Insight

IN-DEPTH DISCUSSION

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NLRB Issues Numerous Decisions Against Employers as Hirozawa's Term Expires

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In the midst of a heated presidential election cycle, employers are following recent decisions of the National Labor Relations Board closely. Before losing its three-member Democratic majority at the expiration of Board Member Kent Hirozawa's term on August 27, 2016, the NLRB issued numerous decisions that are likely to have an adverse impact on both nonunion and unionized employers. Although the Democrats on the Board will continue to have a 2-1 majority, we expect the flow of significant decisions to stop until the Board is reconstituted following the presidential election. The direction of the Board thereafter, of course, will depend on the outcome of the election.

The new President will be able to make two appointments to the Board early in the new term, subject to Senate confirmation, which will result in a new Board majority controlled by the President's party. This will be either an extension of the Obama Board or a new Board majority controlled by Republicans. In addition, the new President will be able to appoint a General Counsel for the NLRB when the term of the existing General Counsel expires in November 2017.

We have summarized below the most significant of the Board's recently-issued decisions.

College Students

Although the NLRB previously rejected union organizing by college football players, the Board majority reversed course by deciding that students at a private college or university who are employed by the same institution may have union representation. Reversing precedent, the majority concluded students are statutory employees and the fact they are also students does not change their employee status. In addition, the majority decided that there were no policy reasons to deprive students of

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the right to unionize. Because the Board's decision creates fertile new ground for union organizers, private colleges and universities should turn their employee relations focus to their student-employee populations. *Trustees of Columbia University*, 364 NLRB No. 90 (Aug. 23, 2016).

Religious College Faculty

The Board majority previously ruled that non-tenure eligible (contingent or part-time) faculty at religious colleges or universities have bargaining rights under the NLRA. In two recent cases, the majority reaffirmed the conclusion that contingent faculty generally do not play a role in creating or maintaining a university's religious environment and the vast majority of contingent faculty members are not hired to advance the religious goals of the university. However, the majority found in both cases that teachers of religion or theology should be excluded from a faculty bargaining unit because the universities held them out as performing a specific role in creating or maintaining the school's religious educational environment. *Seattle University*, 364 NLRB No. 84 (Aug. 23, 2016); Saint Xavier University, 364 NLRB No. 85 (Aug. 23, 2016).

Charter Schools

The Board majority decided to assert jurisdiction over charter schools operated under state law in Pennsylvania and New York. The majority concluded in each case that the school was not exempt from the Board's jurisdiction as a political subdivision of the state because it was not (a) created directly by the state so as to constitute a department or administrative arm of the government; or (b) administered by individuals who were responsive to public officials or the general electorate. In addition, the majority found that there were no compelling reasons to decline to exercise jurisdiction as a matter of discretion. Consequently, charter schools should anticipate union efforts to organize their employees. *Pennsylvania Virtual Charter School, 364 NLRB No. 87 (Aug. 24, 2016); Hyde Leadership Charter School-Brooklyn*, 364 NLRB No. 88 (Aug. 24, 2016).

Joint Employers

The Board majority previously decided that two entities are joint employers if they merely possess the authority to share or codetermine matters governing employment conditions. In two recent cases, the majority applied that principle to the context of union representation elections. First, in *Miller & Anderson, Inc.*, 364 NLRB No. 39 (July 11, 2016), the majority held that employer consent is not necessary for a bargaining unit that combines jointly-employed and solely-employed employees of a single user employer to be found appropriate. The decision reversed precedent holding that this would be a multi-employer unit, which requires employer consent.

The Board majority applied this principle in *Retro Environmental, Inc.,* 364 NLRB No. 70 (Aug. 16, 2016). In that decision, the majority found that a construction company and a staffing agency that had previously provided laborers for the company were joint employers and that a union's election petition should be processed in a combined unit, although the two companies had no current projects or bids for future projects together. In light of this decision, employers who use staffing agencies to supplement their own employees should expect that unions will continue to seek to include an agency's employees in bargaining units with the employer's own employees.

