

National Labor Relations Board Update

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Current State Of Unions

- In 2020, the union membership rate of public-sector workers was 38.4% and 6.3% in the private sector
 - The number of wage and salary workers belonging to unions declined 2.2% from 2019
- The NLRB oversaw 26% fewer elections in the first half of 2020 than it did in the same period in 2019
 - The unions' success rate in these elections fell from 76.6% of representation elections in 2019 to 72.9% in 2020

Bureau of Labor Statistics, U.S. Dep't of Labor, *News Release: Union Members—2020*, <https://www.bls.gov/news.release/pdf/union2.pdf> (Jan. 22, 2021)

Bloomberg Law, *Analysis: NLRB Stats Show Union Elections Still in Slowdown Mode*, <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-nlr-stats-show-union-elections-still-in-slowdown-mode> (Aug. 17, 2020)

Recent Board Decisions: Employee Outbursts

General Motors LLC

- A union committeeperson was suspended multiple times for disrespectful, insubordinate, and profane actions directed at managers
 - Given the target of such comments, the administrative law judge concluded that some statements were protected by the NLRA
- The Board determined that the various existing frameworks by which such statements are analyzed was unworkable and concluded that the often-used *Wright Line* test should be used going forward

Recent Board Decisions: Employee Outbursts

General Motors LLC (cont'd)

- Under the *Wright Line* test, an employer is liable for an unfair labor practice only if
 - the employee engaged in Section 7 activity;
 - the employer knew of that activity; and
 - the employee's Section 7 activity caused the discipline
- Applies to both union and non-union employees

Recent Board Decisions: Employee Handbooks

G&E Real Estate Management Services

- Responsive action
 - Consequences if an allegation of harassment, discrimination, or retaliation was found to be frivolous
- Outside employment and business activities
 - Prohibited outside employment that might present a conflict of interest without written approval
- Reference inquiries and requests for employee information
 - Required reference requests to be directed to HR and prohibited the release of information about an employee other than in writing
- Company property
 - Mandated that company property be used only for business purposes and for the company's benefit

Recent Board Decisions: Employee Handbooks

G&E Real Estate Management Services (cont'd)

- Social media
 - Restricted speaking on behalf of the company and included guidelines regarding social media posts generally
- Outside speaking and writing activities
 - Required permission to participate in company- or industry-related publications, speaking engagements, seminars, etc.
- Confidentiality footnote
 - The handbook included a footer, “Confidential—For Internal Use Only”
- The Board held that all policies were lawful, but the confidentiality footer was not
 - The key in analyzing whether such policies are lawful is how a “reasonable employee would interpret” a policy, not how employees “could reasonably read” it

Recent Board Decisions: Anti-Union Tweets

FDRLST Media

- Ben Domenech, The Federalist’s publisher, tweeted the following from his personal Twitter account: “FYI@fdrlst first one of you tries to unionize I swear I’ll send you back to the salt mine”
 - This occurred shortly after union employees at Vox organized a walkout
- Board agreed with the administrative law judge’s findings that the tweet violated the NLRA
 - It was directed at The Federalist employees
 - It served no purpose other than to threaten them, particularly considering the timing

Recent Board Decisions: Confidentiality Rules Regarding Investigations *Apogee Retail*

- The policy at issue required employees to “maintain confidentiality” with respect to investigations of alleged “illegal or unethical behaviors” and to refrain from having “unauthorized discussions” of the same “with other team members”
- The Board determined that the standard in *The Boeing Company* was the appropriate test by which to evaluate facially neutral confidentiality policies
 - If the confidentiality requirement applies only for the duration of the investigation, the policy is presumptively lawful
 - If, however, it not expressly limited to pending investigations, a case-by-case analysis is performed to determine whether the potential adverse impact on employee rights under Section 7 are outweighed by legitimate business justifications

Recent Board Activity: Scabby the Rat

- In a case involving picketing a neutral employer's jobsite, the administrative law judge found that the union's "scabby the rat" display did not violate the NLRA
- In late October, the Board invited parties both within and outside of the case to file briefs to opine on a few questions, including:
 - How should the Board should treat existing precedent in this area?
 - If the party is advocating for a different standard, what should the standard be?
- The future of this case is uncertain, however, given the change in administration

