Obama Administration and the NLRB

Brought to you by Winston & Strawn's Labor and Employment Relations Practice Group
Today's eLunch Presenters

Derek Barella
Labor and Employment Relations
Chicago
dbarellawinston.com

April Weaver
Labor and Employment Relations
San Francisco
aweaver@winston.com
Today's Question

*If the NLRB (without a quorum) knocks down a tree in the forest...does it make a sound?*
NLRB Overview

- Five-member Board (but often with vacancies or recess appointments)
  - Presidential appointees
  - Typically decides cases via three-member panels
  - Affiliation shifts with political party in control
    - Leads to inconsistent and shifting precedents
    - Current Board has shown itself to be extremely pro-labor

- NLRB General Counsel sets agenda/prosecutes cases
Political Ties

- 2002–2007: Republican-controlled Board
- 2007–2009: Two-member "split" Board
- 2010–Present: Democratic-controlled Board
  - Former Chair Wilma Liebman (term expired Aug. 27, 2011)
  - Current Chair Mark Pearce (term ends Aug. 2013)
- Last Republican on the Board: Member Brian Hayes (term ended Dec. 2012)
The Current Board

**Member**
- Richard F. Griffin, Jr.
  - Former IUOE in-house counsel

**Chairman**
- Mark Gaston Pearce
  - Former Union Attorney
  - Only confirmed Board member
  - Term ends Aug. 27, 2013

**Member**
- Sharon Block
  - Former Counsel for "HELP" and Sen. Edward Kennedy staffer
Aggressive Pro-Labor Tilt

- **Board Rulemaking**
  - Notice posting of employee rights – **SUSPENDED**
  - Revised rules for "quickie" elections – **STAYED**

- **Case law developments** – **SUBJECT TO CHALLENGE**

- **Agency outreach to non-union employees**

- **Acting General Counsel initiatives**
  - Guidance memoranda
  - Case prosecution decisions
NLRB Developments

- Employee Rights Notice Posting Rule
  - Upheld by USDC for the District of Columbia
  - Struck down by USDC in South Carolina
  - Both cases pending appeal

- Representation Case ("Quickie Election") Rules
  - Struck down by USDC for the District of Columbia
  - Appeal pending
  - Board could seek to reenact before Pearce's term ends
    - But, would require confirmed quorum
Noel Canning v. NLRB

- **New Process Steel** (USSC, 2010): The NLRB cannot issue decisions without a valid three-member quorum
  - Invalidated hundreds of NLRB decisions

- Jan. 3, 2012: Member Becker's term expires, leaving two sitting members – Pearce (D) and Hayes (R)

- Jan. 4, 2012: President Obama invokes the Recess Appointments Clause to appoint Board Members Sharon Block (D), Richard Griffin (D), and Terence Flynn (R)
Noel Canning v. NLRB

- Feb. 8, 2012: Three-member panel of Hayes, Flynn, and Block finds Noel Canning committed various ULPs
- Noel Canning petitions D.C. Circuit for review
  - Board's Order invalid and unenforceable because no valid quorum
  - Recess appointments were unconstitutional
- Jan. 25, 2013: D.C. Circuit agrees with Noel Canning
  - President Obama's "recess appointments" were made during a short *intra*-session recess of Congress
  - President's recess appointment power applies only during *inter*-session recesses
  - President may only to fill those vacancies that *arose* during the intersession recess in which the appointment was made
Ramifications of *Noel Canning v. NLRB*

- Actual: Petitions for Review filed in D.C. Circuit are held in abeyance
- Actual: Other Circuits not necessarily bound by *Noel Canning* decision
- Potential: Hundreds of Board decisions from Jan. 4, 2012, to present may be invalid
Statement by Chairman Pearce:

"The Board respectfully disagrees with today's decision . . . It should be noted that this order applies to only one specific case, *Noel Canning*, and that similar questions have been raised in more than a dozen cases pending in other courts of appeals.

In the meantime, the Board has important work to do . . . *

*W*e will continue to perform our statutory duties and issue decisions."
NLRB Response

- NLRB will not seek review *en banc* at D.C. Circuit
- NLRB will file petition for certiorari with USSC – due today
- Board will seek USSC review based on:
  - Claimed novel issue of critical importance
  - Impact on recent/current/future NLRB decisions
  - Impact on other agencies
NLRB Developments

Scope of Protected/Concerted Activity

- Outreach to non-union workers
  - **www.nlrb.gov/concerted-activity**: NLRB's public web page to describe "rights of employees to act together for their mutual aid and protection, even if they are not in a union."
  - Interactive map gives examples
    - A customer service representative who lost her job after discussing her wages with a coworker
    - An engineer at a vegetable packing plant fired after reporting safety concerns affecting other employees
    - A paramedic fired after posting work-related grievances on Facebook
    - Poultry workers fired after discussing their grievances with a newspaper reporter
Protected Concerted Activity

