McNees WHITE PAPER

The National Labor Relations Board 2015 Year in Review

An Overview of Major Developments in Labor Law

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Introduction

To mark the 80th birthday of the National Labor Relations Act, the National Labor Relations Board apparently decided to make history in 2015. The Board did just that, issuing several ground breaking decisions, and in the process addressed facts and circumstances that could not possibly have been contemplated in 1935. The ramifications of the Board's agenda will certainly have both short and long term impact on employers and labor unions.

Generally, the Board continued to make life miserable for employers throughout the United States. We have written regularly about the Board's aggressive, pro-union and employee-friendly agenda over the past several years, and we can report that the Board certainly did not change course in 2015. In 2015, a fully constituted Board finalized new election rules, issued a number of controversial decisions, defended itself in the federal courts of appeal, and even took the time to tackle some new initiatives. By all accounts, it was another whirlwind year for employers covered by the Act with compliance becoming increasingly difficult. We take the opportunity to summarize the highlights below.

Before we get into the specifics, let's look briefly at some stats for the fiscal year ending September 30, 2015. The number of decisions issued by the Board increased significantly over fiscal year 2014. The Board issued 394 decisions (compared to 248 decisions the year before), which included 316 unfair labor practice cases and 78 representation cases. Also, 23,000 charges were filed with the Board's regional offices, which we believe to be an indication that employees, not just unions, are becoming increasingly aware of their rights under the Act.

In its annual performance and accountability report, the Board's General Counsel proudly touted that his office had secured over 2,000 offers of reinstatement and $95 million in back pay awards. The Board also continues to advance its education and outreach efforts, through the use of internet and other resources. The Board has been utilizing social media, including Facebook and Twitter, to engage in both high level and targeted outreach efforts.

In light of these efforts, the number of charges filed in 2016 may be expected to rise above 25,000. In addition, we expect continued, aggressive action by the Board in the last year of the Obama Administration. Please keep in mind that the vast majority of Board decisions are important to all employers, both union and non-union, because the Board's jurisdiction under the Act is extremely broad-based.

Below we have summarized some key decisions and actions from 2015.

Update on the Board's Rulemaking Initiatives

In April 2015, the Board's expedited election rules took effect, furthering the Board's continuing efforts to speed up the election process and assist union organizing. Nicknamed by the employer community as the "Quickie Election Rules," the latter has dramatically shortened the time between the filing of a union election petition and the date of the representation election. Before the new rules became effective, the median processing time from date of filing to date of election was about 38 days. Since April, the time to election has been averaging around 23 days, shaving at least two weeks from the time that employers have to educate their workforces regarding the pros and cons of unionization. Judicial challenges to the Board's new rules have not been successful to date, with employer groups losing in federal district courts (including the federal district courts in D.C. and the Western District of Texas). Even the United States Congress was unsuccessful in trying to reverse the Board's new rules, as a measure which passed 53-46 in the Senate and 232-186 in the House was then vetoed by President Obama.

Not only do the new rules result in much quicker elections, but in September of 2015 the Board's General Counsel directed the Board's Regional Directors to accept employee electronic signatures as proof of the "showing of interest" filed with a representation petition. There is widespread concern in the employer community that electronic signatures are more susceptible to fraud and that this may result in unions filing election petitions with exaggerated

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support, and in some cases being able to meet the Board's requirement that petitions be supported by a 30 percent showing of interest through fraud.

In the Board's annual report, Board Chairman Mark Gaston Pearce reported that the rules have had an immediate impact, increasing the percentage of stipulated election agreements, "eliminating delays caused by hearings," and streamlining the election process. Unfortunately, many employers believe the process had already been moving quickly enough, and most believe that the new rules were simply designed to increase union "win rates" in elections.

Still not satisfied with the new set of rules made for them, unions have been quick to attempt to expand the "quickie" election rules even further. For example, the rule requires employers to provide a petitioning union with employee contact information, including employee names and addresses, available home telephone numbers, mobile phone numbers, and personal email addresses, within two days of the scheduling of the election. In *Danbury Hospital*, 01-RC-153086, after it lost a representation election, the union filed objections seeking a new election. The union argued that the Hospital did not satisfy its obligations to provide "available" mobile phone numbers and personal email addresses.

