New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 253—NO. 25
FRIDAY, FEBRUARY 6, 2015

LABOR RELATIONS

Expert Analysis

NLRB Update: Significant Rulings for Employers

The National Labor Relations Board recently issued a number of precedent-changing decisions with significant implications for employers. Since July 30, 2013, the board operated with a full complement of five members, including Chairman Mark Gaston Pearce (D) and members Kent Hirozawa (D), Nancy Schiffer (D), Philip Miscimarra (R) and Harry Johnson III (R). This month's column will discuss several of the board's latest actions, including rulings regarding arbitration deferrals, work email policies, classification of independent contractors, collective action waivers, as well as considerable changes to its rules for representation elections.

Arbitration Deferrals

On Dec. 15, 2014, in a 3-2 decision, the board in *Babcock & Wilcox Constr. Co*., 361 NLRB No. 132 (2014), announced significant changes in its standards for deferring NLRB action in favor of arbitration awards and arbitration procedures under collective bargaining agreements. The board held that going forward it will defer to an arbitration decision if the proponent of deferral shows (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing the deferral; and (3) board law reasonably permits the arbitration award.

The new standard will not be applied retroactively to pending NLRB cases. The prior deferral standard, decided in *Olin Corp*., 268 NLRB 573 (1984), placed the burden on the party opposing deferral and held deferral was appropriate where the contractual issue was "factually parallel" to the unfair labor practice issue, the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue and the arbitration award was not "clearly repugnant" to the National Labor Relations Act (NLRA).

By **John P. Furfaro**

And **Risa M. Salins**

In *Babcock & Wilcox*, an employee allegedly was suspended without pay and subsequently fired because of her activities as a union steward. The case involved both contractual and statutory issues, namely, whether the employee was retaliated against for union activity and discharged without cause in violation of the applicable collective bargaining agreement and the NLRA. A union-management grievance review subcommittee denied the employee's grievance, and the employee filed an unfair labor practice charge with the NLRB. Finding deferral of the NLRB action was appropriate under *Olin*, an NLRB administrative law judge (ALJ) dismissed the unfair labor practice allegation; the ALJ's ruling was appealed by the NLRB's general counsel.

In 'FedEx Home Delivery,' the NLRB revisited its standard for classifying workers as independent contractors who are not protected under the NLRA.

In reaching the new deferral standard, the board reasoned that deferral of an NLRB action is a matter of the board's discretion under the NLRA. The majority asserted the Olin standard allowed for a conclusive presumption that the arbitrator adequately considered the statutory issue if the arbitrator was merely presented with facts relevant to both an alleged contract violation and alleged unfair labor practice. It found that, because of the informalities of many arbitration proceedings, and the burden of proof being on the party opposing deferral under the Olin standard, it was virtually impossible under that standard to prove the statutory issue was not considered. The board in *Babcock & Wilcox* reasoned it "does not fulfill its role…by deferring to decisions that do not indicate whether the arbitrator has even considered those [Section 7] rights."

Email Policies

On Dec. 11, 2014, in a 3-2 decision, the board in *Purple Commc'ns*, 361 NLRB No. 126 (2014), ruled there is a presumption that employees who have been given access to their employer's email system may use the system to engage in statutorily protected communications about terms and conditions of employment during non-working time, absent a showing by the employer of special circumstances that justify specific restrictions. Thus, the board overruled *Guard Publishing Co. d/b/a Register-Guard*, 351 NLRB 1110 (2007), which held employees have no right under the NLRA to use employers' email systems for non-business purposes.

The employer, a sign-language interpretation company, maintained an employee handbook with an electronic communications policy that prohibited use of company technology or equipment to "engage in activities on behalf of organizations or persons with no professional or business affiliation with the [employer]" or "send[ing] uninvited email[s] of a personal nature." Each interpreter employed by the company was assigned an individual work email account, and work emails were accessible at personal work stations, break areas and on personal computers and smartphones. In post-election objections and an unfair labor practice charge, the union alleged the employer maintained illegal employment policies.

The board found Register Guard does not place enough emphasis on employees' core Section 7 right to communicate in the workplace about terms and conditions of employment, and fails to address the increasing importance of email for engaging in protected communications. Further, the board asserted email systems are significantly different than other forms of workplace equip-

JOHN P. FURFARO *is a partner at Skadden, Arps, Slate, Meagher & Flom.* RISA M. SALINS *is a counsel at the firm.* CHRISTINE A. KUVEKE, *an associate at the firm, assisted in the preparation of this article.*

ment and employer property rights must bend to accommodate Section 7 rights.

Independent Contractors

On Sept. 30, 2014, in *FedEx Home Delivery*, 361 NLRB No. 55 (2014), the NLRB revisited its standard for classifying workers as independent contractors who are not protected under the NLRA. In this 3-1 decision (Member Miscimarra recused himself), the board held a group of FedEx home delivery drivers classified as independent contractors were in fact covered employees.

FedEx refused to recognize or bargain with the Teamsters local union that represented a group of Connecticut drivers, contending the drivers were independent contractors. In finding the workers were employees, the board stated its decision was guided by the non-exhaustive list of common law factors acknowledged by the Supreme Court and outlined in the Restatement (Second) of Agency §220 (1958), with no one factor being determinative. Those factors include, among others, extent of control by the employer; whether the employer supplies the instrumentalities, tools and the place of work; length of employment; and whether the work is part of the regular business of the employer.

