SEYFARTH SHAW

PREPARE FOR CHANGE:

2018 AND BEYOND AT THE NLRB

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What can Employers expect with a change of Administrations?

- Over a period of eight years under the previous administration, the National Labor Relations Board engaged in perhaps the most dramatic reinterpretation of the NLRA in the agency's 80+ year history. Many believe that the Board's actions were the most pro-union and anti-employer in the agency's history.
- With a new Administration, the rules are likely to change again. Here are the things that have changed, may change, and why change is likely to occur more slowly than many employers hope or expect.

How The NLRB Is Structured

Presidential Appointees

- 5 member Board, Serving staggered 5 year terms
- 1 General Counsel, Serving a 4 year term

How The NLRB Is Structured

All Others Are Career Civil Servants

- 26 Regional Offices
  - Regional Director
  - Assistant RD
  - Regional Attorney
  - Staff Attorneys
  - Board

- Headquarters in Washington, D.C.
  - Office of Advice
  - Office of Appeals
  - Members' and GC's Staff

The Balance Of Power

THE BOARD

- Through 8/9/17: Democratic Majority (2-1)
- From 8/10/17 to 9/25/17: Split (2-2)
- From 9/26/17 to 12/16/17: Republican majority (3-2)
- From 12/17/17 to Now: Split (2-2)

  Mark Pearce (D): Term expires 8/27/18
  Lauren McFerran (D): Term expires 12/16/19
  Marvin Kaplan (R): Term expires 8/27/20
  William Emanuel (R): Term expires 8/27/21;
  Vacancy (R): John Ring nominated 1/12/18; Approved by Senate panel 3/14/18; Term would expire 2022

THE GENERAL COUNSEL

- Through 11/4/17: Richard Griffin (D)
- Effective 11/17/17: Peter Robb (R) Term Expires 2021

The NLRB Process

- **RULEMAKING** (Very Rare)

  Proposal → Comments → Revision → Analysis
  Publication → Potential Litigation/Injunction → Implementation

- **CASE-BY-CASE DECISIONS**
  - **ULP CHARGES**

Investigation → Complaint → Hearing → ALJ Decision →
Appeal to NLRB → NLRB Decision → Appeal to US Court of Appeals

  - **REPRESENTATION CASES**

Petition → RD Decision → Election → Objection → Certification of Results → Potential
Appeal to NLRB or Refusal to Bargain ULP Charge

- **GENERAL COUNSEL MEMOS**
  - Guidance on interpretation and application of the Law and Board Decisions
  - Directives to Staff

What has changed so far? Micro Units

OBAMA BOARD:

Specialty Healthcare, 357 NLRB 934 (2011) – Board will not find a petitioned for unit inappropriate unless the employer proves that the excluded employees shared an "overwhelming community of interest" with the petitioned-for group.

TRUMP BOARD:

PCC Structurals, Inc., 365 NLRB No. 160 (Dec. 15, 2017) – Board overrules *Specialty Healthcare* and reinstates the traditional community of interest standard which permits the Board to evaluate the interests of all employees – both within and outside of the petitioned-for unit – without regard to whether these groups share an "overwhelming community of interest."

What has changed so far? "Reasonableness" Settlement Standard

OBAMA BOARD:

United States Postal Service, 364 NLRB No. 116 (2016) – Administrative Law Judge (ALJ) may not accept a Respondent's proposed settlement terms, over the objection of the General Counsel and Charging Party, unless they provided a full remedy for all of the violations alleged in the Complaint.

TRUMP BOARD:

UPMC, 365 NLRB No. 153 (2017) – ALJ can approve an employer's offer to settle unfair labor charges, even over the objection of General Counsel and Charging Party, so long as the settlement offer meet the multi-factored "reasonableness" standard as set forth in Independent Stave, 287 NLRB 740 (1987)

What has changed so far? Past Practice

OBAMA BOARD:

E.I. Du Pont de Nemours, 364 NLRB 113 (2016) – A divided Board held that actions consistent with past practice nonetheless constituted change and required the employer to notify the union and provide an opportunity for bargaining prior to implementation if the past practice was created under a management rights clause in a labor agreement that had expired or if the disputed actions involved employer discretion

TRUMP BOARD:

Raytheon Network Centric Systems, 365 NLRB No. 161 (2017) – A Board majority (3-2) held that actions do not constitute a change if they are similar in kind and degree with an established past practice consisting of comparable unilateral actions. The Board also held this principle applies regardless of whether a labor agreement was in effect when the past practice was created and no labor agreement existed when the disputed action was taken. Finally, the Board ruled that such actions consistent with an established past practice do not constitute a change requiring bargaining merely because they may involve some degree of discretion.

