An Emboldened Labor Board Continues to Expand Union and Employee Protections

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With a series of significant new rules and opinions, the first three quarters of 2015 have proven to be very active for the National Labor Relations Board (the "Board"). Increasingly, the Board has sought to expand the rights of unionized and organizing workers, often by limiting protections for employers. In addition, the Board has aggressively and broadly interpreted the National Labor Relations Act (the "Act") to challenge employment policies and employee conduct rules, even in non-union workplaces.

Three recent actions by the Board highlight the agency's aggressive efforts to expand employee protections in the workplace. First and most recently, the Board issued an opinion that significantly broadened the definition of "joint employer," with potentially far-reaching implications for all employers. Second, it implemented "quickie election" rules, which allow employees to organize and establish unions with unprecedented ease and speed. Third, the Board collected and memorialized a series of internal administrative decisions that struck down confidentiality rules and similar policies often contained in employee handbooks, which it viewed as unduly restrictive of employees' rights to communicate with each other regarding the terms and conditions of their employment.

I. Expansive New Joint Employer Standard

In August 2015, the Board issued a long-anticipated decision in the case of *BFI Newby Island Recyclery,* 326 NLRB No.186 (2015) ("*BFI*"). The Board's *BFI* decision expanded the scope of "joint employer" relationships in the labor context. The new standard would seem to encompass most staffing, employee leasing and franchise arrangements.

In the past, establishing a "joint employer" relationship required a showing that both entities (*e.g.,* the franchisor and franchisee, or the staffing company and its client) (a) possessed the *ability* to control the terms and conditions of employees' employment and (b) *actually* exercised significant control over employees' employment. The *BFI* opinion effectively eliminated the second requirement, or at best severely reduced its significance. According to the Board, it now may be sufficient merely to show that both entities *could* control various aspects of the employees' employment (whether or not they *actually* exercise such control in practice).

Under the new standard, the Board will consider whether, for instance, a client-company contracting with a staffing company retained the right, under the parties' contract, to control any aspect of the employment relationship or the general project. Specifically, the Board will evaluate whether the client-company retained the right to set: the length of the project, the desired or actual pace of work, the

number of employees employed, general qualifications for workers on the project, general work standards or quotas, hours of work, etc. As noted by the Board's dissent, this standard could mean that a "joint employer" relationship exists in most, if not all, contract staffing and franchise arrangements.

As discussed in the *BFI* dissent, the practical implications of this decision are unclear and potentially sweeping. For instance, will a franchisor be liable for every unfair labor practice charge brought against its individual franchisees? Will a parent company have to participate in contract negotiations for each of its unionized subsidiaries? Will a staffing company's unrepresented employees be swept into pre-existing unions at the "joint employer" client-company? Will collective bargaining agreement negotiations require the active participation of every subcontractor, staffing company, parent, subsidiary or partner that falls under the broad new "joint employer" definition, and, if so, how would those negotiations even proceed? Indeed, only time will reveal the full implications of the Board's decision.

Republicans in the U.S. Congress have already introduced a bill aimed at reversing *BFI*. The bill, titled the "Protecting Local Business Opportunity Act," was introduced on September 9, 2015, and it seeks a legislative reversion to the narrower "joint employer" definition by requiring that an entity have "actual, direct and immediate" control over employees in order to be considered a "joint employer" with the employees' statutory employer. For the time being, however, companies with franchise or staffing agreements with other entities, particularly entities with unionized or organizing workforces, now face considerable uncertainty as to their status and legal obligations under the Act.

II. Restricting Confidentiality and Other Employer Personnel Policies

The Board also has been reviewing employers' confidentiality policies aggressively, as well as other work rules regarding, among other things, social media, use of the employer's computer, workplace civility, communications with the press and other third parties, conflicts of interest, and the use of employer logos, copyrights and trademarks. The Board has determined that many of those policies violate the Act.

The Act guarantees the right of employees to form unions, but also generally to engage in "concerted activity" to improve their wages and other terms and conditions of their employment ("protected concerted activity"). The Act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of those rights. Based on this language, the Board has found various common employer policies unlawful. For instance, the Board recognized that employees' right to solicit and distribute literature on non-work time includes electronic distribution (*i.e.*, email). Relatedly, it recently overturned its own precedent by striking down policies prohibiting personal use of an employer's email system.

