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National Labor Relations Board's Recent Rulemaking Agenda

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The National Labor Relations Board (NLRB or Board) recently released its anticipated rulemaking priorities in the Unified Agenda of Federal Regulatory and Deregulatory Actions (the Agenda). In addition to reaffirming that the Board is addressing the joint-employment standard, the Agenda also indicates that the Board will consider rulemaking in the following areas:

1. The Board's current representation-case procedures.

2. The Board's current standards for blocking charges, voluntary recognition, and the formation of Section 9(a) bargaining relationships in the construction industry.

3. The standard for determining whether students who perform services at private colleges or universities in connection with their studies are "employees" within the meaning of Section 2(3) of the National Labor Relations Act (NLRA).

4. Standards for access to an employer's private property.

The Agenda sets forth an ambitious schedule which suggests that the Board will have a more substantial focus on rulemaking than in past years. This is consistent with the comments of Chairman of the Board, John F. Ring, in a recent press release from the NLRB, stating that "[t]he Agenda reflects the Board majority's strong interest in continued rulemaking" and further emphasizing that "[a]ddressing these important topics through rulemaking allows the Board to consider and issue guidance in a clear and more comprehensive manner."

Rulemaking involves a slow process, but it generally results in more stable policies, which are not easily altered by changes in administration. Although the Board has not yet established the schedule for the rulemaking on many of these Agenda items, the short-term actions are expected to occur during 2019, whereas the NLRB may not achieve the long-term Agenda items within the coming year.

Representation-Case Procedures (Long-Term Action)

The NLRB indicated its intent to backtrack the Obama-era union-friendly amendments to representation election procedures, the "Quickie Election" amendments, as it stated that it "will be revising the representation election regulations…with a specific focus on amendments to the Board's representation case procedures adopted by the Board's final rule published on December 15, 2014…."

The Quickie Election amendments have allowed unions to rapidly organize by decreasing the average time between filing a representation petition and the election from approximately six weeks to only 23 days. The amendments also involve burdensome obligations on employers, including submitting Statements of Position to address all potential bargain issues within a seven-day turnaround, providing substantial information regarding potential voters, and waiting until after the election to make certain other critical decisions.

In December 2017, the NLRB began seeking information concerning the impact of Obama-era Board's amendments. Specifically, the Board posed three questions in its Request for Information (RFI):

- Should the 2014 Election Rule be retained without change?
- Should the 2014 Election Rule be retained with modifications? (If so, what should be modified?)
- Should the 2014 Election Rule be rescinded? (If so, should the Board revert to the Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the Board make changes to the prior Election Regulations? If the Board should make changes to the prior Election Regulations, what should be changed?)

The results of this RFI have not yet been released. We anticipate that further information will be reflected in the NLRB's Notice of Proposed Rulemaking (NPRM). We also anticipate that changes to these procedures will likely favor employers.

Joint-Employer Standard (Long-Term Action)

In September of 2018, the NLRB issued its NPRM regarding the standard for determining joint-employer status. During the period for public comment which closed in February of 2019, the Board received nearly 29,000 comments. From the 1980s until 2015, the joint-employer standard remained largely unchanged, requiring that the joint-employer exercise direct control over the terms and conditions of employment. In 2015, the NLRB, in *Browning Ferris*, held that the standard for joint-employer was established if the employer directly or indirectly controls, or reserves the authority to control, the employment terms and conditions. This standard has been subject to ongoing litigation, and in 2017 the Board reversed *Browning Ferris* in *Hy-brand*, reinstating the prior long-standing standard. Then, in February of 2018, the NLRB vacated its decision in *Hy-brand* due to conflict issues of one of the board members involved in the decision.

The Board's Proposed Rule requires a showing that the purported joint-employer possessed and exercised substantial, direct, and immediate control over essential terms and conditions of employment. The proposed rule would relieve many entities of the threat of liability as a joint-employer solely because it may have the right to control a worker. Even after the Proposed Rule becomes final, we may not have seen the last of this issue as the ruling of the D.C. Circuit affirming the *Browning Ferris* standard adds a layer of confusion. Further, there is also the possibility that a change in administration will impact the Board's enforcement position in the future.

Blocking Charges and Voluntary Recognition (Short-Term Action)

With respect to its representation-case procedures, the Board has indicated that it expects to reconsider the standards for blocking charges and the voluntary recognition bar.

A "blocking charge" is an unfair labor practice charge alleging unlawful conduct which, if true, might interfere with employees' ability to make a free and un-coerced choice of representative. The blocking charge policy is one of the NLRB's longest standing rules. Currently, the Board's policy is to suspend the processing of an NLRB representation petition for a vote if the union files a request based on a "blocking charge." While the reasoning for the charge blocking policy is to protect the employees' rights, unions have used this policy to delay a vote to remove that union as the employees' bargaining representative.

The NLRB's "voluntary recognition bar" policy requires workers to wait at least six months before seeking to decertify a union that had been voluntarily recognized by the employer. This bar is intended to afford the union "a reasonable time to bargain and to execute the contracts resulting from such bargaining." We expect the Board will attempt to shorten the bar to less than six months.

Students as Employees (Short-Term Action)

Over the last 20 years, the NLRB has gone back and forth over whether students who perform services at private colleges or universities in connection with their studies are "employees" within the meaning of

Section 2(3) of the NLRA, flip flopping with each change in administration. Most recently, the Obama-era Board found that student assistants and graduate assistants are employees. The Trump-era Board's decisions over the past two years suggest that the Board will likely reverse its position again, or at least modify it. According to the Agenda, the Board aims to issue the student employment status proposal in September 2019.

Access to Employer Private Property (Short-Term Action)

The Agenda also indicates that the Board seeks to provide clarity with respect to the standards for access to an employer's private property. Differing interpretations of the NLRA language which provides employees "the right to form or join unions; engage in protected, concerted activities to address or improve working conditions; or refrain from engaging in these activities," has led to substantial litigation on this issue.

Since the release of the Agenda, the NLRB issued a decision directly addressing this topic. On June 14, 2019, the Board held that an employer may limit nonemployee union organizers from entering even the public spaces of an employer's private property. This decision technically overruled prior NLRB precedent, which interpreted the U.S. Supreme Court's decision in *NLRB v. Babcock & Wilcox Co.*, as creating a carve-out exception for public areas. In Babcock, the Court held that an employer may limit nonemployee union organizers' access to the employer's property *unless* one of two narrow exceptions exists: (1) inaccessibility – there are no other available channels with which nonemployee union organizers may communicate with employees; or (2) discrimination – the employer directly discriminates against the nonemployee union organizers by allowing similar conduct by others on the property.

The NLRB's decision demonstrates its employer-favoring shift and that the anticipated rulemaking is likely to continue in this direction.

As the rulemaking process continues, check back for follow-up articles regarding the status of each of these Agenda items.