The Regional Director agreed with the union, concluding that the employer's efforts were insufficient. Apparently, the employer had searched only one database for the necessary information, when other databases also existed. In addition, it was noted that the employer did not review hardcopy records. The Regional Director found that the Hospital's steps were insufficient, and ordered that a second election be directed. The Hospital appealed, but the union subsequently withdrew the petition and therefore, the Board did not rule on the appeal. This issue is an important one, and it, as well as other issues involving the interpretation of the new rules, will likely be raised again in 2016.

The Rise of the General Counsel

The Board's General Counsel has become a vital player in the Board's efforts to advance its pro-union, pro-employee agenda. In past years, the General Counsel's office was instrumental in helping push that agenda by reviewing and expanding charges to bring forth new issues for the Board to address. For example, if an employee filed a charge challenging some form of disciplinary action, the General Counsel's office would often expand the charge by including challenges to the employer's policies. This allowed the Board to declare a number of fairly typical employer policies unlawful and expand the protections of the Act. The General Counsel has also been actively pursuing several high-profile cases, including "class actions" against national retailers and fast food restaurants. The General Counsel has also taken to issuing regular "opinions" and other unsolicited "guidance" to employers.

Guidance Memo Regarding Workplace Policies

In March 2015, the General Counsel's office issued a memo offering guidance on a number of different types of employer policies that had previously been considered non-controversial. The memo contains several examples of rules that the General Counsel would find unlawful, in the areas of confidentiality, employee conduct toward the company, employee conduct toward other employees, employee conduct toward third parties (i.e. the media), rules restricting the use of company logos and trademarks, rules restricting photographs and recordings, rules restricting employees from leaving the workplace (which could impact striking workers), and employer conflict of interest rules. The memo also contained some examples of lawful policies in these areas.

The 30 page memo, which seemed to contradict itself at times, was really an eye opener for employers. For example, the memo notes the General Counsel's conclusion that employees have the right to publicly criticize employers, and that such conduct does not lose the protection of the Act even if it is abusive and inaccurate. To be fair, the memo is helpful to the extent that employers are seeking to craft policies that will withstand the rigorous review of the Board's General Counsel. Whether the Board and the courts will ultimately sustain that aggressive approach remains to be seen. However, we do recommend reviewing the memo and considering whether any modifications to your policies may be appropriate.

A Summary of the Board's Significant Decisions Joint Employer Status

In a long-awaited and feared decision, a split Board adopted a new test to determine whether two entities could be consider joint-employers of one group of employees. Of course, that new test is not employer friendly and significantly increases the risk that one employer will be found to be the joint employer of a group of employees with a second employer. This could occur either in a franchise setting or in a situation where an employer utilizes a temporary staffing agency. *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015) involved a group of employees employed by a staffing agency who were assigned to work at a recycling facility. The Board concluded that the workers were the employees of both the staffing agency and the recycling facility, and as such, both employers could be liable under the Act and both were required to negotiate with any union representing the employees.

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The *Browning-Ferris* Board found a joint-employer relationship exists where two or more entities "are both employers within the meaning of common law, and if they share or codetermine those matters governing the essential terms and conditions of employment," such as wages, hours, work assignments, and control over the number of workers and scheduling. Per this decision, a joint employer is not required to actually exercise its authority to control terms and conditions of employment, and the Board determined that such control may be "reserved, direct and indirect" (in other words, hypothetical!).

In *Browning-Ferris*, the temp agency and the recycling facility were parties to a temporary labor services agreement, which specifically indicated that the staffing agency was the sole employer of the workers. The agreement was also clear that it did not create an employment relationship between the workers and the recycling facility. The agreement did provide the facility with the authority to end the assignment of a worker at any time. The facility determined the schedule of working hours, overtime, and break times, as well as the number of workers needed. Facility managers and supervisors communicated with staffing agency supervisors regarding the positions to be occupied, daily operating plans, and concerns regarding productivity and job performance. At times, the facility's supervisors addressed productivity and performance concerns directly with the workers.

The workers were required to comply with the facility's safety policies, procedures and training requirements, and received occasional training and education from facility managers. The agreement provided that workers were only to be assigned to the facility for six months, but that particular provision of the agreement was never invoked, nor did the facility ever request to review the staffing agency's records. Importantly, the agreement gave the sole responsibility for disciplinary action to the staffing agency.

