McNees WHITEPAPER

The National Labor Relations Board 2018 Year End Review
AN OVERVIEW OF MAJOR DEVELOPMENTS IN LABOR LAW

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McNees

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Introduction

Although in many respects it was a slow year for the National Labor Relations Board, it was a year of progress in the eyes of many employers. The Board operated at full strength for the entire year, with Republican John Ring as the Chairman. In addition, certain key initiatives were undertaken by the Board's General Counsel, Peter Robb, a Republican. 2018 also brought with it some groundbreaking developments from the courts.

In Fiscal Year 2018, the Board received 18,871 unfair labor practice charges, which resulted in 1,088 complaints. Those complaints resulted in $54 million in back pay awards and 1,270 offers of reinstatement. The Board also handled 1,597 election petitions, which resulted in 1,190 elections. In those elections, the union prevailed 790 times, or about 70.5 percent of the time.

Although the Board did issue a number of employer-friendly decisions, including a few that reversed some controversial Obama-era decisions, Chairman Ring signaled an intention to rely more on the rulemaking process to establish the policies and procedures of the Board. The rulemaking process, although more time consuming, allows for public comment. Rulemaking also often provides more guidance, because the Board can include explanatory comments with the rules. Consistent with this new approach, the Board announced its intention to review the previously adopted election rules and to establish a joint employer test via rulemaking.

Although these processes will take time, many employers are hopeful that patience will pay off and the results will be more consistent and transparent rules governing the workplace. In addition, employers are hopeful that 2019 will bring more employer-friendly decisions. We summarize key labor law developments from 2018 below.

Major Board Initiatives

No Progress on Quickie Election Rules

In December 2018, the Board published a Request for Information related to the "Quickie" or "Ambush" election rules issued and adopted in 2014. The rules, which significantly shorten the period of time between the filing of a petition for election and the actual election date, were clearly intended to aid union organizing efforts. Our 2017 Year in Review, available here, summarized the Board's process for studying the rules. Despite announcing its intention to examine the Quickie election rules, the Board has not taken significant action on this issue as of the date of this year's Review.

Joint Employer Standard Takes Step Forward, Two Back

In 2015, the Obama Board issued a decision in Browning-Ferris Industries of California, 362 NLRB No. 186 (2015), and vastly expanded the situations in which a franchisor or another employer could be deemed a joint employer with its franchisee or with a supplier of a contingent workforce (e.g., temporary staffing agency). With joint employer status comes joint employer liability, and potentially, the obligation to bargain.

Under the Browning-Ferris standard, an employee or group of employees would only need to demonstrate some reserved ability by the franchisor or source employer to potentially control the terms and conditions of the other entity's employees. To the relief of employers, Browning-Ferris was quickly appealed to the United States Court of Appeals for the D.C. Circuit. In the meantime, in December 2017, the Trump Board decided Hy-Brand Industrial Contractors, 365 NLRB 156 (2017) and announced that it would return to the prior standard that required proof of a joint employer's actual exercise of control over essential employment terms, rather than merely having reserved the right to exercise control. After Hy-Brand was issued, Browning-Ferris was no longer relevant, so the Court of Appeals remanded that appeal back to the Board.

Then, in a strange twist, in late February 2018, the Board issued an Order vacating Hy-Brand based on a determination by the Board's Ethics Official that one of the three Members who participated in the matter should have been disqualified. With that disqualification no Board quorum existed. Then, things got confusing. The Board asked the Court of Appeals to step back in, recall Browning-Ferris, and issue a decision.

On April 6, 2018, the Court of Appeals granted the Board's request and recalled Browning-Ferris. Then, at the end of the year, the court upheld the underlying Board decision. The court agreed that in determining employment status, the key question is the common law principle of control, and it does not matter for this analysis if that control is "direct or indirect, exercised or reserved." Thus, according to the court, the NLRB's 2015 decision was consistent

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with the common law and enforceable, unless overturned by the NLRB. The decision, Browning-Ferris Industries of California v. National Labor Relations Bd., 911 F.3d 1195 (D.C. Cir. 2018), was not good news for many employers who use temporary staffing agencies or franchisees. In addition, it appears to be inconsistent with the vacated Hy-Brand decision. In the end, the impact of Browning-Ferris may be short-lived.

