Developments at the National Labor Relations Board

2016 Update

Squire Patton Boggs Labor & Employment Webinar Series

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Agenda

- The NLRB’s Continuing Expansion of the “Protected Concerted Activity” Doctrine
- The NLRB’s Continuing Extension of the Act’s Jurisdiction
- The NLRB’s Continuing Broadening of Remedies Under the Act
- The NLRB’s Continuing Restriction on Employer’s Rights
- The NLRB’s Continuing Assistance to Union Organizing Efforts
- The NLRB’s Continuing Hostility to Waivers in Arbitration Agreements
- The NLRB in 2017 – Impact of a New Administration
- Q&A
“Protected Concerted Activity”

2016 Case Law Developments
Protected Concerted Activity – “Concerted”

- THE POWER OF ONE – THE BOARD EXPANDS THE INTERBORO DOCTRINE
  - Under the Interboro doctrine, a 1966 NLRB decision, the Board held:
    - an individual who asserts a right based on a CBA is considered to be engaging in protected concerted activity;
    - the employee must have had a reasonable and honest belief that he was entitled to the terms of the CBA on which he is relying; and
    - it is not relevant whether the employee is ultimately correct in believing that his right under the CBA was violated.
Protected Concerted Activity – “Concerted”

THE POWER OF ONE

However, in *Omni Commercial Lighting*, issued on July 19, 2016, the NLRB expanded the *Interboro* doctrine.

In *Omni*, there were three different collective bargaining agreements governing various aspects of electrical work: the Master Agreement (MA), the Sign Agreement (SA) and the Lighting Maintenance Agreement (LMA). During his interview, the employee told the employer he would only work under the MA and the employer allegedly said “fine.”

A few months after the employee began work, the employee learned the Union and employer had signed the LMA and not the MA. The employee complained to both the Union and employer that they had signed the wrong agreement. After discussion, the employer fired the employee. The employee filed a ULP against both the Union and employer.

The NLRB, in a 2-1 decision applied the *Interboro* decision finding the complaint that the parties signed the “wrong agreement” constituted a “honest and reasonable invocation of a collectively bargained right constitutes concerted activity regardless of whether the employee turns out to be right in his belief.”
THE POWER OF ONE

In expanding *Interboro*, the majority held that the “collectively bargained right” was his belief that he was entitled to benefits under the MA, even though that was not the agreement that was signed between his Union and the employer.

The dissent pointed out the obvious:

- “Indeed, rather than reasonably and honestly invoking a right grounded in the applicable collective bargaining agreement – the LMA – the employee did precisely the opposite: he spurned any rights afforded by the LMA and contended that the rights arising under a different contract (the MA, to which the Employer and Union were not signatory) should govern his employment.”

*Omni* should sound a word of caution to employers when dealing with employee complaints. This decision clearly shows the Board is willing to expand the scope of PCA by allowing an employee to claim a violation of a CBA other than the one that the employer negotiated to cover the employee.
Protected Concerted Activity – Social Media

- Social Media became a focus of the NLRB a number of years ago, and its passion for Social Media has not faded over time.
- Many have suggested that Social Media has become this generation of workers’ water cooler. As many of you know, the NLRB has throughout the years established rules governing Section 7 rights and employee use of Social Media.
- The NLRB’s infatuation with Social Media began in 2011 when the General Counsel issued the first of three memoranda each intended to provide consistency in enforcement actions and guidance to employers as to how to handle employee social media issues.
- The NLRB issued its first decisions on Social Media in 2012 and there have been a number of subsequent decisions addressing Social Media.
- On August 18, 2016, the Board issued its decision in Chipotle Services, LLC. This decision provides the most recent guidance on NLRB Social Media issues.
Protected Concerted Activity – Social Media

- Chipotle terminated an employee shortly after he made several tweets from his personal account regarding employee working conditions and wages.
- During the same time period, the employee circulated a petition addressing management’s purported denial of break periods.
- The Pennsylvania Workers Organizing Committee subsequently filed two unfair labor practice charges asserting that Chipotle maintained an unlawful social media policy, enforced unlawful work rules, prohibited the employee from engaging in protected concerted activity, and terminated the employee because he engaged in protected activity.

