SheppardMullin

Expect More Pro-Business Rulings From NLRB This Year

By John Bolesta and Keahn Morris

Law360, January 27, 2020, 11:58 AM EST

The current National Labor Relations Board was extremely kind to employers during 2019, issuing a multitude of precedent-setting decisions and new rules that reversed many of the excesses of the Obama board and returned the National Labor Relations Act to its more neutral legislative intent.

The board's current composition will change this coming August when member Marvin Kaplan's term expires. But with the Republicans in control of both the White House and the Senate, at least, through the end of the year, 2020 is shaping up to be another year of decisions and rules that give employers further hope that additional business-friendly decisions are on the way.

These anticipated cases and rule changes include but certainly are not limited to the following.

The board will issue formal rules resolving the joint employer issues created by Browning-Ferris.

In Browning-Ferris Industries of California Inc.,[1] the Obama board in 2015 upended the existing case law by finding that a company contracting for services could be deemed a joint employer of the service provider's employees if the company indirectly exercised control over the employment terms/conditions through the contractor or merely reserved that right to control — even though it might not have been exercised.

BFI created uncertainty as to whether contracting entities and their contractors were, in effect, one and the same for bargaining and NLRA compliance purposes, meaning that contracting entities might be required to bargain with the union of its contractor's employees; that a contract negotiated by a contractor might be binding on the contracting entity; and that contracting entities could be held liable for the unfair labor practices committed by their contractors merely because the contracting entity could exercise control affecting the working conditions of their contractor's employees.

Those most adversely impacted by BFI were franchisers and those leasing temporary workers from temp agencies. A case in point is the massive unfair labor practice proceeding lasting three years between the NLRB and McDonald's Corp. based largely on the conduct of McDonald's franchisees. This case settled[2] in December without McDonald's being declared a joint employer of its franchisees' employees.

---

[1] 362 NLRB 1599 (2015), https://apps.nlrb.gov/link/document.aspx/09031d4581d99106.
[2] https://apps.nlrb.gov/link/document.aspx/09031d4582eab79a.

In September 2018, the current board announced its intention to issue formal rules and invited public comments regarding the standard to be applied to joint employment issues. The new proposed rule[3] establishes that an employer could be found to be a joint employer of another employer's employees only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine.

Thus, contrary to BFI, indirect and/or contractual reservations of authority will no longer be sufficient to establish a joint employer relationship. The rule reflects the current board's view that the NLRA's intent is best supported by a joint employer doctrine that does not draw third parties, who have not played an active role in deciding wages, benefits or other essential terms and conditions of employment, into collective bargaining and third-party labor disputes to which they are strangers.

Importantly, this proposed new rule was promulgated pursuant to the Administrative Procedure Act, meaning the rule cannot be ignored or reversed by way of a board case decision. The public comment period on these proposed rules closed on Feb. 11, 2019. The board's issuance of these rules appears imminent.

The board will likely issue decisions addressing when a person qualifies as a statutory supervisor because they effectively recommend employees for discipline.

A fundamental issue in many unfair labor practice and representation cases concerns which employees are covered by the act, and the factors that have long been considered in that calculus may be changing in 2020. Under the NLRA, persons who qualify as statutory supervisors are not deemed employees and, therefore, do not enjoy the protections of the act.

Accordingly, they may lawfully be precluded from participating in or encouraging union organizing or joining or forming labor organizations. Further, they are, by that very fact, agents of their employer, meaning that their employer may be held liable for the unfair labor practice conduct of their supervisors even though the employer did not directly or otherwise authorize the supervisor to commit their unlawful acts. For these reasons, early and definitive identification of statutory supervisors may be of critical importance when an employer is faced with union organizing or named in a unfair labor practice charge.

Section 2(11) of the NLRA contains the statutory definition of supervisor. It states that the term "supervisor" means any individual having the authority, in the interest of the employer, to take any one of 12 different things in relation to the employer's employees, including authority to discharge or discipline other employees or to "effectively recommend any of such actions, if their exercise of that authority is not of a routine or clerical nature, but requires the use of independent judgment."

[3] https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-19930.pdf.

While sounding confusingly similar to the wage and hour test for exempt and nonexempt employees, the NLRA's test for supervisors is not the same and, indeed, there are many NLRB cases where employees were found to be supervisors even though they were nonexempt employees entitled to overtime. So an employee's exempt versus nonexempt status is no litmus test for supervisory status.