Board's Election Rule

In a decision construing the "ambush" election rule, the Board concluded that the requirement of each party to file and serve a position statement by noon on the business day before a representation hearing must

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be enforced literally, and thus a union should have been precluded from introducing evidence of a contract bar to a decertification petition after serving its statement on the employer approximately three hours late. Nevertheless, the Board ruled that the Regional Director would have discovered the existence of the contract in any event. Thus, the union's infraction did not require the Regional Director to ignore its existence. The Board concluded the petition therefore was appropriately dismissed because of the contract bar. *Brunswick Bowling Products, LLC*, 364 NLRB No. 96 (Aug. 25, 2016).

Bargaining With New Union Over Discipline

The Board majority decided that an employer must offer to bargain with a union over the discretionary aspects of serious forms of discipline—suspension, demotion and discharge—after a union is certified but before the employer and the union have entered into a collective bargaining agreement or other agreement governing discipline. The majority stated that at this stage the employer does not need to bargain to agreement or impasse before implementing discipline if it commences bargaining promptly, but it must do so after imposing discipline.

The majority also stated that in exigent circumstances involving danger to the business or personnel, the employer may impose serious discipline provided that it offers to bargain immediately afterward. And in the case of less serious forms of discipline—such as oral or written warnings—bargaining can be deferred until after the action is taken. *Total Security Management Illinois 1, LLC,* 364 NLRB No. 106 (Aug. 26, 2016).

Financial Audits During Bargaining

It is well established that an employer must submit to a financial audit by a union during collective bargaining negotiations if it claims an "inability to pay." However, the Board majority concluded in this case that an employer is not required to recite any "magic words" about inability to pay. Instead, the majority found that the employer made it clear by various statements during negotiations that its financial circumstances conveyed an inability to pay. Thus, employers should consider carefully their responses to union proposals during negotiations, as this decision will likely increase union attempts to gain access to potentially sensitive financial information. *Wayron, LLC,* 364 NLRB No. 60 (Aug. 2, 2016).

Management Rights

The Board majority issued several decisions undermining the enforceability of management rights clauses and similar provisions both during and after expiration of a collective bargaining agreement. In light of these decisions, employers should use caution in relying on such provisions.

In *Graymont PA, Inc.,* 364 NLRB No. 37 (June 29, 2016), the majority found that an employer unlawfully changed its work rules, absenteeism policy and progressive discipline schedule during the term of an agreement. The employer relied on a management rights clause stating that it retained the sole and exclusive right to evaluate performance; discipline and discharge for just cause; adopt and enforce rules and regulations and policies and procedures; and establish standards of performance for employees. The majority found that because the clause did not specifically refer to work rules, absenteeism or progressive discipline, it could not be construed as a clear and unmistakable waiver of the union's right to bargain over those subjects.

Also, in *IMI South, LLC*, 364 NLRB No. 97 (Aug. 26, 2016), the majority found that an employer unlawfully transferred work from a facility in Kentucky to another facility 15 miles away in Indiana. The employer relied on language in a zipper clause stating in extensive detail that the agreement included all working conditions, and on a geographic scope clause that limited the contractual territory to Kentucky. The majority

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disregarded the contract language and instead relied on an "implied condition" it found in the agreement requiring that all of the work be performed in Indiana.

In several of the cases, the majority found that expiration of an agreement renders the management rights clause ineffective and overruled previous Board precedent relying on the past practice established by such a clause.

In *E.I. DuPont de Nemours*, 364 NLRB No. 113 (Aug. 26, 2016), the majority found that an employer unlawfully made changes in benefit plans after expiration of an agreement. The employer relied on a reservation of rights clause that reserved the right to change or discontinue the plans in its discretion. The majority treated that provision as a management rights clause, but found that such a cause expires upon contract expiration and does not establish a status quo that permits unilateral changes, absent evidence that the parties intended the clause to outlive the contract.

