

Employment Law Alert: The Pendulum Swings Back: NLRB Issues Sweeping Decisions Affecting Union and Non-Union Businesses

October 3, 2019

Over the summer and heading into the fall, the National Labor Relations Board (NLRB or the Board) has issued landmark rulings and proposed new rules that overturn legal precedent and previous Board positions. Together, these cases and rules clearly mark the Board's political repositioning and will significantly alter the legal landscape governing private labor relations in the United States. The current Board, which holds a Republican-majority under the Trump administration, is scaling back many of the broader, pro-labor decisions and initiatives that were a hallmark of the NLRB under the Obama administration. These changes will affect how both union and non-union businesses prepare for and respond to traditional labor law concerns. Below is a summary of the key cases and initiatives that the Board recently decided.

Union Access Rights to Employers' Property

In a recent trio of cases, the NLRB overruled established precedent and expanded employers' rights to limit union activity on their property. These cases protect employers' rights to regulate union solicitation, picketing, handbilling, and leafletting in quasi-public areas to avoid disruption for their customers and employees. They also highlight the importance of companies strictly enforcing non-discriminatory solicitation, distribution, and access policies.

In *Bexar County Performing Arts Center d/b/a Tobin Center for the Performing Arts*, 368 NLRB No. 46 (2019), the respondent property owner operated a performing arts center that was used by several groups, including the San Antonio Symphony and Ballet San Antonio. During a performance by Ballet San Antonio, the San Antonio Symphony musicians passed out leaflets accusing the Ballet of depriving them of work by performing to recorded music rather than with live accompaniment. The property owner refused to allow the musicians to continue leafletting and kicked them off the property. The Board sided with the property owner and held that non-employee contractors and licensees do not possess the same Section 7 access rights as a respondent's own employees — a shift away from prior precedent. The Board supported its decision with a finding that the symphony musicians had other means of communicating with their target audience because they could distribute leaflets on a public sidewalk across the street from the performing arts center, and



distribute their message through social media, newspapers, television, and radio.

In *Kroger Limited Partnership I Mid-Atlantic*, 368 NLRB No. 64 (2019), union representatives were attempting to persuade the public to boycott a Kroger supermarket that was closing and transferring employees to work sites outside the area. They displayed a banner stating "#KrogerStrong SOLIDARITY with Virginia Kroger Workers" and asked customers in the parking lot to sign a petition protesting the transfers. The property owner kicked them off the property and the NLRB sided with the property owner, even though other organizations — such as the Girl Scouts and Salvation Army — were allowed to solicit customers in the parking lot. The Board distinguished those activities because they were not of the same "nature" as the union activities. Had the property owner allowed "comparable organizational activities" from non-union groups, like fraternal societies and religious organizations, the Board suggested that the result might have been different.

Finally, in *UPMC-Presbyterian Shadyside*, 368 NLRB No. 2 (2019), two union representatives sat in the hospital cafeteria with a group of employees and discussed issues related to a union campaign. The union representatives displayed union flyers and pins on the tables where they sat. Because the hospital had a practice of removing non-employees engaged in promotional activity in the cafeteria, they forced the union representatives to leave. Again, the NLRB ruled against the union, holding that employers do not have to allow organizational activity on their property, even in places that are open to the public. Like in *Kroger*, the Board relied on the fact that the hospital strictly enforced its no-promotions rule in the cafeteria for all other groups to support its decision. Further, like in *Tobin Center*, the Board also relied on the fact that the union organizers had other reasonable means of communicating with employees under than in the cafeteria.

Worker Misclassification

In March 2016, former NLRB General Counsel Richard Griffin first floated the theory that an employer commits an unfair labor practice when it incorrectly misclassifies an employee as an independent contractor. Because only employees — and not independent contractors — have organizational rights, Griffin's argument was that companies that improperly refuse to recognize employee status under the law are interfering with such rights in violation of Section 7 of the National Labor Relations Act. Unfortunately for employers, this theory caught on and was adopted by several Administrative Law Judges (ALJs) of the NLRB. In February 2018, the Board sought briefing on this issue and appeared poised to squash this novel theory.

In *Velox Express*, 368 NLRB No. 61, Board reversed the ALJ and held that Velox did not interfere with workers' Section 7 rights by misclassifying them as independent contractors because it did not threaten them with discipline if they engaged in protected, concerted activities (such as union organizing). The Board stated that by classifying a worker as an independent contractor instead of an employee, an employer is



merely expressing a legal opinion and not necessarily motivated by an intent to evade the law. The Board reasoned that this legal opinion, "even if that opinion is ultimately mistaken," is actually protected by law so long as it "does not, in and of itself, contain any threat of reprisal or force or promise of benefit." The Board importantly concluded that a contrary rule would "significantly chill the creation of independent contractor relationships," because businesses would be extremely reticent to classify workers as independent contractors.

