Labor Letter

February 2012

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW
Solutions at Work®
www.laborlawyers.com

It's 2012 And The NLRB Is Off To A Fast – And Controversial – Start

By Joseph Brennan (Cleveland)

The 2011 calendar year was one of the more interesting years for the National Labor Relations Board (NLRB). The Board became a lightning rod for controversy and partisan politics due to its controversial decisions to utilize its rarely-used rulemaking authority to rewrite the rulebook on union elections and to require employers to post what many consider a pro-union National Labor Relations Act (NLRA) poster in its workplace.

Moreover, the Board's decision to pursue litigation against one of America's largest employers, Boeing, Inc., which effectively delayed the opening and creation of jobs at its new production facility in South Carolina, stirred activity in Congress, resulting in numerous Committee hearings where sanctions such as reducing NLRB funding and demanding information to justify the conduct of the Board were contemplated. Disagreements between Board members played out on the public stage in a rather unusual written letter campaign between Board members accusing one another of, among other things, abusing the power of the administrative agency according to political motivations and refusing to participate or even attend Board meetings.

This past year also brought to a conclusion the term of Chairman Wilma Liebman, who is considered by many as the most employee-oriented chairman in the history of the Board. During her tenure, Liebman, who in the past often found herself writing the dissenting opinion, authored many majority-backed decisions with favorable employee outcomes.

The dustup surrounding the Boeing complaint, the retirement and replacement of Chairman Liebman, the ultimate institution of the final rules regarding "quickie" elections and the NLRA postings, brought 2011 to a contentious finish. As 2012 began it was anyone's guess as to what the Board had in store for us this year. Fortunately (or unfortunately) it did not take long to find out.

Three Days Into The New Year…

On January 3, 2012, the NLRB issued a decision on the question of whether employees could lawfully waive their right to pursue class or collective actions in a judicial or arbitral forum. As a case of first impression for the Board, the decision had a profound effect on the validity of individual arbitration agreements signed by employees.

While the issue was new to the Board, there has been much litigation at the federal level concerning the enforceability of class action waivers. The most recent important decision being that of the U.S. Supreme Court in *AT&T Mobility v. Concepcion*. In the *AT&T Mobility* case, the Supreme Court upheld the validity of class action waivers and consumer arbitration agreements, holding that the Federal Arbitration Act, which favored the enforceability of such agreements, preempted a California state law invalidating such class action waivers in *consumer* agreements. Although *AT&T Mobility* was not an employment case, its reasoning and the similar reasoning of other federal courts had been applied by employers across the country to support the enforceability of class action waivers in employment arbitration agreements.

The Board's decision came in the case of *D.R. Horton.* The opinion was authored by Obama appointee Chairman Mark Gaston Pearce and joined by Obama appointee Member Craig Becker. It held that employees' ability to join together as a class for purposes of bringing a claim against their employer constitutes "concerted activity" for purposes of "mutual aid or protection" under Section 7 of the NLRA. Accordingly, the Board held that the mandatory arbitration agreements waiving class actions required by the employer was an unlawful restraint on statutorily protected labor rights. The Board's decision has important implications for both unionized and non-union employers, and serves as a reminder that protected, concerted activity under the NLRA ***is not*** limited to union-related activity.

What *Horton* Stands For

The case involved national homebuilder D.R. Horton, who, over the past several years, began requiring each new and current employee to execute an arbitration agreement. This arbitration agreement provided that all employment-related disputes must be resolved through individual arbitration and that the employees could not pursue class or collective litigation claims.

Notably, the arbitration clause at issue in this case was not found in a collective bargaining agreement. In fact, no union was elected as the exclusive bargaining representative for these employees. Rather, the clause was contained in what D.R. Horton called a Mutual Arbitration Agreement (MAA), which the company imposed unilaterally as a condition of employment.

Michael Cuda was employed by D.R. Horton as a superintendent from July 2005 to April 2006. Like all D.R. Horton employees, Cuda's continued employment was conditioned upon his signing of the MAA, which he did in early 2006. In 2008, Cuda retained the services of an attorney to represent him in a wage-hour case, where he claimed he was misclassified as an overtime-exempt employee.

