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Board Administration Undergoes Another Year of Intriguing Challenges

National Labor Relations Board spends Most of 2015 With a Full Complement of Members; Down to Four at Year's End.

For about two-thirds of the year, the National Labor Relations Board operated with a full complement of five Members. Incoming Board Member Lauren McFerran, a Democrat appointee, replaced Member Nancy Schiffer, also a Democrat, whose term expired in mid-December 2014.

McFerran previously served as labor counsel to both Senator Tom Harkin (D-IA) and the late Senator Edward "Ted" Kennedy (D-MA). While she noted during her confirmation hearing in November 2014 that she would keep a "very open mind" regarding labor issues, she and the Board continued the aggressive pursuit of a pro-Labor, policy-driven agenda. The Board's pursuit of that agenda is checked now by just one minority party Member, Republican Philip Miscimarra, as fellow Republican Member Harry Johnson's term ended in August 2015.

Democrat Member Kent Hirozawa's term expires next in August 2016, which will reduce the Board to the minimum needed to have a quorum. Throughout the Fall of 2015, there were rumors that the Administration and Congress were discussing a mutually agreeable way to keep the Board at full strength in 2016. However, given the political environment as the 2016 Presidential campaign season swings into high gear, it may not be realistic to expect the Republican Congress to agree to fill any Board seats in the coming year – particularly with so much uncertainty about the next occupant of the White House.

DC Circuit Invalidates Most of Lafe Solomon's Tenure as Acting General Counsel

Lafe Solomon served as Acting General Counsel of the Board from June 21, 2010, until November 4, 2013. During that time, Solomon drove some of the Board's more aggressive and notorious initiatives, including the agency's baseless complaint against The Boeing Corporation; its forceful expansion of legal protection of employee social media use; and its bold extension of financial remedies at its disposal. Yet, according to the U.S. Court of Appeals for the District of Columbia, Solomon improperly served as the Acting General Counsel for all but six months of his tenure.

In June 2010 Ronald Meisburg resigned as NLRB General Counsel. The President directed

Solomon, then-Director of the NLRB's Office of Representation Appeals, to serve as the Acting General Counsel, citing the Federal Vacancies Reform Act of 1998 ("FVRA") as authority. Six months later the President sent a nomination to the Senate – which the Senate returned – but Solomon continued to "act" in the position.

On August 7, 2015, the U.S. Court of Appeals for the District of Columbia held in *SW General, Inc. v. NLRB*, --- F.3d. ---, No. 14-1107 (D.C. Cir., Aug. 7, 2015), that Mr. Solomon served in violation of the FVRA from January 5, 2011, to November 4, 2013. According to the Court, because the President sent the nomination to the Senate, the FVRA prohibited Lafe from serving as Acting General Counsel from that date forward. Finding Solomon's FVRA appointment invalid, the Court evaluated whether the FVRA violation was harmless under the Administrative Procedures Act (APA) or whether Solomon's action was ultimately ratified by the NLRB. The Board argued that the type of ULP at issue in the particular case before the Court was a garden-variety 8(a)(5) case – not "of substantial legal interest" to Solomon – and therefore, did not really require special review by the General Counsel's Office prior to issuance of its complaint. The Court, however, accepted the employer's argument that a properly appointed General Counsel might have "imposed different requirements and procedures," and that it was not a given that the complaint would have issued with a different general counsel. The Court, therefore, concluded that the Board's order did not ratify or otherwise render harmless the FVRA defect.

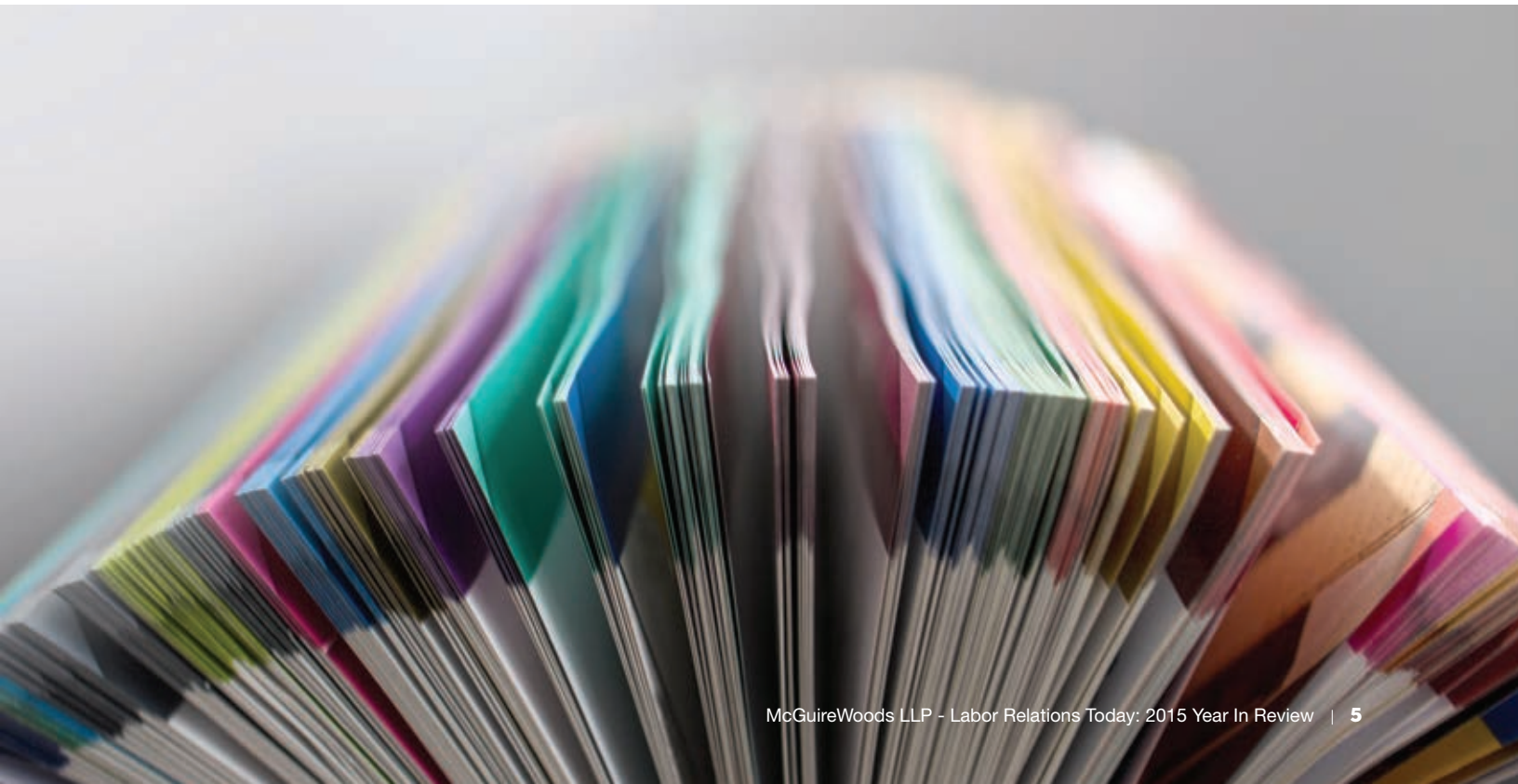
Although the D.C. Circuit invalidated most of Solomon's tenure as Acting General Counsel, the Court also warned that it did not expect its decision "to retroactively undermine a host of NLRB decisions," indicating that employers who timely failed to raise a FVRA objection would likely not "enjoy the same success."