- The two challenged sections of the Social Media policy stated:
  - “If you aren’t careful and don’t use your head, your online activity can also damage Chipotle or spread incomplete, confidential, or inaccurate information.”
  - “You may not make disparaging, false, misleading, harassing or discriminatory statements about or relating to Chipotle, our employees, suppliers, customers, competition, or investors.”
Protected Concerted Activity – Social Media

- The ALJ noted as the benchmark consideration:
- When evaluating the appropriateness of rules, the Board balances the legitimate interests of the employer against the Section 7 rights of employees. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). When work rules are overly broad or ambiguous, they may reasonably read by employees to prohibit lawful Section 7 activity, and may serve to chill employees in the exercise of their Section 7 rights. Ambiguous rules are construed against the employer.

- As to the specific rule, the ALJ found:
  - An employer may not prohibit employee postings that are merely false or misleading. Rather, in order to lose the Act’s protection, more than a false or misleading statement by the employee is required; it must be shown that the employee had a malicious motive. ….Statements are made with malicious motive if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity.
The prohibition against disclosing confidential information is also problematic. The policy does not define confidential, even when it is discussed two paragraphs down. While the Respondent certainly has a valid interest in protecting private company information, and it is inappropriate to engage in speculation or presumptions of interference with employees’ rights, the undefined word “confidential” is vague and subject to interpretation, which could easily lead employees to construe it as restricting their Section 7 rights.

The policy prohibits harassing or discriminatory statements. These are legal terms and are not defined anywhere in the policy. The Board found prohibitions against verbal abuse, abusive or profane language, or harassment to be lawful..... The mere fact that the rule could be read to address Section 7 activity does not make it illegal..... Similarly, in Palms Hotel and Casino, the Board found lawful a rule that prohibits employees from engaging in conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing or interfering with other employees. “Nor are the rule’s terms so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace. . . . We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral work rule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it. Following this rationale, I find that the prohibitions against harassing or discriminatory statements do not violate the Act
The employee also tweeted a news article concerning hourly workers having to work on snow days when certain other workers were off and public transportation was shut down. His tweet addressed Chris Arnold, the communications director for Chipotle, stating: “Snow day for ‘top performers’ Chris Arnold?” In the other tweets, the employee (Kennedy) replied to tweets posted by customers. In response to a customer who tweeted “Free chipotle is the best thanks,” Kennedy tweeted “nothing is free, only cheap #labor. Crew members only make $8.50hr how much is that steak bowl really?” Then, replying to a tweet posted by another customer about guacamole, Kennedy wrote “it’s extra not like #Qdoba, enjoy the extra $2” (referring to the fact that, unlike the restaurant chain Qdoba, Chipotle charges extra for guacamole).

The Company requested the employee delete the tweets.

The ALJ found the request violated the employee’s Section 7 rights but the Board vacated stating:
On this record, we do not find that Kennedy’s underlying actions were concerted. Chairman Pearce would affirm those findings for the reasons stated by the judge, except for the judge’s finding that Kennedy’s tweet regarding the price of guacamole constituted protected, concerted activity, as this tweet appears unrelated to employees’ terms and conditions of employment, and thus was not for the purpose of mutual aid or protection.
In *Schwan’s Home Service, Inc.*, the Board invalidated three seemingly neutral rules addressing disclosure of company information, the use of the company name, and the company’s conflict of interest policy.

- **Disclosure of company information:**
  - Schwan’s handbook rule barred employees from sharing (among other things) “information concerning customers, vendors, or employees.” In addition, it provided: “Schwan’s business shall not be discussed with anyone who does not work for Schwan or with anyone who does not have a direct association with the transaction.”

- **Use of company name:**
  - The Company’s policy provided: “Any articles, speeches, records of operation, pictures or other material for publication, in which the company name is mentioned or indicated, must be submitted, through your supervisor, for approval or disapproval by the Corporate Communications and Law Departments prior to release,”
Protected Concerted Activity – Handbooks

- Conflict of interest:
  - Schwan’s conditioned continued employment on the strict avoidance of conduct, on-duty or off, that “is detrimental to the best interests of the company or its employees.”

- “ECONA”
  - Employees were required to sign the company’s Employment, Confidentiality, Ownership & Noncompete Agreement (ECONA), which prohibited employees from sharing information about “wages, commissions, performance, or identity of employees.” It barred employees from disclosing such information, either directly or indirectly, to “any person not in the employ” of the company and prohibited the employee from using such information to his or her own benefit or the benefit of a third party or employer, or to Schwan’s detriment, or to seek work elsewhere or solicit employees.

