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Key 2018-19 NLRB Rulings and Reversals Impacting Non-Union and Union Employers

Union Access to Facilities, Independent Contractors, and Other Developments

TUESDAY, DECEMBER 3, 2019

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OVERVIEW

1. Class Action Waivers Update
2. The Board Seeks Input on Standard for Profane and Offensive Comments
3. Easing The Standard For Withdrawing Recognition Post-Contract Expiration
4. Definition of Concerted Activity Narrowed
5. Supershuttle DFW, Inc.
6. Velox Express, Inc.
7. The Boeing Company
8. MV Transportation, Inc.
9. Union Access – Something for Everyone
10. Changes in Terms and Conditions
11. Employee Discipline
12. Intermittent Strikes
13. A Successor Still Has Rights
14. Questions?

BOARD COMPOSITION

- John F. Ring, Chairman (Dec 16, 2022)
- Lauren McFerran (Dec 16, 2019)
- Marvin E. Kaplan (Aug 27, 2020)
- William J. Emanuel (Aug 27, 2021)

CLASS ACTION WAIVERS UPDATE

May 21, 2018: Class Waivers Upheld As Valid

- The Supreme Court's decision in the consolidated actions *NLRB v. Murphy Oil Co.; Epic Systems Corp. v Lewis; Ernst & Young LLP v. Morris*
- NLRA does not make class arbitration waivers a violation of Section 7 rights
- Position pushed since 2012 by the NLRB's former General Counsel
- Court focused on what NLRA allows – right to organize and collective bargaining, not right to sue under another statute (FLSA)
- Rejected argument that Court should defer to the NLRB's interpretation; NLRB was not just interpreting the NLRA, but FAA, which was outside its expertise

Cordúa Restaurants, Inc., 368 NLRB No, 43 (August 14, 2019)

- First decision addressing employer conduct related to mandatory arbitration agreements since *Epic*.
- Cordúa Restaurants, Inc. maintained mandatory arbitration agreements for all of its employees that prohibited commencing or joining Rule 23 class action lawsuits, but did not explicitly prohibit opting into collective actions under the Fair Labor Standards Act ("FLSA").
- In response to a collective action, the employer revised its agreement to have employees waive rights to collective and class actions under the FLSA. Employees who refused to sign the agreement were threatened with termination.

Cordúa Restaurants, Inc., 368 NLRB No, 43 (August 14, 2019)*(cont'd)*

- The Board concluded:
  - Employers are **not** prohibited under the National Labor Relations Act (NLRA) from informing employees that failing or refusing to sign a mandatory arbitration agreement will result in their discharge.
  - Employers are **not** prohibited under the NLRA from promulgating mandatory arbitration agreements in response to employees opting in to a collective action under the Fair Labor Standards Act (FLSA) or state wage-and-hour laws.
  - Employers **are** prohibited from taking adverse action against employees for engaging in concerted activity by filing a class or collective action, consistent with the Board's long-standing precedent.

Prime Healthcare Paradise Valley, LLC, 368 NLRB No. 10(June 18, 2019)

- The employer maintained a Mediation and Arbitration Agreement that did not address employee rights under the NLRA.
- The Board initially concluded that the Agreement violated the Act. The Employer appealed to the DC Circuit before the Supreme Court decided *Epic Systems Corp*. After the Supreme Court decided *Epic Systems Corp.*, the DC Circuit remanded the case to the NLRB.
- The Board found the Agreement unlawful again and noted that the Federal Arbitration Act's (FAA) requirement that arbitration agreements be enforced according to their terms may be "overridden by a contrary congressional command." Here, there was a contrary congressional command — the primacy of Section 7 rights. Thus, the Board held the FAA does not authorize arbitration agreements that interfere with an employee's right to file charges with the NLRB.

The Board Seeks Input on Standard for Profane and Offensive Comments

When Do Profane or Racially or Sexually Offensive Comments Lose Protection?