In September, consistent with its approach to some other critical issues, the Board announced an intention of proposed rulemaking to address the standard for determining joint-employer status. Under the proposed rule, "an employer may be found to be a joint-employer of another employer's employees only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine. Indirect influence and contractual reservations of authority would no longer be sufficient to establish a joint-employer relationship."

Chairman Ring's comments accompanying the announcement are telling: "Whether one business is the joint employer of another business's employees is one of the most critical issues in labor law today. The current uncertainty over the standard to be applied…undermines employers' willingness to create jobs and expand business opportunities. In my view, notice-and-comment rulemaking offers the best vehicle to fully consider all views on what the standard ought to be."

General Counsel Clarifies Board's Position on Employer Handbook Rules

The Board's examination of employer policies has been a hotly debated topic and has been the subject of numerous challenges. Back in Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004), the Board held that an employer's facially neutral handbook policy unlawfully interferes with employees' rights under the National Labor Relations Act ("NLRA") if employees could "reasonably construe" such policies to prohibit the exercise of those rights. Unsurprisingly, the standard created a great deal of uncertainty because the lawfulness of a policy hinged on how it could be interpreted by employees instead of its plain language.

In a major victory for employers, the Board issued its decision in The Boeing Co., 365 NLRB No. 154 (2017) at the end of 2017, overturning Lutheran Heritage and replacing its standard with a more concrete test. The Boeing rule holds that when evaluating an employer's facially neutral policies which could potentially interfere with employees' rights under the NLRA, the Board will consider: (1) the nature and extent of the potential impact on NLRA rights, and (2) legitimate justifications associated with the rule. The Board also established three categories of work rules: (1) Category 1 Rules, which are lawful to maintain either because they do not interfere with NLRB rights or because the potential adverse impact on protected rights is outweighed by the justification associated with the rule; (2) Category 2 Rules, which warrant individualized scrutiny on a case-by-case basis to determine lawfulness; and (3) Category 3 Rules which are unlawful to maintain, regardless of the justification behind them.

In 2018, the Board's General Counsel issued a guidance memorandum clearly outlining the types of work rules that fall within each category. The memorandum not only defines broad categories of rules that fit within each classification, but also provides sample policy language. Examples of Category 1 Rules include policies relating to civility between employees, rules against recording and photography, rules prohibiting insubordination, and rules protecting confidential information. Category 2 Rules include broad conflict of interest rules, rules prohibiting the disparagement of the employer, rules regulating the use of the employer's name, and rules banning off-duty conduct. Category 3 Rules include rules that prohibit disclosure of wages, benefits, or working conditions, rules against joining outside organizations, and rules prohibiting employees from voting on matters relating to the employer.

The General Counsel's guidance is a roadmap for employers to establish lawful, and enforceable workplace policies and procedures.

General Counsel Pushes Prosecution of Fair Representation Cases

The General Counsel did not stop with workplace policies. Instead, the GC offered additional guidance directed at unfair labor practice charges against unions themselves. Unions are obligated to represent their members fairly by engaging in conduct that is not arbitrary, discriminatory, or undertaken in bad faith. This obligation is known as the duty of fair representation. Oftentimes when unions are accused of mishandling a member's grievance or some other malfeasance, they are quick to point out that the duty of fair representation is not breached by "mere negligence." In October 2018, the Board's General Counsel sent a strong message to unions that negligence defense may not be as easy to assert as it once was.

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In an internal directive, the General Counsel directed the Board's field offices to require unions accused of breaching their duty of fair representation to produce evidence of internal practices and protocols designed to prevent negligent mistakes such as losing track of grievances, failing to communicate with a member about a grievance, or other negligent conduct. In other words, citing the "mere negligence" defense may no longer be enough for a union to avoid an unfair labor practice charge. Instead, unions will be asked to demonstrate policies and procedures in place to prevent such "mistakes."

Board Announces Intention to Review Email Rule

Another Obama-era National Labor Relations Board policy may be on the ropes. Five years ago, the Board issued its controversial Purple Communications, 361 NLRB 126 (2014) decision. In that case, it determined that employees have the right to use employers' email systems to unionize and engage in other activities protected under the NLRA.