Efforts Continue to Revamp Board Representation Procedures to Facilitate Union Organizing

NLRB Implements Its Expedited Election Rules, Effective April 2015

In April the Board's re-issued overhaul of its election rules took effect, making sweeping changes to representation election procedures in order to expedite the process and facilitate union organizing. In every instance, the changes made it more difficult for employers to communicate with their employees regarding their choice in voting for or against unionization. The final rule specifically made the following significant changes, among others:

- eliminated the 25-day period between the date an election is ordered and the date the election is held, directing elections to be held "as soon as practical."
- permits electronic filing of election petitions and case documents, and delivery of notices and documents.
- requires the filing of a Statement of Position by the employer, by noon of the day before a pre-election hearing, detailing any challenges the employer has to the proposed unit.
- requires any such challenges to be accompanied by an alphabetized list of the full names, work locations, shifts and job classifications of all individuals in the proposed unit.
- requires a pre-election hearing to begin within eight days after a hearing notice is served.
- discontinued pre-election right to request review of the NLRB regional director's voter eligibility and inclusion determinations.
- discontinued parties' right to file a brief within seven days of the closing of the pre-election hearing.
- requires employer to provide to the union, within two days of the approval of an election agreement or direction of election, a list of the bargaining unit employees' addresses, home and cellular phone numbers and personal email addresses.



Litigation Challenging the Board's Rules Initially Unsuccessful; Now Pending on Appeal

Due to these drastic and unnecessary changes to the representation election process, and their attendant negative impact, groups filed two federal lawsuits challenging the rules. The U.S. Chamber of Commerce filed in the U.S. District Court for the District of Columbia (*U.S. Chamber of Commerce, et al. v. NLRB*, Case No. 1:15-cv-00009), joined by the Coalition for a Democratic Workplace, National Association of Manufacturers (NAM), National Retail Federation (NRF), and Society for Human Resource Management (SHRM). Soon after, the National Federation of Independent Business (NFIB) Texas, Associated Builders and Contractors (ABC) of Texas and the Central Texas Chapter of ABC, filed in the U.S. District Court for the Western District of Texas (*Associated Builders and Contractors of Texas, Inc., et al. v. NLRB*, Case No. 1:15-cv-00026).

The lawsuits challenged the final rule on the grounds that it violates both the First and Fifth Amendments, contravenes clear congressional requirements, and is arbitrary and capricious. Specifically, the lawsuits asserted that the final rule impermissibly curtails employers' First Amendment free speech rights, which are expressly protected by Section 8(c) of the NLRA, by denying employers a meaningful opportunity to communicate with their employees between the filing of the election petition and the holding of the election. The lawsuits also challenge the final rule as arbitrary and capricious because the Board provided no legitimate basis for the new rule.

In both cases, the district judges granted summary judgment in favor of the NLRB finding that, given the great deference that must be afforded to governmental agencies, the challengers failed to show that the new rule, on its face, violates the law. In the D.C. District Court Case, the judge noted:

> [The challengers'] policy objections may very well be sincere and legitimately based, but in the end, this case comes down to a disagreement with choices made by the agency entrusted by Congress with broad discretion to implement the provisions of the NLRA and to craft appropriate procedures. Given the level of deference that applies . . . , the Court does not find grounds to overturn the Final Rule.

Although no appeal was made to the D.C. District Court's decision, *Associated Builders* is currently on appeal to the Fifth Circuit. Briefing to the Fifth Circuit was completed as of November 9, 2015, including two amicus briefs filed by the National Right to Work Legal Defense Foundation and by the Retail Industry Leaders Association (RILA)'s Litigation Center, Inc.

Congress Weighed In, But Was Unable to Reverse the Board's Course

Congressional partisans also lined up this year to support, and to challenge, the Board's rules. In January 2015, Democrats, who largely support the Board's new election rules, had 16 Senators send a letter to Chairman Mark Gaston Pearce urging him to "vigorously defend" the Board's controversial new procedures. The letter underscored how important Democrats believed the new rules to be:

"Reports indicate this rule will likely be challenged in court by those who oppose workers efforts to unionize. We believe this rule will restore balance and certainty to the union election process and strongly encourage you to vigorously defend this rule in the face of such challenges."

While Democrats believe the rules "level the playing field," Republicans and business groups largely believe the rule unfairly constricts an employer's ability to discuss unionization with their employees and jeopardizes employees' privacy. In March 2015, a month before the effective date of the rules, Senate Republicans helped pass Senate Joint Resolution 8 in a 53-46 party line vote. The House followed the Senate's lead and passed the joint resolution, 232-186. Surprising no one, President Obama vetoed the measure, calling the Board's actions no more than "modest reforms."

Impact of the New Election Procedures

Early analysis of the rules' impact near year's end generally confirmed some – but not all – of the concerns expressed by opponents to the rule. Data indicates that elections have generally taken place about two weeks quicker – with the median number of days from petition to election dropping from 38 days in 2014 to 24 days in 2015. Pre-election hearings – when they are held at all – are also taking place sooner, with the median time to hearing down from 13 days in 2014 to 9 days in 2015.

During the first month under the new procedures, there was a significant uptick in filing activity, as 266 union certification petitions were filed with the NLRB. That was an approximate increase of 24% from the previous five years' average for the same time period. As the year proceeded, however, the activity trailed off a bit, and on an annual basis, the number of petitions filed in 2015 has not been substantially higher than the number filed last year.

Moreover, to date, the union success rate has not increased significantly in these cases. Long term research, however, has consistently shown that the shorter the time from the petition to the election, the more likely it is that the union will prevail in the election. Employers must continue to track impact as the new rules enter their first full year in effect.

Board Issues Guidance on Acceptance of Electronic Authorization Signatures in Support of Petition

Because the new rules allow the Board to accept employee electronic signatures as proof of the "showing of interest" filed with a representation petition, the General Counsel issued guidance in September 2015 on how electronic signatures should be reviewed and confirmed. Under this guidance electronic signatures should be accepted by the Regional Director where the party provides *prima facie* evidence (1) that an employee has electronically signed a document purporting to state the employee's views regarding union representation and (2) that the petitioner has accurately transmitted that document to the Region.

To be valid, electronic signatures must include: the signer's name, email address or social media account, the signer's telephone number, the language to which the signer agrees, the date, and the employer's name. The party submitting the signatures must submit a "declaration" confirming that the electronic signature is that of and by the signatory employee, and the content of the statement which the employee signed. Finally, if digital signature technology is unavailable, the party must submit evidence that all of the required information was confirmed in a return electronic transmission to a personal address provided by the signatory employee.

Employers understandably fear that electronic signatures will be more susceptible to fraud and abuse and more difficult to ascertain than fraudulent handwritten signatures. With the widespread availability of free email and social media accounts, the practices of "catfishing" (i.e., creating phony online personas) or simply opening phony accounts in employee names can be done relatively quickly and at no cost. However, an electronic signature submitted in support of a showing of interest is presumed to be valid. To overcome this presumption, the Board requires "sufficient probative evidence" warranting an investigation of possible fraud.

Near Year's End, Board Regional Offices Pushing the Envelope to Require Employers to Provide Employee Email Addresses and Cell Numbers

As noted above, within two days of the scheduling of an election, the new rules require the employer to provide the petitioning union with an alphabetized list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters. Previously, the law required that within seven days the employer turn over a list of employees with their home addresses only. For decades, this was considered adequate to allow a union to communicate the details of the scheduled representation election and its position in favor of representation to all affected employees.

The October 2015 decision in *Danbury Hospital*, Case No. 01-RC-153086, demonstrates how far the Board may go to ensure unions the maximum amount of employee contact possible. In a June 2015 election, 739 of the 866 eligible voters cast ballots in the election — 346 for the union, 390 against the union, and 3 challenged. Following its loss, the union filed objections blaming the loss, in part, on an eligibility list that did not fully comply with the new rules because it provided telephone numbers for only 94% of the voters and only the personal e-mail addresses contained in the employer's Human Resources

database. The Regional Director ordered a re-run election because the employer did not "substantially comply" with the new eligibility list requirements when it limited its search for contact information to its Human Resources database. The Regional Director noted the employer could have searched numerous other databases potentially used to store employee contact information. Unless and until this rationale is overturned, prudent employers might exercise exceptional additional care to ensure they have turned over any such information in possession of the employer, and any of its subordinate divisions, departments or management representatives.

Senator Bernie Sanders Proposes Revived Card Check Legislation

At a press conference on October 6, 2015, Democratic presidential candidate Senator Bernie Sanders of Vermont announced that he and Rep. Mark Pocan (D-WI) would introduce the "Workplace Democracy Act" (S. 2142, H.R. 3690). This bill would amend the National Labor Relations Act to facilitate union organizing by requiring certification based on "card check" — the presentation of publicly collected employee signatures. The bill would also eliminate freedom of contract by requiring that the terms of a first labor contract be settled by an interest arbitrator after 120 days of negotiations between management and a union.