- On September 5, 2019, a majority of the National Labor Relations Board invited briefing to reconsider the standards for determining whether "profane outbursts and offensive statements of a racial or sexual nature, made in the course of otherwise protected activity," should lose their Section 7 protection. *General Motors LLC*, 14-CA-197985 and 14-CA-208242.
- The Board currently considers the factors laid out in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979): (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.
- Courts have criticized the Board's protection of extremely intemperate language by employees in a modern workplace under the current standard.

When Do Profane or Racially or Sexually Offensive Comments Lose Protection? (cont'd)

The Board pointed to *Plaza Auto Center*, 360 NLRB 972 (2014); *Pier Sixty, LLC*, 362 NLRB 505 (2015), *enforced* 855 F.3d 115 (2d Cir. 2017), and Cooper *Tire*, 363 NLRB No. 194 (2016), *enforced* 866 F.3d 885 (8th Cir. 2017) as cases that found certain **"extremely profane or racially offensive language" did <u>not</u> lose the protection of Section 7.**

When Do Profane or Racially or Sexually Offensive Comments Lose Protection? (cont'd)

The Board asked interested parties to address these questions in the briefs:

1. **Broadly speaking, when should profane language, or sexually or racially offensive speech, lose Section 7 protection?**

2. **When should the historical leeway for "ill feelings and strong responses" in industrial life give way to concerns for the lack of respect or offense to others on the basis of race or sex?**

When Do Profane or Racially or Sexually Offensive Comments Lose Protection? (cont'd)

3. **Should the Board continue to consider the realities of the workplace if profanity is commonplace or tolerated, and, relatedly, should the Board consider employer policies about profanity, bullying, or uncivil behavior in the context of Section 7 protection?**

4. **Should the Board overrule the line of authority that permits racially or sexually offensive language on the picket line, the historical bastion of profane language?**

5. **Should the Board consider the impact of antidiscrimination laws like Title VII in addressing protected Section 7 comments?**

Easing The Standard For Withdrawing Recognition Post-Contract Expiration

Anticipatory Withdrawal of Recognition

- Under Section 9(a) of the NLRA, employers must recognize and bargain in good faith with unions that have been certified as the exclusive representative for an appropriate unit of employees.
- Unions enjoy:
  - a presumption of majority status for one year following the certification (the "certification bar"); and
  - a conclusive presumption of majority status during the term of a labor agreement for up to three years duration (the "contract bar").

The Board's Prior Standard

- Under long-settled case law, an employer that received evidence within a reasonable period before its labor agreement expired, that the union no longer enjoyed majority support, may notify the union it intends to withdraw recognition when the labor agreement expires.
- Under *Levitz Furniture Co. of the Pac.*, 333 NLRB 717 (2001), however, the employer had to demonstrate the union lacked majority status when recognition was *actually* withdrawn. The employer acted at its peril if it made a lawful anticipatory withdrawal of recognition, but the union subsequently reacquired majority support.

Johnson Controls, Inc., 368 NLRB No. 20 (July 3, 2019)

- The Board in *Johnson Controls* announced a new framework to address questions about employees' preference – a Board-conducted secret-ballot election.
- Conducting an election safeguards employee free choice about representation, and promotes labor relations stability by ensuring fewer disruptions in the bargaining relationship.

Johnson Controls, Inc., 368 NLRB No. 20 (July 3, 2019) (cont'd)

- The anticipatory withdrawal of recognition doctrine therefore was modified in two important ways.
    1. The anticipatory withdrawal must be made no more than 90 days before expiration of the labor agreement; and
    2. If the union wishes to re-establish its majority status following the anticipatory withdrawal of recognition, it must file an election petition within 45 days from the date the employer announces its withdrawal.
        - If the union does not file a petition, at contract expiration, the employer safely may rely on its evidence of loss of majority support.

Definition of Concerted Activity Narrowed

Alstate Maintenance, LLC, 367 NLRB No. 68 (January 11, 2019)

- Narrowed the scope of "concerted activity" subject to NLRA protection.
- Board majority held that a skycap who complained about tipping habits of an international soccer team was not engaged in concerted activity merely because the employee used the term "we" and voiced his complaint in front of other skycaps.
- "[T]o be concerted activity, an individual employee's statement to a supervisor or manager must either bring a truly group complaint regarding a workplace issue to management's attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to induce, initiate or prepare for group action."
- Restored the standard for concerted activity articulated in *Meyers Industries*.
- Overruled *Worldmark by Wyndham*, 356 NLRB 765 (2011), which held that an employee engaged in concerted activity by publicly protesting in a group setting.

