



# Recent National Labor Relations Board Issues of Importance to Healthcare Providers

Grapevine, TX

September 24-27, 2016

G. Roger King

Senior Labor and Employment Counsel

HR Policy Association

IRI Consultant

[rking@hrpolicy.org](mailto:rking@hrpolicy.org)



# National Labor Relations Board (NLRB)



Lauren McFerran (D)

Term expiration.....December 16, 2019



Mark Gaston Pearce (D)  
Nominated as Chairman

Term expiration.....August 27, 2018



Phillip Miscimarra (R)

Term expiration.....December 16, 2017  
*(Seat of Former Member, Brian Hayes)*

**Open  
Republican  
Seat (formally  
held by Harry  
Johnson)**  
  
**?**

**Democrat  
Seat Vacant  
(formally held  
by Kent  
Hirozawa)**  
  
**?**

# NLRB General Counsel



- Richard Griffin
  - Was one of the NLRB recess appointees successfully challenged under the Supreme Court's holding in the *Noel Canning* case
  - Former General Counsel for the International Union of Operating Engineers
  - Served on the Board of Directors for the AFL-CIO Lawyers Coordinating Committee
  - Mr. Griffin's term expires on November 3, 2017



*Richard Griffin,  
General Counsel*

# NLRB General Counsel Initiatives



- Misclassification of individuals as independent contractors a potential unfair labor practice – employer depriving individuals of Section 7 Rights under the NLRA
- Initiative to expand *Weingarten* rights including expansion to non-union represented employees
- Cases involving allegations that “English-only” policies violate the NLRA
- Cases involving the expansion of the right of employees to utilize employer electronic communication systems in addition to email systems – expansion of the Board’s *Purple Communications* decision
- Cases involving union access to employer property during union organizing campaigns – “equal access issues”



# NLRB Issues

- NLRB implementation and court review of the new joint employer standard
  - *Browning-Ferris* appeal pending in the D.C. Circuit
  - *McDonald's* case et al.
  - McDonald's also is involved in joint employer litigation involving other statutes
  - A federal judge in California allowed class action wage theft litigation to proceed against McDonald's and certain of its franchisees on a joint employer theory
- Dues checkoff clauses now are a term and condition of employment – careful contract drafting on this point is important – *Lincoln National*
- According to a recent Willis Tower Watson survey, employers are expected to increase wages this coming year in the 3% range





# NLRB Issues

- A wage increase provided in a collective bargaining agreement does not necessarily become a term and condition of employment – again careful contract drafting is important - *Finley Hospital*
- Arbitration Agreement Wording - NLRB opposition to employer prohibition of class action litigation - cases pending on this issue in various state courts and appeals pending in all federal circuit courts – U.S. Supreme Court will no doubt resolve this issue
- Employer confidentiality investigation restriction issues pending in the *Banner Healthcare* case - Appeal filed in the D.C. Circuit
- “Micro-unit” and “fragmented unit” cases  
(*Macy’s case still pending in Fifth Circuit Court of Appeals*)



# NLRB Issues

- “Recent Eighth Circuit Decision in *FedEx* case and the Fourth Circuit Decision in *Nestle-Dreyer* upheld the Board’s *Specialty Healthcare* “overwhelming community of interest” unit determination approach
- Individuals working for Uber and other similar employers may unionize and may be found to be “employees” under the NLRA
- Law professors’ captive audience petition - expect “equal access” issues to be brought before the Board for decision
- Graduate students and student teaching assistants now eligible for union representation – *Columbia University* case overrules 2004 *Brown University* decision
- Expansion of the Board’s *Weingarten* doctrine to various employee interview situations



# NLRB Issues

- Continued NLRB scrutiny of employer handbooks and other policies including social media policies. Employers need to be aware of:
  - Overly broad confidentiality provisions
  - Restrictions on employees speaking to the media
  - Policies that restrict or prohibit employee criticism of employer terms and conditions of employment
  - Prohibitions on employees recording conversations and photographing in the workplace
  - Policies that dictate “positive” relationships among employees
  - Policies that strictly prohibit use of vulgarity by employees in the workplace
  - Policies that prohibit discussion of employee wages/benefits and other terms and conditions of employment



# NLRB Issues

- Continued implementation of the Board's new election rule and its employee electronic signature option for employees to sign union authorization cards – average time from petition filing to election decreased from approximately 38 days to 24 days
  - *Danbury Hospital* case - election results overturned even though the employer furnished 94% of required employee personal contact information - how exhaustive does an employer search for this information have to be to be compliant with the new election rule?
- The Board will only have 3 Members in September – Chairman Pearce, Member McFerran (both Democrats) and Republican Member Miscimarra with one Republican and one Democrat seat vacant
- How many NLRB member slots will be filled at the end of this year?



# NLRB Issues

- Expansion of the Successorship Doctrine, including binding purchasers based on sellers comments to employees regarding job security

**G. Roger King**  
**Senior Labor and Employment Counsel**  
**HR Policy Association**  
**IRI Consultant**  
**[rking@hrpolicy.org](mailto:rking@hrpolicy.org)**