What has changed so far? Deferral to Arbitration

OBAMA BOARD:

Memorandum GC 12-01 – On 01/20/12 Acting GC Lafe Solomon changes existing policy and will no longer defer Section 8(a)(1) and (3) case to arbitration unless it appears likely the grievance arbitration will be completed in less than a year. It also introduced significant changes to the NLRB's longstanding deferral policy by imposing significant limits to the use of dispute resolution systems specifically designed by employers and unions to meet their particular needs.

TRUMP BOARD:

Memorandum GC 18-02 – On 12/01/17 newly appointed GC Peter Robb rescinds GC 12-01 and upholds the parties' agreed upon method of grieving and arbitrating certain unfair labor practice charges, allowing the parties to move within the time limits set forth in their bargained-for labor agreements.

(GC 18-02 also made clear GC Robb's intention to re-examine much of the legal precedent that had changed under the Obama Board.)

What has changed so far?
Not so fast: Joint Employer Standard

OBAMA BOARD:

Browning-Ferris Industries of California, 362 NLRB No. 186 (2015) – Overturning its 30-year test for determining whether separate businesses are "joint employers" under the NLRA, Board majority (3-2) holds that even if two entities have never exercised joint control over essential employment terms, and even when joint control is not "direct and immediate," joint employer status will be found based on the existence of "reserved" joint control or control that is "limited or routine."

TRUMP BOARD:

Hy-Brand, 365 NLRB No. 156 (2017) – Board majority (3-2) returns to prior standard that joint employer status turns on whether two entities exercised joint control over essential employment terms and that the putative joint employer's control over employment matters had to be "direct and immediate."

BUT

On 2/27/18 the Board issued an Order vacating the *Hy-Brand* decision in light of a determination by the Board's Designated Agency Ethics Official that Member William Emanuel is, and should have been, disqualified from participating in the Hy-Proceeding because of his prior membership in a management employment law firm, which restored the Browning-Ferris joint employer test.

What has changed so far? Workplace Rules – Not so fast?

OBAMA BOARD:

Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004) – Applying one of the tests in the *Lutheran Heritage* decision, specifically that an employer policy would be found unlawful if "employees would reasonably construe the language to prohibit Section 7 activity," the Board invalidated numerous common sense policies, such as requiring employees not to engage in conduct that impedes "harmonious interactions or relationships" or prohibiting "abusive or threatening language to anyone on the premises."

TRUMP BOARD:

The Boeing Company, 365 NLRB No. 154 (2017) – A Board majority (3-2) overrules the *Lutheran Heritage* "reasonably construe" standard and establishes a new standard and balancing test for determining the lawfulness of a facially neutral policy. Specifically, the Board will seek to strike a proper balance between (1) the nature and extent of the potential impact of the policy on employees' Section 7 rights and (2) the employer's legitimate justifications associated with the rule.

BUT

Last week the International Union of Painters and Allied Trade filed a motion to intervene in a NLRB case for the purpose of seeking reconsideration of the Board's decision in *Boeing*, arguing that Member Emanuel was disqualified from participating in *Boeing* for the same reason as in *Hy-Brand*.

What may change?
Class Action Waivers

- Employers have faced questions about the enforceability of arbitration agreements with class and collective action waivers since the NLRB's controversial *D.R. Horton* decision in 2012, which held that the waivers violate employees' rights to engage in collective concerted activity. The Board has adhered to its position in a number of cases, including *Murphy Oil*.
- The Fifth Circuit refused to enforce this decision, and other courts followed, but the NLRB refused to change course; subsequently the Sixth, Seventh, and Ninth Circuits adopted the NLRB's view.
- *Murphy Oil* is now before the U.S. Supreme Court.
- Following the change of Administration, the Office of the Solicitor General reversed its position and filed an amicus brief in support of the employers.

What may change?
Who is a Supervisor

"The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement."

OBAMA BOARD:

Cook Inlet Tug & Barge, Inc., 362 NLRB No. 111 (2015)

Buchanan Marine, L.P., 363 NLRB No. 58 (2015)

TRUMP BOARD: ?

