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Management, Buckle Up. It's Going To Be a Roller Coaster Over the Next Four Years.
A Review of The NLRB's Holiday Gift to Unions and Employees

Introduction

Just before the holidays, the National Labor Relations Board (NLRB or the Board) issued a slew of eye-opening decisions, only days prior to the expiration of the term of Member Hayes – the lone Republican Board member. The Board is now comprised of all Democrat appointees, clearing the path for an anticipated run of pro-labor and employee-friendly decisions, even more so than the cases we discuss in this Alert.

But first, some background. In 2008, employers were gearing up for the possible passage of the Employee Free Choice Act (EFCA), the then-centerpiece labor law reform legislation on the Democratic Party's agenda. Had it passed, EFCA would have radically changed the rules for how unions gain the right to represent employees by requiring that employers accept union authorization cards as proof of majority desire instead of insisting on the time-honored secret ballot election. Labor unions, encouraged by President Obama's pledge to seek passage of ECFA and to sign the bill into law, contributed millions of dollars to President Obama's first campaign. However, after the 2008 election, Congressional Republicans acted quickly and vigorously to oppose the bill, and, by 2010, EFCA essentially was dead.

Unable to accomplish sweeping labor policy change through legislation, the Obama Administration instead took a different tack, appointing a number of openly pro-union lawyers to the NLRB, the federal administrative agency charged with enforcing the National Labor Relations Act (Act), the statute that governs the relationship between employees, employers, and unions. These appointees, along with the NLRB's acting general counsel (the agency's chief prosecutor), quickly moved to advance a labor- and employee-friendly agenda through a series of administrative decisions and policy memoranda. High profile disputes, such as the NLRB's decision to bring a complaint against The Boeing Company, through which the Board sought to force the company to abandon its more than US$1 billion investment to build its newest commercial aircraft in South Carolina and instead move it back to a union-represented production line in Washington state, attracted national attention to the Board's renewed activism. The NLRB's increased scrutiny of social media in the workplace has garnered similar national attention.

Although the experiences of the past few years and President Obama's recent reelection have left many employer and management-side labor lawyers anticipating additional pro-labor decisions, even the most jaded employers and lawyers were taken by surprise by the decisions issued by the NLRB over the course of one week in December, just before the holidays, several of which we summarize below. Perhaps these decisions signal a not-so-subtle response to the direct attacks on unions mounted by lawmakers in Wisconsin and Ohio in 2012 and the recent successful initiatives to pass right-to-work legislation in Oklahoma and Michigan. Whatever may have triggered these recent decisions, the effect is the reversal, in some instances, of decades-old precedent and, in other decisions, the NLRB's digging in its heels to advance a pro-labor and pro-employee agenda, a position that employers have come to expect from the current Board, and anticipate more of in the future.

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Perhaps the most important takeaway for employers from this recent run of cases is that employers are in a precarious spot with this Board. Employers rely on NLRB precedent to inform their decisions on workplace issues. However, it has become readily apparent that no rule, no matter how long it has been on the books, is safe from the NLRB's scrutiny. Given the NLRB's open agenda to advance the cause of employees, union and non-union employers alike should brace themselves for a bumpy ride over the next four years.

Decisions Affecting All Employers – Union and Non-Union

Protected Concerted Activity on Facebook Is Still Protected Concerted Activity

Hispanics United of Buffalo, Inc., 359 NLRB No. 37 (2012)

