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New Changes To Long-standing National Labor Relations Board Law

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New Changes To Long-standing National Labor Relations Board Law

It is a long-recognized phenomenon that the interpretation and enforcement of the National Labor Relations Act (the "NLRA" or the "Act") changes with the inhabitant of the White House and the consequent makeup of the National Labor Relations Board ("Board" or "NLRB").[1] This last year in particular serves as a reminder of how much can change as a result of a presidential election. During, 2007, the Republican-dominated Board has reversed four long-standing precedents affecting union recognition, replacement workers, non-solicitation policies, and backpay. This article reviews these reversals and thereby offers a glimpse of what may be on the horizon should 2009 bring a Democratic Administration.

Union Recognition

In *Dana Corp*.[2], two employers, Dana Corporation and Metaldyne, independently entered into neutrality and card check agreements with the United Auto Workers ("UAW"). The UAW subsequently obtained a majority of signed authorization cards from a majority of workers, and the employers voluntarily recognized the Union. The parties then began negotiations for collective bargaining agreements. Within 35 days of recognition, workers at each employer filed decertification petitions. The Metaldyne employees' petition was supported by over 50 percent of the unit employees; the Dana Corp. employees' petition was supported by over 35 percent of the unit employees.

The two regional directors who reviewed the cases dismissed the petitions, citing the recognition-bar doctrine. Under that doctrine, established in *Keller Plastics Eastern, Inc.,*[3] in 1966, an employer's voluntary recognition of a union, in good faith and based on a demonstrated majority status, immediately bars an election petition by either the employees or a rival union for a reasonable period of time.[4] If a collective bargaining agreement is executed during this protected period, the contract-bar doctrine then applies, barring elections for an additional period of time up to three years of the new contract's term. Petitioners sought review of the Regional Directors' decisions and asked the Board to abolish the voluntary recognition bar or, alternatively, to modify it to permit decertification petitions filed within a certain number of days.

In an effort to more finely balance the competing interests of protecting an employee's freedom of choice and promoting stability in bargaining relationships, the Board majority modified the long-standing recognition-bar doctrine by creating a new set of notice and window-period requirements. As a result, no election bar will be

imposed after an employer voluntarily recognizes a union unless (1) employees in the bargaining unit receive official notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition with the Board or to support the filing of an election petition by a rival union and (2) 45 days pass from the date of the notice without the filing of a validly supported petition. If a valid petition supported by 30 percent or more of the unit employees is filed within 45 days of the notice, the petition will be processed. Additionally, any contract bar will not apply unless the 45-day notice of recognition has been given and 45 days have passed without a valid petition being filed.

In support of its decision, the Board majority emphasized that the changes were intended to "provide greater protection for employees' statutory right of free choice and to give proper effect to the court- and Board-recognized statutory preference for resolving questions concerning representation through a Board secret-ballot election." In response, the dissent argued that nothing had changed since *Keller Plastics* to warrant the reversal and that the change would serve only to discourage employers from voluntarily recognizing unions.

In a break from its usual practice of applying changes in Board law retroactively and to the case in question, the new 45-day notice rule applies prospectively only. Thus, the Board affirmed the Regional Directors' decisions dismissing the petitions in *Dana Corp*.

In October 2007, the General Counsel issued a memorandum to the field regarding the implementation of *Dana Corp*. Under the new procedures announced in the decision and the General Counsel's memorandum, an employer or union that is a party to a voluntary recognition must promptly notify the Regional Office of the Board, in writing. The written notification must include the recognition agreement, which must be reduced to writing and must describe the unit and the date of recognition. Upon receipt of such notice, the Regional Office will promptly issue an official NLRB notice to be posted by the employer in conspicuous places at the workplace throughout the 45-day period. *See* GC Memo. 0807 (Oct. 22, 2007).

Permanent Replacement Workers

In *Jones Plastic & Engineering Co.*,[5] following an economic strike by a majority of its workers, Jones Plastic hired replacement workers on an "at-will" basis. The strikers made an unconditional offer to return. Jones Plastic, however, refused to reinstate the workers, relying on long-standing Board law holding that employers can refuse to displace replacement workers in favor of returning strikers, where the employer can show that the employer and the replacement workers have a mutual understanding that the replacement workers will not be discharged to make room for returning strikers. The union argued that the "at-will" nature of the employment (i.e., that the employer could discharge the employees at any time, without notice or cause) barred permanent replacement status, citing *Target Rock Corp.,*[6] in which the majority noted that at-will employment "obviously" did not support a showing of permanence.