Based on this fairly common fact pattern, the Board nevertheless found the recycling facility was a joint-employer of the staffing agency employees. A majority of the Board concluded that the facility had significant control over employment-related decisions such as hiring, firing and discipline as well as employee wages and wage increases. The Board further found that the facility exercised direct and indirect control over operational decisions and productivity standards. Additionally, the facility exercised "near-constant oversight of employees' work performance."

In reaching its conclusion, the Board rejected the prior joint-employer test which had been in effect for about 30 years and adopted a test that will likely lead to far more joint employer findings. The Board justified its new standard by noting changes in today's workplace arrangements and pointed towards these changes as "reason enough" to adopt a new joint employer test.

Browning-Ferris has appealed the Board's Decision to the D.C. Circuit Court of Appeals. Additionally, legislation has been introduced to overturn the decision, and if successful, the legislation would amend the Act by expressly defining a joint employer narrowly. Such proposed legislation is, however, unlikely to become law in the current political climate.

Board Holds One-Person Complaint is Concerted Activity

In *200 East 81st Restaurant Corp.*, 36 NLRB 152 (2015), the Board held that an employee who has filed a class action lawsuit has engaged in concerted protected activity under the Act, even if no other employees have joined in the lawsuit. The lawsuit alleged that the employer had failed to pay overtime as required under the law, and the employee was fired shortly after the suit was filed. The employee filed an unfair labor practice charge with the Board alleging that that his discharge was in violation of the Act. Essentially, the employee argued that he had engaged in protected activity under the Act by filing the suit, and that his employer retaliated against him. The employer countered that the employee's law suit was not "concerted" activity, and was therefore not protected, because the employee was the only member of the class.

The Board held that the filing of a class or collective action by an employee is an attempt to initiate a group action, and that in this case the filing of the class action law suit was the first step in an effort to represent a group of employees. As a result, the Board concluded that the filing of a class action, even in the absence of any other class members, was a form of concerted, protected activity under the Act.

The Board's decision seems to defy common sense and the common understanding of the term "concerted," which implies group action. *200 East 81st Restaurant Corp.*, is just the latest in a long line of decisions significantly expanding the protections of the Act.

Board Punts on Whether College Athletes Are Employees Under the Act

In August, the Board declined to assert jurisdiction over the case involving Northwestern University football players who were attempting to form a union. Rather than determine whether the players were statutory employees under the Act, the Board decided to exercise discretion and not assert jurisdiction over the dispute. The Board overturned a Regional Director's Decision and dismissed the petition for election that had been filed by the union.

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The Board announced that asserting jurisdiction would not promote labor stability due to the nature and structure of college football. Under the law, the Board does not have jurisdiction over state-run colleges and universities, which constitute the vast majority of college football teams. The Board essentially concluded that exercising jurisdiction over just one team would not promote stability in labor relations, and would be contrary to the purposes of the Act. The Board was quick to note that its decision was narrowly focused to apply only to the players in the Northwestern case and did not preclude reconsideration of this issue in the future.

Despite the Holdings of the Federal Courts, the Board Continues to Find Most Arbitration Agreements Unlawful

The Board continues to ignore the rulings of the federal circuit courts of appeal, and has continued to hold that certain arbitration agreements violate the Act. As you may recall from our prior reports, the Board has taken the position that arbitration agreements that require individual arbitration, as opposed to class action arbitrations, violate the Act. Despite contrary opinions from the circuit courts of appeal, the Board continues to declare these arbitration agreements unlawful, and in *On Assignment Staffing Services, Inc.*, 362 NLRB 189 (2015), concluded that even where such an arbitration agreement has an opt-out clause, it is still unlawful. A show down in the Supreme Court of the United States over the Board's position on arbitration agreements is likely sometime in the future.

