NLRB UPDATE: Key Precedents Likely to Fall Under Liebman Board

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In February 2009, President Obama appointed long-time Board member Wilma Liebman as Chairperson of the National Labor Relations Board (NLRB). As a member of the Bush-era Board under former Chairperson Robert Battista, Ms. Liebman dissented from most of the critical pro-employer decisions issued under the Battista Board. Analysis of Liebman's dissenting opinions provides a legal roadmap – charting the likely course the Liebman Board will take if it is able to reconsider the issues addressed in these critical decisions.

Ford and Harrison's NLRB UPDATE is a 10-part series, analyzing critical decisions issued by the Bush-appointed Battista Board that likely will be overturned in the next few years if reconsidered by the Obama-appointed Liebman Board. Please see our web site at http://www.fordharrison.com for the earlier parts of this series.

NLRB UPDATE PART VI: LIEBMAN BOARD MAY EXPAND PROTECTIONS AFFORDED TO UNION SALTS

Overview

In 2007, the Bush-appointed Battista Board issued a pair of decisions that significantly curtailed potential "salting abuses" by union organizers. First, in *Oil Capitol Sheet Metal, Inc.*, 349 N.L.R.B. 1348 (2007), the Battista Board adopted a new evidentiary standard for establishing the duration of the backpay period in salting discrimination cases – eliminating the presumption of "indefinite employment" and requiring that the alleged discriminatee present affirmative evidence that he or she would have worked for the employer for the backpay period claimed. Second, in *Toering Electric Company*, 351 N.L.R.B. 225 (2007), the Board held that an applicant who is not "genuinely interested" in an employment relationship with the employer is not entitled to statutory protection against discrimination based on his or her union activities.

These critical Bush-era decisions significantly limit the potential impact of "salting" as a union organizing tactic. In *Toering Electric*, the Board effectively narrowed the statutory protections afforded to union salts – holding that employers can refuse to hire a union salt unless the applicant can establish a "genuine interest" in working for the employer. Moreover, in *Oil Capitol*, the Board held that, even where an employer engaged in unlawful discrimination by refusing to hire a salt, the burden falls on the applicant to establish the potential length of his or her employment in order to assess the appropriate backpay award to remedy the employer's unlawful discrimination.

In both *Toering Electric* and *Oil Capitol*, then-members Liebman and Dennis Walsh dissented, criticizing the majority opinions as overturning prior Board precedent "without sound legal or empirical basis." Accordingly, given the opportunity to reconsider the Board's approach in "salting" cases, the Liebman Board likely would overturn both the *Toering Electric* and *Oil Capitol* decisions, effectively expanding the protections afforded to union salts.

A Primer On Salting

"Salting" is an aggressive union organizing tactic in which professionally trained (and often-times paid) union organizers seek and obtain employment with a non-union company for the purpose of using their status as an "employee" to organize on behalf of the union.

Salting is considered a protected activity under the National Labor Relations Act (NLRA). In NLRB v. Town & Country Electric, Inc., 516 U.S. 85 (1995), the U.S. Supreme Court held that paid professional union organizers who apply for work with non-union employers – purportedly for the purpose of organizing – are nevertheless "employees" within the meaning of the NLRA. Therefore, an employer may not deny employment to the trained union organizer/job applicant merely because the organizer is a paid union employee or has otherwise announced the intention to organize the employer. In other words, if an employer discharges or refuses to hire a "salt" because of his or her union affiliation or union activity, the employer's conduct constitutes unlawful discrimination, in violation of Sections 8(a)(1) and (3) of the Act.

Upon a finding of unlawful discrimination, the Board usually orders "make whole" remedies – requiring that the employer hire or reinstate the discriminatee with full backpay. In this regard, the Board typically applies a "rebuttable presumption" that the backpay for an alleged discriminatee should continue indefinitely from the date of discrimination until after an offer of reinstatement is made.

Once hired, the "inside organizer" is in a unique position to gather information about the employer as well as other employees and to solicit employees to sign union authorization cards – fundamental to any union organizing, whether it be "card-check" recognition or a prerequisite to the filing of a petition for an NLRB conducted secret-ballot election. While most "salts" seek to gain employment surreptitiously, some salts openly declare support for unionization and their intention to organize the workforce – effectively daring the employer not to hire them because of their support for unionization.

