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2023 NLRB Update
Recent Board Decisions Alter Landscape for Union and Non-Union Employers

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Agenda

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1. Handbook and Work Rule Standards
2. NLRB Provides Unions Path to Representation Without Winning an Election
3. "Quickie Election" Rules Return
4. Narrower Independent Contractor Standard
5. Expansion of Protected Concerted Activity Doctrine
6. Changes to "Past Practice" in Unionized Setting
7. Broader Joint Employer Standard

Fundamentals

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- National Labor Relations Act (NLRA) applies to virtually all private-sector employers and employees
- Most changes come through adjudication before the National Labor Relations Board (NLRB)
- The NLRB General Counsel and a majority of the Board are from political party of the sitting president
- Consequently, there has been a back-and-forth on the most controversial issues every 4-8 years as political winds shift

1. Handbooks and Work Rules

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- Board's decision in *Stericycle* applies to "facially neutral" rules that do not expressly prohibit protected activity
  - E.g., Conflict of Interest, No-Recording, Civility, Confidentiality During Investigation, Outside Employment, and Personal Conduct Rules

- NLRB GC must show an employee could reasonably interpret rule to be coercive
  - Even if a contrary, non-coercive interpretation is reasonable
  - Rule looked at from perspective of employee who wishes to engage in protected activity

- If established, Employer must prove both:
  - Rule advances legitimate and substantial business interest
  - Narrowest possible rule to advance that interest

Handbooks and Work Rules

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TAKEAWAYS

- Immediately assess facially neutral work rules to determine if they could be construed as interfering with protected activity
- Even if rule advances legitimate business interest, can rule be more narrowly tailored?
- Harbinger for a host of customary work rules to be found unlawful by NLRB – for example, this case remanded rule relating to confidentiality during investigations
- Simply having an unlawful rule could result in a *Cemex* order

Other Handbook Issues

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Required

- Disclaimer
- Acknowledgement
- Harassment and discrimination policy
- FMLA policy
- Safe harbor against improper deductions
- Pregnancy and other accommodations
- Overtime
- Discipline/Corrective Action

Other Handbook Issues

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Recommended

- Sick and safe leave (MD and MontCo)
- Other leaves?
- Drug and alcohol
- Conduct
- Confidentiality
- No solicit/distribution
- Computer system/electronic communications
- Problem-solving procedure

2. *Cemex Construction* Decision

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- The NLRB's decision in *Cemex Construction Materials Pacific*, establishes the rules for what occurs if a union makes a demand for voluntary recognition
  - Old Rule: Employer can do nothing and wait for Union to file petition

- New Rule: Upon a demand for voluntary recognition, Employer has two options:
  - (1) Extend voluntary recognition; or
  - (2) File RM petition with the NLRB within two weeks

- If employer does neither, NLRB says employer has waived its right to demand an election and Board can impose bargaining order

Cemex Construction Decision

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Cemex provides that a union can become bargaining representative in one of two ways without the union ever winning a secret-ballot election OR the employer extending voluntary recognition:

1. The employer fails to recognize the union or file a RM petition within two weeks of the demand for recognition; or
2. The employer commits unfair labor practices that would require the setting aside of the election – even if the employer ultimately won an election
   - Commission of an unfair labor practice will result in a bargaining order unless it is "so minimal or isolated that it is virtually impossible to conclude that the misconduct…affected the election results."

Cemex Construction Decision

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Silver Linings

- Board did not return to full *Joy Silk* standard (mandating card check)
- Board passed on addressing "captive audience" issue on procedural grounds
- Board rejected GC's request to overturn *Tri-Cast,* a 40-year-old decision permitting employers to state during organizing campaigns that unionization would change employee-management relationship

Cemex Construction Decision

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TAKEAWAYS

- Train employees about legal consequences of signing authorization card
- Establish process for quick reporting of demand for recognition– you are on the clock
- Minor ULPs after recognition demand may result in bargaining order – training for supervisors is critical
- Use 14 days to your advantage and campaign.
  - Can also use this time to prepare strategy for challenging petitioned-for unit and get back some time lost to "quickie election" rules

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Conclusion

- Cemex now provides an avenue for union representation premised solely on employer inaction following a demand for recognition even if the employer did not commit a single unfair labor practice
- Card signing education strategy becomes critical
- Minor ULPs after demand for recognition may result in an NLRB bargaining order
- Potential conflict with Supreme Court Gissel decision (extraordinary relief for significant ULPs)
- Will be appealed but this is our likely operating environment for several years

3. New NLRB Election Rules

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- The NLRB issued a final rule implementing new election timeliness – the rule is effective December 26, 2023.
- The final rule brings back the "quickie election" rules from the Obama-era Board that were nixed in 2019.
- The result: employers will have less time to respond to union organizing activity and prepare for an election.