Alstate Maintenance, LLC, 367 NLRB No. 68 (January 11, 2019) (cont'd)

- Factors that would support an inference that a statement made by an employee in a group setting is protected concerted activity:

  (1) the statement was made in an employee meeting called by the employer to announce a decision affecting wages, hours, or some other term or condition of employment;

  (2) the decision affects multiple employees attending the meeting;

  (3) the employee who speaks up in response to the announcement did so to protest or complain about the decision, not merely (as in *WorldMark*) to ask questions about how the decision has been or will be implemented;

  (4) the speaker protested or complained about the decision's effect on the work force generally or some portion of the work force, not solely about its effect on the speaker him-or herself; and

  (5) the meeting presented the first opportunity employees had to address the decision, so that the speaker had no opportunity to discuss it with other employees beforehand.

SuperShuttle DFW, Inc.

SuperShuttle DFW, Inc.

- Section 2(3) of the National Labor Relations Act ("NLRA") excludes independent contractors from statutory coverage
- The Board has traditionally used the common-law agency test to determine whether an individual is an employee or independent contractor
- Non-exhaustive list of ten-factors:
- (1) the extent of control the master may exercise over the work
- (2) whether or not the employed is engaged in a distinct business
- (3) whether the work is usually done under the direction of the employer

SuperShuttle DFW, Inc.

- (4) the skill required
- (5) employer or workman supplies the instrumentalities and place
- (6) the length of employment
- (7) method of payment
- (8) whether the work is part of the regular business of the employer
- (9) whether the parties think they are creating the relation of master and servant
- (10) whether the principal is or is not in business

SuperShuttle DFW, Inc.

- Background regarding the 2014 *FedEx* decision
- New factor: Whether the evidence tends to show that the putative contractor is, in fact, rendering services as part of an independent business
- Characterized entrepreneurial opportunity as simply one aspect of that factor
- Only actual, not theoretical, entrepreneurial opportunity should weigh in favor of a finding of independent contractor status
- The Board should evaluate whether the company imposes restrictions on an individual's entrepreneurial opportunities

SuperShuttle DFW, Inc.

- *SuperShuttle* dealt with whether franchisee-operators of shared-ride vans ("drivers") were independent contractors

- Drivers were classified as independent contractors

SuperShuttle DFW, Inc.

- Rescinded the 2014 *FedEx* Board's "refinement" of the traditional common-law test

- Going forward, the Board stated that the common-law factors should be evaluated through the "prism of entrepreneurial opportunity," when appropriate given the facts of the case

- Applying the newly articulated test, the Board affirmed that the SuperShuttle drivers were independent contractors

SuperShuttle DFW, Inc.

- The Board relied mainly on the following facts:

  (1) drivers made a significant initial investment in their business by purchasing or leasing a van and entering into the franchise agreements;

  (2) drivers had nearly limitless ability to meet or exceed their weekly overhead because they had complete control over their schedule and when and how often to work;

  (3) drivers kept all of their fares and thus, the amount of money they could make was determined by how much they worked; and

  (4) drivers had discretion over the bids they chose to accept, meaning they could weigh the cost of a particular trip against the fare received.

Velox Express, Inc.

Velox Express, Inc.

- In mid-2016, Velox, drivers used personal vehicles to pick up medical samples and deliver them to its customer's diagnostic laboratory

- Velox treated the drivers in a manner characteristic of an employer-employee relationship

- Velox terminated one of its drivers who then filed an unfair labor practice charge contesting the lawfulness of her discharge and alleging that her former employer violated the Act by misclassifying her and her coworkers as independent contractors

Velox Express, Inc.