Board Precedents At Risk

Battista Board's New Evidentiary Standard for Establishing the Duration of Backpay Period in Salting Discrimination Cases: Oil Capitol Sheet Metal, Inc., 349 N.L.R.B. 1348 (May 31, 2007).

In *Oil Capitol Sheet Metal, Inc*., a 3-2 Board majority adopted a new evidentiary standard to determine the duration of the backpay period in salting discrimination cases. Recognizing that union salts do not seek long-term employment, the Board in *Oil Capital* concluded that the typical backpay presumption of "indefinite employment" should not apply in salting cases. Thus, although the Board unanimously found that Oil Capital violated Sections 8(a)(1) and (3) by refusing to hire a salt, a three-member Board

majority required that the General Counsel present "affirmative evidence that the salt/discriminatee, if hired, would have worked for the employer for the backpay period claimed" as part of its burden to establish a reasonable backpay award.

In fashioning a new backpay standard in salting cases, the Board recognized that a union salt would usually stay on the job either until he or she succeeds in the organizational effort or until he or she reaches a point where such efforts are unsuccessful. In either situation, the union typically will send the salt to seek employment at another non-union employer for purposes of organizing that employer. Although that may not always be the case, the Board further recognized that the union – not the employer – is in the best position to explain its intention with regard to a particular salt and therefore the burden to establish that intention should be on the union. As noted by the Board:

The traditional presumption that the backpay period should run from the date of discrimination until the respondent extends a valid offer of reinstatement loses force both as a matter of fact and as a matter of policy in the context of a salting campaign. Indeed . . . rote application of the presumption has resulted in backpay awards that bear no rational relationship to the period of time a salt would have remained employed with a targeted nonunion employer. In this context, the presumption has no validity and creates undue tension with well-established precepts that a backpay remedy must be sufficiently tailored to expunge only actual, not speculative, consequences of an unfair labor practice, and that the Board's authority to command affirmative action is remedial, not punitive.

Although members Liebman and Walsh agreed with the majority holding in *Oil Capital* that the employer had unlawfully refused to hire the union salts, they issued a partial dissent – highly critical of the majority's adoption of a new remedial approach in salting cases. According to the dissent:

In reversing the burden of proof with respect to remedial issues involving salts, the majority overturns Board precedent endorsed by two appellate courts and rejected by none. Today's change in the law is made without any party having raised the issue, without the benefit of briefing, and without a sound legal and empirical basis. . . . The majority's new approach in contrast, not only violates the well-established principle of resolving remedial uncertainties against the wrongdoer, but also treats salts as a uniquely disfavored class of discriminatees. . .

Additionally, the dissent claimed the majority ignored the fundamental policies of the NLRA to arbitrarily reach a completely "result-oriented decision." As noted in the dissent, "we have little doubt that the majority's decision is grounded in hostility to the practice of salting and to unions' increasingly successful use of salting as an organizing tactic. . . . But that practice is – at least for now – protected by the statute."

Battista Board's Modified Standard for Protection of Discriminatees in "Failure to Hire" Cases: Toering Electric Company, 351 N.L.R.B. 225 (Sept. 29, 2007).

In *Toering Electric Company*, a divided NLRB established a new legal standard for determining whether an applicant for employment is entitled to statutory protection under the NLRA against union-based hiring

discrimination. In *Toering Electric*, a 3-2 Board majority ruled that an applicant for employment is not entitled to statutory protection against discrimination based on purported union activity unless the applicant is "genuinely interested" in an employment relationship with the hiring employer. According to the Board, "one cannot be denied what one does not genuinely seek." Therefore, in discrimination cases brought under the NLRA, the Board concluded that the General Counsel has the "ultimate burden" of proving the applicant has a "genuine interest" in employment.