The Biden Administration: The NLRB

- Current Board composition:
 - 3 Republican appointees
 - 1 Democrat appointee
 - 1 vacant seat
- President Biden will likely appoint someone to fill the vacant seat
 - Republican appointees would still retain a 3-2 majority until August

The Biden Administration: General Counsel

- The General Counsel is responsible for enforcing the NLRA and shaping the policy direction of the Board
- Peter Robb, who assumed the role of General Counsel in 2017, was serving a term that was set to expire in November 2021
 - He was terminated on Inauguration Day
 - First General Counsel to be terminated upon change of administration
 - Robb's chief deputy was terminated the following day
- On January 25, Peter Sung Ohr was named acting General Counsel
 - Ohr was previously the regional director of the Board's Chicago office

Rescinded 2020 Guidance from General Counsel: Changes to Investigative Practices

- Investigators were to notify employers prior to communicating with former supervisors or other decision-makers and to allow the employer to be present for substantive communications with these individuals
- There was additional guidance regarding the Regions' gathering and use of audio and video recordings that may contain relevant evidence
- Despite the rescission, Regions still should not obtain recordings that violate the Federal Wiretap Act and apprise individuals who submit recorded evidence that may violate state law

Rescinded 2020 Guidance from General Counsel: Employer Assistance in Union Organizing

- Board precedent had evolved such that there is a different standard for employer involvement in an organizing drive and one for its involvement in a decertification campaign
 - “Totality of the circumstances” versus “more than ministerial aid”
- The former General Counsel advised that the Board should
 - apply the “more than ministerial aid” standard in both contexts and in analyzing certain provisions of neutrality agreements
 - adopt a simple bright-line test with respect to pre-recognition agreements
- The acting General Counsel’s rescission of this memo is another signal of the change in direction under the Biden Administration

Board Decisions in Jeopardy: Employee Handbooks

- In 2017, the Board issued its decision in *The Boeing Company*, overruling its 2004 *Lutheran Heritage Village-Livonia* decision
 - Under the *Lutheran Heritage Village* analysis, facially neutral policies could violate the NLRA under a three-prong test
- *The Boeing Company* Board concluded that the “would reasonably construe” standard, as applied, had become impractical
 - Instead, the Board used a two-factor test and defined three categories of handbook rules
 - The Board will analyze (1) the potential impact on employees’ rights under the NLRA, and (2) the legitimate business justifications of that rule

Board Decisions in Jeopardy: Employee Handbooks (cont'd)

- The former General Counsel provided additional guidance in a subsequent memorandum
 - The memorandum has already been rescinded by the acting General Counsel,
 - But the Board's decisions following *The Boeing Company*, including those interpreting that memorandum, still stand
- Under the Biden Administration, the Board may move back to the standards set forth in *Lutheran Heritage Village*

Board Decisions in Jeopardy: Use of E-mail and IT Resources

- Board decisions regarding employees' right to use employer-owned or -provided equipment and network capabilities has flip-flopped during the past few presidential administrations
 - *Register Guard* (2007)
 - *Purple Communications* (2014)
 - If employees are provided access to an employer's e-mail system, the employer cannot prohibit them from using it for communications protected by Section 7
 - *Caesars Entertainment* (2019)
 - Employees generally do not have a statutory right to use their employer's property for non-work purposes
- *Caesars Entertainment* is the current governing precedent, but the Board will likely return to *Purple Communications* during the Biden Administration

Board Decisions in Jeopardy: Appropriate Bargaining Unit

- During the Obama Administration, the Board issued a decision that authorized the recognition of “micro-units” in the organizing process
- The Board’s 2017 decision in *PCC Structural*s overturned the use of these bargaining units and signaled the returned of the “community-of-interest” standard when determining the appropriate bargaining unit
- The Biden Administration’s campaign website suggests that a return to the micro-unit is part of the President’s agenda

Other Notable Potential Labor Changes

- President Biden has expressed support for a number of other changes to existing labor law and policy, including
 - Creating a cabinet-level working group to “deliver a plan to dramatically increase union density”
 - Expanding the scope of individuals covered by the NLRA, which would increase the number of workers granted the right to organize and bargain collectively
 - Effectively eliminating state right-to-work laws by permitting fair share agreements
- Some of these changes are included in the PRO Act, which will be discussed in greater detail in the presentation at 10:30 this morning

Questions?

Thank You!

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