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Returning Balance To The NLRB

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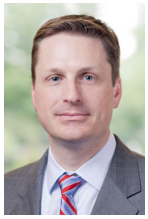

The National Labor Relations Board has an 80-plus year history of administering federal labor law and regulating labor-management relations in the United States. Formed in 1935 by the passage of the original Wagner Act, the board's primary obligations are to oversee the formation of collective bargaining units, to investigate and prosecute unfair labor practices, and to establish legal precedent through regulations and binding case precedents. In carrying out its responsibilities, the board is generally expected to act as a neutral arbiter of facts and cases.

Since the board is made up of political appointees — five members who decide cases and a General Counsel who sets the board's enforcement agenda — its interpretation of the National Labor Relations Act can vary depending on which political party holds the majority. Accordingly, labor practitioners have come to expect changes when control of the board changes hands. As long as the pendulum swings within the limitations established in the act, the system remains workable (although sometimes unpredictable).

The last eight years, however, have seen the pendulum swing further than ever before. In contrast to the modest and gradual changes seen in previous administrations, the board under former President Barack Obama produced some of the most drastic and one-sided policy changes in its history. In virtually every instance, the changes favored organized labor and harmed the interests of employers. While the board need not pursue a pro-business agenda, its recent precedents suggest a decidedly anti-business mindset. By any objective measure, it is clear the pendulum needs to swing back.

"Ambush" Elections

The board's marked shift in favor of labor is nowhere more evident than in its union election rules, which became effective in April of 2015. The rules were seen when passed as an attempt to forestall the slow and steady decline of the private sector unionization rate, which has dropped below 7 percent. The attempt was also seen as misguided. Immediately before the changes went into place, unions had been winning NLRB elections at a clip of well-over 60 percent, leading many to view the changes as a solution in search of a problem.

As we close in on two years under the "ambush" rules, it is evident they have done little to "fix" anything. Organized labor's win-rate has increased slightly (over 70 percent) in the past year, but the overall rate of unionization in the private sector has not increased. All that has increased is the administrative burden on employers who now face elections that take place in an average of 23 days compared to the 38 days under the old rules. This compressed time frame makes it extraordinarily difficult for an employer to

communicate effectively with its workforce about relevant issues. The rules have also sidelined key legal issues until after the election, resulting in confusion about issues as fundamental as whether an employee in the proposed bargaining unit is a supervisor who is ineligible to vote but who can campaign on behalf of the employer, or an employee with Section 7 rights.

These changes have transformed the board from supposedly neutral investigator to one-sided advocate. In the name of rushing as quickly as possible to a vote, board operatives have issued extraordinarily one-sided rulings. Pressuring employers to stipulate to union-proposed voting groups; forcing employers who insist on challenging such groups to make unexpected and rushed offers of proof; speeding along pre-election hearings as quickly as possible (sometimes, barring the employer's evidence along the way); and denying employers from filing post-hearing briefs, are just a few examples of treatment that has become commonplace during election cases.

The "Micro-Unit" Nightmare

The board's one-sided election rules compounded an already problematic landscape for employers. In 2011, the board's decision in in Specialty Healthcare & Rehabilitation Center of Mobile[1] upended years of long-standing precedent and redefined the standard for determining the appropriate bargaining unit. In Specialty, the board introduced a test that too easily allows unions to draw bargaining units based on the apex of their organizational strength. This practice is inimical to the concept of majority rule enshrined in the nation's labor laws. Indeed, Congress passed the Taft-Hartley amendments to the National Labor Relations Act in 1947 to insure that the extent of a union's organizational efforts never controls the outcome of a bargaining unit determination.

Specialty turns a blind eye to that mandate. Its new standard, which provides that any collection of employees "readily identifiable as a group" will be found appropriate for bargaining unless the employer shows that some other group of employees has an "overwhelming community of interest" with the proposed group, makes it nearly impossible for an employer to alter the composition of a union's would-be unit. In fact, in every case that has reached the board level in which the Specialty standard has been fully applied, the party opposing the proposed unit has failed to alter it.

Specialty's convoluted test has allowed unions to seek bargaining units that reflect little more than the extent to which they have been successful in recruiting employees who support unionization. This approach is inconsistent with the act's express command in Section 9(c)(5) that the extent of union organization shall not control the board's determination of whether a proposed bargaining unit is "appropriate" under the act. Specialty's "readily identifiable" standard allows the board to rely on job titles, departmental lines, work locations and skills — factors that concern only the employees in the union voting group — as a proxy for finding that group appropriate.