What may change?
Who is an Employee

"The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivocally employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.] , as amended from time to time, or by any other person who is not an employer as herein defined."

OBAMA BOARD:

Columbia University, NLRB No. 90 (2016)

(Teaching Assistants)

Northwestern University

(CollegeAthletes)

TRUMP BOARD: ?

What may change?
Who is an independent contractor

OBAMA BOARD:

- *Timberwolves Basketball, LP*, 365 NLRB No.2017 (2017) – a Board majority (2-1), over a lengthy and spirited dissent by Chairman Miscimarra, holds workers who produce content shown on the jumbotron at Timberwolves games are employees and not independent contractors where Timberwolves management gives them a script to follow, tells them when to work, and provides most of their tools and equipment.

TRUMP BOARD: ?

- Although the *Timberwolves* decision did not change the analytical framework for determining independent contractor versus employee status, the framework *as applied* significantly tilted the analysis in favor of a finding of employee status. It is not unreasonable to expect the Trump Board to apply the additional framework in a more balanced manner as reflected in Chairman Miscimarra's dissenting opinion.

What may change? Misclassifications of Employees as Independent Contractors a ULP

OBAMA BOARD:

- *Velox Express, Inc.,* 2017 NLRB LEXIS 486 (09/22/2017) – an ALJ rules that the misclassification of employees as independent contractors violates Section 8(a)(1) of the Act,

TRUMP BOARD:

- *Velox* is now before the Board, which has invited interested parties to file amicus briefs to address "under what circumstances, if any, the Board should deem an employer's act of misclassifying statutory employees as independent contractors a violation of Section 8(a)(1) of the [NLRA]."

What may change?
Pre-CBA Discipline

OBAMA BOARD:

- *Alan Ritchey, Inc*., 359 NLRB No. 40 (2012) – employers must bargain over discretionary discipline of newly organized employees prior to execution of a first contract or a separate side letter addressing discipline; *Total Security Management Illinois*, 364 NLRB No. 146) reaffirms *Alan Ritchey* and sets forth the remedies for violations.

TRUMP BOARD: ?

- Restoration of pre-*Alan Ritchey* standard
- General Counsel Robb's 12/01/17 Memo GC 18-02 identified *Total Security* as a decision where although Complaints may issue where a newly organized employee fails to bargain over discipline, "alternative analysis" might be offered to the Board.

What may change?
Strike Replacements

OBAMA BOARD:

- *Piedmont Gardens*, 364 NLRB No. 13 (2016) – a long-term care facility acted unlawfully when it permanently replaced striking workers allegedly in order to teach the union and strikers a lesson and to avoid future strikes; employer ordered to offer reinstatement and pay compensatory damages.

Trump Board: ?

- Restoration of the pre-*Piedmont Gardens* standard, *Hot Shoppes, Inc*., 146 NLRB 802 (1964) which has permitted employers to hire permanent replacements for economic strikers, unless the hiring of replacement workers was unrelated to the strike itself. This would restore the balance of power between employers and unions that has existed for more than 40 years with respect to the use of economic weapons.

What may change?
Election Rule Changes

OBAMA BOARD:

- New “Quickie Election” Rules went into effect on 04/04/15 and marked the biggest change in the NLRB’s approach to union elections in over 50 years. The rules provide unions with a much quicker path to an election and were widely expected to increase union wins rates; as a general proposition, however, that has not happened.

TRUMP BOARD: ?

- The new election procedures are under examination by the current Board, but any change is likely to take some time. Changing the rules will presumably require another Formal Rulemaking Process, starting with the drafting of NPRM. Rulemaking resulting in the 2015 changes took 14 months from NPRM to the effective date of the new rules.

What may change?
Structure & Procedure

GC Memo 18-02	GC's Telcon 1/11/18	OM Memo 1/29/18

• Mandatory Submissions Rolls Back Initiatives of two prior GCs
• Including any NEW precedent from the preceding 8 years in which a dissent
	• Field Ops
	• Announced Intentions to:
	  • Downgrade Regional Offices
	  • Centralize decision-making in Washington
		• Case Processing Suggestions
		  • Detailed Evidence for ULP Charges
		  • Witness Lists and Position Statements
		  • Determination of lack of merit
		  • Acceptance of settlement offers

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QUESTIONS

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Thank You