On March 18, 2015, the Board's Office of the General Counsel ("OGC") issued a report outlining its recent decisions regarding employer rules, policies and confidentiality agreements. The report focuses on the types of rules commonly found in employee handbooks and employment agreements, such as confidentiality rules, conflict of interest and professionalism rules, anti-harassment rules, trademark rules, photography and recording rules, restrictions against employees leaving work, non-solicitation and distribution polices and rules pertaining to media contacts, and compares language in these common types of policies that the Board has found unlawful with language that it has found to be lawful.

The Board found many handbook policies to be unlawful on their face, whether or not those policies actually are enforced so as to restrict a protected concerted activity. In its view, a policy or provision is unlawful if employees could reasonably construe its language to prohibit protected, concerted activities. Therefore, the mere *existence* of a policy that violates the Act can give rise to an unfair labor practice charge, regardless of whether the policy *actually* is applied to discipline or terminate an employee's employment.

For example, the Board generally will strike confidentiality rules that broadly restrict disclosure of confidential employer information (whereas policies that limit the restriction to confidential business information and trade secrets may be acceptable). According to the Board, rules requiring employees to be "respectful" towards the company and coworkers are problematic, since those policies could restrict criticism or protests regarding supervisors or the company in general. Similarly, rules that prohibit "walking off the job" are considered unlawful, because they may discourage strikes and walkouts.

However, the Board acknowledges that context is important. For instance, an otherwise-unlawful policy that prohibits "walking off shift" or "failing to report for a scheduled shift" may be lawful in the context of a healthcare employer with a public safety interest in ensuring patient care. As these examples indicate, navigating what is lawful in context is a tricky task. Indeed, because so many once-standard policies have failed to survive recent Board scrutiny, it will be difficult to find any employer that currently maintains a handbook that is fully compliant with the Board's new standards.

For employers, these escalating enforcement efforts mean that employee handbooks and other workplace policies, as well as confidentiality agreements, will need to be reviewed carefully. It is critical to remember: The Act applies to non-union employers as well as those that currently have a union, so these recent federal enforcement efforts potentially affect most private employers.

III. Quickie Elections

On April 15, 2015, the Board's new election rules became effective. These rules, which many characterized as enabling "quickie" or "ambush" elections, change the procedures for organizing campaigns and elections. Among other changes, the new rules dramatically reduce the amount of time between the union's filing of an election petition and the actual election.

Union supporters contend that the prior election procedures took too long. Under the new rules, the time from petition, or election-request, to election will be as little as 15 days as opposed to several months. However, such a compact timeline significantly curtails employers' ability to participate meaningfully in the campaign. Indeed, these so-called "ambush" elections hold many advantages for unions. Chief among them is that a union often will be able to run a one-sided campaign, springing an election before the employer has an opportunity to make or develop a case against unionization.

The "ambush" strategy stems from the nature of the union's organizing tactics. Unions rarely give employers warning when they begin soliciting employees. Employers often only become aware of the effort after the union "petitions" for an election – usually after the union already has gathered "cards" indicating majority support of a "unit" of employees. Prior rules gave employers (and unions) time after that petition, but before the election, to mount a campaign and formally raise issues regarding the petition, the union, voting and other important matters. This will no longer be the case.

The new Board rules also alter the election process in many other ways, each geared towards expediting elections at the expense of procedural protections for employers. Indeed, observers have opined that the new election rules effectively achieve the goals previously sought through the "card check" laws: *i.e.,* the ability to achieve unionization quickly, secretly and without meaningful challenge or response from employers.

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The current Board has not been shy about announcing and pursuing its goals aggressively. Bolstered by a sympathetic administration, years ago Union-friendly Board leadership announced its intent to expedite elections, expand Board authority into non-unionized contexts and "correct" what it viewed as "overly employee-friendly" legal precedent. After some initial setbacks – notably, the failure of the

“Employee Free Choice Act” and card-check legislation – the Board has succeeded since in shifting the legal landscape for labor law in significant ways. The year 2015 ultimately may prove to be the most significant yet for the Obama administration’s labor law efforts.

Related People

- Amanda M. Weaver – 804.420.6226 – aweaver@williamsmullen.com
- Laura D. Windsor – 804.420.6466 – lwindsor@williamsmullen.com

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