The board declined to follow *FedEx Home Delivery v. NLRB*, 563 F3d 492 (D.C. Cir. 2009), in which the U.S. Court of Appeals for the D.C. Circuit held FedEx drivers in Massachusetts, performing the same jobs as the Connecticut drivers, were independent contractors. The board rejected the circuit court's approach, which emphasized the "significant entrepreneurial opportunity for gain or loss" available to the FedEx workers as the decisive factor. Specifically, in support of its argument that the drivers were independent contractors, FedEx cited evidence that they were permitted by their contacts to sell their routes for a nominal profit and to operate multiple routes. Here, the board held entrepreneurial opportunity is just one factor to consider in the common law analysis to determine whether workers are "rendering services as part of an independent business."

In addition, the board found the drivers' right to sell routes was "more theoretical than actual," drivers were given long shifts preventing moonlighting, and vehicles were specifically tailored for FedEx's operations. The board did not find evidence that the drivers advertise for other work or maintained "any type of business operation or business presence" and, thus, concluded they did not have the initiative or authority associated with independent contractor status.

Collective Action

On Oct. 28, 2014, in *Murphy Oil USA*, 361 NLRB No. 72 (2014), the NLRB, in a 3-2 opinion, restated its position that an employer violates the NLRA when it requires employees to waive the right to participate in joint, class or collective actions. This case upholds the board's 2012 opinion in *D.R. Horton*, 357 NLRB No. 184 (2012), which held waivers of the right to participate in class actions effectively interfere with the right to engage in "concerted protected activity" under Section 7 of the NLRA.

The employer in this case required job applicants and employees, as a condition of employment, to agree to resolve all employment-related claims through individual arbitration, and took steps to enforce those agreements when four of its employees filed a collective claim in district court for violations of the Fair Labor Standards Act. The employer asked the board to overrule the NLRB's holding in *D.R. Horton*, a case which the U.S. Court of Appeals for the Fifth Circuit had rejected in *D.R. Horton v. NLRB*, 737 F3d 344 (5th Cir. 2013), ruling there is no explicit or implicit language in the NLRA or legislative history prohibiting employees from waiving their right to participate in activity otherwise protected by the law.

In refusing to overrule the NLRB's decision in *D.R. Horton*, the Murphy Oil board reasoned that workers' Section 7 rights to act in concert for mutual aid and protection are not limited to supporting a labor union or pursuing collective bargaining, as working conditions can also be improved through pursuit of administrative and judicial relief. The board agreed with the D.R. Horton board's position that, considering the Federal Arbitration Act and the NLRA in conjunction, a valid arbitration agreement may not require a party to prospectively waive his or her right to pursue statutory remedies.

The NLRB restated its position that an employer violates the NLRA when it requires employees to waive the right to participate in joint, class or collective actions. This case upholds the board's 2012 opinion in 'D.R. Horton.'

Election Rules

On Dec. 12, 2014, after a 3-2 vote, the board announced a final rule amending its election procedures, scheduled to take effect on April 4, 2015. The final rule contains many of the same controversial measures published in the board's 2011 attempt to overhaul its election procedures. The 2011 effort was invalidated by the courts because the board promulgated the rule without a proper quorum of three board members. The board subsequently withdrew the rule, but in February 2014, with a full quorum of confirmed members, reissued a Notice of Proposed Rulemaking identical to its earlier proposal.

The board hopes the final rule will increase the flow of information and eliminate delays and litigation in the election process. In its statement announcing the rule, the board highlighted that it provides for electronic filing and transmission of election petitions; ensures employees, employers and unions receive timely information they need to understand and participate in the representation case process; requires additional contact information (including personal telephone numbers and email addresses) to be included on voter lists, thereby permitting parties to the election to communicate with voters about the election using modern technology; and consolidates all election appeals to the board into a single appeals process.

The board rejected commentators' arguments that, by shortening the time between the commencement of a union organizing drive and the date of an NLRB election, the new rule will limit the ability of employers to communicate with employees about elections and take needed time away from employees to educate themselves before voting. The board argued employers often know that organizing is under way before a formal election petition is filed and insisted the changes made by its amendments will not impair employers from expressing their views on unionization before an election. In addition, the board stated any privacy concerns voiced by opponents with respect to the voter list are outweighed by the need to adapt the election process to communications in a modern age.

The amendment has been criticized by members Miscimarra and Johnson, who claim employers and unions must be given ample time to communicate with employees about their rights and the choice of representation. Senator Lamar Alexander cautioned, "[t]he board's 'ambush election' rule will sacrifice every employer's right to free speech and every worker's right to privacy for the sake of boosting organized labor…."

Notably, on Jan. 5, 2015, the U.S. Chamber of Commerce joined by several trade associations filed suit in U.S. District Court for the District of Columbia to stop the NLRB from moving forward with the amendment. The complaint asserts, among other arguments, that the final rule impermissibly curtails employer First Amendment free speech rights by denying them a meaningful opportunity to communicate with employees between the filing of the election petition and holding of the election.

Conclusion

On Dec. 16, 2014, Lauren McFerran (D) was sworn in as the newest board member, succeeding member Schiffer whose term expired. Employers are advised to keep apprised of developments in 2015, particularly regarding the board's election rules, joint employer status under the NLRA and employer communication policies.