- Administrative Law Judge ("ALJ") concluded that:

1. Velox's drivers were statutory employees covered by the Act and not exempt independent contractors;

2. The charging party had been wrongfully terminated in violation of Section 8(a)(1); and

3. Velox also violated Section 8(a)(1) by misclassifying its drivers as independent contractors

Velox Express, Inc.

- Contrary to the ALJ, the Board concluded that misclassification standing alone was not coercive

- Such honest, albeit mistaken, classification decisions and their announcements to employees do ***NOT*** violate the Act

Velox Express, Inc.

- According to the Board, the employer was acting on a legal opinion
- The classification did not invoke the Act, did not prohibit workers from engaging in NLRA-protected conduct, and did not threaten workers with adverse consequences for doing so

Velox Express, Inc.

- The Board was quick to distinguish *Velox* from prior decisions

- Notwithstanding *Velox*, employer's still may not use erroneous classifications as a basis for telling workers that they may not engage in union or other protected concerted activities or threaten them with adverse consequences for engaging in such conduct

The Boeing Company

The Boeing Company

- *Specialty Healthcare* (2011): Board allowed unions to dictate unit scope unless an employer could show that the union-selected unit was too narrow because there existed an overwhelming community of interests between the petitioned-for unit and excluded employees

- *Specialty Healthcare* was reversed in *PCC Structurals, Inc.* (2017), where the Board returned to the traditional community of interest test

The Boeing Company

- Under that standard, when a party asserted that the petitioned for unit was inappropriate and that the smallest appropriate unit must include employees excluded from the petitioned for unit, the Board applied its traditional community of interest factors

- Where the petitioned-for unit was found to have a sufficiently distinct set of interests, the unit was deemed appropriate and an election was held in that smaller, presumably pro-union unit

- However, where the petitioned-for unit was found to not enjoy a distinct set of interests, it was deemed inappropriate

The Boeing Company

- The *Boeing* decision was issued on September 9, 2019
- The *Boeing* case arose out of a regional director's pre-election unit determination
- The Union won the resulting election in this gerrymandered voting group
- The Board voided the Union's election victory
- The Board clarified *PCC* and devised a three step model for future decision-makers to follow when making unit determinations

The Boeing Company

- The proposed unit must share an internal community of interest

The Boeing Company

- The interests of those within the proposed unit, and the shared and distinct interests of those excluded from the unit, must be comparatively analyzed and weighed to determine whether the petitioned-for unit is sufficiently distinct from other employees to constitute a separate voting/bargaining unit

The Boeing Company

- Lastly, consideration must be given to the considerable body of Board law addressing appropriate units in the particular industry involved

The Boeing Company

- The Board concluded that the two classifications constituting the petitioned-for unit did not constitute an appropriate unit

- Unit determinations will now be done on the basis of the three step *Boeing* model requiring a careful analysis and weighing of the similarities and differences between petitioned-for units and those excluded from the unit

MV Transportation

MV Transportation

- The NLRA requires employers and unions to bargain in good faith with respect to mandatory bargaining subjects

- The end product of that bargaining process is the parties' collective bargaining agreement (CBA)

- It is that language that determines each parties' rights, duties and obligations under the CBA and, now, under the Act

MV Transportation

- The Board announced that it would no longer apply the "clear and unmistakable waiver" standard when evaluating the lawfulness of an employer's unilateral change in working conditions and that it would decide such cases in the future by means of the "contract coverage" test

- Under the "clear and unmistakable waiver" standard the Board looked to whether the CBA contained a provision that specifically addresses and governs the controversy at hand

MV Transportation

- The Contract Coverage Test:
  - The Board now views the alleged change in the context of the terms of the parties' CBA, and determines whether that purported change is within the 'compass' or 'scope' of the contract's provisions that grant the employer the authority to act unilaterally
  - If so, then the employer's so-called change may give rise to a contract dispute requiring an interpretation of the language of the CBA by an arbitrator, but it will not be considered a unilateral change requiring pre-implementation bargaining because the parties have already bargained over the issue
  - Additionally, the dispute is "covered" and, thus, governed by the parties' existing CBA