Cuda's attorney then notified D.R. Horton that his firm had been retained to represent Cuda and a nationwide class of similarly situated superintendents in a Fair Labor Standards Act (FLSA) arbitration action. Horton refused to consent to arbitration, noting that Cuda had failed to give an effective notice of an intent to arbitrate, and citing the language of the MAA that barred arbitration of collective claims. In response, Cuda filed an unfair labor practice charge against D.R. Horton under Section 8(a)(1) of the NLRA.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7 of the Act. Section 7 of the Act provides that employees shall have the right "to engage in…concerted activities for the purpose of collective bargaining or other mutual aid or protection."

In holding that the MAA violated Section 8(a)(1) of the Act, the Board found that any individual who files a class or collective action concerning wages, hours or working conditions, whether in court or before an arbitrator, is seeking to initiate or induce group action which is "at the core

Continued on page 2

It's 2012 And The NLRB Is Off To A Fast – And Controversial – Start

Continued from page 1

of what Congress intended to protect by adopting the broad language of Section 7" and that "[s]uch conduct is not peripheral but central to the Act's purposes." Because D.R. Horton's arbitration agreement explicitly restricted such class or collective actions, the Board concluded that the agreement violated Section 8(a)(1) of the Act and was an unfair labor practice.

But the Board's analysis didn't stop there. It still needed to reconcile the apparent conflict between its holding and those of the Supreme Court which ostensibly supported the opposite outcome. The Board distinguished an earlier Supreme Court ruling in *14 Penn Plaza LLC*, where the Court held that in exchange for bargaining concessions by the employer, a union could lawfully negotiate an arbitration clause requiring that employees arbitrate their statutory age discrimination claims.

While recognizing that a union may waive certain Section 7 rights in exchange for employer concessions, in this case the MMA was not a collectively-bargained provision but rather a unilaterally imposed condition of employment. The Board further distinguished cases decided by the Supreme Court concerning its consistent deference to the Federal Arbitration Act (FAA) and its policy of promoting the enforceability of individual arbitration agreements. For example, the Board distinguished the recent *AT&T Mobility* case based on the fact that the case was about consumer class actions, whereas *D.R. Horton* involved the workplace and substantive rights granted to all employees under the NLRA. Furthermore, the Board explained that *AT&T Mobility* involved a conflict between the FAA and state law, whereas *D.R. Horton* addressed the interaction of two federal statutes (the FLSA and FAA), a key distinction, said the Board.

In its closing, the Board tempered its holding stating that "[o]nly a small percentage of arbitration agreements are potentially implicated by the holding in this case." For example, the Board explained, the NLRA only covers certain classes of "employees," which excludes supervisors, government employees and independent contractors; and only protects "concerted activity."

The Board also left open several questions surrounding the waiver of class claims by leaving alone the more difficult questions of 1) whether an employer can require employees, as a condition of employment, to waive their right to pursue class or collective action in court so long as the employees retain the right to pursue class claims in arbitration and 2) whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court.

The litigation is likely far from over. Due to the sweeping effect this holding has on the enforceability on what has become a relatively common employment agreement, we can realistically anticipate a ruling from a federal circuit court of appeals and possibly even the Supreme Court on this issue.

Four Days Into The New Year…

The same day that the *D.R. Horton* decision was reached marked the end of the Board term for Member Craig Becker. The loss of Member Becker left the Board with only two members – one less than required for maintaining a quorum within the agency. In light of a recent Supreme Court decision, which held that the authority of the five-seat Board could not be delegated to a panel with fewer than three members, the Board was effectively stripped of the authority to reach final decisions in NLRB proceedings.

But this lack of quorum lasted less than a week. On January 4th President Obama announced his intent to utilize his constitutional authority to grant recess appointments to Democrats Sharon Block and Richard F. Griffin, and Republican Terrence F. Flynn. Block and Griffin had originally been nominated on December 15, 2011, but the Senate Health, Education, Labor and Pensions Committee had not acted on the nominations. The recess appointees were all sworn in as members on January 9, 2012.