Because there is a strong presumption under the act in favor of a person's employee status, the burden of proving a person to be a supervisor is placed squarely on the party asserting that exclusionary status. In many cases, it is an employer who is taking that position because they wish to exclude putative supervisors from participating in union activity, voting in a union election, or from the coverage of a collective bargaining agreement.

Saddled with that burden, employer's often fail in their efforts to have a person excluded as a statutory supervisor. This is because the proof offered in support of supervisory status is often highly subjective. It's also because the board is so very reluctant to disenfranchise a person who is on the cusp, separating supervisors from employees who enjoy the protections of the act absent clear compelling proof of that person's supervisory conduct and the exercise of independent judgment. A recent but little-noticed board decision signals that that may soon be changing.

In a unpublished order issued in early December in Bloomsburg Care And Rehabilitation Center,[4] the board sustained a regional director's earlier finding that certain designated licensed practical nurses were not statutory supervisors. However, based on concerns articulated by appellate courts (i.e., the U.S. Court of Appeals for the Third Circuit's NLRB v. New Vista Nursing and Rehabilitation ruling)[5] about the board's decision-making in this area, the board announced its openness to reconsidering extant board law in a future case.

Accordingly, it is likely that a board decision addressing this issue, and perhaps adopting a test similar to the one used by the court in New Vista, will soon issue, giving employer's a clearer blueprint for what they must show to qualify a person on the margin between rank-and-file and management as a statutory supervisor.

If the board's new test resembles the test used by the courts, a person will qualify as a statutory supervisor if they (1) have the discretion to take different actions including verbally counseling a misbehaving employee or taking more formal action; (2) their actions initiate the disciplinary process; and (3) their actions function like discipline because it increases the severity of the consequences of future misconduct.

The board will continue to chip away at the concept of inherently or presumed concerted activity and require conduct to be concerted, in fact, in order to be protected by Section 7.

---

[4] Case No. 06-RC-241173 (2019), https://apps.nlrb.gov/link/document.aspx/09031d4582e9d97d.
[5] 870 F.3d 113 (2017), http://www2.ca3.uscourts.gov/opinarch/113440p1.pdf.

An employee's right to engage in concerted activity for the purposes of mutual aid and protection or for collective bargaining is fundamental to the NLRA. Accordingly, conduct that is concerted and carried out in furtherance of the employees' protected concerted activity is protected by law and cannot be the basis for an employer's adverse action.

On the other hand, individual conduct or an individual's complaint is not, by definition, concerted. Accordingly, close questions commonly arise as to whether the conduct of an individual constitutes protected concerted activity and whether an employer's adverse actions directed against such individual conduct is a violation of the act.

During the Obama board's years, protected concerted activity was given an expansive reading; so expansive as to blur the line between protected group action and unprotected individual action. Such decisions arguably rendered almost any individual complaint made at or about work legally protected on the theory that the complaint about a working condition that affects one, affects all and is, therefore, concerted because it affects the interests of other employees and might induce him or her in preparation for group action with respect to commonly experienced working conditions.

In Alstate Maintenance LLC,[6] the current board overruled prior board precedent and found an individual employee's complaint in front of other employees about not getting an adequate group tip from a customer not to be concerted because it was a mere individual gripe and not made on behalf of or made to induce action by his co-workers. According to the Alstate board, its decision "begins the process of restoring [the law] by overruling conflicting precedent that erroneously shields individual action and thereby undermines congressional intent to limit protection afforded under the Act to concerted activity for the purpose of mutual aid or protection."

Indeed, going one step further, in Alstate's first footnote, the board expressly recognized the existence of other questionable protected concerted activity cases in which statements about certain subjects, i.e., discussions about wages, working schedules and job security, were found to be inherently concerted by virtue of their subject matter, implicitly suggesting that they may have been wrongly decided and expressing its interest in reconsidering that line of precedent in a future appropriate case.

Based on these comments as well as other recent board decisions, it is evident that the current board is looking to decide more cases that will allow it to chip away at the circumstances under which individual conduct will qualify as concerted activities.

The board is likely to issue formal rules concerning access to an employer's private property.

Access to an employer's private property for the purpose of engaging in union activity or protected concerted activity is a hot-button issue for the current board. In the agency's

[6] 367 NLRB No. 68 (2019).

agenda[7] of anticipated regulatory actions published last May, the board announced that it would consider a new rule setting forth standards for access to an employer's private property.

In remarks made at a recent American Bar Association meeting, member William Emanuel said that the new rule "will clearly define the right of an employer to prohibit certain activity on its private property" by both union representatives and employees. While a notice of proposed rulemaking on this subject has yet to issue, the board was very active in addressing access issues and protecting employer property rights throughout 2019.