The law we enforce gives employees the right to act together to try to improve their pay and working conditions or fix job-related problems, even if they aren’t in a union. If employees are fired, suspended, or otherwise penalized for taking part in protected group activity, the National Labor Relations Board will fight to restore what was unlawfully taken away. These rights were written into the original 1935 National Labor Relations Act and have been upheld in numerous decisions by appellate courts and by the U.S. Supreme Court. Recent cases involving a range of industries and employees are highlighted on the map below; please hover over a pin for a summary or click and the full story will appear below.
NLRB Developments (cont'd)

Scope of Protected/Concerted Activity

- Fresenius USA Mfg. Inc.
- Parexel Int'l
- Sabo, Inc.
- Hispanics United of Buffalo
Hispanics United of Buffalo

- Off-duty Facebook exchange between coworkers
  - Employee Cole-Rivera Facebook post:
    
    "Lydia Cruz, a coworker[,] feels that we don't help our clients enough at [Employer]. I about had it! My fellow coworkers how do u feel?"

  - Four off-duty employees respond, objecting to assertion that work performance is lacking
  - Cruz also responds, directed at Cole-Rivera:
    
    "stop with ur lies about me"
Cruz reports incident to Employer

Employer fires Cole-Rivera (original poster) and the four employees who commented
- Remarks constituted "bullying and harassment" of a coworker
- Violated "zero tolerance" policy
Board applies four-part test, discipline/discharge violates Section 8(a)(1) if:

1. the employee activity was "concerted";
2. the employer knew of the concerted nature of the employee's activity;
3. the concerted activity was protected by the Act; and
4. the discipline or discharge was motivated by the employee's protected, concerted activity.
Hispanics United of Buffalo

- Board finds all five employees were engaged in "concerted activity"
  - Facebook communication had the clear "mutual aid" objective of preparing for a group defense to co-worker's complaints about job performance
- Board also finds employees' concerted activity was protected
  - Employees were directly responding to allegations they were providing substandard service
Hispanics United of Buffalo

- Board holds that assuming harassment policy covered the comments, it could not be lawfully applied in this circumstance:

"legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to . . . discipline on the basis of the subjective reactions of others to their protected activity."
NLRB Developments (cont'd)

- Union organizing and rights
  - *Specialty Healthcare* and progeny
  - *Lamons Gasket*
  - *UGL-UNICCO*
NLRB Developments (cont'd)

- Alternate Dispute Resolution
  - D.R. Horton
  - Supply Technologies, LLC
NLRB Developments (cont'd)

- Compliant Employment Policies
  - *Am. Red Cross Ariz.* and *Hyatt Hotels*
  - Social Media Policies
NLRB Developments (cont'd)

- Ability to Conduct Effective Investigations
  - *Banner Health*
  - *Hyundai Am. Shipping Agency, Inc. and Flex Frac Logistics*
  - *Hawaii Tribune Herald*
Confidentiality of workplace investigations

- April 16, 2013: Division of Advice memo examines employer code of conduct and confidentiality language
  - **Lawful:** Verso has a compelling interest in protecting the integrity of its investigations. In every investigation, Verso has a strong desire to protect witnesses from harassment, intimidation, and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up
  - **Unlawful:** To assist Verso in achieving these objectives, we must maintain the investigation and our role in it in strict confidence. If we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination
Confidentiality of workplace investigations

- April 16, 2013: Division of Advice memo examines employer code of conduct and confidentiality language
  - **Suggested re-write by GC:** Verso may decide in *some circumstances* that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence. If Verso *reasonably imposes* such a requirement and we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.
Acting General Counsel Developments

- Increased use of extraordinary remedies in routine cases
  - Alleged interference with organizing
  - First contract disputes
  - Back pay standards
- Fewer deferrals to arbitration
- Social media policies and issues
- Challenges to State "Secret Ballot Amendments"
Acting General Counsel Developments

- Class action waivers in mandatory arbitration disputes
- Employment-at-will statements
- General amenability to "quickie" elections
- Increased publicity and use of press releases
- Regional office use of investigative subpoenas
What's Next?

- Recent nominations
  - Chairman Pearce for another term
  - Harry I. Johnson, III, partner with Arent Fox LLP
  - Philip A. Miscimarra, partner with Morgan Lewis & Bockius
  - Prior Griffin and Block nominations still pending

- Quorum could restart rulemaking

- *Noel Canning* to be litigated at all stages
  - USSC
  - Circuit Courts of Appeals
  - NLRB
Thank You.