Unilateral Changes

One of the most fundamental tenets of the federal labor law is that when a majority of workers in a given unit choose to be represented by a union, their employer must bargain in good faith with the union for agreement on the terms and conditions of employment to be applied in the workplace. Reaching agreement is never actually required, but a failure or refusal of the employer to bargain with the union over such essential subjects is an unfair labor practice subject to remedy by the NLRB.

Under this legal framework *all* terms and conditions of employment are considered mandatory subjects of bargaining. The fact is, however, that "terms and conditions of employment" can be an ambiguous category description as applied to particular matters in the workplace; and unions and employers rarely, if ever, actually bargain every single "term and condition of employment," at least as that category can be most broadly interpreted. Thus, the door is left open for the question of under what circumstances the law permits a unionized employer to make unilateral changes to terms and conditions of employment *without bargaining with the union*.

The NLRB and the federal courts of appeal have long been at odds on the answer to the unilateral changes question. That is, until now. In *MV Transportation, Inc.*, 368 NLRB N. 66 (2019), the NLRB reversed its long-standing narrow view on this subject and adopted the position that has long been held by the D.C. Circuit court of Appeals. That position is known as the "contract coverage" doctrine. It stands in contrast to the Board's previous position, which only permitted an employer to make unilateral changes to terms and conditions where the union had given a "clear and unmistakable waiver" of its right to bargain over the particular subject. Under the contract coverage standard, which is now the NLRB's position and clearly the law of the land, an employer is free to make unilateral changes to terms or conditions if the changes contemplated are within the scope of a provision in the parties' collective bargaining agreement that grants the employer the right to act unilaterally. The Board further explained that the plain language of the contract provision is to be given its usual and ordinary meaning in making this determination.

Proposed Rules on Student Employees and Election Procedures



The NLRB has recently been employing a formal notice-and-comment procedure it has rarely used through its 80-plus year history. Ordinarily, the NLRB has preferred to make rules for the federal labor law in decisions on particular cases and their facts — in the same manner as our courts do — establishing controlling precedents as the law develops to fit actual cases and controversies.

Proposed Rule: Students are Not Employees. For more than 40 years there has been an ongoing controversy in the labor law, and any number of NLRB case decisions swinging back and forth with the political pendulum over whether and when, if ever, the federal labor law applies to graduate or undergraduate students who perform services for their school in exchange for some form of financial benefit. The controversy, in other words, is whether such students are ever "employees" protected by the labor law. The currently-controlling NLRB case decision on this issue involved Columbia University and held that a wide range of students should be considered employees under the law. Under the Trump administration, unions have withdrawn or avoided engaging in organizing or election activities under NLRB jurisdiction that would give the NLRB an opportunity to exercise its anticipated reversal of the Columbia ruling.

To overcome that stagnation, the Board recently issued a Notice of Proposed Rulemaking (NPRM). The proposed rule would effectively undo the Columbia decision. In its place, the rule would establish "that students who perform any services for compensation, including, but not limited to, teaching or research, at a private college or university in connection with their studies are not 'employees' within the meaning of" the federal labor law. If enacted in its proposed form, the rule would presumably put an end to union organizing efforts among students at both the graduate and undergraduate levels.

Proposed Rule: Changes to NLRB Election Procedures: Another recent NPRM proposes three amendments to the regulations applicable to union representation elections under NLRB jurisdiction. Perhaps the most significant of these would significantly alter what is known as the NLRB's "blocking charge" doctrine. This doctrine applies to halt proceedings when an unfair labor practice charge is filed while a petition is pending for a secret ballot election to decide whether a union will represent, or continue to represent, a specified group of workers. The doctrine has most often been used by unions to block a decertification election that would result in the union losing its right to represent a unit of employees. The proposed rule amendment would modify the Board's blocking charge policy by establishing a vote-and-impound procedure for processing a representation petition when a party seeks to stay an election while an unfair labor practice (ULP) charge is pending. This is potentially good news for unionized employers with employees interested in ousting their union but who may have been frustrated with the substantial obstacles in the previous Board process for doing so.

A second proposed amendment in the NPRM would change the current Board policy applicable when an employer has voluntarily recognized a union without an NLRB election to require notice of the recognition to employees and a 45-day window for them to challenge it. The third proposed amendment is very significant



for the construction industry. It would overrule Board law holding that contract language, by itself, can establish the existence of a permanent bargaining relationship, in contrast to one that a construction employer can get in and out of at the beginning and end of each contract period.

Conclusion

It has taken longer than expected to see many of the substantial labor law changes that have been expected since the beginning of the Trump administration. Now, however, they are coming with increased velocity and force, largely to employers' benefit. Employers who are unionized as well as those who are not will be well-served to continue to pay attention to the NLRB's activities and consult labor counsel on potential opportunities to make favorable shifts in the workplace that the Board's new positions may present.

For more information, reach out to a member of the Gray Plant Mooty employment law team.