Recent Developments Under National Labor Relations Act

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National Labor Relations Board

- Philip Miscimarra, Chairman, will not seek another appointment when his current term expires on December 16, 2017.
- Members Mark Gaston Pearce and Lauren McFerran are Democrats.
- President Trump has nominated Marvin Kaplan and William Emanuel. The Senate Committee on Health, Education, Labor, and Pensions approved both nominees on July 19, 2017.
- If both are confirmed, Republicans will have a majority for first time since 2007.

General Counsel

Richard F. Griffin Jr.’s term expires November 7, 2017.

Joint Employer Standard

- Is there a common-law employment relationship?
- *D*oes the putative employer possess sufficient control over essential terms and conditions of employment for meaningful bargaining?
- No longer necessary to *exercise* authority; *possession* is sufficient
- Indirect control over employees is sufficient to show joint employer status

Browning-Ferris Industries of California, 362 NLRB No. 186 (2015)

BFI Review Pending in D.C. Circuit

- *Browning-Ferris Industries of California v. NLRB*

  No. 16-1028 (D.C. Circuit)

- Oral Argument before Judges Patricia Millet, Robert Wilkins, and Raymond Randolph on March 9, 2017

Legislative Response

- Protecting Local Business Opportunity Act

  S.B. 2015, S.B. 2686, H.R. 3459 codify "direct and immediate control" standard.

Current Status

- S.B. 2686 pending in the Senate Small Business and Entrepreneurship Committee
- S.B. 2015 pending in the Senate Committee on Health, Education, Labor, and Pensions
- H.R. 3459 pending

Mixed Bargaining Units

Board overturned *Oakwood Care Center* and now permits mixed units of solely-employed and jointly-employed employees without employers' consent

Miller & Anderson, Inc., 364 NLRB No. 186 (2015)

Micro Units

- In concluding that the proposed bargaining unit was appropriate, the Court applied the "community of interest" analysis of *Specialty Healthcare & Rehab. Ctr. Of Mobile*, 357 NLRB 934 (2011).
- The challenge to the unit as under-inclusive was rejected as employer failed to show that the excluded employees shared an "overwhelming community of interest" with the included employees.

Rhino Northwest, LLC v. NLRB, 2017 WL 3443032
(D.C. Circuit August 11, 2017)

Legislative Response to *Specialty Healthcare*

- Representation Fairness Act

- Latest Developments
  - H.R. 2629 referred to House Committee on Education and the Workforce (May 24, 2017)
  - S. 1217 referred to Committee on Health, Education, Labor, and Pensions (May 24, 2017)

Graduate/Teaching Assistant Representation

- Graduate Workers of Columbia/UAW filed petition for election of unit including all student employees who provided instructional services, including graduate and undergraduate teaching assistants and research assistants.

- Held: Graduate teaching assistants are statutory employees.

Columbia University, 364 NLRB No. 90 (2016), reversing *Brown University*, 342 NLRB 483 (2004)

Waiver of Class and Collective Actions in Employment Arbitration

- Employment agreement requiring individual arbitration of all employment-related claims violated Section 8(a)(1) of the NLRA by interfering with employee rights to engage in "other collective action" under Section 7.

  Murphy Oil USA, 361 NLRB No. 72 (2014)
- Collective action is a substantive right that cannot be prospectively waived
- Mandatory individual arbitration agreements that extinguish this right are unenforceable under the Saving Clause of Federal Arbitration Act (FAA)
- The Fifth Circuit, following *D.R. Horton*, granted the petition for review and vacated the Board's order.

Murphy Oil, USA v. NLRB, 808 F.3d 1013 (5th Cir. 2015)

Waiver of Class and Collective Actions in Employment Arbitration (continued)

- Seventh Circuit rejected Fifth Circuit's analysis and struck down collective action waiver.

  Lewis v. Epic Systems Corp., 823 F.3d 1147 (7th Cir. 2016)

- Ninth Circuit rejected Fifth Circuit's view on same basis.

  Morris v. Ernst & Young LLP, 834 F.3d 975 (9th Cir. 2016)

- The three cases have been consolidated and scheduled for oral argument before the Supreme Court on October 2, 2017.

Operations-Management Memo 17-11

- Pending the Supreme Court's decision General Counsel Griffin has directed that:
  - In cases involving an arbitration agreement prohibited by the Board's decision in *Murphy Oil*, Regions are to pursue informal settlement agreements conditioned on the Board prevailing before the Supreme Court.
  - To the extent any unfair labor practice charge involves both a class and collective action waiver violating Section 7 and an allegation unrelated to the agreement, Regions are to pursue informal settlement agreements conditioned on the Board prevailing before the Supreme Court and proceed on the unrelated allegations (absent settlement).
  - In situations involving opt in/opt out clauses in mandatory arbitration agreements, or where there is some other distinguishing feature, Regions are directed to hold such cases in abeyance.

Right-to-Work Laws

28 states have enacted so-called right-to-work laws.

Most recently adopted statutes:

- Wisconsin (2015)
- West Virginia (2016)
- Kentucky, Missouri (2017)

National Right To Work Act (S.B. 545, H.R. 785)

- H.R. 785 is pending in House Committee on Education and the Workforce.
- S.B. 545 is pending in Senate Committee on Health, Education, Labor, and Pensions.

Local Right-to-Work Ordinances

- Section 14(b) of the NLRA provides that "any State or Territory" may enact laws prohibiting union shop and agency shop agreements.

- 12 Kentucky counties passed so-called right-to-work ordinances after state legislature failed to pass statute.

- U.S. District Judge David Hale held that "State or Territory" language does not apply to local governments and invalidated the ordinances.

UAW Local 3047 v. Hardin Cty., Kentucky, 160 F. Supp.3d 1004 (W.D. Ky. 2016)

Local "Right-to-Work" Ordinances (continued)

- On appeal, Sixth Circuit affirmed in part and reversed in part:
  - Hiring hall and dues checkoff provisions preempted by federal labor law and not permitted by Section 14(b)
  - Local right-to-work ordinances not preempted
  - "State or Territory" includes any political subdivision of a state

UAW Local 3047 v. Hardin Cty, Kentucky, 842 F.3d 407 (6th Cir. 2016)

Expedited Election Rules

- Took effect April 14, 2015
- Significant changes:
  - Hearings and reviews of RD rulings
  - Position statements
  - List of eligible voters
  - Electronic filing
- Electronic signatures for union authorization cards
  GC Memo 15-08 (Revised) (applying Board's existing evidentiary standards for handwritten signatures to electronic signatures)

Impact of Expedited Election Rules

- Board released data gathered from 4.14.15 – 4.14.16
- Election petitions filed: 2,674
- Median days between filing and election: 24
- Elections blocked by ULP charge: 107
- Union win rate for elections unchanged

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