On August 1, 2018 the Board approved an invitation to file briefs on whether Purple Communications should be modified or overruled altogether. Some interpret this approval as a signal that employees' ability to use their employer's email systems to unionize and engage in non-business, protected activity could soon be in jeopardy.

In other words, another employer-friendly NLRB ruling could be on its way.

Board Reinstates Test for Examining "Concerted" Under NLRA

In Alstate Maintenance LLC, 367 NLRB 68 (2019), the Board clarified the definition of "concerted" under the National Labor Relations Act, and reiterated that individual employee complaints or gripes are not "concerted" activity under the Act. Before we look at Alstate, let's take a step back and look at what Section 7 of the Act does protect.

Section 7 of the Act may be its most important provision, and certainly the area that gets the most attention and litigation. Section 7 provides employees with the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." In order to be protected, employee activity must be "concerted" and engaged in for the purpose of "mutual aid or protection." These terms have been examined extensively by the Board and the courts.

The definition of "concerted" for example, has been argued about countless times. For many years, nearly three decades, the Board used a consistent standard to review whether an employee's activities were "concerted" The standard is known as the Myers Industries standard, and it is named after a series of cases that date back to the 1980s. Essentially, under Myers Industries, concerted activity is defined as (1) group action or action on behalf of other employees; (2) activity seeking to initiate or prepare for group activity, or (3) bringing a group complaint to the attention of management. Individual grips or complaints were not protected.

The Board modified the last part of this test in 2011 when it issued its decision in WorldMark by Wyndham, 356 NLRB 765 (2011), which held that lodging a complaint in a group setting and using the term "we" qualified as concerted activity. This decision essentially held that an individual complaint in a group setting qualified as "concerted" activity.

Alstate reversed WoldMark by Wyndham and reinstated the Myers Industries test set forth above. In Alstate, the Board said that a complaint in a group setting, alone, is not enough to satisfy that test. The Board clarified that for an employee's statement to qualify as a group complaint, the statement must be a complaint regarding a workplace issue and the circumstances must make it clear that the employee was seeking to initiate or induce group action. In other words, an individual gripe does not qualify as concerted activity, even if it takes place in front of other employees.

Significant Court Decisions Impacting Labor Law

In 2018, some key Board decisions were reviewed on appeal. In addition, the courts issued key decisions that will have a significant impact on labor law in the years to come. The key decisions are summarized below.

SCOTUS Rules Individual Arbitration Agreements Lawful

In May, the Supreme Court of the United States ruled that arbitration agreements, which waive the right to proceed as part of a class or collective action, are enforceable in the employment context. In Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018), the Court held that employment agreements that require individualized arbitration proceedings to resolve workplace disputes are lawful.

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In a series of cases, employees and former employees had asserted that agreements requiring individual arbitration violate the NLRA, because the NLRA protects employee rights to proceed in class or collective actions. Although it had taken a different position in 2012, the Board agreed that arbitration agreements, which waive the right to proceed in class or collective actions, violate the NLRA. The Board's controversial position was set forth in D.R. Horton, 357 N.L.R.B. 2277 (2012) and Murphy Oil USA, 361 NLRB 774 (2014).

Employers countered that the Federal Arbitration Act expresses a strong preference for arbitration and makes clear that arbitration agreements are presumptively valid. The FAA requires that courts enforce arbitration agreements, including procedural terms related to the arbitration process itself. The FAA does provide that arbitration agreements will not be enforced if there is a legal basis to set aside the agreement, such as fraud or duress in the making of the contract. However, in this case, the only argument presented was that the individual arbitration agreements violate the NLRA.

The Supreme Court rejected that contention, holding that the FAA requires enforcement of arbitration agreements, including agreements that call for individual proceedings. The Court noted that in order for a law such as the NLRA to trump the FAA, there must be a clear statement of intention in the law. The Court found no such clear intention in the NLRA. The Supreme Court's decision is the law of the land, and that means that arbitration agreements in the employment context that require individualized claims are lawful.