- The Board found that all of these provisions violated the “reasonably construe” standard set forth in Lutheran Heritage Village, once again reinforcing the need for specifics in these types of policies and the fact that any ambiguity will be construed against the employer.
NLRB Jurisdiction

2016 Case Law Developments
The Board’s Expanding Jurisdiction

- **CHARTER SCHOOLS – Hyde Leadership Charter School & Pennsylvania Virtual Charter School**
  - The Board possesses jurisdiction over employers engaged in interstate commerce.
  - Specifically excluded from the Board’s jurisdiction are public sector employers, including public schools and school districts.
  - The Board held in two cases that it has jurisdiction over employees of charter schools in New York and Pennsylvania, finding they are not political subdivisions.
  - Both the union in the New York case and the school in the Pennsylvania case argued against the Board’s exercising jurisdiction over the charter school employees. The New York union and the Pennsylvania school argued, along with dissenting Member Miscimarra, that the Board’s exercise of jurisdiction over charter school employees creates a lack of uniformity among charter schools whose employees may seek to organize under either the National Labor Relations Act or alternatively under state law in the context of states’ public employment relations boards.
The Board’s Expanding Jurisdiction

- GRADUATE STUDENTS – Columbia University
  - The Board held that Columbia’s graduate students who teach and do research in connection with their studies are employees within the meaning of the Act.
  - The Board overruled its prior Brown University decision.
  - Private university graduate assistants throughout the US may now unionize.
Joint Employer Developments

- **Miller & Anderson -- Bargaining Units Consisting of Employees of Two Different Employers**
  - The Board in a 3-1 decision returned to the rule it established in *M.B. Sturgis, Inc.* and reversed its 2014 *Oakwood Care Center* decision.
  - The Board held in *Miller & Anderson* that petitioners seeking to represent employees in bargaining units that combine both solely and jointly employed employees of a single user employer are no longer required to obtain employer consent.
  - The Board’s majority held that petitioned-for units combining solely and jointly employed workers of a single user employer must share a community of interest in order for a single unit combining the two to be deemed appropriate. The Board will apply the traditional community of interest factors for determining unit appropriateness.
  - As outlined in *Sturgis*, a user employer will be required to bargain regarding all terms and conditions of employment for unit employees it solely employs. However, it will only be obligated to bargain over the jointly-employed workers’ terms and conditions which it possesses the authority to control.
Joint Employer Developments

- **Browning-Ferris Industries – BFI Appeals**
  - In August 2015, the Board held that BFI, as a joint employer of employees, unlawfully refused to bargain with a union representing employees employed by its subcontractor.
  - The Board overruled 30 years of prior decisions and announced a new standard under which the Board evaluates:
    - Whether a common-law employment relationship exists; and
    - Whether the putative joint employer "possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful bargaining."
  - The Board’s standard, though, allows “control” to be established directly or indirectly, such as through an intermediary or through contractual provisions that preserve the right to control, whether or not that control is ever exercised.
  - After an election in which the union prevailed, the Board certified the union.
  - BFI refused to bargain, the union filed an unfair labor practice charge, and the Board found BFI and its subcontractor violated the Act.
  - BFI appealed the Board’s decision to the D.C. Circuit, and the case is pending.
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Remedies Under the NLRA

2016 Case Law Developments
Expanded Remedies Under the NLRA

- **King Soopers, Inc.**
  - NLRB changed method of computing back pay to unlawfully terminated employees.
  - Search for work expenses and other interim employment expenses are now a separate element of damages, rather than an offset against interim earnings (as had been the case since 1938).
  - Example from case:
    - Terminated employee earned $1,000/month. Employee moves to new state to obtain new employment and is required to obtain training. Her job search, moving expenses, and training expenses equal $6,000. The new job pays $750/month. Employee has worked two months, resulting in $1,500 in interim earning.
    - Under prior approach, expenses were capped at $1,500, as they were an offset against interim earnings and thus could not exceed those earnings.
    - Now, search for work and other interim employment expenses are a separate element of damages, so the employee would be entitled to net back pay (here $500), plus all of the search and interim employment expenses ($6,000), for a total award of $6,500 instead of $2,000 ($500 in back pay plus $1,500 in capped interim earnings).
  - Problem (noted in dissent): formulation could result in a windfall for an employee who receives a higher paying subsequent job, where an offset of expenses against interim earnings would still result in no loss to the employee, but the employee would nonetheless be awarded the search for work expenses.
    - Example: Employee would have made $5,000 in back pay, spent $250 in search for work expenses, and obtained a job that paid $6,000 in interim earnings. Under prior formulation, no award because expenses are offset by earnings; now employee gets the $250 even though they had no financial loss during the period.
  - Complicates what can already be a complicated compliance process.
Expanded Remedies Under the NLRA

