Labor Relations Issues to Watch for in 2016

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In 2015, the National Labor Relations Board has given us the "quickie" election rule, *Browning-Ferris Industries of California* (greatly expanding instances where joint employer relationship exists), *Northwestern University* (declining to determine whether college football players who receive grant-in-aid scholarships are employees under the National Labor Relations Act), *Banner Estrella Medical Center* (finding employer's blanket request that employees keep an investigation confidential violated employees' right to engage in protected concerted activity), *Piedmont Gardens* (adopting a balancing test to determine whether employee witness statements are confidential), and *Lincoln Lutheran of Racine* (ruling an employer's obligation to deduct union dues from employees' pay continues after expiration of the collective bargaining agreement), among other developments. Next year promises to be another in which the NLRB seeks to reshape the nation's primary labor relations law in favor of unions, while Congress attempts to push back against Board activism.

Here are some of the interesting issues worth watching:

1. *Miller & Anderson, Inc.,* NLRB Case No. 05-RC-079249.

The Board will decide whether to adhere to its 2004 decision in *Oakwood Care Center,* 343 NLRB 659. There, the Board refused to include in the same bargaining unit (in connection with an NLRB election) employees employed solely by the "host" or "user" employer and employees jointly employed by the host employer and another, "supplier" employer, without the consent of *both* employers. If the Board decides to abandon *Oakwood Care Center,* it will decide whether it should revive its 2000 holding in *M. B. Sturgis, Inc.,* 331 NLRB 1298, which permits inclusion of both solely- and jointly-employed employees in the same unit *without* the consent of the employers. Prediction? The Board will reverse *Oakwood Care Center* and decide the solely- and jointly-employed employees should be included in the same bargaining unit without the employers' consent. Since employees supplied to an employer by a temporary staffing agency or similar concern often may not feel the same allegiance to the user employer as do the user employer's own employees, jointly-employed employees may be more susceptible to union organizing than solely-employed employees, and therefore, make the user employer more vulnerable to union organizing.

2. Legislation to overturn *Browning-Ferris.*

Identical legislation has been introduced in the House of Representatives and the Senate to overturn the Board's *Browning-Ferris* decision. The bills, H.R. 3459 and S. 2015, have been referred to committees. The bills seek to amend the National Labor Relations Act by defining a joint employer narrowly:

> Notwithstanding any other provision of this Act, two or more employers may be considered joint employers for purposes of this Act only if each shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate.

The legislation may pass both Houses of Congress, but likely will be vetoed by President Barack Obama.

The employer in *Browning-Ferris* may have a better chance of convincing a court to overturn the Board's decision — it has signaled its intent to appeal the Board's decision to a United States Court of

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3. Application of *Browning-Ferris* by the Board.

The Board's new joint employer standard has been announced in *Browning-Ferris,* but the full implications of the new test will not be known until the Board begins to apply it. One case that may provide guidance during 2016 is *Green JobWorks LLC/ACECO, LLC,* No. 05-RC-154596 (Oct. 21, 2015). Surprisingly, a National Labor Relations Board Regional Director declined to find joint employer status between ACECO, a demolition, environmental remediation, and renovation services company, and Green JobWorks, a temporary staffing agency, because the Construction and Master Laborers' Local Union 11 failed to establish "specific, detailed and relevant evidence" demonstrating a joint employment relationship. No time is specified for a Board ruling on the union's request for review.

4. Handbook rules and policies.

Expect the NLRB to continue its assault on employer rules and policies. The NLRB's General Counsel hopes to convince the Board to expand the scope of *Purple Communications,* the 2014 decision in which the Board allowed employees to use an employer's email system for NLRA-related purposes. Employer policies that prohibit employees from using employer computers to post on blogs, Facebook, and the like, may be in the General Counsel's sights.

5. Voter Lists — what does "available" mean?

The Board's "quickie" election rule requires employers to provide a petitioning union with employee contact information — employee names and addresses, and *available* home telephone numbers, cellphone numbers, and personal email addresses — within two days after the election is scheduled. A recent case involving Danbury Hospital raised questions as to the meaning of "available" and to what lengths an employer must go to compile this information.

In *Danbury Hospital,* after losing a Board-conducted representation election, the union sought a rerun election because, it claimed, the employer did not try hard enough to supply it with available cellphone numbers and personal email addresses. An NLRB Hearing Officer and the Regional Director agreed that the employer's effort (searching only one hospital electronic database when others existed, and not accessing non-electronic sources of information) was not sufficient and did not yield "available" information. The employer appealed, seeking an NLRB ruling, but the appeal subsequently was withdrawn. This is an important issue under the Board's new election rules, so expect it to arise again in 2016.

6. Union use of electronic signatures to support a showing of interest.

In a memorandum dated October 26, 2015, the NLRB's General Counsel determined that, effective immediately, electronic signatures should be accepted by the Board for purposes of a union's "showing of interest" in support of an election petition. In the memorandum, the General Counsel wrote that an electronic signature "can include various forms of electronic identification, including e-mail exchanges or internet/intranet sign-up methods." For example, a union could send a mass email to an employer's employees containing a link to a website set up by the union asking employees if they want to be represented by the union. Those who answer "yes" and give the union their contact information will have "signed up."

Although this development should concern employers, it remains to be seen how much unions will use this new organizing tool. Although gathering electronic "signatures" is much easier than collecting handwritten signatures, unions may not be as comfortable filing petitions without having had face-to-face contact with their "supporters." Unions are aware that authorization cards with handwritten signatures are unreliable indicators of employee support for the union — they may be even less comfortable relying upon electronic showings of support.

Expect challenges to the validity of electronic signatures as well.

7. Length of time between date of filing of petition and date of election.

Back to the "quickie" election rule. It was expected to shorten the time period between the date of the filing by a union of a petition seeking an election to represent an employer's employees and the election. The rule has accomplished that, but observers are not sure how far the Board will go to speed up the election process. During 2016, expect to find out. Twenty-three days is becoming the norm, even where the petitioning union agrees with the employer to a longer period.

The coming year has its share of challenges in store for employers. Jackson Lewis attorneys will be watching closely these and other issues at the Board and in Congress. Please contact the attorney with whom you regularly work if you have any questions.

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