THIS IS AN ADVERTISEMENT.

Your "New" NLRB at Work – Involving Secondary Employers in Union Disputes

Much has been written and said about the new pro-union make-up of the National Labor Relations Board ("NLRB") under the Obama Administration, just as it was about the NLRB's pro-business bias under the Bush Administration.

We want to bring the latest product of "the new NLRB" to your attention, **because it impacts non-union as well as union employers.**

In a recent unfair labor practice charge ruling, the NLRB held that the union practice of **displaying large stationary banners in front of a secondary employer's business (regardless of whether it is union or non-union) is lawful.**

The significance of this ruling is that by permitting this practice regarding secondary employers (i.e., businesses who employ or otherwise do business with a business that has a dispute of some sort with a labor union), the NLRB is allowing both union and non-union secondary employers to be brought into the middle of union disputes or campaigns, even though they otherwise have no involvement in the same.

The facts of this NLRB ruling illustrate how this happens, as it involved two (non-union) medical centers and a (non-union) restaurant.

These three businesses had hired (union) contractors to do some carpentry work for them. The Carpenters' Union was engaged in a protest campaign with these unionized contractors regarding unfair wages and benefits along with other issues. These three (non-union) businesses became involved in this protest campaign when the Union placed 4 x 16 foot stationary banners manned by 2-3 people on public property near each of their entrances. The two medical center banners said "Shame on . . .[medical center's name]," while the banner at the restaurant urged customers not to eat there.

Historically, acts such as picketing a secondary employer who is not directly involved in a labor dispute or campaign have been prohibited by the NLRB. The Board previously has stated that picketing such employers is "threatening, coercive, and/or restrains others from doing business" with them by creating at least a symbolic confrontation between the picketers and those trying to enter the secondary employer's business.

The "new" NLRB, however, relied on a 1988 U.S. Supreme Court decision, *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, in which the Court expressed that Congress did not intend to bar all forms of union protest activity in the National Labor Relations Act (NLRA), given the fact that unions have a First Amendment right to peaceful communication.

In *DeBartolo*, the Supreme Court held that the distribution of handbills urging customers not to patronize a local shopping mall was not a violation of the NLRA. The NLRB thus used this holding to rationalize that placing large stationary banners with "insufficiently confrontational" messages on them which did not block ingress and egress was "much like distributing handbills," in that both are not "threatening, coercive or restraining any

person from doing business" with the secondary employer. Note that if the majority of the Board had determined that "bannering" was more akin to "picketing," the NLRB may have reached the opposite conclusion (i.e., that "bannering," like picketing, secondary employers is a violation of the NLRA).

Accordingly, for those of you whose eyes glaze over whenever you see the terms "NLRB," "NLRA," or "union," because your workforce is not unionized, please be aware that **whether unionized or union-free, all employers are impacted by some of the decisions made by the NLRB, like this one.**

Another ruling we are looking out for is the NLRB's overturn of the Bush Board's Weingarten ruling, which stated that Weingarten rights (i.e., the right of employees to have another person with them in any work meeting which could involve disciplinary action) only apply to unionized workforces. (Those of you who have been around for awhile will remember that this was not the case under the Clinton NLRB, as all employees had Weingarten rights back then.) We will, of course, update you on this development when (or, for you optimists out there, "if") it occurs.

In the meantime, if you find yourself caught in the crossfire of a union dispute as a secondary employer, or certainly if you are faced with attempts to unionize your workforce, or need assistance handling current union issues, please feel free to contact Bill Trumpeter, Shomari Dailey, Joseph McCoin or your Miller & Martin Labor Law attorney for assistance.

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