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COZEN O'CONNOR

Activist NLRB Created More Problems For All Employers in 2016 — What Happens Under President Trump?

During 2016, the National Labor Relations Board (NLRB or the Board) maintained its generally pro-union, anti-employer stance in ways that affect both unionized and non-unionized employers. The Board currently sits with three members, which gives the newly elected president the ability to nominate two new members and shift the Board majority from Democratic to Republican. However, due to the Board's structure, employers might not see immediate improvement under a reconstituted Board, although major changes should be seen in the long-term. Thus, even given the ideological "sea change" that could flow from the presidential election, employers in 2017 will be forced to grapple with the Board's 2016 activity in the following key areas until the opportunity for reconsideration is presented.

Organizing Efforts Are Eased Through Joint Employer Relationships

Perhaps the most important 2016 NLRB decision is *Miller & Anderson, Inc.*, 364 NLRB No. 39 (July 11, 2016).This decision amplified last year's *Browning Ferris* ruling, expanding the ability of "joint employees," such as those provided to a user-employer by a staffing company, to organize. *Miller & Anderson* reversed years of precedent by holding that the Board would no longer require the consent of both the user-employer and provider-employer to combine workers in a single unit for a union election. Rather, solely and jointly employed employees can band together in the same unit without consent from either the user-employer or the provider-employer, if the "community of interest" standard is met. In a combined unit, the user-employer is required to bargain over all terms and conditions of employment for all employees it solely employs and for jointly employed employees that it possesses the power to control. This simplifies the task of organizing joint employees.

In light of this decision, we expect a spate of organizing occurring within the staffing industry, and this organizing will flow over into those companies using supplied employees. Our advice to staffing companies is to step up their employee satisfaction and union avoidance programs — right now. User-employers may need to completely reassess their staffed employee business models. At a minimum, user-employers need to evaluate both their own and their staffing companies' vulnerability to union organizing. And in all cases, employers in this situation should be looking at scenarios, including worst-case scenarios, in the event of organizing.

Access to Employer Premises is Increasing

The Board has been expanding access to employer premises. In *Capital Medical Center*, 364 NLRB No. 69 (August 12, 2016), the Board held that preventing off-duty employees from picketing at nonemergency entrances violated the NLRA. Negotiations between this acute care hospital and the UFCW, representing technical employees, had stalled. Several off-duty employees engaged in hand-billing at two hospital entrances, but two employees engaged in picketing at the main entrance. The hospital asked the picketers to leave and then called the police. The Board found the hospital violated the Act by threatening to discipline employees and have them arrested for picketing, and by summoning the police to the hospital.

In reaching its decision, the Board balanced the employees' Section 7 rights against the employer's legitimate business interest in protecting its patients. However, the Board said the hospital failed to show that the prohibition on picketing was necessary to prevent disruption to the patients or the hospital's operations. Other cases have allowed access to employer premises in various conditions, a trend we hope will stop with new NLRB members.

Organizing Rights for Graduate Students are Expanding

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Another 2016 Board decision reversed precedent and expanded organizing rights for graduate students. In *Columbia University*, 364 NLRB No. 90 (August 29, 2016), the Board held that research and teaching assistants at private colleges and universities are "employees," and may be unionized, despite their "student" status. (Public universities are not impacted by the *Columbia University* decision because they are covered by state labor laws rather than the NLRA.)

Central to the Board's decision was simply "the existence of an employment relationship," regardless of whether "some other relationship between the employee and the employer is the primary one." Put directly, the Board held that it was reversing *Brown University* because that decision "deprived an entire category of workers of the protections of the Act without a convincing justification." The Columbia students voted in favor of unionization on December 8, 2016.

This decision dovetails with a strong campaign by unions to organize adjunct and other non-tenured professors in higher education, as permitted by other recent NLRB decisions. This trend indicates that many colleges and universities, but especially those where such faculty have organized recently, will be vulnerable to union organizing efforts aimed at student teaching and graduate research assistants in 2017.