Breaking with the majority in *Target Rock*, the Board ruled that "at-will" status does not necessarily speak to whether there is a mutual understanding as to job retention vis-à-vis the returning strikers. As such, it does not detract from an employer's otherwise valid showing that its newly hired workers are permanent replacements. In this regard, the Board majority found Jones Plastic's evidence, that the employment documents referred to the new workers as "permanent replacements" and identified each new worker as a replacement for a specifically named striking employee, was sufficient to show a mutual understanding that the workers were permanent. In contrast, while the dissent agreed that at-will employment did not *per se* preclude permanent status, the dissent would have ruled that failing some specific assurance that the employee would not be terminated in favor of a returning striker, the required mutual understanding was lacking.

Non-Solicitation Policies

Though the Board's decision in *The Guard Publishing Co.*[7] has garnered the most attention for its ruling that the Act does not confer on employees a statutory right to use the employer's email system for Section 7[8] activities, its shift in the Board's application of the Act's long-standing views on non-solicitation policies will likely also have significant impact. In *Guard Publishing*, the union challenged not only the employer's policy prohibiting solicitations via email but also its purportedly discriminatory application of the ban, disciplining an employee for sending union-related messages yet permitting other employees to send personal email messages and solicitations for the employer's annual United Way campaign.

Relying on the Board's decision in *Fleming Cos.,*[9] the administrative law judge (the "ALJ") found that "[i]f an employer allows employees to use its communications equipment for nonwork-related purposes, it may not validly prohibit employee use of communications equipment for Section 7 purposes." Accordingly, the ALJ held that by distinguishing between union and nonunion (i.e., personal) emails, the employer had discriminated against the disciplined employee. [10]

Agreeing that *Fleming Cos.* and other cases supported the ALJ's decision, the majority nonetheless adopted the approach used by the Seventh Circuit in refusing to enforce *Fleming Cos.* In *Fleming Cos. v. NLRB,*[11] the Seventh Circuit criticized the Board's precedents for failing to focus on the unequal treatment between equals. That is, while the Board's approach, typified by *Fleming Cos.*, distinguished between the treatment of Section 7 activities versus *everything else*, the proper focus should be on whether there is disparate treatment between Section 7 activities and other similar activities on the basis of their protected nature. Adopting this approach, the Board held that "in order to be unlawful, discrimination must be along Section 7 lines." For example, the employer could draw the line between charitable and non-charitable solicitations, whereby solicitations for the union and solicitations for, e.g., Avon would be prohibited equally but United Way solicitations would be permitted. However, an employer could not draw the line between solicitations for one union over another or between pro-union communications and anti-union communications because the latter two examples prohibited conduct along Section 7 lines.

Backpay

In *St. George Warehouse,*[12] the employer challenged the Board's long-standing allocation of the burden of proof on the issue of backpay where the General Counsel failed to offer any evidence that the workers had conducted a reasonable search for replacement employment. Under well-established Board law, where a loss of employment is caused by a violation of the Act, there is a presumption that some backpay is owed. While the General Counsel has traditionally borne the burden of proving the amount of backpay due, if the employer seeks to reduce that sum for the discriminatee's failure to mitigate his damages, the employer bears the burden of proof on the issues of (1) whether there were substantially equivalent jobs within the relevant geographic area, and (2) whether the discriminatee unreasonably failed to apply for those jobs.[13] Here the employer argued that the burden of persuading the trier of fact that the discriminatee unreasonably failed to apply for jobs should not rest on the employer unless and until the General Counsel offers some evidence that the discriminatee had conducted a job search.

Adopting the employer's position, the majority modified the long-standing allocation of burden of proof by parsing out the burden of production from the burden of persuasion. While the employer retains the burden of persuasion at all times, the burden of production now shifts between the parties. An employer seeking to reduce a discriminatee's backpay for failure to mitigate must first produce evidence that there were substantially equivalent jobs in the relevant geographic area available for the discriminatee during the relevant backpay period. Then the burden of production shifts to the General Counsel to produce evidence concerning the discriminatee's job search, such as the discriminatee's testimony or documentary evidence of applications filed. Only after the General Counsel comes forward with such evidence does the burden shift back to the employer to prove that the discriminatee's efforts as shown by the General Counsel did not constitute reasonable diligence in seeking alternative employment.