Board Further Solidifies Position Against Confidentiality of Investigations

In *Boeing Co.*, 362 NLRB 195 (2015), the Board affirmed its prior *Banner Estrella Medical Center,* 362 NLRB NO. 137 (2015) holding that blanket confidentiality policies governing internal investigations were unlawful, and then went even further. Despite Boeing's efforts to conform its policies regarding the confidentiality of internal investigations to the Board's prior holdings, the Board held that it did not go far enough. Boeing's policy previously provided that employees were "directed not to discuss" internal investigations with other employees. Boeing revised the policy to provide that it was "recommended" that employees refrain from discussing such investigations. The Board held that "direct" and "recommend" are essentially the same, and that the policies were virtually identical. Consistent with *Banner Estralla*, the Board concluded that this blanket restriction on discussing internal investigation was unlawful.

No-Photographing Policies Also Unlawful

The Board has not stopped at more traditional employer policies, but has also addressed technology-related policies and procedures. In *Caesar Entertainment d/b/a Rio All-Suites Hotel and Casino*, 362 NLRB 190 (2015), the Board declared unlawful a rule that restricted employees from taking photographs in the workplace. The policy essentially prohibited employees from using mobile devices to take pictures while on company property. The Board concluded that this rule, as with so many others, was overly broad and would restrict employees from taking pictures where such actions were specifically authorized by law. The Board found that the no-photograph rule was too broad and not narrowly tailored to protect privacy interests, which was the offered basis for the policy. Interestingly, the Board remanded to an Administrative Law Judge ("ALJ") another employer policy at issue in this case, which placed restrictions on employees' use of computers. The Board remanded a review of that policy to the ALJ, so that the policy could be reviewed in light of the Board's *Purple Communications, Inc.*, 361 NLRB 126 (2014) decision, which had granted essentially unfettered access for employees to the employer's email system. This will be another decision to watch for in 2016.

ALJ Decisions to Watch

Observation of the Workplace Unlawful if it will Chill Protected Activity

Did you ever think you could get in trouble observing conduct in your own workplace? Well apparently you can. Boeing found that out the hard way when an ALJ concluded that its use of digital cameras and photographing of "solidarity marches" within their facilities in Washington and Oregon, which were conducted in response to an ongoing contract dispute, was unlawful. In *Boeing*, 19-CA-090932 (ALJ 2014) the ALJ concluded that because the filming occurred only during solidarity marches, the practice was unlawful, and Boeing was directed to end its practice.

Generally, the test for whether an employer has engaged in unlawful surveillance is whether the employees would reasonably assume from the employer's statements or conduct that their protected activities being conducted privately were being observed by their employer. Deviations from normal security practices or video observation in response to union activity will surely activate the Board's scrutiny. Under well-settled case law, "an employer engaging in such photographing or videotaping [must be able] to demonstrate a reasonable basis to have anticipated misconduct by the employees." The ALJ in the Boeing case determined that Boeing had no valid reason to conduct the video surveillance and that it was inherently intimidating.

English Only Rules Under Attack

English-only rules are not as common as they once were, but some workplaces still require employees to speak English in the workplace. Justifications for these rules vary, but the Equal Employment Opportunity Commission ("EEOC") has taken the position that

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such rules are only lawful under very narrow circumstances. In *Valley Health System, LLC*, 28-CA-123611 (ALJ 2015), a Board ALJ joined the EEOC in challenging the legality of English only rules. The ALJ concluded that the employer's English only rule, as set forth in the employer's handbook, violated the Act.

The Health System's rule required employees to communicate only in English in the work environment, but the ALJ found that the English-only rule was overbroad and inhibited non-native English speaking employees from communicating freely about working conditions and/or other terms and conditions of employment. The Health System argued that the policy was in full compliance with guidance provided by the EEOC, which allows English-only rules if justified by safety and efficiency concerns.

The ALJ ignored the EEOC guidance on English-only rules and applied the Board's test for evaluating workplace polices. The ALJ concluded that employees would reasonably interpret the rule as restricting them from engaging in protected activity under the Act, and as such, the rule was deemed unlawful. This ALJ decision is just another example of how the Board has waged war on employer policies, and it likely will be upheld by the Board.

Board Decisions on Appeal

Overall, efforts to appeal the Board's decisions to the federal courts have generated mixed results. Some of the Board's decisions are being upheld, while others are being reversed. The Board, however, seems undeterred. In fact, in many cases, the Board is simply ignoring the decisions of the courts of appeals, which it can do unless and until the Supreme Court decides an issue.

