Chairman Miscimarra Fought for Employers on NLRB, Left Board Roadmaps for Reversal of Obama Precedent

By Philip B. Rosen and Jonathan J. Spitz

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Philip A. Miscimarra was sworn in as a Member of the National Labor Relations Board on August 7, 2013, for a four-year term. On April 24, 2017, President Donald Trump appointed Miscimarra NLRB Chairman. Chairman Miscimarra's term expired on December 16, 2017 (Miscimarra declined to be considered for a second term, for family reasons). His departure left the Board with two Democrats and two Republicans, an even split that likely means months will pass before more changes will be coming from the NLRB.

While Miscimarra will not be a participant in the Trump Board's efforts to roll back additional Obama Board labor-friendly rulings, he leaves behind dissenting opinions that his replacement and Members William Emanuel and Marvin Kaplan likely will follow as they travel down an employer-friendly road. (The new Board will be assisted in that endeavor by new NLRB General Counsel Peter Robb, who has replaced former GC Richard F. Griffin. See our articles, What Did National Labor Relations Board General Counsel Richard Griffin's Term Mean for Employers? and New Labor Board General Counsel Issues Plans for Reversing Course, on Griffin's four years as GC and Robb's plans.)

During his more than four years on the Board, Miscimarra participated in approximately 1,400 published decisions, dissenting in approximately 297 of them. Many of these dissents were in response to controversial Board decisions, including (in chronological order):

- Applying the *Specialty Healthcare* appropriate bargaining unit analysis to find a "micro-unit" appropriate in *Macy's, Inc.,* 361 NLRB No. 4 (July 22, 2014)
- Finding National Labor Relations Act Section 7 "concerted protected activity" where a single employee asks for assistance in pursuing a personal sexual harassment claim in *Fresh and Easy Neighborhood Markets,* 361 NLRB No. 12 (Aug. 11, 2014)
- Liberalizing the "joint employer" standard and requirement that a joint employer exercise "direct" control over workers in *CNN America, Inc.,* 361 NLRB No. 47 (Sept. 15, 2014)
- Applying *D.R. Horton* to find an arbitration agreement unlawful in *Murphy Oil USA, Inc.,* 361 NLRB No. 72 (Oct. 28, 2014)
- Changing the deferral standard in *Babcock and Wilcox,* 361 NLRB No. 132 (Dec. 15, 2014)
- Requiring employers to produce witness statements to a union in connection with a workplace misconduct investigation in *Piedmont Gardens,* 362 NLRB No. 139 (June 26, 2015)
- Finding it unlawful for an employer to require confidentiality from employees in connection with internal investigation in *Banner Estrella Medical Center,* 362 NLRB No. 137 (June 26, 2015)
- Expanding the Board's "joint employer" doctrine to include indirect and potential control of terms and conditions of employment in *Browning-Ferris Industries,* 362 NLRB No. 186 (Aug. 27, 2015)
- Regarding employers' obligation to continue dues check-offs following expiration of collective bargaining agreement in *Lincoln Lutheran of Racine,* 362 NLRB No. 188 (Aug. 27, 2015)
- Applying *Lutheran Heritage* to find a hospital's work rules unlawful in *William Beaumont Hospital,* 363 NLRB No. 162 (Apr. 13, 2016)
- Allowing jointly employed and solely employed employees to comprise a single bargaining unit without the joint employer's consent in *Miller & Anderson,* 364 NLRB No. 39 (July 11, 2016)
- Regarding off-duty employees' right to picket near a hospital entrance in *Capital Medical Center,* 364 NLRB No. 69 (Aug. 12, 2016)
- Finding graduate assistants to constitute "employees" under the NLRA in *Columbia University,* 364 NLRB No. 90 (Aug. 23, 2016)
- Regarding an employer's obligation to bargain over discipline before a first collective bargaining agreement is reached in *Total Security Management Illinois 1, LLC,* 364 NLRB No. 106 (Aug. 26, 2016)
- Regarding application of the Board's "quickie election rules" in *European Imports, Inc.,* 365 NLRB No.

