



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



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*





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 Health* 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*)
 - Volkswagen has filed an appeal in the Sixth Circuit Court of Appeals from an NLRB finding that the maintenance groups at its Chattanooga, Tennessee plant, constituted an appropriate unit



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?
- Expansion of the Successorship Doctrine, including binding purchasers to sellers union contract terms based on sellers comments to employees regarding their job security
- 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?

G. Roger King
Senior Labor and Employment Counsel
HR Policy Association
IRI Consultant
rking@hrpolicy.org