These provisions were repeatedly introduced and defeated in the legislative battles over the Employee Free Choice Act (EFCA) during the Bush presidency and President Barack Obama's first term. In fact, the text of Senator Sanders' bill reflects the first two of EFCA's three provisions verbatim.

Compare, however, the change in the tone and content of the chief sponsor's rationale. Back in 2007, EFCA sponsor Rep. George Miller (D-CA), a devoted proponent of union organizing, still attempted to frame the issue as one of "fairness" and "opportunity." Senator Sanders' introductory language is far more honest regarding intent. He concluded his introductory remarks:

"If we are serious about reducing income and wealth inequality and rebuilding the middle class, we have got to substantially increase the number of union jobs in this country."

At year's end, there had been no further action on the bill.

The Department of Labor set a target publication date of March 2016 for its new persuader rule

Throughout 2013 and 2014, the Department of Labor (DOL) repeatedly pushed off its target date to finalize rules, initially proposed in July 2011, to impose expansive reporting requirements on employers, their labor relations consultants, and their attorneys. In March 2014, the DOL indefinitely postponed the final rule, expressing that the DOL "intends to take the time to get it right rather than meet arbitrary deadlines." More than a year and half later, in November 2015 the DOL finally set March 2016 for issuance of the rule effectively eliminating the "advice exception" to the so-called "persuader rule" in the Labor-Management Reporting Disclosure Act of 1959 (LMRDA). To that end, on December 7, 2015, the DOL sent the final rule to the Office of Management and Budget for review, one of the final steps before the rule can be published.

The LMRDA currently provides that employers must report to the DOL each time they engage a consultant to persuade employees directly or indirectly regarding employees' rights to organize or bargain collectively (i.e., "persuader activity"). If employers fail to comply with any of the LMRDA's reporting requirements, they could face jail for a year and a $10,000 fine. However, the LMRDA carves out from the reporting requirements an "advice exception," which has consistently been interpreted to exclude an employer's engagement of labor counsel to assist them with organizing campaigns so long as counsel has no direct contact with employees and the employer is free to accept or reject its counsel's recommendations.

If the DOL's final rule tracks the proposed rule it released in June 2011, it will narrow the advice exception significantly. As a result, employers who engage attorneys to assist in organizing campaigns will now have to file publicly available reports with the government detailing all the labor work, regardless of whether it is considered persuader activity or not, that the law firm performs for the employer.

The proposed rule had certainly drawn heavy fire. Critics of the rule claimed that the proposed rule was improper because it effectively wrote the advice exception out of the statute. Moreover, the American Bar Association and the Association of Corporate Counsel asserted that the proposed rule was also inconsistent with the rules of professional conduct pertaining to attorney-client confidentiality. They and others believe that the proposed rule forces attorneys to disclose privileged attorney-client information and that it will discourage employers from seeking legal assistance during union organizing campaigns.

In anticipation of the rule's publication in March 2016, employers should continue to prepare for the expected rule change by evaluating their options for compliance and/or challenging the new rule once it is published.

Browning-Ferris: The Board Rewrites Decades-Old "Joint Employer" Standard, Expanding the Types of Economic Relationships Within Its Reach

On August 27, 2015, the Board issued its long-awaited ruling in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015). In a 3-2 decision, citing the need to revisit the Board's thirty-year-old standard because of expanding "diversity of workplace arrangements in today's economy," the Board overruled decades of precedent and adopted an expansive view of joint employment. Although *Browning-Ferris* involved a routine and commonplace vendor-client relationship, the Board's new standard likely will impact a broad range of arm's length economic relationships.

Under the Board's new joint employer standard, the Board will now find that: "two or more statutory employers are joint employers of the same statutory employees if they share or codetermine those matters governing the essential terms and conditions of employment." Unlike the previous standard, however, the Board will no longer require that an employer actually exercise authority directly and immediately over a third-party's employees to be deemed a joint employer. As the Board explained, "[r]eserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry" and "control exercised indirectly—such as through an intermediary—may establish joint-employer status." In practical terms, under the Board's new standard, joint employer status may be found by virtue of contractual control which is rarely, if ever, exercised. Specifically, in *Browning-Ferris*, the Board found a joint employment relationship by virtue of:

- The client's retained right to require that the vendor's employees meet or exceed its own standard employee selection procedures and tests;
- The client prompting discipline of the vendor's employees on only two occasions;
- The client setting its facility's operating hours and productivity standards;
- A contract clause providing that the vendor would not pay its employees a higher hourly rate than the rate earned by the client's employees performing comparable work; and
- The vendor's supervisors purportedly acting as "middlemen" for instructions that came from the client.

The *Browning-Ferris* decision provides little guidance as to the circumstances under which the Board will find a joint employer relationship. As Member Miscimarra pointed out in his blistering dissent, the Board did not specify which facts it found controlling or determinative in its analysis and instead embraced a "the Board will know it when it *wants* to see it" approach.

While the Board acknowledged that its decision eliminates "certainty and predictability regarding the identity of the 'employer'" in favor of an "evolutionary process," it fails to appreciate the new standard's far-reaching consequences. As highlighted in Member Miscimarra's dissent, the new standard 1) threatens not only traditional vendor-client arrangements but also may bring within the Board's reach franchisor-franchisee and parent-subsidiary relationships; 2) limits companies' ability to replace unionized contracts; 3) exposes more companies to secondary economic coercion (e.g., picketing); and 4) potentially leads to a variety of fractured and unstable bargaining relationships.

Hoping to curtail the impact of the new joint employer standard before it takes root, Congressional Republicans introduced legislation to reverse the decision. On October 28, 2015, the House Committee on Education and the Workforce met to mark up the Protecting Local Businesses Opportunity Act (H.R. 3459)—a bill designed to restore the traditional joint employer standard, which requires actual, direct, and immediate control. The bill advanced out of committee along a 21-15 party-line vote. Like most Republican legislative efforts to take on the NLRB, however, it will face a likely veto by President Obama. Accordingly, employers need to continue to plan for life under *Browning-Ferris*.

Not only does it appear that the new standard is here to stay, the Board looks poised to broaden the impact of *Browning-Ferris*. In December 2014 the Board's General Counsel announced that he will proceed with the issuance of unfair labor practice complaints against a fast food franchisor and a number of its franchisees as joint employers. At the time of the announcement, the General Counsel's position appeared at odds with decades of joint employer precedent. Under the Board's new *Browning-Ferris* standard, however, it is far more likely that the franchisor will be deemed a joint employer. Although the Board did not address what impact, if any, the *Browning-Ferris* decision will have on franchising, given the breadth and rationale of the new joint employer standard, franchisors should be concerned that the Board will find their "indirect control" over franchisees sufficient to establish joint employer status.

Finally, the Board also is posed to decide whether it can impose mixed units of both solely and jointly employed employees. On May 18, 2015, the Board granted review in *Miller & Anderson, Inc.*, Case No. 05-RC-079249, to decide whether to revive *M.B. Sturgis*, 331 NLRB 1298 (2000). Under *Oakwood Care Center*, 343 NLRB 659 (2004), which overturned *M.B. Sturgis*, "combined units of solely and jointly employed employees are multi-employer units and are statutorily permissible only with the parties' consent." If the Board revives *M.B. Sturgis*, however, consent of both employers will no longer be required. Instead, the Board will apply its traditional "community of interest" analysis to determine whether "mixed" units are appropriate. A revival of *M.B. Sturgis*, combined with *Browning-Ferris'* expanded joint employer standard, will further increase the number of economic relationships within the Board's reach. Freed from the requirement of consent, unions will be able to organize workforces comprised of regular and temporary employees more easily. *Miller & Anderson* has been fully briefed as of September 30, 2015, and a decision is expected in the coming months.

