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Changing the Guard: What to Expect From a "Trump" NLRB

Article By:

Bradley G. Kafka

Robert E. Entin

When President Elect Trump is inaugurated, he will immediately have the opportunity to appoint two new members of the ***National Labor Relations Board (NLRB)***. Both of those appointees will be Republican appointees, and will immediately provide the NLRB with a Republican majority. A new "Trump Board" will have the opportunity to review existing decisions as new cases arise, but due to the time progression of most NLRB cases, the result of this review will not likely be felt prior to the middle of 2018. This blog post will review precedential decisions established by the present "Obama Board" that are likely to be considered,revised, or reversed by the new Trump Board.

Joint Employment. Since 2011, the NLRB has expanded the definition of joint employment. When two or more employers are found to be joint employers, they both have the same responsibilities to recognize and bargain with a union selected by their employees. Recently, the NLRB ruled that fast food franchisers and franchisees may be joint employers. Similarly, the NLRB determined that a business may be a joint employer of temporary employees supplied by a staffing agency, and that those temporary employees may be counted along with employees directly hired by the business to form a bargaining unit. The NLRB's decisions have not depended upon whether both employers actually control the terms and conditions of employment of the temporary employees, but rather whether the putative joint employers have the authority to control such terms, regardless of whether such authority was ever exercised. Also, the Obama Board found that if a business can indirectly control employees by influencing the contractor who hired the employees, that indirect authority is sufficient to establish joint employment. A new Trump Board may reverse the joint employer decisions and revert to traditional NLRB principles, which only lead to a joint employer finding when both employers actually and directly control the terms and conditions of employment of employees in a bargaining unit. If the new Trump Board reaches such a determination, then franchisers and businesses who utilize contracting services that bring in temporary employees are much less likely to be considered joint employers.

Micro-Units. Prior to the Obama Board, the NLRB most often determined that bargaining units comprised of all employees at a facility (with certain limited exceptions) were presumptively appropriate. The Obama Board reversed that doctrine and placed the burden on the employer, rather than the organizing union, to demonstrate that a small group of employees was an appropriate or inappropriate bargaining unit. Specifically, if there exists a sufficient community of interest among a small group of employees (i.e., common terms and conditions of employment), then the Obama

Board considers that group of employees to be a presumptively appropriate bargaining unit, and an employer must show by “overwhelming evidence” that a broader group of employees should be included in the proposed bargaining unit. This decision, known colloquially as *Specialty Healthcare* and its progeny, paved the way for ”micro-units” that consist of only a few employees (e.g., only the cosmetics and fragrance employees at a Macy’s in Massachusetts). A new Trump Board could reverse the present policy and eliminate the presumptive appropriateness of “micro-units.”

Handbook Interpretations. Numerous NLRB decisions over the last several years have concluded that provisions frequently included in employee handbooks are unlawful and overly broad because they might have a chilling effect on employees who wish to exercise their rights under the National Labor Relations Act (NLRA). In one case, the Obama Board determined that a handbook rule prohibiting “harassment” was too broad because it might cause employees to believe they could not vigorously argue with co-workers in the context of a union organizing campaign. Similarly, handbook provisions that required employees to keep investigations regarding employee misconduct confidential were held to be unlawful because employees could possibly construe such a prohibition as preventing them from discussing terms and conditions of employment. It is likely that a Trump Board will reverse these decisions and allow employers broader discretion in promulgating handbook provisions and other workplace rules.

Mandatory Arbitration and Class Action Waivers. The NLRB has held that individual contract provisions between an employee and an employer requiring an employee to resolve disputes through arbitration and prohibiting employees from joining class actions filed in courts are unlawful. The NLRB found that these provisions, and particularly the prohibition against participating in class actions (e.g., “class action waivers”), prevented employees from joining together to address wages, hours, working conditions as specified in Section 7 of the NLRA. At the present time, two federal courts of appeals have sustained the NLRB’s decisions prohibiting mandatory arbitration and class action waivers and two courts of appeals have refused to follow those decisions. While a Trump Board is likely to reverse the Obama Board position, the issue may still be addressed by the Supreme Court because there is now a split among the federal circuit courts.

Social Media Policies. Since 2011, the NLRB has limited an employer’s discretion to prohibit employee communications on social media about the employer. Among other things, employer efforts to restrict employees from social media communications about the employer’s workplace, supervisors, and/or products have been found to unlawfully limit an employee’s Section 7 rights. Again, it is likely that the new Trump Board will allow employers greater latitude to prohibit employee statements on social media, particularly with respect to statements about the employer’s products.

The Obama Board attempted to facilitate union organization and limit the authority of employers to restrict communications by employees that might relate to efforts to improve wages, hours and working conditions. While the effect may not be felt for some time, it is likely that many of the changes initiated by the Obama Board will be sharply cut back or reversed by a new Trump Board.

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