In June 2019, in UPMC, the board held that an employer could legally eject union organizers in their public spaces to speak with off-duty employees, provided they did not discriminate against the union and proscribed other third parties from engaging in similar conduct.[8] Likewise, in Bexar County Performing Arts Center Foundation,[9] the board held that an employer need not grant access to off-duty employees of an onsite contractor to engage in a public demonstration against their employer unless they had no other means by which to communicate their message to their target audience.

And finally, in December, in Caesars Entertainment,[10] the board overruled the Obama board's decision in Purple Communications Inc.[11], holding that, except in those very rare cases where employees have no other reasonable means of communicating with one another, employees have no statutory right to make use of a company's information technology systems or other employer-owned equipment to engage in protected concerted activity.

Since the board has not yet issued a notice of proposed rulemaking, there is no way to know the focus or content of the anticipated rule. However, it is likely that the new rule will borrow heavily from the board's recent access cases and be based on a balancing of an employer's property interests and how granting access is likely to affect those property interests against the proven necessity for employees and/or unions to be granted access.

Where unions and employees have adequate alternative means by which to communicate with one another or with the public or where such access will unduly burden an employer's quiet enjoyment of its property, the board's new rule will likely say that no enforceable access right exists. Conversely, where no alternative means of communication exists and/or where the impact of access on property rights is slight, the new rule will probably grant unions and employees limited rights of access.

Having recently reversed Banner Health, the board may soon also reverse

---

[7] https://www.nlrb.gov/news-outreach/news-story/nlrb-rulemaking-agenda-announced.
[8] UPMC, 368 NLRB No. 2 (2019).
[9] 368 NLRB No. 46 (2019).
[10] 368 NLRB No. 143 (2019), https://apps.nlrb.gov/link/document.aspx/09031d4582ec1a7e.
[11] 361 NLRB 1050 (2014), https://apps.nlrb.gov/link/document.aspx/09031d45819e22c9.

American Baptist and reinstate an employer's blanket right to keep its investigative statements confidential.

For 37 years, employers enjoyed an unqualified right to maintain the confidentiality of statements and to withhold them from unions prior to arbitration.[12] This protected employer witnesses from harassment and undue influence by unions prior to an arbitration hearing.

However, in 2015, the Obama board reversed Anheuser-Busch Inc. and issued two separate but substantively related decisions in Banner Health System[13] and American Baptist Homes of the West[14] over the dissents of then-members Philip Miscimarra and Harry Johnson, holding that:

- An employer could not lawfully require an employee to refrain from telling others what had been discussed during and investigative meeting; and
- An employer was obligated to turn over witness statements to unions prior to arbitration unless it could show a preponderant confidentiality interest that outweighed the union's need for it and justified the statements' withholding.

On Dec. 17, 2019, the current board reversed Banner Health, upholding in Apogee Retail LLC that the facial validity of an employer's work rule requires "reporting persons and those who are interviewed [in a workplace investigation] ... to maintain confidentiality [and prohibits] unauthorized discussion of [an] investigation or interview with other team members."[15] The board in Apogee further announced its willingness to rethink American Baptist.

In footnote 20 of Apogee, the current board observed that "for decades the Board ... maintain[ed] its own categorical confidentiality rule ... that an employer has no obligation to turn over witness statements obtained in investigations of possible workplace misconduct" to its employees' union, citing with approval Anheuser-Busch, and noting that this time-honored doctrine had been reversed by the prior board in American Baptist.

Though the issue decided in American Baptist was not presented in Apogee, the board then went on to announce that it would consider revisiting that decision (and presumably reinstating an employer's right to withhold witness statements) if the issue is raised in a future case. Based on Apogee's footnote 20 and for the reasons articulated in the Miscimarra/Johnson American Baptist dissents, it appears that the American Baptist ruling's days are numbered and it is highly likely that when presented

---

[12] Anheuser-Busch, Inc., 237 NLRB 982 (1978), https://apps.nlrb.gov/link/document.aspx/09031d45800346c2.
[13] 362 NLRB 1108 (2015) https://apps.nlrb.gov/link/document.aspx/09031d4581cd3b7b.
[14] 362 NLRB 1135 (2015), https://apps.nlrb.gov/link/document.aspx/09031d4581cd4631.
[15] Apogee Retail, LLC[xv], 368 NLRB No. 144 (2019), https://apps.nlrb.gov/link/document.aspx/09031d4582ec1a7d.

with the appropriate case, the current board will return to Anheuser-Busch and reinstate an employer's blanket right to keep its investigative witness statements confidential.