While the Board acknowledged that its decision eliminates "certainty and predictability regarding the identity of the 'employer'" in favor of an "evolutionary process," it fails to appreciate the new standard's far-reaching consequences.

"Fair Pay and Safe Workplaces": Administration Imposes Significant New Labor Law Obligations on Federal Contractors

On May 28, 2015, the Obama Administration published proposed amendments to the Federal Acquisition Regulation and related Department of Labor guidance to implement the July 31, 2014 "Fair Pay and Safe Workplaces" Executive Order 13673. The Order and these proposed changes would subject government contractors to a broad new set of record-keeping, reporting and compliance requirements. Failure to fulfill these obligations and exhibit compliance with all applicable federal and state labor laws would expose the contractor to the prospects of disqualification, suspension, or debarment.

Under this proposed regulatory scheme, offerors on contracts or subcontracts estimated to exceed $500,000 must disclose **"any administrative merits determination, arbitral award or decision, or civil judgment"** against the contractor under the following fourteen enumerated federal statutes and Executive Orders (labor law violations), for the three years preceding the contract bid:

- the Fair Labor Standards Act (FLSA);
- the Occupational Safety and Health Act of 1970 (OSHA);
- the Migrant and Seasonal Agricultural Worker Protection Act (MSPA);
- the National Labor Relations Act (NLRA);
- the Davis-Bacon Act;
- the Service Contract Act;
- Executive Order 11246 (Equal Employment Opportunity);
- the Rehabilitation Act of 1973;
- the Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974;
- the Family and Medical Leave Act (FMLA);
- Title VII of the Civil Rights Act of 1964 (Title VII);
- the Americans with Disabilities Act of 1990 (ADA);
- the Age Discrimination in Employment Act of 1967 (ADEA);
- Executive Order 13658 (Minimum Wage for Contractors); and
- any and all "equivalent State laws."

This information will then be considered when making responsibility determinations during the contract award process. More specifically, the proposed regulations also define new categories of labor law violations – i.e., "serious," "repeated," "willful," and "pervasive" violations. These violations may be considered evidence of "a lack of integrity or business ethics" sufficient to disqualify a contractor from consideration for a contract. Covered contractors and subcontractors would also be required to update all this information every six months during the term of a contract. Finally, contractors must obtain all this information from any subcontractor and attest to all subcontractors' fitness under these new standards. The regulations would create a new position – Labor Compliance Advisor – to assist contract officers in the process of evaluating responsibility and in procuring labor compliance agreements from contractors trying to ensure their consideration for contracts.

Finally, the proposed regulations would also require inclusion of contract language under which the contractor declines to obtain or enforce pre-dispute arbitration agreements for Title VII, sexual assault or harassment claims; and, would require covered contractors and subcontractors to provide certain employees with additional wage and hour information every pay period.

Comments were submitted throughout the summer, and finalization of the proposed rules and guidance is expected sometime in the coming year. The proposed regulations and guidance, in conjunction with the Executive Order, would completely transform the risks and costs of doing business with the federal government. If finalized in current form, the regulations and guidance will invite significant challenging litigation. The entirety of the scheme represents a constitutional overreach, with the President exercising significant powers reserved to the legislature. Numerous federal statutes already address the subject matter of the Order, regulations and guidance.

Moreover, the standards set by the proposed regulations are grossly unfair to contractors as they are designed to base contract awards, disqualification and suspension entirely on administrative allegations – before those allegations are fairly and fully adjudicated. Finally, the vast majority of contractors – who abide by the law – will nonetheless be subjected to a vast new array of record-keeping and reporting obligations, as well as increased legal fees to maintain their competitive positions. These increased costs are sure to be passed on to the customer – i.e., the federal government – thereby undermining the express purported purpose of the entire scheme.

The Board Continued To Consider Expanding Scope Of Its Jurisdiction To Cover New Groups Of Workers

NLRB Declines to Assert Jurisdiction Over Northwestern University Football Players

In a much anticipated decision, issued in the closing moments of Member Harry Johnson's term, the Board declined to assert jurisdiction over the unionization effort of scholarship football players at Northwestern University. In *Northwestern University*, 362 NLRB No. 167 (Aug. 17, 2015), a unanimous decision of all five Board Members held:

> …we conclude, without deciding whether the scholarship players are employees under Section 2(3) [of the NLRA], that it would not effectuate the policies of the Act to assert jurisdiction in this case.

In so doing, the Board reversed the March 26, 2014 decision of the Regional Director, and dismissed the petition, thereby rendering moot the sealed results of the balloting held on April 25, 2014.

Much of the Regional Director's decision, and the arguments of the student-athlete organizers and allies, focused on whether or not the day-to-day experience and grant-in-aid "compensation" of the students rendered them more like "employees" within the meaning of the NLRA. The Board's decision, on the other hand, focused on the difficulties in pursuing productive collective-bargaining within the current structure of the Football Bowl Subdivision ("FBS") of the NCAA. The top division of NCAA football incorporates conferences containing a mixture of (few) private and (many) public institutions — the latter over which, the Board

would have a difficult, if not impossible, time of asserting jurisdiction. Injecting itself into such a patchwork of regulatory schemes would complicate, rather than promote stability in labor relations:

> Some states, of course, permit collective bargaining by public employees, but others limit or prohibit such bargaining. At least two states — which between them, operate three universities that are members of the Big Ten [along with Northwestern] — specify by statute that scholarship athletes at state schools are not employees. Under these circumstances, there is an inherent asymmetry of the labor relations regulatory regimes applicable to individual teams. In other contexts, the Board's assertion of jurisdiction helps promote uniformity and stability, but in this case, asserting jurisdiction would not have that effect because the Board cannot regulate most FBS teams. Accordingly, asserting jurisdiction would not promote stability in labor relations.

The ruling by the Board may be expected to have little impact on *Anderson et al. v. NCAA et al,* the collective FLSA action filed by former student-athletes against the National Collegiate Athletic Association and member institutions. That suit alleges that student-athletes were "temporary employees" who must be paid the minimum wage under the Fair Labor Standards Act. Motions were filed over the summer and remain pending. Now that the traditional union organizing route via the Board appears to be a dead end, however, one would expect the College Athletes Players Association (CAPA), student-athletes and their other allies to pursue their goals by forum-selective litigation like this suit.

University Student Assistants Continue Push for "Employee" Status

This year, applying the Board's 2004 precedent in *Brown University*, 342 NLRB 483 (2004), the Regional Director for Region 2 rejected two separate organizing efforts aimed at university graduate assistants -- *Columbia University*, Case No. 02-RC-143012, and *The New School*, Case No. 02-RC-143009. In *Brown*, the Board had concluded that a university's relationship with student teaching and research assistants and proctors was "primarily educational," such that the students were not "employees" under the National Labor Relations Act. On October 21, 2015, however, the Board granted a request for review in *The New School* and followed up similarly by doing the same on December 23, 2015, in *Columbia University*. As such, it is likely that the Board is looking for a case to overturn *Brown University* and to provide collective bargaining rights to university student teaching assistants and others in similar student assistant positions.

Indeed, in connection with its deliberation in the Northwestern University football case outlined above, the Board issued an invitation for amicus briefs expressly asking:

> Insofar as the Board's decision in *Brown University*, 342 NLRB 483 (2004), may be applicable to this case, should the Board adhere to, modify, or overrule the test of employee status applied in that case, and if so, on what basis.

The Board ultimately declined to express an opinion on the continued viability of *Brown University* in the *Northwestern* case. With *The New School* and *Columbia University* now set for review, however, the Board may not be silent on the issue much longer. The Board's description of *The New School* petition as raising "substantial issues warranting review" suggests that the *Brown University* decision likely will be either modified or entirely overruled. If the Board does overrule *Brown University*, it will be

yet another example of the Board's continued effort to expand its reach to thousands of additional workers.

The Board Reversed an ALJ Decision to Hold That Non-Profit Canvassers Are Employees

Further crystalizing the Board's efforts to expand the definition of "employee" under the NLRA, the Board recently reversed an ALJ's decision, holding that canvassers for a non-profit organization were employees, not independent contractors. In *Sisters Camelot,* 363 NLRB No. 13 (Sep. 25, 2015), a canvasser filed a charge alleging that he was terminated for engaging in protected concerted activities during an organizing drive by the Industrial Workers of the World (IWW). The ALJ initially dismissed the complaint, holding that the canvassers – who went door-to-door collecting donations for a non-profit organization without any direct supervision – were independent contractors, not employees.