Almost immediately after notifying Congress of his intent to recess appoint the new NLRB members, an uproar arose in both the House and Senate accusing the President of abusing his executive authority by unilaterally appointing Board members during a *pro forma* recess – a recess in which Congress is technically in session but no business is being conducted. This prompted the Department of Justice to issue a letter arguing that President Obama's *pro forma* recess appointments were indeed constitutional.

This did not prevent employer associations, such as the National Federation of Independent Business, the Coalition for a Democratic Workplace and the National Right to Work Legal Defense, from filing their own legal actions asserting that the recess appointment of the three members to the National Labor Relations Board was "unconstitutional, null and void," and, under the holding of *New Process Steel*, the Board now lacks a quorum necessary to implement rules or otherwise enforce the National Labor Relations Act.

And remember, 2012 is only a few weeks old. It should be an interesting year.

For more information contact the author at jbrennan@laborlawyers.com or 440.838.8800.

Can A Paid Break Become Unpaid?

By John Thompson (Atlanta)

Acme Corporation's longstanding policy is to give non-exempt employees two 10-minute rest breaks each workday. It treats these breaks as paid worktime. Management recently realized that, over the years, most of the employees have gradually come to be spending 15 to 20 minutes or even a little longer on each break. Acme sent out a memo reminding everyone that the breaks are limited to 10 minutes, but it had no effect. Could Acme start considering the over-10-minute extensions to be unpaid time?

The U.S. Labor Department has said that this *is* permitted under the federal Fair Labor Standards Act (FLSA), if an employer makes its intentions clear in advance.

The FLSA does not require employers to give rest breaks (which should be distinguished from lactation breaks, which *are* required). Many employers do give rest breaks, of course, and the Labor Department's position is that short periods like this (typically running from five to about 20 minutes) count as worktime for employees who are subject to the FLSA's minimum-wage or overtime requirements. In the Labor Department's view, such breaks mainly have the effect of promoting employee efficiency, so they cannot be deducted from or offset against other compensable time.

Consequently, many employers assume that, when an employee stretches a 10-minute break to 20 minutes, the FLSA does not allow the

Continued on page 4

Interviewing The Pawn Stars Way

By James Holland (Kansas City) and Michael S. Mitchell (New Orleans)

Viewers of the popular television show "Pawn Stars" (*The History Channel)* know that recently the owner, Rick Harrison, and his father, "the old man," have been interviewing applicants for the night shift. Here is their exchange when the old man sat in on one of the interviews:

> Old Man: [to the applicant] "Are you married, son?"
> Rick: [to his dad] "You're not allowed to ask that kind of stuff."
> Old Man: "Why not?"
> Rick: "That's just the laws. Do you understand that?"
> Old Man: "I just want to know if he's got kids running around, if he's responsible."
> Rick: "You can ask him questions but they have to be pertinent to the job."
> Old Man: "If he's got kids it's pertinent to the job, for he needs to feed 'em."
> Rick: "You're not allowed to ask them if they've got kids."
> Old man: [frustrated] "Well, why are we even interviewing him if I can't ask questions?"

So Much To Avoid

No doubt, many of our readers have felt the same frustration that the senior Mr. Harrison did. Sometimes an interviewer, in trying to make an applicant feel comfortable, discover common ground, or simply be friendly, may ask about the applicant's family, outside interests, or background. While in a social setting these types of questions are good icebreakers, in a business environment inquiries like that can open your company up to possible lawsuits. Here's a quick checklist with some common sense guidelines to help avoid the hot spots.

Age

Questions about age, date of birth, date of graduation from high school, or other inquiries that are designed to determine a person's age, are inappropriate. In those very few cases when age does matter – for example, when federal or state law requires a person to be over the age of 18 to operate dangerous equipment – then it is appropriate to confirm age. Absent a direct nexus to job functions, inquiries about age are never appropriate in an interview.