Second Circuit "Likes" Board's Facebook Decision

In *Three D LLC v. Nat'l Labor Relations Bd.*, ___ F.3d ___ (2nd Cir. 2015), the U.S. Court of Appeals for the Second Circuit affirmed a Board decision involving employee social media use. The Board had held that employee discharges based on Facebook discussions, which included calling the employer an "asshole" and complaining about how taxes were withheld from their paychecks, were unlawful. In fact, the decision concluded that even the act of simply "liking" a comment on Facebook can be protected under the Act.

The company argued that under the Act, employees could be disciplined for disparaging comments about the employer made publicly, but the court found that the employees' online comments were protected. The Court noted that accepting the argument that the comments made on Facebook were made "in public" or "in the presence of customers" would lead to the undesirable result of chilling virtually all employee speech online. Employers should certainly take note that at least one court has affirmed the Board's approach to protecting employee social media use.

D.C. Circuit Issues Split Ruling on Board Decision Dismantling Policies

As noted above, the General Counsel has been capitalizing on employee charges and has been expanding those charges to in an effort to target employer policies. The Board has been more than willing to review those policies, and for the most part, declare them unlawful. One employer recently took issue with the General Counsel and the Board's tag team approach, and appealed a Board ruling to the Court of Appeals for the D.C. Circuit.

In *Hyundai America Shipping Agency, Inc. v. Nat'l Labor Relations Bd.*, __ F.3d ___ (D.C. Cir. 2015), the court made clear that there are restrictions on the General Counsel's ability to add additional charges to a complaint against an employer. The court held that while it was permissible for the General Counsel to expand a charge to include a review of additional issues, the additional issues must be "closely related" to the original charge. In order for the Board to have jurisdiction over such an additional issue, that issue must involve the same legal theory, arise from the same factual circumstances or sequence of events, and must involve similar defenses.

In *Hyundai*, the General Counsel attempted to expand an employee complaint regarding her discharge to include a review of five employer policies. The court concluded that four of the policies were sufficiently related to the initial charge such that the Board had the jurisdiction to review the policies, but that one policy was not related enough. That policy, which governed personnel files, did not have any link to the underlying complaint regarding the employee's discharge, and as a result, the Board lacked jurisdiction to review the policy. As such, the Board's holding that the policy was unlawful was reversed.

The court then went on to review the Board's holdings with respect to the four other policies, which included a rule requiring the confidentiality of internal investigations, an electronic communications rule, a working hours rule, and a policy "urging" employees to make complaints to their immediate supervisors rather than coworkers.

Unfortunately for employers, the court upheld the Board's

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determination that the investigation confidentiality rule was overly broad and therefore unlawful. The court did recognize that an employer will often have a legitimate business reasons to ban discussions of internal investigations, such as in cases of sexual harassment investigations, but held that an employer may not maintain a policy that demands confidentiality with respect to all internal investigations. Importantly, the court did not sustain the Board's requirement that an employer demonstrate a legitimate and substantial justification to support a confidentiality requirement. Instead, the court simply held that the rule in this case was too broad and undifferentiated.

The court also agreed with the Board's finding that the electronic communications rule and the working hours rules were overly broad. But, the court reversed the Board's finding with respect to the complaint policy. The court found that the policy did not preclude employees from talking to coworkers about workplace complaints, but merely encouraged employees to bring those complaints to supervisors instead. The court noted that the policy made clear that reports to supervisors could benefit both the employee and the company, and that no reasonable employee could interpret such a policy as prohibiting complaints protected by the Act.

This decision is important for a number of reasons. First, it shows that there are at least some limits on the General Counsel's ability to expand charges against employers. In addition, the court sustained the Board's highly controversial approach to policies requiring employees to maintain the confidentiality of workplace investigations. Finally, the decision demonstrates that while the courts will follow the same analytical process as the Board in reviewing workplace policies, the courts will not always reach the same result. That is at least some good news for employers.