In reversing the ALJ, the Board applied the 11-factor independent contract test laid out in recent cases, and held that, on balance, ten of the eleven factors favored employee status. Even though the canvassers were not required to report for work on any specific day, were not subject to in-person supervision, were able to work for other organizations, could quit or go inactive for any periods of time, and understood themselves to be independent contractors, the Board concluded overwhelmingly that the canvassers were employees. The Board held:

> Critically, when the canvassers work for the Respondent, they do so at times and locations determined by the Respondent. Their compensation is nonnegotiable and strictly limited by the Respondent's time and location restrictions. Canvassers must generally use the Respondent's tools and instrumentalities, including materials and transportation. They have no proprietary interest in any part of the canvassing operations, including their raps. They must keep accurate and detailed records as part of the Respondent's close scrutiny of their activities. If they do not comply with the Respondent's directives, they may be subject to discipline. Canvassers are also well integrated into the Respondent's organization and identify themselves as part of it. The Respondent provides training, and canvassers need not have any specialized education or prior experience. While the Respondent conducts other fundraising activities beyond neighborhood canvassing, it could not fulfill its charitable mission without the canvassers, who procure most of its operating funds. Finally, there is no evidence showing that the canvassers render services as part of an independent business.

Having reversed the ALJ on the issue of employee status, the Board then affirmed his contingent holding that the employer had violated the Act by its termination of the individual worker.

The Battle Between the Board's Jurisdiction and Indian Country's Sovereignty Wages On

The jurisdiction of the National Labor Relations Board on Tribal lands has been a deeply contentious issue since the Indian Gaming Regulatory Act of 1988 ("IGRA"). 2015 was no different, as there continued to be substantial litigation of the NLRB's jurisdiction over Tribal casinos and proposed legislation seeking to exclude Tribal employers from the National Labor Relations Act's definition of "employer."

Tribes assert that the NLRA only governs relationships between workers and private employers, and because Tribes are sovereign governments, the Act does not apply to them. Indeed, for decades, the Act was generally understood to exclude sovereign tribal government employers, but that changed in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004). In *San Manuel*, the NLRB cast aside claims of tribal sovereignty to assert federal jurisdiction over the tribal government operating the gaming enterprise in that case. For the most part, that trend continued in 2015 as the Little River Band of Ottawa's and the Saginaw Chippewa Indian Tribe of Michigan's jurisdictional challenges were denied

by the Sixth Circuit, and the NLRB asserted jurisdiction over the Pauma Band.

The Sixth Circuit first decided *NLRB v. Little River Band of Ottawa Indians*, 788 F.3d 537 (6th Cir. 2015), upholding the NLRB's assertion of jurisdiction over the tribe in Michigan. Notwithstanding that the tribal government derived approximately half its operating revenue from its gaming enterprise, the Court concluded that the application of the NLRA did not implicate "exclusive rights of self-governance in purely intramural affairs."

A different Sixth Circuit panel decided *Soaring Eagle Casino and Resort v. National Labor Relations Board*, 791 F.3d 648 (6th Cir. 2015), reluctantly dooming the Saginaw Chippewa Indian Tribe to a similar fate. The panel strongly questioned the recent jurisprudence in this area, but felt constrained by the Court's decision just weeks earlier in *Little River Band* to uphold the Board's assertion of jurisdiction:

> [I]f writing on a clean slate, we would conclude that, keeping in mind "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area," *Santa Clara Pueblo*, 436 U.S. at 60, the Tribe has an inherent sovereign right to control the terms of employment with nonmember employees at the Casino, a purely tribal enterprise located on trust land. The NLRA, a statute of general applicability containing no expression of congressional intent regarding tribes, should not apply to the Casino and should not render its no-solicitation policy void.

The Court reserved significant skepticism for one of the issues at the heart of the Board's *San Manuel* holding and the recent *Little River Band* decision—the analytical dichotomy between commercial and more traditional governmental functions of Indian tribes:

> The *Little River* majority characterizes this distinction as one between "core" tribal concerns and those lying on the "periphery" of tribal sovereignty. … We believe this government-commercial or core-periphery distinction distorts the crucial overlap between tribal commercial development and government activity that is at the heart of the federal policy of self-determination. *See Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J., concurring) ("For tribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions."). Indeed, that distinction flies in the face of congressional pronouncements to the contrary in the IGRA.

In two separate NLRB decisions this year, *Casino Pauma*, 362 NLRB No. 52 (March 31, 2015) and *Casino Pauma*, 363 NLRB No. 60 (Dec. 3, 2015), the NLRB asserted jurisdiction over the Pauma Band in California finding no

reason to distinguish those cases from *San Manuel*. In the second case, which involved employee hand billing in guest areas, the tribe also asserted that even if the NLRB had jurisdiction, Indian casinos should be allowed to protect their "economic interests" by barring unions, their agents, members or sympathizers from engaging in conduct that is otherwise protected at private employers. The NLRB rejected that argument, finding that tribal employees have the same rights as other employees to be present on their employer's property during their non-work time.

However, one tribe did score a victory this year in *Chickasaw Nation*, 362 NLRB No. 109 (June 4, 2015). There, the NLRB declined to assert jurisdiction over a tribal gaming enterprise operated by the Chickasaw Nation in Oklahoma. The NLRB concluded, contrary to earlier deliberations, that assertion of jurisdiction over this tribe would abrogate a specific and unique treaty right, and thus it was prevented from asserting jurisdiction over the tribal gaming enterprise.

Meanwhile, members of Congress sought to limit the NLRB's jurisdiction over Tribal employers by introducing the "The Tribal Labor Sovereignty Act of 2015" in both the House and Senate (H.R. 511 and S.248). The bill would amend the Act to expressly exclude Tribal employers from the Act's definition of "employer." On June 16, 2015, the House Committee on Education and the Workforce held a hearing during which the witnesses supporting the legislation argued that this is simply a matter of parity – there being no reason to exclude federal and state government employers, while subjecting Tribal government employers to the Act. Richard Guest, Senior Staff Attorney for the Native American Rights Fund (NARF) testified:

> … it is time for Congress to provide parity for tribal governments under the NLRA. In this context, parity encompasses the quality of being treated equally under the law alongside Federal, State and Local governments.

The bill passed the House in November, while the Senate bill was voted favorably out of the Committee on Indian Affairs, but is still awaiting a vote by the full Senate.

Unions Continued To Pursue Alternative Organizing Strategies

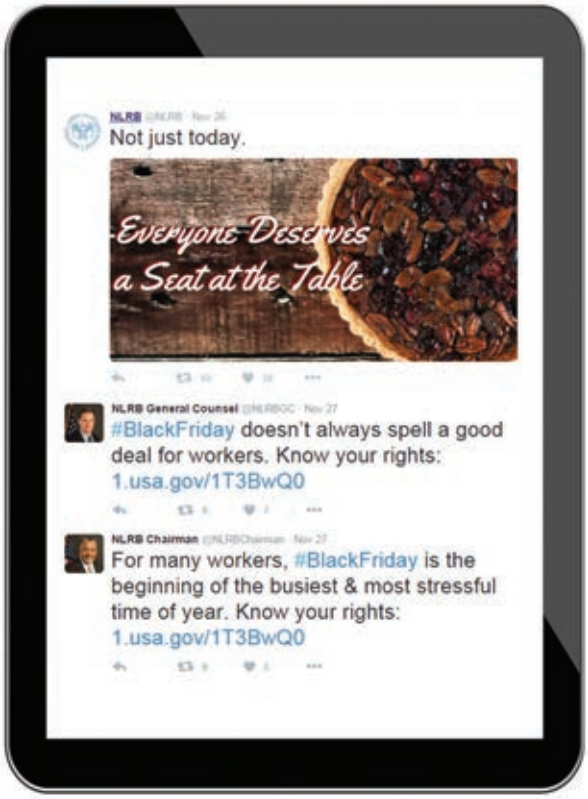
The Fight for Fifteen and Black Friday Protests Continue

The Fight for Fifteen began just over three years ago in a New York City campaign when several hundred fast food employees took to the streets to raise awareness of what they believed to be substandard wages. The campaign has since spread to other workers, and seeks a $15 per hour minimum wage for employees working at low-skill jobs including convenience store workers, airport employees, and gas station attendants. During the past three years, fast-food and retail workers have staged rallies and one-day strikes in an effort to bring attention to their cause.