SCOTUS Rules Fair Share Fees Unconstitutional

In June, the Supreme Court issued its long-awaited opinion in Janus v. AFCSME, 138 S. Ct. 2448 (2018), which held that requiring public sector employees to pay fair share fees to unions violates the First Amendment. A fair share fee (sometimes called an agency fee) is a fee that non-union members must pay to the union to cover the expenses incurred by the union while representing bargaining unit employees. Until Janus, fair share fees were legal in most states, and required by many collective bargaining agreements.

This was true despite the fact that the employees paying the fees had intentionally opted not to join the union, because the union still had a legal obligation to represent all employees within the bargaining unit, regardless of whether the employee was a member of the union. These laws became common after the Supreme Court issued its 1977 opinion Abood v. Detroit Bd. of Educ., 97 S. Ct. 1782 (1977), which held that fair share fees were constitutional and maintained labor peace by preventing "free riders." However, in recent years, there have been a number of challenges to the constitutionality of fair share fees and the validity of Abood.

Those challenges came to a head in Janus. Ultimately, the Court ruled that fair share fees violate public sector employees' right to free speech. As a basic premise, the Court recognized that the right to free speech includes the right to refrain from speaking at all. Thus, "[c]ompelling individuals to mouth support for views they find objectionable violates the cardinal constitutional command, and in most contexts, any such effort would be universally condemned." Accordingly, forcing employees to pay fair share fees (i.e., compelling employees to speak in support of the union when they may otherwise remain silent) violates the First Amendment.

The end result of the Court's holding is clear: fair share fees are unlawful, and unions must have an employee's consent before withholding any dues, fees or other assessments from employee wages.

Third Circuit Holds Union Membership Worthy of Constitutional Protection

In another case examining constitutional protections for employees, the Third Circuit Court of Appeals held that a public employer violates the First Amendment of the United State Constitution when it retaliates against an employee based on the employee's union membership. In reaching its conclusion, the court distinguished between First Amendment "free speech" claims and First Amendment "association" claims.

Palardy v. Township of Millburn, 906 F.3d 76 (3d. Cir. 2018), involved a claim by a former police officer who alleged that the Township refused to promote him to Chief because of his affiliation with the police officers' union. In support of his claim, the former officer presented testimony that the Township's business administrator made a number of derogatory comments about his role as a union leader. Interestingly, the former police officer retired before the Chief position actually became vacant, because he believed that he would not be selected for the position.

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The Township argued that union affiliation is not a matter of public concern, and therefore not protected by the First Amendment. The trial court agreed, holding that speech on behalf of the union and association with the union were not constitutionally protected conduct. On appeal, the Third Circuit analyzed and rejected the trial court's opinion, which also happened to be the same opinion reached by the majority of other circuit courts throughout the United States.

Instead, the Third Circuit adopted the minority view, and concluded that union affiliation is protected by the First Amendment freedom of association clause. The Court agreed with the Fifth Circuit, which had previously held that the union activity of public employees is always a matter of public concern, and therefore, no additional proof is necessary to establish that the union affiliation is protected

Accordingly, when an association claim arises from a public employee's union affiliation, the employee or former employee need not establish that his association was a matter of public concern or that any specific free speech issues are implicated. Keep in mind that First Amendment claims still require that the plaintiff establish three things: (1) that he engaged in constitutionally protected conduct; (2) that the defendant engaged in retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights; and (3) a causal link between the protected conduct and the retaliatory action. In Palardy, the court only considered the first question, finding conclusively that union-affiliation is constitutionally protected conduct. The court remanded the case for consideration of the additional two elements.

Only time will tell if the Supreme Court will step in and provide a consistent, nation-wide test for determining whether union activity is protected by the Constitution of the United States.

Summary

2017 was marked by a flurry of Board activity, but developments in 2018 came at a slow trickle. Nonetheless, there were a number of significant labor law developments last year, and a good number were employer-friendly. The Trump Board continued to reverse some of the Obama Board decisions and began the process to reverse some others. Although the rulemaking process may take more time, the hope is that this approach will bring more consistency and transparency, which will bring greater ease of compliance for employers.

As the Board's efforts continue, we will keep you updated on our blog: www.palaborandemploymentblog.com