In considering whether a union salt was entitled to the NLRA's protection against union-based discrimination, the Board in *Toering Electric* concluded that applicants with no genuine aspiration to work for an employer are not "employees" within the meaning of Section 2(3) of the Act. According to the Board majority, only applicants who are statutory employees as defined by Section 2(3) are entitled to protection against hiring discrimination. According to the Board, this statutory protection requires "at least a rudimentary economic relationship, actual or anticipated, between the employee and employer." Where the applicant has no genuine desire to work for the employer, no such economic relationship is anticipated.

Moreover, the Board further held that in all cases alleging discrimination under the NLRA, the General Counsel has the burden of proving the alleged discriminatee was genuinely interested in seeking to establish an employment relationship – and thereby qualified for protection under Section 2(3) of the Act. The Board explained that meeting this burden has two components:

(1) There was an application for employment, and (2) the application reflected a genuine interest in becoming employed by the employer. As to the first component, the General Counsel must introduce evidence that the individual applied for employment with the employer or that someone authorized by that individual did so on his or her behalf. . . . As to the second component (genuine interest in becoming employed), the employer must put at issue the genuineness of the applicant's interest through evidence that creates a reasonable question as to the applicant's actual interest in going to work for the employer. In other words, while we will no longer conclusively presume that an applicant is entitled to protection as a statutory employee, neither will we presume, in the absence of contrary evidence, that an application for employment is anything other than what it purports to be.

As a practical matter, the *Toering Electric* decision effectively limits the statutory protection typically extended to union salts – effectively undermining organized labor's reliance on salting campaigns in the course of organizing a non-union employer. According to the Board, "submitting applications with no intention of seeking work but rather to generate meritless unfair labor practice charges is not protected activity."

Members Liebman and Walsh dissented, claiming the majority decision "represents a failure in the administration of the National Labor Relations Act" that creates "a legalized form of hiring discrimination." According to the dissent, the majority in *Toering* ignored Board precedent, and "continues the Board's roll-back of statutory protections for union salts who seek to uncover hiring discrimination by nonunion employers and to organize their workers." According to the dissent, rather than focus on whether a refusal to hire was based on the employer's anti-union animus – as required under the Board's decision in *FES*, 331 N.L.R.B. 9 (2000) – the majority approach in *Toering Electric* "reorients the focus in hiring-discrimination cases from employer

motive to applicant intent, holding that applicants whose 'genuine interest' cannot be established are not even statutory employees, and so may freely be discriminated against." *Toering Electric*.

Moreover, the dissent claims that the majority's new approach is "impossible to reconcile" with the National Labor Relations Act. According to the dissent, the majority "refuses to recognize that Federal labor law permits employees to pursue their own economic interests in organizing, in eliminating antiunion discrimination, and in protecting the gains won by unionized workers. . . . The Board, with the approval of the courts, has long treated salting as a legitimate tactic. But that era seems to be ending."

Potential for Change

In light of the strong dissents issued by now-Chairperson Liebman in both the *Toering Electric* and *Oil Capitol* cases, there is little doubt that given the opportunity the Obama-appointed Liebman Board likely would overturn both decisions and thereby reestablish the protections afforded to union salting that were curtailed under the Battista Board – leading to a new era of salting abuses under a re-energized labor movement desperate to add new members.

Significance of Employers

The potential for salting abuses may be critically important for union-free employers over the next several years, as organized labor continues to push for labor law reforms designed to make it easier for unions to organize and to increase potential penalties against employers. Notably, the proposed Employee Free Choice Act (EFCA) as well as virtually every EFCA-compromise currently being debated by Congress calls for increased penalties against employers and contains provisions designed to make it easier for unions to organize, whether by card check recognition, mail ballots, or expedited elections.

Through an effective "salting campaign," a union can gain a significant number of signed authorization cards before the employer ever realizes a union organizing attempt is underway. In fact, if organized labor ultimately is able to secure some form of labor law reform, "salting" likely will become one of the most common and effective organizing tactics.

For more information concerning the Ford & Harrison NLRB Update and the Board precedents likely to be overturned under the Liebman Board, contact the Ford & Harrison attorney with whom you usually work, or the author of this Alert, John Bowen, a partner in our Minneapolis office at jbowen@fordharrison.com or 612-486-1703.

LOOK FOR PART VII OF NLRB UPDATE NEXT WEEK