Court of Appeals Remands Bargaining Order

In *Intertape Polymer Corp. v. Nat'l Labor Relations Bd.*, 801 F.3d 224 (4th Cir. 2015), the Fourth Circuit Court of Appeals reversed and remanded a Board decision ordering an employer to bargain with a union despite the employer's successful defense of the union's organizing campaign. The Board has long held that if an employer engages in significant unfair labor practices during the pre-election period, then the employer may be required to recognize and bargain with the union regardless of the outcome of the election. That result could be devastating for an employer who spends weeks engaging in a successful anti-union campaign, only to find itself forced to bargain with the union anyway. That was the case in *Intertape Polymer*, until the appeal.

The court did find that the employer engaged in multiple unfair labor practices, but reversed a Board finding with respect to the employer's alleged unlawful surveillance. During the pre-election period, supervisors and managers stood at the gate and distributed election-related literature to arriving employees. The Board found that this had never happened before and as a result concluded that it was unlawful surveillance. The court reversed the Board on this point. The court found that distributing campaign literature was a very "ordinary" response to the union's election petition. In fact, the employer's rights to express its views against the union are protected by the Act. Luckily for employers, the court reaffirmed this right in the face of the Board's attempt to further erode employer rights under the Act.

As a result of its decision to reverse the unfair labor practice finding with respect to the alleged unlawful surveillance, the Board remanded the case to the Board to reconsider whether the bargaining order was still appropriate. We believe the Board will likely affirm its prior decision, but the employer may appeal again. Only time will tell.

Other Interesting Developments in Labor Law

Pennsylvania Closes Loophole in Criminal Law Following Indictments of Union Leaders for Violence

In November of 2015, Pennsylvania Governor Tom Wolf approved a measure amending the Pennsylvania Crimes Code, which was designed to close a loophole in the crimes code related to union violence. The amendment eliminated the "union intimidation" loophole from the Crimes Code and removed certain exceptions that had applied to crimes committed during the course of or in connection with a labor dispute. Prior to the recent amendments, unbelievably, a perpetrator could escape conviction for various crimes merely by relying upon the fact that his or her misconduct was committed in furtherance of a union's labor dispute with an employer.

The impetus for this much-needed legislation was likely the announcement of federal indictments (and subsequent convictions) against 10 Ironworkers Local 401 leaders related to the burning and vandalism of a construction site in Philadelphia. It was alleged that Local 401 representatives set fires, started riots, and took crowbars to non-union contractors who had ignored threats against hiring non-union employees. Several union leaders had earlier been acquitted of charges brought under the state crimes code based upon their reliance on the labor dispute exceptions referenced above.

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Supreme Court to Decide Legality of Fair Share Fees

Last year we reported on the Supreme Court's decision in *Quinn v. Harris*, ___ U.S. ___ (2014), which examined the constitutionality of union fair share fees, but only in the public sector and only in limited circumstances. This term, the Court is set to take on the broader issue of the constitutionality of fair share fees in general. The Court will decide whether a requirement that public sector employees pay "fair share" fees to a union, despite their desire not to be union members, is "compelled speech" in violation of the First Amendment.

In *Friedrichs v. Cal. Teachers Assoc.*, the Court will decide if fair share fees, which are fees that non-union members must pay to the union in order to reimburse the union for the costs of representing the employees in collective bargaining and related matters, is a form of unconstitutional compelled speech in violation of the First Amendment. These fees are required by unions even though the employee is not an actual member of the union because, under the law, the union has the obligation to fairly represent all employees, whether or not the employee is a member of the union. The idea is that non-union members should pay their fair share because they receive the benefits of the representation. The payment of fair share fees is typically authorized by state law. The Court may strike down the legality of these state laws, and determine that fair share fees are unconstitutional. Such a decision would significantly weaken the financial and political strength of public sector labor unions.

Summary

After 80 years, the Act is certainly alive and well, even if recent interpretations heavily favor unions. Clearly the current Board views the Act expansively. The Board seems willing to make history on a number of issues, often disregarding years of precedent, and has shown that it will defend even its most controversial decisions.

With continued employee outreach generating charges at an unprecedented level, a General Counsel always looking for new union or employee issues to support, and probably the most pro-union and employee-friendly Board in history, we expect that the bad news for employers will continue in the final year of the Obama administration. How much staying power these controversial decisions will ultimately have is subject to dispute, but the appellate courts are generally reluctant not to defer to the Board's judgment in cases interpreting the Act. We will do our part and keep you up-to-date on the major developments as they occur in 2016.