- **United States Postal Service**
  - NLRB again discards decades of case law, ruling that ALJs no longer can approve settlements over the objection of the General Counsel and Charging Party unless the settlement provides a “full remedy” for the alleged violation(s).
  - Since 1980s, ALJs could approve unilateral settlement agreements if the settlement “substantially remedied” the violations alleged in the complaint, when evaluated under a standard that looks at whether the settlement is reasonable in light of the nature of the violations alleged, the risk of litigation, and the stage of the litigation.
  - Now, if the GC or CP objects, ALJs can only approve the settlement if it provides “full relief” – which, of course, is no settlement at all.
  - Likely impact: GC and CP now have greater leverage in settlement discussions, will make settlements more difficult to obtain, and force more cases to go to trial, since employers cannot obtain a settlement unless they provide a full remedy.
Restrictions on Employer Rights

2016 Case Law Developments
Restrictions in Collective Bargaining

- **Total Security Management Illinois, LLC**
  - *Total Security* reaffirmed the Board’s *Alan Richey* decision
    - In *Alan Richey*, the Board held that once a union is certified, the employer, with limited exceptions, is under an obligation to bargain with the Union before imposing serious discipline if no CBA has yet been agreed upon.
    - In *Total Security*, three employees were terminated. The company did not provide notice to the union of the terminations and did not provide an opportunity to bargain over the discharges before they became effective. The Company had no good faith belief that the continued presence of the employees presented a serious, imminent damage to its business or personnel or that any of them engaged in unlawful conduct.
    - The Board held the company violated the Act by failing to notify the union and engage in bargaining prior to imposing serious discipline.
Restrictions in Collective Bargaining

- **Total Security Management Illinois, LLC**
  - Significantly, the Board for the first time established the remedies for an *Alan Richey*-type violation.
  - These include standard remedial relief, i.e. cease-and-desist order, a requirement to bargain, and notice-posting, however, the Board opined that make-whole remedial relief, including reinstatement and back pay, also would be appropriate. Where post-violation the parties did bargain and later reached agreement on discipline, the majority indicated the back pay remedy generally would run from the date of unilateral discipline until the date of the agreement, to the extent the agreement did not provide for such back pay. An agreement providing less than full back pay and purporting to settle the pre-discipline bargaining violation would be subject to review under the Board’s standards for non-Board settlement agreements. if challenged. In the event the parties, post-violation, bargained in good faith to impasse over the discipline, back pay would run until the date of impasse.
  - Such make-whole relief would, however, be subject to an employer’s affirmative defense that the discipline was “for cause” under the Act. The majority’s new “for cause” defense places the burden on the employer, during the compliance phase of the case, to show “(1) the employee engaged in misconduct, and (2) the misconduct was the reason for the suspension or discharge.”
Restrictions in Collective Bargaining

- Relying on your management rights clause? Better think again.
- Reliance upon a management rights clause is a time honored foundation of administering a collective bargaining agreement.
- Before the NLRA, management had all of the rights.
- Once the NLRA became law and collective bargaining became the approved method for dealing with employer rights, it became the union’s job to try to take those rights away.
- Almost all collective bargaining agreements contain a management rights clause that grants the employer the right to take unilateral action with respect to the terms and conditions of employment unless it has specifically given up those rights through contract language. Most clauses are vague and simply say unless expressly addressed in the agreement, management retains all of its rights to manage the workforce.
Restrictions in Collective Bargaining

- All of this changed with the Board’s decision in *Graymont PA, Inc.*

- In *Graymont*, the management rights clause stated that management “retains the sole and exclusive right to manage; to direct its employees; to evaluated performance, … to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies and procedures and the set and establish standards of performance for employees.”

- The Company announced its intent to change the work rules and the Union demanded to bargain over those changes. Despite claiming it had no obligation to bargain, the Company did bargain and ultimately implemented the modifications.

- The Union filed a ULP and the Board held the Company committed an unfair labor practice.

- The Board held the management rights clause did not constitute a “clear and unmistakable” waiver of the right to bargain. It held that “none of the provisions specifically reference work rules, absenteeism and progressive discipline. Further there is no evidence that the parties discussed these subjects during negotiations.”
The Board’s Continuing Assistance to Union Organizing Efforts

2016 Developments
Update on Ambush Election Rules

- **The New Rules**
  - Went into effect April 2015.
  - Elections can now be held as soon as 10 days after the filing of a petition (but most are not).
  - Most employer challenges to voter eligibility and unit appropriateness can only be pursued post-election.