Children

Avoid questions about status as a parent, plans regarding future children, daycare arrangements for existing children, plans to marry, etc. Inquiring into these aspects of life are almost always regarded as gender discrimination (because women are generally the only ones asked), or harassment, and should never be made.

You may permissibly ask an applicant whether there is anything in his or her life that might interfere with work hours. For example, asking a female applicant if her daycare obligations might require her to leave at 5:00 p.m. every day could likely be gender discrimination. On the other hand, asking the same person if there is anything about her personal life that might interfere with the performance of occasional overtime is neutral and entirely acceptable so long as the job features occasional overtime, and the inquiry is made of all applicants.

Health

Disabilities and medical conditions are areas that require sensitive handling. It is generally inappropriate to inquire about disabilities, diseases, or health status. If an applicant volunteers this information, you may receive it, but should not act on it, unless an applicant indicates that he or she needs a job accommodation. In that case, it's acceptable to ask any related questions necessary to understand the limitations that the person is describing.

For example, asking if an applicant has back problems that will prevent him from lifting heavy equipment and supplies is inappropriate. But explaining to that person that an essential function of the job requires that he be able to repeatedly lift over 50 pounds, and asking whether he can perform this essential function with or without a reasonable accommodation is permissible.

Ethnicity

Ethnicity and race are not performance-related, and are always inappropriate. An applicant's national origin is completely irrelevant to job performance and is never a safe area for inquiry or discussion. But to the contrary, inquiring about language skills necessary to the job may be appropriate.

Religion

Religious beliefs or religious affiliations are generally not proper topics for interviews. With rare exceptions, no employer may require employees to espouse any particular religious belief in the workplace, so discussion of religious beliefs in an interview setting is not appropriate. But if an applicant volunteers that he or she engages in a religious observance that would require accommodation (e.g., "I can't work on certain days"), you may obtain enough information to understand the needed accommodation. All inquires, responses and processing of this information should be handled cautiously.

Unions

Asking an applicant for his or her views on labor unions is illegal. Whether your company works with unions or not, this is an inappropriate area of inquiry. If you want to make your own feelings about unions known, you may lawfully do it, and you may explain the company's preference for remaining union free – but be careful to stop it there. If you solicit the employee's opinion about unions and then he or she isn't hired, you could be creating real problems.

So What Can I Talk About?

Take Rick's advice. Always focus on job-related topics to keep yourself out of trouble. Provide information to the applicant about the company and its culture, essential aspects of the job, what is required for job performance, and industry standards that are appropriate to a particular job.

You should also obtain job-related information from the applicant, such as the applicant's work experience, educational background, job objectives, and attitude towards the particular position. Just remember that personal information such as social associations, religious beliefs, family traditions, living arrangements, marital status, parental status, health, union views etc., are generally unrelated to work performance.

You don't want to end up pawning your valuables to pay for court costs!

For more information contact the authors: jholland@laborlawyers.com or 813.842.8770 and mmitchell@laborlawyers.com or 504.522.3300.

Can A Paid Break Become Unpaid?

Continued from page 2

additional 10 minutes to be treated as non-compensable time. On the contrary, the Labor Department's internal enforcement manual takes the position that unauthorized break extensions need not be considered worktime, so long as the employer has expressly and unambiguously told employees that:

- authorized breaks may last only for a specific length of time;
- any extension of those breaks is against the rules; and
- any extension of those breaks will be punished.

If you are looking to rely upon this position in the future, our advice is to adopt a written break policy that includes these points and makes clear that unauthorized extensions will not be counted as worktime. And make sure you can demonstrate that employees are aware of the policy.

Remember that many states impose rest-break rules of their own. Employers must also be aware of and comply with whatever the applicable obligations are. A state need not follow FLSA interpretations with respect to breaks, including as to whether unauthorized extensions of breaks are or are not to be counted as worktime under the state's own break requirements or under its other laws relating to hours worked.