The majority reached the same decision in *American National Red Cross*, 364 NLRB No. 98 (Aug. 26, 2016). In that case, local chapters of the Red Cross relied on contractual provisions that permitted them to implement any changes made by the national Red Cross in its national benefit plans. However, the majority found that these clauses did not survive the expiration of local agreements and they did not establish a past practice that permitted the benefit changes.

The same result was reached in a similar case, although language incorporated into the agreement provided that if the employer did not continue the plan, "the employer's participation in and status as an employer under the fund shall forthwith terminate," employees would be notified that the "employer is no longer maintaining the plan," and the coverage "terminated on the expiration/termination date of the collective bargaining agreement." *Staffco of Brooklyn, LLC*, 364 NLRB No. 102 (Aug. 26, 2016).

Based on these cases, it appears that employers will not be able to rely on typical management rights provisions to make post-expiration changes to the terms and conditions of represented employees' employment.

Confidentiality Rules

The Board majority continued to scrutinize the employee handbooks and personnel policies of numerous employers to find language in confidentiality policies and other work rules that might conceivably be construed by employees as a restriction on their right to engage in protected concerted activity. In three surprising decisions, however, the Board found that employers had discovered the correct language to avoid such a violation in at least part of their confidentiality policies.

In a decision reported at 364 NLRB No. 63 (July 29, 2016), this language was found to be lawful:

> Confidential Information refers to any information not generally known in the relevant trade or industry which was obtained from the Company, or which was learned, discovered, developed, conceived, originated, or prepared by me in the scope of my employment. Such Confidential Information includes, but is not limited to, software, technical, and business information relating to the Company inventions or products, research and development, production processes, manufacturing and engineering processes, machines and equipment, finances, customers, marketing, and production and future business plans and any other information which is identified as confidential by the Company.

Focusing on the last clause, the Board stated that, if viewed in isolation, prohibiting the release of information "identified as confidential by the Company" would be unlawful; but considered in context,

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employees would understand that it referred to the examples of proprietary information and trade secrets in the policy, and not wages or working conditions.

In the second case, *G4S Secure Solutions (USA) Inc.,* 364 NLRB No. 92 (Aug. 26, 2016), this language was found to be lawful:

> The protection of confidential information, trade secrets, and company-specific operating procedures is vital to the interests and success of G4S Security Solutions USA. Additionally, in the line of duty, you may come into contact with our customers' confidential information. Employees who improperly use, reveal, copy, disclose or destroy G4S or client information will be subject to disciplinary action, up to and including termination of employment. They may also be subject to legal action even if they do not actually benefit from the disclosure. Such information includes any information considered proprietary by G4S or the client organization.

The Board stated that this language did not restrict disclosure of employee information; it was limited to information that was considered proprietary by the company or the client; and nothing in the rule suggested that the employer considered employee information to be proprietary.

In the third case, *Schwan's Home Service, Inc.,* 364 NLRB No. 20 (June 10, 2016), the Board approved language in an employee handbook stating that employees were "not permitted to reveal information in company records to unauthorized persons or to deliver or transmit company records to unauthorized persons."

Employers should consider the policy language approved by the Board in these cases in evaluating their own confidentiality and proprietary information policies.

Handbook Disclaimers

The Board majority found in two recent cases that disclaimers in handbooks did not cure unlawful provisions. In *G4S Secure Solutions (USA)*, 364 NLRB No. 92 (Aug. 26, 2016), the majority found ineffective a disclaimer stating that "this policy will not be construed or applied in a manner that interferes with employees' rights under federal law." In another case, the majority affirmed a decision in which an ALJ found this disclaimer ineffective: "This code does not restrict any activity that is protected or restricted by the National Labor Relations Act, whistleblower laws, or any other privacy rights." *Chipotle Services LLC*, 364 NLRB No. 72 (Aug. 18, 2016).