Management Rights Clauses are Under Fire

Employers also face new hurdles with respect to discipline rules and other policy changes. In *Graymont PA*, 364 NLRB No. 37 (June 29, 2016), the Board held that the employer violated the Act by denying the union the opportunity to bargain before unilaterally changing its work rules, absenteeism policy, and progressive discipline policy, notwithstanding a management rights clause in the collective bargaining agreement. The management rights clause stated that the employer "[R]etains the sole and exclusive rights to manage; to direct its employees; … to evaluate performance, … to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies and procedures; [and] to set and establish standards of performance for employees … ."

However, the Board held that the language in the clause did not support the conclusion that the union "clearly and unmistakably" waived its right to bargain over the policies as the language did not specifically mention the policies that would be controlled by the provision, and there was no indication that the parties discussed the subjects in question during negotiations. Thus, the employer had a duty to bargain with the union before changing the policies. This decision grossly undermines the effectiveness of employer management rights clauses, which are often the subject of bitter negotiation. Similarly, in *E.I. du Pont de Nemours*, 364 NLRB No. 113 (August 26, 2016), the Board held that discretionary unilateral changes made pursuant to a past practice under an expired management rights clause were unlawful, and noted that an employer may unilaterally act under an established past practice only if the changes are not made in the exercise of managerial discretion.

These decisions are a harsh reminder to employers to carefully consider the management rights clause in any operative collective bargaining agreement before implementing unilateral changes. Additionally, employers at the bargaining table in 2017 should reconsider the wording of a management rights clause to maximize their authority to act unilaterally in the future. At least for now, the Board has eroded the discretion that employers historically had under their management rights clauses.

Employers Continue to be "Ambushed"

During 2016, the Board continued to gain experience with its new "ambush" election rules. The time from the filing of an election petition to the actual election is averaging 23 days, which gives an employer little time to make the case against unionization to employees who may have been proselytized by a union for months before a petition is filed. Because of this short time limit, some employers have adopted a "continuous campaign mode" of communicating frequently with employees about unions and workplace concerns. At a minimum, employers should prepare advance plans for their union campaign and campaigners well in advance of any possible petition.

So far, the good news is that unions are not winning a significantly larger percentage of elections under the new rules. However, unions are winning more than 60 percent of the elections they seek,

which demonstrates the need for vigilance.

Handbook Policies Are Under the Board's Microscope

All employers, regardless of union status, should remain (or become) aware of the general counsel's position that many handbooks and other employer policies may be unlawful. In March 2015, the Board's general counsel issued guidance on lawful employer policies in GC Memorandum 15-04.This guidance applies to union and non-union employers alike. The guidance reviews recent Board decisions and provides the general counsel's own interpretations of acceptable and unacceptable employer policies.

The guidance gives examples of bad and good language for policies on keeping employer information confidential (broad policies are deemed unlawful, because employees must be allowed to discuss wages and other issues of mutual interest), professionalism, media contact (employees have the right to talk to the media on their own behalf or on behalf of others), use of company logos (employees are allowed to use logos and marks for their own, non-commercial purposes), conflicts of interest, and, quite controversially, recording and photography at work, which the General Counsel says must be permitted on non-work time when employees are engaged in protected activity. Changes here cannot be expected for some time, as many of these theories are now supported by recent NLRB decisions.

For example, in *Blommer Chocolate Co. of California, LLC*, 32-RC-131048 (February 17, 2016), the Board directed a second election on the grounds that the employer maintained overly broad work rules that interfered with the initial election. The assault on employer governance continued in *Chipotle Mexican Grill*, 364 NLRB No. 72 (August 18, 2016), in which the majority held that the employer violated Section 8(a)(1) by prohibiting employees from posting certain social media statements, soliciting during nonworking times if the activity occurred in close proximity to customers, limiting the use of the employer's name, discussing politics, and maintain certain rules regarding "ethical" communications. As noted above, employers in 2017 should closely review their written policies and procedures to the extent they have not recently done so because the Board has made it clear the lengths it is willing to go to enforce the Act as it relates to employer handbook policies.

