

L&E Live

The Employer-Friendly NLRB, Enjoy it While it Lasts

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Labor Movement Hits All-time Low

- Record number of strikes, but membership continues to decline
- The culprit? Rapacious Capitalists, Corporations, the National Labor Relations Board (under the leadership of Employer-friendly appointees).
- Labor's Solution: The Protecting the Right to Organize Act ("PRO Act").
 - Eliminate "Right to Work"
 - Eliminate Independent Contractors
 - Allow Secondary Boycotts (enmeshing neutral employers).
 - Mandatory interest arbitration
 - Speed up elections
 - Bring back Obama era Joint Employer
 - Gag employers, prevent legal training

Membership declined to

10.3%

Overall, and

6.2%

in Private Sector

Representation in Private Sector down to

7.1%

Pandemic has not helped Union Organizing

- NLRB has received fewer than 800 petitions for union elections since the agency briefly suspended processing these requests in mid-March.
- **Compare** to prior four years, in which the board fielded between 1,100 and 1,400 representation cases over the same period.
- Numbers were already in decline....

The National Labor Relations Board

- Board consists of 5 members
 - Board is customarily filled with 3 members of President's party, 2 of the other party
 - Board members serve 5 year terms
 - Senate confirmation of these positions
 - Currently 3 Republicans, 1 Democrat, 1 Democratic seat vacant
 - August 2021 – Bill Emmanuel (R)'s term expires
- General Counsel is customarily member of President's party (4 year terms)
 - November 2021 – General Counsel Robb's term expires

Significant Pending Issues

- **New election rules**
 - Scheduling hearing *at least* 14 days from issuance of the notice
 - Posting the notice of election within 5 days instead of 2 days
 - Changes in timeline for Employer's statement of position;
 - Requiring petitioner to serve a responsive statement of position;
 - Reinstatement of Post-Hearing Briefs
 - Ballot impoundment procedures when a request for review is pending
 - Prohibition on bifurcated requests for review
- District Court Review

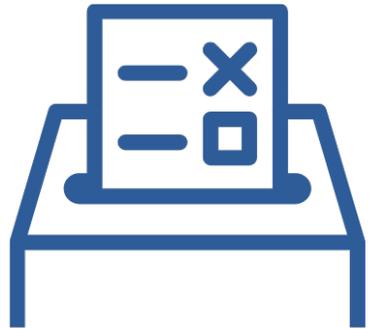
Significant Pending Issues

- **Reconsideration of Contract Bar**
 - Contract Bar Doctrine
 - Prevents any election during the existence of a collective bargaining agreement (limited to 3 years).
 - Problem of renewal and “window”
 - "We find merit in the petitioner's contention that it is appropriate for the board to undertake in this case a general review of its contract bar doctrine," stated a Board panel
 - May add the contract bar doctrine to the long list of union-friendly policies it has recently modified or discarded.

Significant Pending Issues

- **Joint Employer Rule**
 - Final Rule issued February 25, 2020
 - Establishes pre-*Browning-Ferris* joint employer test
 - Requires evidence of “substantial direct and immediate control” over employees’ essential terms and conditions of employment to be found a joint employer
 - Indirect control alone will not result in joint employer finding
 - Legal challenge
 - “PRO” Act
 - Same fight, different day
 - Labor looking to leverage points, expanding liability due to the inability to organize its way out of existential crisis

Significant Pending Issues



- **NLRB's Proposed Voter List Rule**
 - As part of the Board's voter list requirement, eliminate requirement to provide:
 1. Available personal email addresses
 2. Available home and personal cellular telephone numbers
 - Provide absentee mail ballots for employees who are on military leave.

NLRB in the Vid...(COVID)

Mail Ballot Elections

- Increase in mail ballot elections, even for essential employer

Video hearings

- NLRB has been conducting all hearing via telephone or video teleconference.
- Unclear whether NLRB has power to subpoena witnesses to appear via video.

GC Memo 20-14

- COVID does not insulate employers from ULPs).

2020 Keeps the Hits Coming

- *Argos USA*, 369 NLRB No. 26 (February 5, 2020)
 - Electronic communication, Cell Phone policy also lawful
 - Discipline for violation lawful (reasonable to restrict cell phones from cabs of vehicles).
- *Wynn* (redefined solicitation)
 - Employee engaged in union solicitation by encouraging a coworker to vote for the Union in a then upcoming representation election while the coworker was on working time.
 - Overruled *Wal-Mart Stores*, 340 NLRB 637 (2003), and *ConAgra Foods, Inc.*, 361 NLRB 944 (2014),
 - Neither the presentation of an authorization card for signature at the time nor the duration of the conversation are determinative.