- **The Impact**
  - Election filings have gone up, but only slightly.
  - Election time has dropped to 24 days, down from about 38 days.
  - Union win rates have remained around 65%
Electronic Signatures

- **NLRB General Counsel Memoranda, September and October 2015**
  - September 2015 GC memo: Parties may submit electronic signatures in support of a showing of interest.
  - October 2015 revised GC memo: Provided more detail and examples, including email exchanges and internet sign-up methods.
  - Includes a website that employees can access to complete an online authorization form.
  - The online authorization must include the signer’s name, email address or social media account, telephone number, and the actual “authorization language” to which the employee assents, the date of the submission and the name of the employer.
  - Employees can affirm their desire for union representation essentially by clicking a box.
  - How the Board will verify the authenticity of electronic signatures remains unclear. The union can provide verification through independent public key infrastructure (PKI) technology, which the Board will accept. Otherwise, the union must send a “confirmation transmission” to each signer.
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Class and Collective Action Waivers in Arbitration Agreements

2016 Case Law Developments
NLRB’s Continuing Rejection of Class/Collective Action Waivers in Arbitration Agreements

The NLRB last year -
NLRB’s Continuing Rejection of Class/Collective Action Waivers in Arbitration Agreements

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The NLRB next year -
NLRB’s Continuing Rejection of Class/Collective Action Waivers in Arbitration Agreements

How we got here:

- **D.R. Horton, Inc.** (2012) – NLRA guarantee of right to engage in PCA prohibits mandatory waiver of class/collective actions in employment arbitration agreements as a condition of employment.
  - NLRB to Fifth Circuit – class/collective actions are a procedural device that can be waived, not a substantive right; NLRA interpretation not subject to deference; FAA savings clause applies.

- **Murphy Oil USA, Inc.** (2014)
  - NLRB back to Fifth Circuit

Meanwhile, Second, Eighth, and Eleventh Circuits follow Fifth Circuit, along with every state and federal court.

But then…

- **Lewis v. Epic Systems, Inc.** (Seventh Circuit; 5/26/16; cert petition filed 9/2/16)
- **Morris v. Ernst & Young** (Ninth Circuit, 8/22/16; cert petition filed 9/8/16)
- **Murphy Oil USA, Inc.** – cert petition filed 9/9/16
NLRB’s Continuing Rejection of Class/Collective Action Waivers in Arbitration Agreements

- Supreme Court review seems inevitable (and desired by all stakeholders).
- Recent trend is either wait-and-see, or now towards NLRB view.
  - *In re: Fresh & Easy, LLC; Case No. 1:15-bk-12220* in the U.S. Bankruptcy Court for the District of Delaware.
  - Third Circuit has not addressed, but in October 2016, a Delaware bankruptcy judge refused to enforce a class action waiver in an employee arbitration agreement because the Court determined the waiver violated the NLRA.
- Supreme Court’s decision will impact thousands of employers and millions of employees.
  - If the Supreme Court affirms Fifth Circuit; rejects Seventh and Ninth Circuits…
  - If the Supreme Court rejects Fifth Circuit; adopts NLRB (and Seventh and Ninth Circuits) position…
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The NLRB in 2017 – Impact of a New Administration
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Impact of a Trump Presidency?

▪ Trump has said very little about his agenda regarding the NLRB and whether he would attempt to walk away from many of the Board decisions which have been viewed as decidedly pro labor.

▪ However, the Republican platform either directly or indirectly suggests that the joint employer issue will be revisited.

▪ It contains vague language about bring labor law into the 21st century by eliminating regulations and presumably Board decisions that restrict workplace flexibility.

▪ Trump will have the ability to reshape the Board. Board members are appointed to five year terms with one member seat coming open every year. There are currently two open seats and the three other seats will come up for appointment within the next four years.
Impact of a Clinton Presidency?

- “I’ve always believed that when unions are strong, families are strong and America is strong. That is not a slogan for me. That is a statement of fact. You created the strongest middle class in the history of the world. You led the fight for affordable health care more than half a century ago. And today, you’re leading the fight to raise the minimum wage, which will lift 35 million working Americans out of poverty.”
  – Hillary Clinton, March 2016

- A Clinton presidency will seem like a third term of an Obama presidency.

- Clinton will likely continue the momentum built up through President Obama with respect to utilizing executive orders to implement policy without having to work through the Congress.

- There is no likelihood that any of the developments such as union election rules, the joint employer issue and other pro-union and pro-employee issues will be unraveled.

- The pendulum will stay on the side of organized labor.
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