The campaign has had some success, as Seattle and San Francisco adopted a $15 per hour minimum wage last year, and Chicago approved a $13 minimum wage. In 2015 others joined in, with Los Angeles approving an increase in its minimum wage to $15, and a panel appointed by New York Governor Andrew Cuomo recommended that the minimum wage be raised for employees of fast-food chain restaurants to $15 an hour over the next few years. Kansas City followed in Chicago's footsteps in approving a $13 minimum wage.

The Service Employees International Union (SEIU) is backing the movement financially, and has even established a "strike fund" from which it can pay workers who otherwise could not afford to take a day off to protest. According to some reports, the SEIU has spent more than $30 million on the campaign with an apparent eye towards organizing fast-food and other low-skill workers. To that end, the SEIU is exerting pressure on franchisors from multiple angles such as calling for government investigations and encouraging lawsuits. While union officials and members have questioned the amount the SEIU is spending on this campaign, the SEIU's president has repeatedly defended the SEIU's financial backing, stating that the movement has turned low-wage work into a national issue and has improved the working conditions and pay of union members earning less than $15 an hour such as home-care aides, janitors, nursing-home workers, and security guards.

A similar movement targeting big box retailers is being led by the United Food and Commercial Workers (UFCW) and is most known for its annual Black Friday protests. The UFCW's goals are similar to those of the Fight for Fifteen campaign: $15 an hour minimum pay; full-time, consistent hours; no more unfair disciplines and terminations; and improved racial justice and women's rights. Interestingly, but not surprisingly, the NLRB took to Twitter on Thanksgiving and Black Friday to offer its apparent support of the movement:



The UAW's Southern Strategy Gains a Foothold

The United Auto Workers (UAW) has developed a "Southern Strategy" in an aggressive effort to unionize foreign automakers in the Sunbelt. For better or for worse, the UAW's efforts to organize Volkswagen's Chattanooga facility has become the poster child of that strategy, and thus employers and unions alike are paying close attention to the developments in Chattanooga.

In February 2014 the UAW suffered a highly-publicized defeat at Volkswagen's Chattanooga, Tennessee plant despite running unopposed by the employer. The union filed objections, but ultimately withdrew them. In November 2014 Volkswagen released a new labor policy providing labor groups with differing levels of access depending on the number of Volkswagen workers in their ranks. For example, the greater the number of workers in a given labor group, the more likely that group will be able to meet and confer with management officials. At that time, a Volkswagen official explained that:

> "We recognize and accept that many of our employees are interested in external representation, and we are putting this policy in place so that a constructive dialogue is possible and available for everyone," said Sebastian Patta, executive vice president for human resources at Volkswagen Chattanooga. "Volkswagen has a long tradition of positive employee engagement at our plants around the world, and we welcome this in our company."

Just one month after Volkswagen announced its new labor policy, the UAW claimed that it had reached the "highest level" of recognition entitling it to meet bi-weekly with Volkswagen officials on campus. Then, in April 2015, the UAW claimed to have majority support at the Volkswagen plant, and sought to implement a German-style works council at the factory. According to reports, the parties had laid the groundwork for a group made up of both management and bargaining-unit employees to meet and discuss wages, hours, and terms and conditions of employment in the spirit of a German-style works council. Interestingly, however, the UAW did not file papers to hold a union election or ask for a card check. Meanwhile, Volkswagen stated that it would continue to work with the American Council of Employees (ACE), a rival union that is also seeking to organize Volkswagen's employees. ACE has previously referred to Volkswagen's labor policy as "unfair" and has warned the company not to dole out improper benefits to the UAW.

Months went by without any significant developments. That changed in October 2015, however, when the UAW filed a petition seeking to represent 162 maintenance employees at the Chattanooga facility. Volkswagen challenged the petition on the ground that the petition to represent just the maintenance employees was not consistent with its "'one team' approach," and thus asserted that the petition must include all 1,400 maintenance and production employees. The Regional Director disagreed, and an election was held in November, which the Union won. However, in December the UAW announced it was filing unfair labor practice charges because Volkswagen refuses to recognize and bargain with the union. With an apparent win in hand and now a purported legal right to sit at the table with Volkswagen, the question is whether the UAW can parlay this success both to expand its influence within Volkswagen and to organize other manufacturing facilities in the South.

Various Legislative Efforts Attempted Either to Restrict or Expand The Board's Reach

As More States Enact Right-to-Work Legislation, Board Could Be Poised to Push Back

Wisconsin became the 25th state to enact a right-to-work law this year following a heated, all-night debate. In right-to-work states, no employee can be compelled to pay fees to the union as a condition of employment. The Wisconsin bill passed by a vote of 62-35 in the state assembly, and by a vote of 17 to 15 in the state senate despite two weeks of protests at the Wisconsin capitol. However, the very next day, three unions filed suit against state agency officials seeking injunctive relief as they did unsuccessfully in Michigan and Indiana in years prior. Meanwhile, right-to-work legislation is also gaining momentum in other states such as West Virginia and Kentucky.

While the unions' lawsuits to repeal right-to-work legislation have proven unsuccessful, the unions might be getting a helping hand from the National Labor Relations Board. On April 16, 2015, the NLRB invited interested parties to file briefs in *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union International, Local 1192, AFL-CIO, CLC (Buckeye Florida Corp.)*, in which an ALJ found that the union violated the National Labor Relations Act by maintaining and implementing a "Fair Share Policy" that required nonmember bargaining-unit employees to pay a grievance-processing fee. In excepting to the ALJ's decision, the union asked the Board "to adopt a rule allowing unions to charge nonmembers a fee for grievance processing, so long as that fee does not exceed the amount a union could charge nonmember objectors under Beck and California Saw." In response to that request, the Board invited briefs addressing the following questions:

1. Should the Board reconsider its rule that, in the absence of a valid union-security clause, a union may not charge nonmembers a fee for processing grievances? Should it adhere to or overrule *Machinists, Local No. 697 (H.O. Canfield Rubber Co.)*, 223 NLRB No. 832 (1976), and its progeny?
2. If such fees were held lawful in principle, what factors should the Board consider to determine whether the amount of such a fee violates Section 8(b)(1)(A)? What actions could a union lawfully take to ensure payment?

Concerned by the Board's consideration of this issue, the House Education and the Workforce Committee held a hearing entitled, "Compulsory Unionization through Grievance Fees: The NLRB's Assault on Right to Work." During the hearing, Mark Mix, President of the National Right to Work Committee, explained:

> the NLRB's new 'fee-for-grievance' scheme would give union officials a way to extract 'fees' from nonunion workers – fees that could in fact be greater than regular dues – leaving the right-to-work law on the books, but severely emasculated….

Briefs were due in July 25, 2015, and thus a decision is expected sometime in 2016.

"The WAGE Act": Democrats Seek to Give the NLRA More Teeth

In September 2015 Senator Patty Murray (D-WA) and Representative Bobby Scott (D-WA) introduced the Workplace Action for a Growing Economy (WAGE) Act (S. 2042), a bill proposed primarily as an election season litmus test. While passage of the bill is very unlikely, employers should monitor it, especially if it leads to any serious policy discussions as the bill would amend the National Labor Relations Act to:

- Provide treble damages in cases of economic loss to employees (without any offset for interim earnings);
- Provide concurrent private civil causes of action for individual employees to pursue in the federal courts;
- Allow private litigants to obtain relief as under the civil rights acts, including attorneys fees;
- Provide civil penalties up to $100,000 against employers who commit unfair labor practice charges resulting in economic loss to employees;
- Provide civil penalties for up to $100,000 personally against officers or directors of an employer;
- Expressly expand the Board's "joint employer" standard for enforcing joint and several liability against multiple parties;
- Expressly protect the right of unauthorized immigrant workers to collect these remedies;
- Require the Board to pursue, and federal courts to grant, preliminary injunctions in a broad variety of cases;
- Provide bargaining orders as the standard remedy for any election objections, if majority authorization card status can be established at any time within a year preceding an election;
- Require all employers to post a Notice of employee rights under the NLRA, and advise new employees of the same; and
- Make Board orders self-enforcing.