Employees' Right to Use Company Email is Emphasized

In *T-Mobile USA, Inc.*, 363 N.L.R.B No. 171 (April 29, 2016), the Board found that an employer rule prohibiting "non-approved individuals' access to information or information resources, or any information transmitted by, received from, printed from, or stored in these resources" without prior written approval was unlawful under the rule established in *Purple Communications* because it would prevent employees from sharing, with their union representatives or their coworkers, information relating to work conditions stored on the information systems. The Board also struck down bans on employees using information or communication resources in ways that were "disruptive, offensive, or harmful" or to "advocate, disparage, or solicit for political causes or non-company related outside organizations." The Board found that these prohibitions were overbroad and could reasonably be understood to include protected Section 7 activity.

In 2017, employers should audit all written policies and procedures in light of this and other recent decisions centering on language the Board finds to impose impermissible restrictions on employee use and access to email and information systems.

Unions Gain Easier Access to Witness Statements

In *Piedmont Gardens*, 364 NLRB No. 95 (Aug. 24, 2016), the Board declared that witness statements obtained from employees subject to a promise of confidentiality are not "fundamentally different" from other types of information and that there should not be a "blanket exemption" precluding union access. In other words, the Board made it much easier for unions to demand investigation materials from employers.

Unless and until the Board reverses course on this point, witness statements must be turned over unless the employer can show that particular circumstances exist that make disclosure inappropriate. A "legitimate and substantial confidentiality interest" must exist for an employer to withhold such a statement — it appears interests such as threats of violence or retaliation, a

pending investigation, or the implication of trade secrets or other protected confidential business information would be sufficient grounds for doing so.

What Employers Can Expect in 2017 and Beyond

With the election of Donald Trump, employers are asking what changes are likely at the Board. For the present, there is a 2 to 1 Democratic majority of members. A former union lawyer is the general counsel and has the power to decide which unfair labor practice cases are litigated. Although there is a tradition that the Board should not decide major cases when not at full-strength, it is possible that the current majority will ignore the tradition and continue to issue far-reaching decisions. In fact, a series of such decisions were issued in August 2016, during the month that a Democratic member's Board term expired.

Changes at the Board depend upon how quickly the new president can nominate Republican members and have them confirmed by the Senate. Even then, it will take time to overturn precedents the current Board set, as the members do not choose the decisions that come before the Board. History suggests that it will take most or all of the next four years before a significant number of precedents are reversed. However, employers are well-advised, if charged with unfair labor practices, to argue for reversals of recent anti-employer precedents. This tactic was used successfully by unions to effect change at the Obama Labor Board, and similar appeals may receive a receptive hearing once a Trump Labor Board is in place.

With respect to rules, such as the "ambush" election rules, despite the president-elect's comments on reducing federal regulations, rule changes do not come easily. Rather, a notice-and-comment procedure, followed by potential legal challenges, must be used to eliminate regulations adopted through the same process.

The president can, however, rescind executive orders and policy statements. This may result in changes to some regulations at the Department of Labor, such as the "blacklisting" rules (requiring reporting by government contractors of federal labor "violations") under the Fair Pay and Safe Workplaces Executive Order of President Obama. In addition, a new administration may change the government's legal position on contested matters. As examples, most of the blacklisting rules, the DOL's "persuader" rules (requiring reporting by lawyers and consultants working on organizing and other employee issues with employers), and the new Fair Labor Standards Act rules (raising the salary level for exempt employees), have all been enjoined by federal courts. The Trump administration may decide not to appeal or to drop any appeals of those orders, effectively killing these rules.

In conclusion, we expect changes at the NLRB once a new Republican majority and general counsel take control. These changes will not be immediate, but given the length of the NLRB proceedings, employers may be able to adopt a more aggressive approach now on unfair labor practices and other matters, in the expectation that the cases ultimately will be reviewed by a Board with a changed majority membership.