MV Transportation

- The "clear and unmistakable" waiver standard did not effectuate the policies of the NLRA because it:

1) resulted in the Board having to sit in needless judgment of the parties' contract terms by selectively applying exacting scrutiny to only those CBA provisions that vested in the employer a right to act unilaterally and not giving effect to the entire agreement;

2) undermined contractual stability and altered the deal struck by the parties in collective bargaining;

3) undermined the grievance and arbitration process

MV Transportation

- In addition, the “clear and unmistakable” waiver standard created the risk of conflicting interpretations between the Board and the courts

- Board cases relying on the standard had often been denied enforcement by the courts of appeal that opted instead to apply the “contract coverage” test

MV Transportation

- The “contract coverage” test supports the practice and procedure of collective bargaining
- Ends the Board’s practice of selectively scrutinizing limited portions of a CBA and sitting in judgment of the parties’ terms
- The “contract coverage” standard discourages forum shopping

Union Access – Something for Everyone

History

- *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)
  - Employers can exclude union organizers (third party) if suitable alternative access.
- *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)
  - Off-duty employees have the right to organize on exterior grounds before and after shift.

Access to Building Interiors

UPMC, 368 NLRB No. 2 (2019)

- Union organizers had no right to use the employer's cafeteria to organize, even if open to the public.
- Employer had a blanket non-solicitation rule.

Contractor's Employees Access to Exterior Grounds

BEXAR County Performing Arts, 368 NLRB No. 46 (2019)

- The Property owner can exclude other off-duty employees of a contractor from building grounds unless:
  - (1) Only site at which employees work; and
  - (2) No reasonable alternative means to communicate Section 7 message.

Union Protesters in Parking Lots

Kroger Ltd. Partnership, 368 NLRB No. 64 (2019)

- An Employer can exclude union agents soliciting customers to engage in a boycott.
- Test:
  - Were like activities permitted.
  - Charity is not a protest.

Union Business Agents Inside Buildings

Fred Meyer Stores, 368 NLRB No. 6 (2019)

- An Employer can compel:
  - A union SWAT team who are in-store during working time to confine activities to employee break rooms.
  - CBA contained a break room access visitation provision.

Changes in Terms and Conditions

Du Pont de Nemours, 367 NLRB No. 48 (2019)

- Changes in company-wide retiree medical and dental plans permitted by the reservation of rights language in expired CBAs.

Changes in Terms and Conditions

Pittsburgh Post-Gazette, 368 NLRB No. 41 (2019)

- Employer not obligated to increase the contribution level to the union health plan following expiration of CBA.
- No *status quo* existed which continued after CBA expired.

Changes in Terms and Conditions

Pacific Maritime Assn., 367 NLRB No. 121 (2019)

- The Employer unlawfully imposed discipline ordered by the arbitrator under one CBA to an employee in a second bargaining unit.

"Changes" in Terms and Conditions

Merck, Sharp & Dohme Corp., 367 NLRB No. 122 (2019)

- Corporate-wide appreciation holiday not provided to union-represented workforce.
- The employer could not provide day-off without bargaining, therefore no violation.

Employee Discipline

Oberthur Technologies, 368 NLRB No. 5 (2019)

- The standard for pre-contract discipline is *Fresno Bee*, 337 NLRB No. 1161 (2002).
- Duty to bargain extends only to changes in standards for discipline, and not to the application of existing standards.

To watch:

- *800 River Road*, 368 NLRB No. 60 (2019)
  - Panel majority denied union's motion to withdraw a *Total Security*-based change.

Intermittent Strike

Walmart Stores, 368 NLRB No. 24 (2019)

- Lawful to disciplined or discharged unrepresented employees who protested by striking for one day, after third strike.
- Lawful to strike but unprotected because it was all part of a singular strategy.

A Successor Still Has Rights

Ridgewood Health Services, 367 NLRB No. 110 (2019)

- Successor employer who refused to hire some of the predecessor employer's workforce still could lawfully set initial terms and conditions of employment.
- Overruled *Galloway School Lines*, 321 NLRB No. 1422 (1996).

QUESTIONS?

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