Employee Picketing on Hospital Property

The Board majority found that a hospital unlawfully attempted to prevent off-duty employees from picketing on hospital property in front of the main lobby and physician entrances. The majority disregarded Board precedent holding that picketing should not be allowed on hospital property, and relied instead on an earlier case in which employees were allowed to picket on the property of a grocery store. But the majority acknowledged that U.S. Supreme Court precedent would require limiting the picketing if necessary to prevent patient disturbance or disruption of health care operations. *Capital Medical Center,* 364 NLRB No. 69 (Aug. 12, 2016).

Permanent Replacements for Economic Strikers

It is well established that an employer has a legal right to hire permanent replacements for employees who engage in an economic strike. However, the Board majority has now apparently carved out two exceptions to that right.

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First, the majority held that an employer's own intent to hire permanent replacements is insufficient, and it must be able to show that there was a mutual understanding with the replacements that the nature of their employment was permanent. *IMI South, LLC*, 364 NLRB No. 97 (Aug. 26, 2016).

Second, the majority held that an employer must have a proper motive in hiring permanent replacements. Thus, it cannot hire them to teach the strikers or the union a lesson, or to avoid the cost of hiring temporary replacements for strikers in the future. *American Baptist Homes*, 364 NLRB No. 13 (May 31, 2016).

Settlement Agreements

In a rare decision favoring employers, the Board held that an employer could lawfully require an employee to sign a settlement agreement that included a confidentiality clause in exchange for reinstatement. The Board stated that although employees have a legal right to discuss discipline with other employees, a narrow waiver of that right is permissible as part of the settlement of a charge. *S. Freedman & Sons, Inc.*, 364 NLRB No. 82 (Aug. 25, 2016).

However, the Board majority rejected an ALJ's consent order approving settlement terms proposed by an employer over the objections of the General Counsel and the charging party. The majority explained that the order did not provide a full remedy for the alleged violations. This decision overruled previous Board precedent. *United States Postal Service*, 364 NLRB No. 62 (July 29, 2016).

Election Observers

The Board majority decided that a terminated employee could serve as an election observer at a union representation election, even though he had been terminated for brandishing an imitation gun at work and making threatening statements. *Equinox Holdings, Inc.,* 364 NLRB No. 103 (Aug. 26, 2016).

In addition, the majority set aside an election because the Board agent refused to allow a union official to serve as an observer for the union. The majority stated that, absent misconduct, a union official must be allowed to serve as an observer. *Longwood Security Services, Inc.,* 364 NLRB No. 50 (July 19, 2016).

Withdrawal of Recognition

The Board majority found that a security company that had voluntarily recognized a "mixed-guard" union as the representative of its security guards could not withdraw recognition at a time when no collective bargaining agreement was in place, without an actual loss of majority support for the union. The decision overruled previous Board precedent, which allowed withdrawal under these circumstances. A "mixed-guard" union admits both guards and non-guards to membership or is affiliated with a union that does so. Because the employer in this case reasonably relied upon longstanding precedent when it withdrew recognition, the Board dismissed the charges in this particular case. *Loomis Armored US, Inc.,* 364 NLRB No. 23 (June 9, 2016).

Managerial Employees

The Board majority found that security training instructors at a nuclear power reactor facility were not managerial employees excluded from coverage of the NLRA, even though they were responsible for creating, implementing and enforcing security training programs. The majority's determination rested on its finding that the instructors did not exercise sufficient independent discretion. *Wolf Creek Nuclear Operating Corporation*, 364 NLRB No. 111 (Aug. 26, 2016).

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Protected Concerted Activity

The Board majority found that an employer unlawfully disciplined a union steward because of profane, threatening and insubordinate conduct during a grievance hearing. The majority stated that the steward's conduct, albeit obnoxious, was not so opprobrious as to cause her to lose the protection of the NLRA. Thus, employers should be careful when considering discipline for employees who engage in misconduct while also engaged in protected concerted activity. *United States Postal Service*, 364 NLRB No. 62 (July 29, 2016).