These represent fairly radical increases in the exposure employers would face when unions seek to organize their workplaces. Perhaps notably, it also seeks to amend the law legislatively in ways that have been inappropriately pursued by executive and administrative fiat the past few years. For instance, the "notice posting" provisions resemble significantly the attempted 2011 rulemaking by the Board, which was subsequently invalidated by the federal courts. The effort to include express expansion of joint employment liability beyond even the Board's recent radical departures from long-standing precedent provides another example.

Many other provisions of the bill are outright retreads or subtle re-packaging of provisions proposed without any success during the repeated failure to pass the Employee Free Choice Act (EFCA) last decade. The treble damages provision, for one, was central to one of EFCA's "three legs." The WAGE Act includes that proposal "on steroids." Current financial remedies available to the National Labor Relations Board in economic loss cases are primarily designed as "make whole" remedies – to put a wronged employee in the financial position he or she would have been in absent any unlawful activity causing a loss. This proposal, purportedly for deterrent effect, would provide an economic windfall via the treble damages provision, not to mention the right to pursue concurrent civil litigation outside the Board.

The WAGE Act would provide a significant back-door approach to the Board's secret ballot election process by allowing the Board to issue a bargaining order against an employer for any run-of-the-mill election objection. So long as the union could subsequently prove it had signatures from a majority of employees at some point prior – regardless of how collected – the union could be certified without a re-run election. For decades, the Board has reserved this type of remedy for only the most egregious examples of employer misconduct during union organizing efforts. Under this bill, it would become the norm, and allow the Board to force union representation upon employees who have voted against union representation after becoming more informed about the issue.

All of this begs the question – why would Democrats, who enjoyed a legislative majority supporting an otherwise very labor-friendly White House for most of the last four years, wait until 2015, when they have lost that majority to propose these measures? The AFL-CIO, which coordinated a publicity blitz (blog posts, Richard Trumka contribution to The Hill, etc.) with the introduction of the bill, was not coy about its true intent. The coalition's Director for Government Relations explains the strategy:

> Having this legislation really puts [politicians] to a test – we want to make sure that our elected officials have something concrete to point to, to embrace, to explain to the public and to the press, and that's really why we are doing this now.

While even the AFL-CIO concedes this bill has absolutely no chance of being enacted into law this year, or next, the proposal should provide employers with a very clear vision of the Democrats' potential 2017 labor agenda.

Miscellaneous Board Decisions and Related Developments of Import

Will the Board Require the Reinstatement of a Racist Union Picket?

In *Cooper Tire & Rubber Co.*, Case No. 8-CA-87155, the National Labor Relations Board is hearing a challenge to an administrative law judge's decision requiring the employer to reinstate an employee who made racist statements on the picket line. The case arose when the parties' collective bargaining agreement expired, the employer locked out its employees, and began using temporary replacements, many of which were African American. When several vans of replacement workers drove past the pickets, a locked-out employee yelled several racist statements at the vans, including:

> "Hey, did you bring enough KFC for everyone?" and
>
> "I smell fried chicken and watermelon!"

The employer terminated the employee for those statements, and the union grieved and arbitrated the termination. Although an arbitrator upheld the termination, a NLRB administrative law judge found that the harassment policy did not justify the termination and ordered reinstatement:

> [The employee's] "KFC" and "fried chicken and watermelon" statements most certainly were racist, offensive, and reprehensible, but they were not violent in character, and they did not contain any overt or implied threats to replacement workers or their property. The statements were also unaccompanied by any threatening behavior or physical acts of intimidation by [the employee] towards the replacement workers in the vans.

In an *amicus* brief filed with the Board, the National Association of Manufacturers (NAM) asserts that the ALJ decision:

> cannot be allowed to stand. The Board must recognize the important purposes underlying federal anti-discrimination and anti-harassment statutes enacted by the United States Congress and acknowledge employers' obligations—both legal and moral—to protect employees' right to be free from discrimination and harassment in the workplace. Further, the Board should affirm its stance against racial discrimination and harassment, harmonize its interpretation of the Act with the clear federal policies prohibiting racism, and determine employees do not have any statutory right to engage in discriminatory and harassing conduct.

The case remains pending on review.

Courts Continue to Reverse The Board on Arbitration Agreements

In *Murphy Oil USA, Inc. v. National Labor Relations Board*, a three-judge panel of the United States Court of Appeals for the Fifth Circuit again held, contrary to the NLRB, that an employer does not commit an unfair labor practice by requiring its employees to sign arbitration agreements. In doing so, the Fifth Circuit followed its earlier decision in *D.R. Horton*, which rejected a similar ruling from the NLRB. Nevertheless, the Fifth Circuit denied the employer's request to hold the Board in contempt for disregarding its precedent, stating that the Board may not have known that Fifth Circuit law would control on petition for review. The Fifth Circuit stated, "We do not celebrate the Board's failure to follow our *D.R. Horton* reasoning, but neither do we condemn its non-acquiescence."

The Board also found that the employer's arbitration agreement and revised arbitration agreement violated § 8(a)(1) of the NLRA because employees could reasonably believe the agreements precluded the filing of Board charges. The Fifth Circuit partially enforced this ruling.

The original arbitration agreement provided that "any and all disputes or claims [employees] may have . . . which relate in any manner . . . to . . . employment" must be resolved by individual arbitration and that employees "waive their right to . . . be a party to any group, class or collective action claim in . . . any other forum." The employer issued the revised arbitration agreement after the Board's decision in *D.R. Horton*, adding the following clause: "nothing in this Agreement precludes [employees] . . . from participating in proceedings to adjudicate unfair labor practice[] charges before the [Board]." The Board found that this modification did nothing to correct the unlawfulness of the agreement because it left the entirety of the original agreement intact. Although the Fifth Circuit agreed that the original agreement was unlawful, the Fifth Circuit disagreed with the Board regarding the revised agreement because, as a whole, "it would be unreasonable for an employee to construe the Revised Arbitration Agreement as prohibiting the filing of Board charges when the agreement says the opposite."

The Fifth Circuit also rejected the Board's finding that the employer violated § 8(a)(1) of the NLRA by filing a motion to dismiss and compel arbitration in response to claims filed by its employees in federal court. The Fifth Circuit, finding that the employer's motions had a reasonable basis in fact and law, issued the following warning to the NLRB:

> Though the Board might not need to acquiesce in our decisions, it is a bit bold for it to hold that an employer who followed the reasoning of our D. R. Horton decision had no basis in fact or law or an "illegal objective" in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.

Board Finds Putative Collective Action FLSA Lawsuit to Be Concerted Activity

In *200 E. 81st Rest. Corp.*, 362 NLRB No. 152 (2015), the National Labor Relations Board concluded that an employee's filing of a putative collective action under the Fair Labor Standards Act ("FLSA") constituted concerted activity under the National Labor Relations Act, even though the employee filed the lawsuit without the consent of any other employee.

On June 25, 2013, the employer received notice that one of its employees filed a lawsuit in federal court on behalf of himself and others similarly situated, alleging violations of the FLSA. Although the employee filed his complaint as a putative collective action, he did not obtain any authorizations or consents from any current or former employees to file the lawsuit. That same day, when the employee arrived at work, he noticed that his name was not on the work schedule. His supervisors met with him and informed him that they removed him from the schedule because he had filed a lawsuit. The employee went home after the meeting and never returned to work. The employer conceded that it terminated the employee on June 25, 2013.