In another decision scrutinizing an employer's response to its employees' airing of workplace issues on social media, the NLRB found that a nonprofit agency violated the law by discharging five employees for comments they made on Facebook in response to a coworker's criticisms of their job performance. After one employee, Lydia Cruz-Moore, threatened to report her concerns about her coworkers' allegedly lackadaisical performance to their supervisor, a coworker, Marianna Cole-Rivera, took to her Facebook page to ask how her fellow employees felt about Cruz-Moore's threat. Four coworkers who had access to Cole-Rivera's Facebook page commented on the post, objecting – at times profanely and sarcastically – to the assertion that their performance was substandard. Cruz-Moore printed the Facebook comments, brought them to her supervisor and, as a result, Cole-Rivera and her four colleagues were terminated for engaging in "bullying and harassment" of a coworker. An administrative law judge decided, and the Board affirmed, that the employer violated the Act by terminating the employees for their Facebook comments. The Board reasoned that the online comments constituted concerted activity for the purpose of mutual aid or protection – specifically, protesting Cruz-Moore's threat to report their alleged poor performance to their supervisor. Although the Board recognized that the employees' "mode of communicating their workplace concerns might be novel," it nonetheless concluded that their actions (which the dissenting Board member described as mere "griping") fell within the scope of activity protected by the Act.

Failure To Specifically Identify NLRB Charges As Excluded From Mandatory Arbitration Program Renders Program Unlawful

Supply Technologies, LLC, 359 NLRB No. 39 (2012)

Continuing its attack on alternative dispute resolution procedures implemented by employers (see prior DR Horton Alert), in this case, the NLRB held that the employer "Mandatory Alternative Dispute Resolution Program," which required that employees submit the majority of employment-related claims to binding arbitration rather than litigation, was illegal because it could cause employees to reasonably believe they were restricted from filing unfair labor practice charges or otherwise accessing the Board's processes. As pointed out in Member Hayes' dissent, however, the program materials specifically stated that employees could "file a charge or complaint with a government agency." The Board majority, however, held that because the materials did not specifically state that employees retained the right to file charges with the National Labor Relations Board, and because it did not specifically carve out NLRB charges from the list of claims excluded from the program, the program materials could cause employees to believe they did not have the right to file charges with the Board, and therefore the entire alternative dispute resolution program was unlawful.

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Employers Responsible For Tax Consequences Incurred By Employees Receiving Lump Sum Back Pay Awards

Latino Express, Inc., 359 NLRB No. 44 (2012)

Deviating from precedent established in 1984, the NLRB held that an employer who pays an award of back pay, in addition to paying interest on the amount, also must pay any additional taxes the recipient incurs as a result of the back pay. A brief illustration shows how the NLRB came to this decision: assume an employer was held to have unlawfully discharged an employee on March 1, 2010. Because of the economic downturn, the employee did not find a replacement job until July 1, 2011. After lengthy litigation, the employee receives a back pay award covering the 15-month period he or she was out of work as a result of the unlawful discharge, and receives a lump sum back pay check in December 2012. Because the employee was working all of 2012, the receipt of the back pay award of 15 months' wages, in addition to the 12 months of wages the employee earned by working in 2012, could result in the employee moving into a higher tax bracket for 2012 than the employee would have been in but for the back pay award (the IRS treats the income as received in the calendar year it is paid to the employee, regardless of when it should have been received). The NLRB's decision in this case now requires employers to pay any additional taxes the employee may incur in this scenario. It also requires the employer to file a statement with the Social Security Administration (SSA) allocating the back pay amounts over the relevant periods so that the employee receives credits for the period of time covered by the back pay award – in the example above, for the second, third, and fourth quarters of 2010 and first and second quarters of 2011 – so that the employee's eligibility and entitlement to SSA benefits are not adversely affected. Both of these new remedial obligations will be applied retroactively, meaning they apply to all present cases before the Board (at any stage), as well as to all cases going forward.

Witness Statements Obtained in Investigations of Employee Misconduct No Longer Absolutely Protected From Disclosure

Piedmont Gardens, 359 NLRB No. 46 (2012)

In 1978, the NLRB held in *Anheuser-Busch, Inc.* that witness statements obtained by employers in the course of an investigation into employee misconduct are subject to a per se exemption from disclosure in response to a union's request for information. Overruling that case, the NLRB held in *Piedmont Gardens* that the balancing test from *Detroit Edison* should apply. Under that standard, a union need only establish that the statements are relevant to its role as the employees' representative, which then shifts the burden to the employer to establish that the union's claimed need for the information is outweighed by "legitimate and substantial confidentiality" interests. Moreover, even if the employer can establish a basis to keep the statements confidential, the Board will not permit the employer to simply refuse to provide them, but instead the employer must raise its confidentiality concerns to the union in a timely manner and seek an accommodation (e.g., an agreement regarding the use or disclosure of any statements).