The board has applied this one-sided standard to overturn precedent in a variety of industries, including in retail, manufacturing, aerospace and defense, and even in higher education. Indeed, just last month, the board used the Specialty test to certify elections in nine separate bargaining units consisting of nine different academic departments at Yale University. The burdens such a bizarre result may create for Yale (and any other employer who suffers a similar ruling) are all too obvious. In this way, the proponents of Specialty who claim that it has not led to a decrease in the average size of a bargaining unit miss the point. The fact that a bargaining unit may be a "micro-unit" has nothing to do with its size. Instead, it has to do with the artificial fragmentation of the workplace that can now occur, as was made so plainly apparent in the Yale case. In an effort to facilitate organizing in the unit preferred by the union, the board has opened the door to a balkanization of the American workplace.

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A Brave New World for the Joint Employer

As troubling as these developments have been, they may not be the worst blow dealt to employers by the Obama board. That came in August of 2015 with the board's decision in Browning-Ferris Industries.[2] The board in Browning-Ferris announced a wide-ranging new standard for determining if a business is the "joint" employer of individuals employed by another business. Under the old standard, a business was only a joint employer if it exercised direct and immediate control over essential terms and conditions of employment of another firm's workers. Now, the board may find joint employer status where the putative employer merely retains the authority to control employment terms, or does so only indirectly (for example, by negotiating a cost-plus payment model in a contract with a supplier of temporary labor, or by requiring that all contractors follow certain safety rules while on the premises).

This murky standard has led many to question how much retained or indirect control is necessary to establish that you are a joint employer. The board has offered little guidance. This is no small matter, as the consequences of a finding that a business is a joint employer with its customer or subcontractor can be substantial, including: (1) a requirement that the business participate in bargaining with the union that represents the customer's employees; (2) a finding that picketing directed at the business by the union representing the customer's employees is no longer illegal secondary activity under labor law; (3) shared liability for unfair labor practices; and (4) potential limitation of the parties' flexibility to extend, modify or even terminate their business relationship without labor law liability.

The board is now using its expanded joint employer test to attack one of the nation's most vibrant engines for small business growth: franchising. At the behest of organized labor — which is capitalizing on the Browning-Ferris rule to organize the fast food industry — the board is seeking to hold McDonald's liable for unfair labor practices allegedly committed by several of its franchisees. While the board likely views the case as a principled attack on one of America's largest corporations, what it appears not to realize is that holding franchisors and franchisees to be joint employers will be devastating for small business. Faced with the prospect that they may be joint employers, many large franchisors may no longer provide their franchisees with access to operating and accounting systems and other best practices developed to maximize brand enhancement and opportunities for success. Access to these tools is the reason many small-business owners decide to become a franchisee in the first place. Even worse, some large brands may decide to de-emphasize or even eliminate franchising. This would be disastrous for small business.

The Tip of the Iceberg

As bad as all of these developments have been for the business community, they are just the tip of the iceberg. The board has also in recent years waged an all-out assault on an employer's right to maintain common sense workplace policies including confidentiality rules, employer arbitration programs, civility codes and even rules that protect an employer's legal obligation to investigate and remediate complaints of workplace misconduct and harassment — all in the name of protecting employee rights to engage in protected, concerted activity. The board has made little to no effort, however, to balance employee rights with the legal and practical obligations on employers.

There is a common theme in most of the board's actions: its decisions and rules neglect to account for the realities of the American workplace and the challenges business owners of all sizes face in today's economy. The board has given little thought over the last decade to how its policies can hinder an employer's ability to run a business and maintain a productive workplace. This fundamental lack of understanding of how overregulation can interfere with legitimate business interests is reflected in so many of the board's policy shifts, that many businesses have concluded that the board simply doesn't care whether its policies hurt their interests.

So while the ability to set the agenda might be the prerogative of those in control of the board, its actions over the past eight years have turned the labor-management relations landscape upside-down. It is long past time to restore a sense of fairness and common sense at the NLRB. That starts with a re-examination of the many precedents the board has reversed or abandoned during the past eight years. This cannot take place, however, until the board is fully constituted. Only three members are presently serving terms, leaving two seats open. The board has a long tradition of not overruling precedent without a three-member majority. With two Democrats and one Republican currently sitting on the board, changes are unlikely to happen.

As such, it is perhaps more imperative than ever that Congress and the president reconstitute the board to its full, five-member capacity as quickly as possible, so that it can begin to re-examine and, hopefully, restore its precedents to a state that more meaningfully accounts for the realities of the American workplace.

[1] 357 NLRB 934 (2011).

[2] 362 NLRB No. 186 (2015).

DISCLOSURE: Larkin recently testified before the U.S. House of Representatives Committee on Education and the Workforce, HELP Subcommittee on the issues addressed in this article.

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