"Perfectly Clear" Successors

Board precedent establishes that to avoid "perfectly clear" successor status—and thus retain the right to fix initial employment conditions without bargaining with a predecessor's union—a successor employer must announce its intent to establish new conditions prior to, or simultaneously with, its expression of intent to retain the predecessor's employees. However, several recent decisions highlight the need for potential successor employers to exercise extreme caution under these circumstances.

In a highly controversial decision, *Nexeo Solutions, LLC*, 364 NLRB No. 44 (July 18, 2016), the Board majority found that the purchaser of a unionized facility was a "perfectly clear" successor based on language in the purchase agreement and communications to the employees by a representative of the seller, and therefore it violated the NLRA by implementing new conditions when it began operating the business. The majority found that the purchaser had controlled the seller's communications to the employees and also ratified them.

In another case, a labor supply company distributed job applications to about 20 of the predecessor's employees before taking over operations and told them at the same time that there would be changes in employment conditions. Then applications were distributed to about 50 more employees who were not informed about the changes. Before the start of the first day of operations, all of the employees were informed that conditions would change. The Board majority decided that this notice was too late and most of the earlier notices were insufficient and, as a result, the company was a "perfectly clear" successor and violated the NLRA by changing conditions. *Creative Vision Resources, LLC*, 364 NLRB No. 91 (Aug. 26, 2016).

In contrast, the Board majority concluded in two cases that government contractors successfully avoided "perfectly clear" status although they were subject to a federal executive order that requires successor contractors to offer a right of first refusal to non-managerial and non-supervisory employees of a predecessor. *Paragon Systems, Inc.,* 364 NLRB No. 75 (Aug. 26, 2016); *Data Monitor Systems, Inc.,* 364 NLRB No. 4 (May 31, 2016).

Union Election Campaigns

Employers that might be involved in union election campaigns should take note of several recent decisions by the Board majority curtailing employers' campaign conduct.

In one recent case, the majority acknowledged that an employer can "criticize, disparage or denigrate" a union without violating the law. But in the same paragraph, the majority found the employer guilty of "disparaging" the union by threatening that representation would lead to plant closure and appealing to racial prejudice. *Southern Bakeries, LLC,* 364 NLRB No. 64 (Aug. 4, 2016).

In the same case, the majority found that the employer violated the law by telling employees that if they were "harassed or threatened" during an election campaign, they should report it to the company. The majority stated that the NLRA allows employees to "annoy or disturb" other employees when they engage in union solicitation.

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In another recent case, the majority found that an employer unlawfully suggested that it would be "futile" to support a union because it would take the union years to negotiate an agreement. *Durham School Services, LP,* 364 NLRB No. 107 (Aug. 26, 2016).

The majority found in another case that an employer violated the law by stating that "strikers often lose their jobs." This was found to be a threat because the employer did not accurately explain the circumstances under which an employer can hire permanent replacements for strikers. *Stahl Specialty Company*, 364 NLRB No. 56 (July 20, 2016).

Finally, the majority found in a recent case that a restaurant violated the law by prohibiting employees from wearing one-inch union buttons on their uniforms in front of customers. The majority stated that the employer's desire to maintain its public image to customers failed to establish "special circumstances" for the rule. *Grill Concepts Services, Inc.,* 364 NLRB No. 36 (June 30, 2016).

General Counsel Memo: Intermittent Strikes

In addition to the NLRB decisions summarized above, the Board's General Counsel recently issued a memorandum urging the Board to change its precedent involving intermittent strikes. This term refers to multiple strikes for short periods of time that are repeated periodically, such as a series of one-day strikes, which the Board has found to be unprotected conduct under the NLRA. The General Counsel argues in the memo that intermittent strikes—as distinguished from slowdowns or other partial strikes—should be legally protected by the Board. He contends that the Board has never had a compelling reason under that statute to deprive employees of this "economic weapon."

Conclusion

These decisions and others issued by the Obama Board in the past few years have greatly changed the landscape of labor relations, increasing exposure and risk for both union and nonunion employers. As employers consider what changes to policies and practices may be warranted by these recent cases, we will look ahead to what further developments may emerge when the new President reconstitutes the NLRB next year.

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