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41 (Feb. 23, 2017)

Miscimarra's dissents and the NLRB's new employer-friendly composition already have resulted in the Board's overturning its policies on joint employers, micro-units, and work rules. The Board also is seeking public comment on whether to maintain, modify, or rescind the quickie election rule. For more on how these rulings may effect employers, see our article, Unwrapping Late Year NLRB Decisions – Next Steps For Your Organization to Consider.

(Miscimarra also revealed his interest in sci-fi pop-culture, likening the requirements for drafting "reasonable" work rules under *Lutheran Heritage* to "Lord Voldemort" in *Harry Potter,* in that both are "ever-present but must not be identified by name." Referring to a *Star Trek* character in his dissent in *American Baptist Homes,* 364 NLRB No. 13 (May 31, 2016), he explained that the law does not require parties to maintain "Spock-like objectivity" in the midst of heated labor disputes.)

Once the Board is back to full strength, employers can expect additional Obama-Board precedents to be overturned, following the Miscimarra roadmap, in cases involving issues such as these:

Employee Use of Employer Email Systems for Section 7 Activity

Dissenting in *Verizon Wireless,* 365 NLRB No. 38 (Feb. 24, 2017), Miscimarra voiced his opposition to the Board's *Purple Communications* decision, where the Board found that employers that provide employees access to their email systems must allow employees to use those systems for personal use, including to engage in Section 7 activity. Miscimarra argued that the Board should follow its decision in *Register Guard,* 351 NLRB 1110 (Dec. 16, 2007), where the Board found that an employer's ban on employees use of its email system for non-work purposes was lawful, provided they do not discriminate against NLRA-protected communications.

In *Banner Estrella Medical Center,* 362 NLRB No. 137 (June 26, 2015), the Board ruled that the company unlawfully requested employees involved in an internal investigation to keep their discussions confidential during the pendency of the investigation. The Board reasoned that such a request interfered with employees' Section 7 rights to discuss discipline or investigations involving themselves or coworkers, finding requests for confidentiality proper only upon a particular showing of a "legitimate and substantial business justification that outweighs employees' Section 7 rights." Miscimarra dissented, calling the Board's decision a "disappointing extension" of the Board's treatment of workplace investigations. In Miscimarra's view, the majority failed to "properly balance Section 7 rights against the legitimate interests that exist" for such confidentiality requests.

Mandatory Arbitration Agreements

Miscimarra also dissented from the Board's ruling that employers may not condition employment on an employee's agreement to arbitrate. That issue is controlled by the Board's *Murphy Oil* decision, which held such mandatory arbitration agreements are unlawful. *Murphy Oil* is pending before the U.S. Supreme Court, which heard oral arguments on October 2, 2017. A decision is expected in early 2018.

Graduate Students as "Employees"

In *Columbia University,* 364 NLRB No. 90 (Aug. 23, 2016), Miscimarra penned a 15-page dissent when the NLRB ruled that university graduate students and research assistants are "employees" under the NLRA. The Board reasoned that, because graduate students "perform work, at the direction of the university, for which they are compensated," the NLRA's "very broad statutory definitions" of "employee" and "employer" warranted including graduate students as employees "unless there are strong reasons *not* to do so." The Board found no such reasons, ruling that student assistants "who have a common-law employment relationship with their university are statutory employees under the Act."

Accusing the majority of failing to give sufficient "thoughtful consideration" to the issues raised by that case, Miscimarra explained that, "for students enrolled in a college or university, their instruction-related positions do not turn the academic institution they attend into something that can fairly be characterized as a 'workplace.'"

He emphasized that attending higher education is an educational investment, where students are "enrolled" or "admitted," not "hired," and the value from their attendance almost entirely attaches to the student's graduation and obtaining the sought-after degree. The Board "has no jurisdiction" over "postsecondary education requirements," according to Miscimarra, and the risks of collective bargaining complicating and interfering with their educational goals warranted more careful scrutiny of whether they should be deemed "employees" under the Act.

See our article, Grad-Student Unions One Year after Columbia University: More to Come or a Thing of the Past?, about *Columbia University* and the expectations that a Trump Board will reverse that ruling.

Conclusion

Chairman Miscimarra was a vocal advocate for employers during one of the Board's most liberally progressive periods. Although he will not be a sitting Member, his dissents will no doubt guide the Trump Board as it reconsiders numerous contentious issues.

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