2020 Keeps the Hits Coming

- *Cott* (rule restricting personal belongings – including cell phones- in work area ok)
 - Board reversed the judge's conclusion that the Respondent violated Section 8(a)(1) by maintaining rules that prohibit employees from possessing cell phones on the manufacturing floor and at workstations.
 - Applying *Boeing*, the rules at issue are lawful because the Respondent's legitimate business interests outweigh the relatively slight risk that the rules will interfere with employees' right to engage in protected activity.
- *800 River Road Operating Company, LLC*, 369 NLRB No. 109, (June 23, 2020).
 - Overturned *Total Security Management*
 - Employer did not violate the NLRA when it failed to provide the new union with notice and an opportunity for pre-discipline bargaining prior to suspending three employees and discharging one employee.
 - Retroactively applied to all pending cases.

2020 Keeps the Hits Coming

- *Providence* – ballot marking
 - Where a ballot includes markings in more than one square or box, it is void, overruling inconsistent Board precedent, including *Thiele Industries*, 325 NLRB 1122 (1998).
- *Graphic Communications Conference (Bemis Co., Inc.)*, 369 NLRB No. 97 (June 5, 2020)
 - Union violated the NLRA by attempting to retaliate against employees who reported other employees' improper conduct to their employer.
 - Union threatened employees by posting a memo indicating that it would assess fines against the employees and/or blacklist them from union jobs if they reported fellow union member misconduct and/or participated in employer investigations.

2020 Keeps the Hits Coming

- *General Motors LLC*, 14-CA-197985 369 NLRB No. 127 (2020)
 - Biggest case of the year
 - NLRB modified the standard for determining whether employees have been lawfully disciplined or discharged after making abusive or offensive statements in the course of activity otherwise protected under the Act.
 - including profane, racist, and sexually unacceptable remarks.
 - Employer intent now considered

Still Feeling 2019

- *Apogee Retail*, 368 NLRB No. 144 (December 16, 2019)
 - Overturned *Banner Health*, 362 NLRB 1108 (2015)
 - Employer does not violate Section 8(a)(1) merely by imposing blanket confidentiality to HR investigations.
- *LA Specialty Produce*, 368 NLRB No. 93 (October 10, 2019)
 - Confidentiality rule would not reasonably be interpreted to interfere with Section 7

Still Feeling 2019

- MV Transportation, Inc., 368 NLRB No. 66 (September 10, 2019).
 - Out with the “clear and unmistakable” waiver test, in with the new “contract coverage” standard.
 - Employers can rely on a defense that the objected-to change was covered by the language of the CBA. In that case, the Board will “give effect to the plain meaning of the relevant contractual language” and find a change covered if it “falls within the compass or scope of contract language that grants the employer the right to act unilaterally.”
- Valley Hospital, 368 NLRB No. 139 (December 16, 2019).
 - Decision overruled Lincoln Lutheran of Racine, 362 NLRB 1655 (2015) that a union can continue to insist on dues checkoff post-expiration. The Board returned to the rule of Bethlehem Steel, 136 NLRB 1500 (1962) which had stood for half a century.

Still Feeling 2019

- Caesars Entertainment, 368 NLRB No. 143 (December 16, 2019).
 - Overruled Purple Communications, 361 NLRB 1050 (2014).
 - Employer may insist on only business use of its email system.
- UPMC Presbyterian, 368 NLRB No. 2 (June 14, 2019).
 - Employer may exclude non-employee organizers from public access areas.
 - Long-standing problem for employers.
- Kroger Mid-Atlantic, 368 NLRB No. 64 (September 6, 2019).
 - In Sandusky Mall, 329 NLRB 618 (1999), the Board held that an employer discriminates against non-employee union representatives if it bars them from its property while permitting access to charitable and civic organizations.
 - NLRB will only find that an employer has discriminated in its denial of access to union representatives, if it permits access to other organizations for *similar types of activities*.

Biden Board Hit List

- SuperShuttle
 - Employees v. Independent Contractor
 - Don't need to if Pro Act gets passed/signed
- Caesars Entertainment, 368 NLRB No. 143 (December 16, 2019).
 - Overruled Purple Communications, 361 NLRB 1050 (2014).
 - Employer may insist on only business use of its email system.
- Boeing!!!
 - The Board created a new standard for determining if an employer's rule was unlawful
 - NLRB looking to strike a balance between exercise of Section 7 "protected" activity and legitimate business interests

Biden Board Hit List

- Alstate Maintenance, 367 NLRB No. 68 (January 11, 2019).
 - When skycap at JFK informed that soccer team needed help, he complained we did a similar job last year and didn't get a tip.
 - Use of "we" presence of other did not render the activity concerted.
 - Also, not for "mutual aid and protection" because employer has no involvement in tipping.
- Cordua Restaurants, Inc., 368 NLRB No. 43 (August 14, 2019).
 - Agreement prohibited employees from opting into class or collective wage and hour actions.
 - Not unlawful to require the employees waive their right to class or collective actions.
 - Although the agreement was in response to collective action, the Board reasoned that the agreement did not actually restrict protected activity

Biden Board Hit List

- McDonalds
 - Approving settlement easier
 - Finds that the settlement agreements effectuated the NLRA because they remedy every alleged violation

Questions?

SHERMAN & HOWARD