New NLRB Election Rules

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ISSUE	2019 Rule	New Rule
Posting Notice of Petition	Five (5) business days	Two (2) business days
Statement of Position	Eight (8) business days	Seven (7) calendar days
Pre-Election Hearing	14 business days (nearly three weeks)	Eight (8) calendar days
Postponements of Hearing	Amount of time at RD's discretion for "good cause"	-Up to two (2) days for "special circumstances" -More than two days only for "extraordinary circumstances"
Right to File Post-Hearing Brief	Yes	No, now at RD's discretion
Waiting Period Following Direction of Election by RD	20 business days (four weeks)	"The earliest date practicable…"

New NLRB Election Rules

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- Less time to post Notice of Petition
  - Employer's failure to timely post can result in re-run election if employer wins.
- Reduction of time to identify deficiencies and legal issues with Union petition prior to filing Statement of Position
  - Union no longer has to file Responsive SOP, which will negatively impact employer preparation for hearing
- Less time to prepare for a hearing
- Earlier hearing date will result in quicker election agreements, which will result in quicker elections
  - That means less time for employers to campaign against unionization.
- End result – these rules are designed to get to elections quicker and allow unions to win more elections

4. Independent Contractor Standard

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- Board returns to 2014 standard and will analyze common-law factors:
  - Extent of control employer exercises over worker
  - Whether occupation is done under direction of employer or by specialist without supervision
  - Skill required in occupation
  - Who supplies the tools of the job and place of work
  - Whether master-servant relationship created
  - Method of payment – by time or job
  - Length of time person is rendering services
  - Whether work is part of employer's regular business
- Board will consider whether alleged IC is rendering services as part of an independent business
- Board will no longer afford "entrepreneurial opportunity" additional weight

Independent Contractor Standard

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TAKEAWAYS

- Non-weighted application of common-law factors with no one factor given greater weight
- Industry practice and norms not relevant to analysis (e.g., rideshare drivers, consultants)
- Closely scrutinize contractual relationships with workers to minimize liability and financial exposure

5. Expansion of PCA Doctrine

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- In *Miller Plastics*, the Board returned to a "totality of the circumstances" test and held that protests or complaints by a single employee may be "concerted" activity

- Lone employee's protest of Company's decision to remain open at start of COVID-19 pandemic was "concerted" activity

- Board reaffirms that activity that "only involves a speaker and listener" can be "concerted" because it is a preliminary step to group action

- **Takeaway:** Be cautious when considering discipline for employee's "individual gripe" because this Board takes a broad view of what constitutes protected concerted activity

Expansion of PCA Doctrine

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- In second case, the Board held that concerted activity by employees on behalf of nonemployees can be PCA when it can also benefit employees (*American Federation for Children*)
  - Employee, in advocating for rehire of former coworker awaiting work authorization renewal, called Company manager "racist" – Company terminates the employee.

- Board says that PCA includes employees trying to help themselves by helping nonemployees (the "solidarity principle") – for example, by creating "possible reciprocal support" in the future

- **Takeaway:** Board is likely to find PCA where employees advocate for nonemployee if argument can be made that it could benefit employees in future

6. Unilateral Changes and Past Practice

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- The Board issued two decisions restricting unionized employers' ability to act unilaterally by relying upon "past practice" when no CBA is in effect with the union representing employees

- In *Wendt Corp.*, the Board reinforced that to rely upon "past practice" to support unilateral action the practice must:
  - (1) Occur with "regularity and frequency" such that employees reasonably expect the practice to reoccur on a consistent basis; and
  - (2) No significant managerial discretion involved

- The *Wendt* Board also held that employers may not rely on past practice of unilateral changes that pre-date union representation cannot be relied upon by employer

Unilateral Changes and Past Practice

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- In *Tecnocap*, the Board held that right to act unilaterally authorized by "management rights" clause expires with the CBA

- Thus, employer cannot rely on practice of unilateral action after contract expiration

Unilateral Changes and Past Practice

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TAKEAWAYS

- If relying on past practice of unilateral action, assess how "regular" and "frequent" the unilateral action occurred
- If unilateral action has degree of management discretion, it likely needs to be negotiated with the union
- Newly-unionized employers will not be able to rely on past practice
- Management-rights clause's authorization to act unilaterally ends with CBA expiration

7. Joint Employer Standard

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- Board returns to 2015 *Browning-Ferris* standard and will find joint employment where two employers "share or co-determine" essential terms and conditions of employment.
- Even if one of the employers possesses only "indirect" or "contractually reserved" control.
- "Essential term and condition of employment" means:
  - wages, benefits, and other compensation;
  - hours of work and scheduling;
  - the assignment of duties to be performed;
  - the supervision of the performance of duties;
  - work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
  - the tenure of employment, including hiring and discharge; and
  - working conditions related to the safety and health of employees.

Joint Employer Standard

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TAKEAWAYS

- Review existing and future contractor/staffing agreements and arrangements

- If joint employer status found, each employer must bargain collectively over any term or condition of employment that it possess the authority to control or exercises the power to control – not just essential ones!

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Questions?

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