The Board majority, consisting of Chairman Pearce and Member McFerran, held that the employee engaged in concerted activity when he filed the FLSA lawsuit even though "the evidence in this case [did] not establish that [the employee] acted in concert with, or on the authority of any of the other employees." In holding that a single plaintiff putative collective action lawsuit qualifies as concerted activity, the Board majority relied on its language in two recent decisions. In the first decision—holding that an employer's mandatory arbitration agreement was unlawful on its face—the Board noted, "[c]learly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7." *D.R. Horton*, 357 NLRB No. 184 (2012). In the second decision—similarly invalidating another arbitration agreement—the Board stated that "the filing of [a putative collective] action contemplates—and may well lead to—active or effective *group* participation by employees in the suit...." *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) (emphasis in original). Extending the reasoning in *D.R. Horton* and *Murphy Oil*, the Board majority concluded in no uncertain terms that "the filing of an employment-related class or collective action by an individual is an attempt to initiate, to induce, or to prepare for group action and is therefore conduct protected by Section 7."

In dissent, Member Miscimarra found that the majority's decision incorrectly overextended the reach of the NLRA to *all* non-NLRA class or collective action claims. According to Member Miscimarra, because the employee acted alone in filing his lawsuit, he did not engage in concerted activity. Member Miscimarra also noted that the employee was not without remedy for his termination, as the FLSA expressly prohibits termination of an employee based on the filing of an FLSA complaint.

Court Refuses to Enforce Board Decision Allowing Employees to Wear "Inmate," "Prisoner" Shirts

With a subtle introductory rebuke, the Court of Appeals for the District of Columbia reined in one of the National Labor Relations Board's more outrageous decisions of the past few years. In *Southern New England Telephone Company v. NLRB*, 793 F.3d 93 (D.C. Cir. 2015), the court vacated the Board's ruling that the employer violated the Act when it disciplined technicians for wearing T-shirts identifying themselves as "Inmates" and "Prisoners" on service calls to customer homes.

> "Common sense sometimes matters in resolving legal disputes."

So begins the Court's order. Employers may be relieved that someone has finally said so to the Board.

During collective bargaining negotiations, the employees' union distributed white shirts with black lettering bearing the label "Inmate #" on front and "Prisoner of AT$T," with vertical stripes above and below the lettering on the back. It said nothing about the union or the ongoing labor dispute. The employer suspended 183 employees who wore the shirt in public interactions on behalf of the company.

The Court vacated the Board's ruling that the employer violated the employees' Section 7 rights based on the "special circumstances" exception to the general rule protecting employee rights to wear union apparel:

> A company may lawfully prohibit its employees from displaying messages on the job that the company reasonably believes may harm its relationship with its customers or its public image.

One need not read too far into the Court's introductory passage, however, to find sympathy with those who recognize the extent to which recent Board decisions have been handed down in a vacuum, divorced from business realities:

> Common sense sometimes matters in resolving legal disputes. This case is a good example. AT&T Connecticut banned employees who interact with customers or work in public – including employees who enter customers' homes – from wearing union shirts that said "Inmate" on the front and "Prisoner of AT$T" on the back. Seems reasonable. No company, at least one that is interested in keeping its customers, presumably wants its employees walking into people's homes wearing shirts that say "Inmate" and "Prisoner."

Thus, the Court restored the "special circumstances" exception, which would have been all but eliminated if this case was left to represent its boundaries.

What to Expect in 2016

Impact of 2016 Presidential Campaign Cycle

The 2016 election cycle is already shaping up to be one of the more intriguing sets of political races in some time. If the 45th President is a Democrat, most expect that it will be Sec. Hillary Rodham Clinton, whose husband, President Bill Clinton was viewed skeptically by Labor hard-liners. Challenger Sen. Bernie Sanders (D/I-VT) is viewed as a more strident ally of Labor, although Sec. Clinton appears to have the inside track on establishment endorsements. On the Republican side, the wide range of candidates makes specific predictions difficult, but the nominee will likely want to revisit much of the radical upheaval of the last several years. Whether or not he or she has a cooperative Congress is also a critical question, as current estimates have the Republican majorities in each house retaining control, but losing some seats. No projections have the GOP picking up filibuster- or veto-proof majorities. How the Obama Board conducts itself as the presidential campaign heats up will also be something to watch.

Composition of The Board

The Board currently has four Members, but the expiration of Member Kent Hirozawa's term in August of 2016 will leave the Board with a bare quorum of three. Obtaining a confirmed Republican replacement for departed Member Harry Johnson never seemed like a priority for anyone as 2015 rolled on, and it is not likely to

be something in which the Administration is interested until the second vacancy – a Democrat seat – opens mid-year. As Congressional Republicans will be in no hurry to see this Board back at full strength, it is reasonable to expect the positions will remain vacant until the next President assumes office in early 2017.

Clarity or More Ambiguity Regarding The Board's New Joint Employer Standard

While constituting a sea change in the law regarding joint employer relationships, the Board's *Browning-Ferris* decision does very little, if anything, to provide any guidance to employer's regarding what does and does not constitute a joint employer relationship. Because the new test gives the Board the discretion to "give dispositive weight to an employer's control over any essential term and condition of employment in finding a joint-employer relationship," it is impossible to predict how the Board will weigh and factor those facts in deciding whether a joint-employer relationship exists. Accordingly, as the Board decides new cases under its new standard, hopefully it will provide more definitive guidance as to what factors are or should be determinative in joint employer determinations.

Moreover, it is currently unknown how *Browning-Ferris* will be applied to other business relationships, as the Board specifically noted that it was not addressing franchisor-franchisee, parent-subsidiary, and other relationships in *Browning-Ferris*. If the Board similarly expands its joint employer standard in these and other similar contexts, employers will be facing more uncertainty in its rights and obligations under the Act vis-à-vis the employees of its business partners and related entities.

How Will The Board Be Allowed to Push Specialty Healthcare to Facilitate Micro-Unit Organizing?

Following the Board's decision in *Macy's Inc.,* 361 NLRB No. 4 (2014), upholding the approval of a micro-unit consisting only of some product sales employees within a store, the retail giant engaged in a technical refusal to bargain with the union in an effort to seek judicial review of the Board's decision. The case is now pending before the Fifth Circuit Court of Appeals. The outcome of the case should provide substantial guidance on the extent to which the Board may ignore long-standing Board precedent to apply its new micro-unit standard in all industries – not simply to the non-acute healthcare facilities at issue in the *Specialty Healthcare* decision. Not only has the Board been applying *Specialty Healthcare* to any and all industries, but its impact has been dramatic. For example, in *Northrop Grumman Systems Corp.,* Case No. 31-CA-136471 (Oct. 20, 2014), a regional director found the union's petitioned-for unit was not appropriate–but directed an election in a unit ***even smaller than that sought by either party*** based upon the Board's holding in *Specialty Healthcare*.

Following Rejection By Successive Generations, Can Unions Convince Millenials?

In 2015, unions highlighted a Pew Research Center survey to assert that "unions are becoming cool" because more young people view unions more favorably. According to the Pew Research Center,

> Across age groups, views of unions are most positive among young adults: 55% of those ages 18-29 view unions favorably, while just 29% view them unfavorably. Among older adults, favorability ratings of unions are mixed with about as many holding favorable as unfavorable views.

Given the Pew Research Center's survey data, it is not surprising that labor organizers might be looking to create online tools for workplace organizing to target younger workers. The Century Foundation, a liberal think tank, released a report making an impassioned plea for app developers to get involved in online organizing:

> All around us, online technology has disrupted business models and entire industries virtually overnight, dramatically changing the landscape for consumers and workers alike. … The problem today is that joining a union at work is decidedly last century—clunky, contentious, confusing—and companies…want to keep it that way.

But virtual labor organizing could change that. Even a moderately successful app could cause union organizing to undergo a sea-change.

The major changes the Board has announced in 2015 to welcome emerging technologies into the organizing and representation election process may very well invite such development.

About Labor Relations Today

Labor Relations Today (LRT) is a blog maintained by attorneys from McGuireWoods Labor and Employment Practice group. LRT provides up-todate analysis, resources and commentary on developments in traditional labor law.

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