreement
  - Established past practices become part of the *status quo*
  - Maintaining the *status quo* includes the continuation of such practices

Joint Employer Test

- Out with the old…
  - *Browning-Ferris* – two entities would be deemed joint employers based on the mere existence of:
    - reserved joint control
    - indirect control, or
    - control that is limited and routine

Joint Employer Test

- In with the new…
  - *Hy-Brand* – return to standard of requiring proof of the actual exercise of control over essential terms of employment rather than merely "reserving" the right to exercise control
    - control must be "direct and immediate" (rather than indirect)
    - joint-employer status will not result from control that is "limited and routine"

Joint Employer Test

- Impact
  - More concrete and defined joint-employer test
    - Focuses on whether an alleged joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction"

Enforcement Developments

- The NLRB GC's agenda
  - Outlined in a 12/1/17 memo
  - Looking for:
    - "cases over the last eight years that overruled precedent and involved one or more dissents"
    - "cases where complaint issuance is appropriate under current Board law, but where we might want to provide the Board with an alternative analysis"

Enforcement Developments

- In the cross hairs…
  - Protected concerted activity
    - Only one employee with skin in the game
    - Vulgar, obscene behavior
  - Employee use of/access to employer property
    - E-mail
    - Picketing on property
  - Dues checkoff, “discipline” bargaining,” wage increases during first-time negotiations

Enforcement Developments

- Into the recycling bin…
  - Prior GC guidance or initiatives that would have tilted the playing field, e.g.,
    - Extend *Purple Communications*
    - Extend *Weingarten* to non-union settings
    - Expanded rights for university faculty and students
  - Default language in settlement agreements

Enforcement Developments

- What does all this mean for employers?
  - Fewer complaints against employers (maybe)
  - A more balanced consideration of all parties' interests
  - If you're dealing with an unfair labor practice charge, you have expanded opportunities to defend, settle, and shape a settlement agreement

The Quickie Election Rule

- New election rules went into effect April 14, 2015
- Significantly shortened the time period between the filing of a union representation petition and an election
- Also placed additional burdens on employers

The Quickie Election Rule

- On December 14, 2017, the NLRB published a Request for Information asking for input on the new rules. Specifically:
  - Should the 2014 Election Rule be retained without change?
  - Should the 2014 Election Rule be retained with modifications? If so, what should be modified?
  - Should the 2014 Election Rule be rescinded? If so, should the Board revert to the Representation Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the Board make changes to the prior Representation Election Regulations? If the Board should make changes to the prior Representation Election Regulations, what should be changed?

What's next for organized labor?

- More difficult for unions to use rules/policies as a weapon against employers
- More difficult to shape voting/bargaining unit
- Expect a more level playing field in negotiations
  - But, expect unions to bargain hard for members' share of tax cut money
  - Also need to analyze union bargaining strength in a tight job market (upward wage pressure?)

What's next for organized labor?

- Anticipate that a new, more employer-friendly Board Member will be appointed
- In FY17, number of representation petitions dropped dramatically
  - From 2029 in FY16 to 1854 in FY17*
  - Can expect that trend to continue especially if election rules change
- Challenging period for unions
  - Membership down (6.4% in private sector*)
  - Right to Work?
- Fight for $15
- Avoid the NLRB – if cases do not go in front of the Board, it cannot overturn current precedent

*https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc

*https://www.bls.gov/news.release/union2.nr0.htm

Thank you for joining us today