Looking into Our NLRB Crystal Ball

With everything going on in Washington, D.C., it is easy to overlook the significant changes to the National Labor Relations Board ("NLRB" or the "Board"). With the impending addition of two Republican-appointed members to the Board, we expect many changes that could impact all employers—those with or without unions.

The NLRB is a federal agency that is responsible for enforcing labor law in relation to collective bargaining and unfair labor practices. It has five members serving staggered five-year terms. The sitting president appoints members to the Board and those appointees must be confirmed by the Senate. The president appoints three of the five appointees from his or her political party, and therefore, as the majority changes, so does the flavor of the decisions (e.g., typically, a Democratic majority's decisions lean toward pro-employee/union and a Republican majority generally favors employers).

Recently, President Trump has nominated William Emanuel (a management-side labor attorney) and Marvin Kaplan (a longtime legal adviser to lawmakers) to fill the vacancies on the Board and create a Republican majority. Upon the impending, likely Senate confirmation of Kaplan and Emmanuel, we expect the following Obama-Board rulings and processes to be either overturned or significantly modified:

Cases Likely to Be Overturned or Modified

Purple Communications

One employee-friendly ruling coming out of the Obama-NLRB was the *Purple Communications* decision, which held that employees could use their company-issued email to engage in protected concerted activity on nonworking time. This created an easier, more efficient way for employees to communicate with each other about union-related activities or events.

Banner Health

A decision that has hampered an employer's ability to conduct confidential workplace investigations is *Banner Health*, in which the Board held that an employer's direction to employees not to discuss workplace investigations with other employees violates the National Labor Relations Act (NLRA). Allowing employees to freely discuss workplace investigations, which at times can contain sensitive subject matter, has arguably limited the effectiveness of employers to conduct investigations with complete confidentiality guaranteed.

Whole Foods

In *Whole Foods*, the NLRB held that video or audio recording by employees is protected activity under the NLRA. Although Whole Foods argued that its prohibition on recording allowed employees to speak more freely in company events, such as company town hall meetings, the Board found that a prohibition on recording essentially chilled workers' rights to engage in

protected concerted activity, such as unionization.

Browning-Ferris Industries

A highly publicized opinion that has been raised during the confirmation hearings is the *Browning-Ferris* decision. In this case, the Board significantly broadened the definition of "joint employer," holding that a company can be a joint employer if it exercises "indirect control" over employees, or even if it "reserves" the control but does not exert it. This decision has been an avenue for unions to try to bring additional "employers" to the bargaining table.

Specialty Healthcare

The *Specialty Healthcare* ruling permits unions to form micro-units within the larger union, so long as the unit is made up of an identifiable group of employees who share a community of interest with one another. This modification of what is a permissible bargaining unit has allowed unions to more easily target a group of employees it knows will vote in favor of union representation.

Impact on Election Procedures

In 2015, the NLRB implemented a Final Rule for "Quickie Elections," which shortened the amount of time between a union's petition and the actual union election. Under the old rules, the petition to election process took approximately 45 days. However, the new Final Rule requires that an election occur within 25 to 30 days after a direction of election. The condensed time period has limited an employer's ability to conduct a more thorough campaign against union organization. A reversal back to the former timeline should help employers better educate their employees about the impact of union representation.

What Should Employers Do?

- **Stay the course, for now**. Make sure your handbook or policies are compliant with current law. The above Obama-NLRB rulings are contrary to what many employers perceive are their legal rights. Employers can be in violation of the NLRA simply by having noncompliant handbook policies.
- **Stay up to date**. Pay close attention (with the help of experienced labor attorneys) to the inevitable pendulum shift in the above cases as well as plenty of others.

Make appropriate policy and practice changes. When the law does change, check back in to make sure you understand the new rulings and that your company is in compliance.

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