In announcing this new standard, the Board principally relied on the fact that the General Counsel and discriminatee were most likely to possess evidence related to the job search, that the shifting burden of production places no additional burden on the General Counsel, and that the Casehandling Manual already directs the regions to investigate the discriminatee's mitigation efforts. In its dissent, the minority argued that the change unfairly burdens the General Counsel and the charging party with having to produce evidence with respect to the employer's affirmative defense and sets up an unnecessary stumbling block which—the minority argued—would have the effect of making it less costly for an employer to violate the Act.

What's on the Horizon

Assuming 2009 brings a Democratic president, significant changes in Board law can be expected. Besides the cases above, other likely candidates for reversal or "finessing" include reinstating *Weingarten* rights for nonunion employees (the Bush Board overturned the Clinton Board's decision in *Epilepsy Foundation of Northeast Ohio*—granting such rights—in 2004) and reevaluation of the *Kentucky River* "supervisor" standard to gather more employees under the auspices of the Act.

NLRB Weighs In On Handbook Policies—Is Your Company At Risk?

The past year saw an increasing trend in union challenges to seemingly innocuous handbook policies. As discussed in our March 2007 Employment Law Commentary, *Employer Personnel Policies May Constitute An Unfair Labor Practice* (pdf), even nonunion employers can be subject to an unfair labor practice charge for policies that expressly or impliedly limit employees' Section 7 rights.[14] Recent examples of handbook policies found to violate Section 7 include:

a chain-of-command policy prohibiting employees from seeking client assistance with any aspect of their employment;[15]

an anti-fraternization policy prohibiting fraternization with fellow employees on and off duty;[16] and

a confidentiality policy broadly prohibiting the disclosure of *any* information concerning the company.[17]

In each instance, the Board or court ruled that the policies reasonably could be read to prohibit employees from discussing their wages and other terms and conditions of employment, a protected activity under Section 7.

As always, employers are advised to periodically review their handbooks, e.g., at the start of each year when new legislative enactments go into effect, to ensure continuing compliance with developing labor and employment law.

Footnotes:

[1] NLRB consists of five members, serving staggered five-year terms, nominated by the President and confirmed by the Senate. The current Board, nominated by president Bush, will soon be down to two members. Former Chairman Robert J. Battista's term expired on December 16, 2007. Members Kirsanow and Walsh were serving recess appointments that expired in December 2007. President Bush nominated Battista and Walsh for additional terms this month. President Bush also nominated Gerard Morales, a private practice attorney.

[2] 351 NLRB No. 28 (2007).

[3] 157 NLRB 583 (1966).

[4] What constitutes a "reasonable time" turns on what has transpired since the recognition, e.g., in negotiations, and what has been accomplished during that time. For example, in *Brennan's Cadillac*, 231 NLRB 225 (1977), the Board found a period of less than six months was sufficient because, based on the bargaining that had occurred, the union had been given a fair chance to succeed.

[5] 351 NLRB No. 11 (2007).

[6] 324 NLRB 373 (1997), *enfd.,* 172 F.3d 921 (D.C. Cir. 1998).

[7] 351 NLRB No. 70 (2007).

[8] Section 7 guarantees employees the right to self-organize, to form, join, or assist a labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and to refrain from any or all such activities. 29 U.S.C. § 157.

[9] 336 NLRB 192 (2001).

[10] Similarly, the California Public Employment Relations Board has ruled that California cannot prohibit employees from using the State's email systems for union-related communications if employees are otherwise permitted to use the system for other nonwork-related messages. *See* CSEA v. State of California, 1998 PERB Decision No. 1279-S, (22 PERC Para. 29034).

[11] 349 F.3d 968 (7th Cir. 2003).

[12] 351 NLRB No. 42 (2007).

[13] *See, e.g., Lloyd's Ornamental & Steel Fabricators, Inc.*, 211 NLRB 217 (1974).

[14] Section 7 guarantees employees the right to self-organize, to form, join, or assist a labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities

for the purpose of collective bargaining or other mutual aid or protection and to refrain from any or all such activities. 29 U.S.C. § 157.

[15] *Guardsmark LLC v. NLRB*, 475 F.3d 369 (D.C. Cir. 2007).

[16] *Id.*

[17] *Cintas Corp. v. NLRB*, 482 F.3d 463 (D.C. Cir. 2007); *Albertson's Inc.*, 351 NLRB No. 21 (2007).