But does this mean that, if employees impermissibly extend their rest breaks, then the *whole rest break* could be treated as non-compensable time under the federal Fair Labor Standards Act? For example, if an employee stretches a 10-minute rest break to 20 minutes, then can you exclude the full 20-minute period from worktime, rather than only the additional ten minutes?

The Labor Department has said that this is not the case. In an opinion letter on this subject, the Acting Administrator, wrote that "[o]nly the length of the unauthorized extension of an authorized break will not be considered hours worked when the three conditions are met, not the entire break." In our illustration, then, the Labor Department would say that only the additional 10 minutes could be treated as non-compensable time.

And it's important to distinguish among different kinds of breaks. For purposes of what is and is not FLSA worktime under Labor Department interpretations, it can be useful to view scheduled breaks as falling into essentially three categories:

- bona fide meal breaks, which are typically noncompensable time
- "short" rest breaks of "about 20 minutes" or less, which the Labor Department says are typically compensable time; and
- break periods which are neither meal breaks nor "short" rest breaks, which might or might not be compensable time.

You should evaluate these categories differently in deciding whether and to what extent to treat them as being compensable hours worked under the FLSA. And, as always, be aware of and comply with whatever are the applicable break obligations of your state or local jurisdiction.

For more information contact the author at jthompson@laborlawyers.com or 404.231.1400, or visit our blog at http://wage-hour.net.

Office Locations

Atlanta phone 404.231.1400	**Houston** phone 713.292.0150	**New Orleans** phone 504.522.3303
Boston phone 617.722.0044	**Irvine** phone 949.851.2424	**Orlando** phone 407.541.0888
Charlotte phone 704.334.4565	**Kansas City** phone 816.842.8770	**Philadelphia** phone 610.230.2150
Chicago phone 312.346.8061	**Las Vegas** phone 702.252.3131	**Phoenix** phone 602.281.3400
Cleveland phone 440.838.8800	**Los Angeles** phone 213.330.4500	**Portland** phone 503.242.4262
Columbia phone 803.255.0000	**Louisville** phone 502.561.3990	**San Diego** phone 858.597.9600
Dallas phone 214.220.9100	**Memphis** phone 901.526.0431	**San Francisco** phone 415.490.9000
Denver phone 303.218.3650	**New England** phone 207.774.6001	**Tampa** phone 813.769.7500
Fort Lauderdale phone 954.525.4800	**New Jersey** phone 908.516.1050	**Washington, DC** phone 202.429.3707

Fisher & Phillips LLP represents employers nationally in labor, employment, civil rights, employee benefits, and immigration matters

We're interested in your opinion. If you have any suggestions about how we can improve the *Labor Letter* or any of our other publications, let us know by contacting your Fisher & Phillips attorney or email the editor at mmitchell@laborlawyers.com.

How to ensure continued receipt of this newsletter

If you would like to continue to receive our newsletters and other important information such as Legal Alerts and seminar information via email, then please take a moment right now to make sure your spam filters are set to allow transmissions from the following addresses: communications@laborlawyers.com or seminars@laborlawyers.com. If you currently receive communications from us by regular mail, and would like to begin receiving them by email, please send a request to communications@laborlawyers.com.

In an effort to reduce the amount of paper used for our newsletters, we are encouraging our subscribers to receive our newsletters electronically. We will begin using only email delivery of our newsletters beginning in March 2012, unless you inform us otherwise. If you want to continue receiving a hard copy of the newsletters we have set up a couple of ways for you to continue your subscription. You may email fp@laborlawyers.com, or fill out the enclosed postage-paid form and mail it back to our Marketing Department in Atlanta. Please indicate which of our newsletter(s) you want to receive through the mail.

If you prefer to receive the newsletter electronically, you may also email fp@laborlawyers.com or indicate your choice on the mail-in form – and be sure to include your email address.

If you do not choose one or the other, and we have your email address, we will change your subscription to an electronic one in March 2012.

Thank you for helping Fisher & Phillips reduce the amount of paper we use to continue providing newsletters to all our subscribers.