Decisions Affecting Employers With Union-Represented Employees

Dues Check-off Obligation No Longer Expires With Collective Bargaining Agreement

WKYC-TV, Gannet Co., Inc., 359 NLRB No. 30 (2012)

In those states that do not have right-to-work laws, employees can be required to become members of, and pay dues to, a labor union in order to keep their jobs. Leveraging off the ability to maintain a "closed shop," unions typically seek two terms in collective bargaining agreements with employers in

those states. The first, referred to euphemistically as a "union security" provision rather than "forced membership," reflects the closed-shop nature of the workplace, and requires that employees become members of the union (usually by paying an hefty initiation fee and agreeing to pay monthly dues) within 30 days of hire, or else the employer must terminate their employment. The second term is commonly referred to as a "dues check-off" provision, and requires that the employer deduct union dues from the employees' paychecks and remit the deductions directly to the union, effectively functioning as the union's collection agent and thereby relieving the union of the expense and burden of having to seek dues payments directly from the employees. Since an NLRB decision 50 years ago, the law has been settled that an employer need not continue to remit union dues to a union following the expiration of a collective bargaining agreement containing a dues check-off provision. In this case, the NLRB discarded a half-century of settled law, holding that employers now must continue to deduct union dues from employee paychecks and send the deducted funds to the union, even after the contract requiring it to do so has expired.

In the Absence of a Negotiated Grievance Procedure, Employers Must Bargain With Unions Over Significant Employee Discipline

Alan Ritchey, Inc., 359 NLRB No. 40 (2012)

In a decision the NLRB described as the first in its "doctrinal context," the Board considered whether an employer whose employees are represented by a union must bargain with the union before imposing discretionary discipline on a unit employee. After a majority of its employees voted in favor of representation by a union, but before execution of a first collective bargaining agreement, the employer disciplined certain employees without providing the union notice and an opportunity to bargain. The NLRB concluded as a matter of policy that, where a collectively bargained grievance and arbitration system does not yet exist, as is usually the case where an employer and a union are bargaining a first contract, an employer generally may not unilaterally exercise discretion in imposing significant discipline (e.g., suspension and termination). Instead, the employer must give the union notice and an opportunity to bargain before imposing such discipline on an employee. The NLRB defined discretion to include any instance in which management reserves to itself the right to consider all the circumstances, including the severity of the offense by an employee and possible mitigating circumstances, before imposing discipline.

Dues Objectors Can Be Forced to Pay Union Lobbying Expenses

United Nurses and Allied Professionals (Kent Hospital), 359 NLRB No. 42 (2012)

In 1988, the US Supreme Court held in *Communications Workers v. Beck* that employees who are required to be members of a union pursuant to a union security clause cannot be compelled to pay dues to fund a union's activities that are not related to collective bargaining, contract administration, and grievance processing, such as for political, ideological or other non-representational expenses. At issue in this case was whether a Beck objector – a union member who objects to paying anything other than the core amount of dues directly expended in representational activities – could be compelled to also pay for a union's lobbying activities. The Board held that as long as the lobbying activities are "germane" to the union's representational activities, these expenses can be included in the amounts charged to Beck objectors. The Board also held that a union is not required to provide Beck objectors with an auditor's verification letter attesting to accuracy the union's breakdown of its expenditures to ensure that objectors are not being charged for non-representational activities and instead, absent circumstances calling into question the union's disclosure, objectors must rely on the union's self-disclosed financial breakdown, coupled with its "assurance that the figures were independently verified."

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