The board will likely continue to rein in the so-called perfectly clear successor exception to Burns.

In NLRB v. Burns International Security Services Inc.,[16] the U.S. Supreme Court held in 1972 that an employer who purchases the assets of a unionized business (and who may ultimately qualify as a successor employer with a duty to recognize and bargain with a union) is still free to set initial wages and working conditions of those it offers employment to unless the new employer clearly plans to retain all of its predecessor's unionized workers, rendering the new employer a perfectly clear successor.

According to the Burns court, perfectly clear successors are not free to establish initial employment terms without first consulting the union representing the incumbent workforce the new employer intends to hire, meaning that the new employer is saddled with the old employer's wages, hours and working conditions until it has either obtained the union's agreement to changed working conditions or, at least, satisfied its duty to bargain with that union, allowing the employer to unilaterally implement said changes.

The board, in Spruce Up Corp.,[17] initially read the perfectly clear successor exception very narrowly, limiting its application to those cases where a new entity either actively or, by conduct, misled incumbent employees to believe that they would all be retained without any change in working conditions or where it failed to clearly announce its intention to condition future employment on changed working conditions. However, over time, and especially during the Obama board, the reach of this supposed narrow exception expanded and began to swallow the Burns rule allowing the acquiring entity to set initial working conditions, its successor status notwithstanding.[18]

Presented with appropriate cases, the current board will likely cull back on the use of the clear successor exception to Burns and recognize an employer's right to determine and implement initial terms. Indeed, in Ridgewood Health Care Center Inc.[19], the current board refused to apply the perfectly clear successor exception to an employer who avoided successor status by unlawfully refusing to hire four incumbent employees. Likewise, shortly after taking office, the board's current general counsel, Peter Robb, announced that any new case involving the aforementioned Obama board decisions had to be submitted to the Division of Advice for review before a complaint could issue.[20]

In light of Ridgewood and based on the general counsel's memo, it would appear that

---

[16] 406 U.S. 194 (1974), https://supreme.justia.com/cases/federal/us/406/272/.
[17] 209 NLRB 194 (1974), https://apps.nlrb.gov/link/document.aspx/09031d45800a9c1e.
[18] 362 NLRB No. 194 (2015), https://apps.nlrb.gov/link/document.aspx/09031d4581da3310; 364 NLRB No. 44 (2016), https://apps.nlrb.gov/link/document.aspx/09031d458215a114; and 364 NLRB No. 91 (2016), https://apps.nlrb.gov/link/document.aspx/09031d45821c2a4f.
[19] 367 NLRB No. 110 (2019), https://apps.nlrb.gov/link/document.aspx/09031d4582b68a40.
[20] General Counsel Memo 18-02, https://apps.nlrb.gov/link/document.aspx/09031d458262a31c.

the board is now looking for appropriate cases to decide that will allow it to undo the damage done by the Obama board and to return the perfectly clear successor exception to what it was under Spruce Up.

The board will soon issue formal rules addressing the issue of whether undergraduate and graduate students who perform services for compensation for their schools as part of their education should be considered employees.

Whether graduate students who perform compensable work for schools as part of their advanced education are merely students or also employees within the meaning of the NLRA and, thus eligible to organize has been a hotly contested issue over the years. In 2000, in New York University,[21] the board held that such graduate-student assistants were employees.

Four years later, in Brown University,[22] a different NLRB reversed itself, holding that graduate assistants pursuing advanced degrees and performing teaching as part of that graduate schooling were students and not employees within the meaning of the act. Then, over the dissent of Miscimarra, in 2016 the Obama board flip-flopped yet again on this issue in The Trustees of Columbia University in the City of New York,[23] noting that for 45 years, the board had exercised jurisdiction over private universities and had frequent cause to apply the act to faculty in the university setting and that it could see no reason to deprive graduate students of the protections of the act.

Now the current board seeks to nullify the Columbia University decision and to, again, treat them as students who render services to their schools as an integral part of their education and who will not be treated as employees. However, the current board is going about this change and answering this recurring issue by nontraditional means: formal rulemaking. This route is an alternative to the more traditional case decision route so as to bring greater stability to this important area of federal labor law after getting maximum input on the issue from the public.

Thus, last September, a notice of proposed rulemaking was issued indicating that, subject to receipt of public input, it was the board's intention to revise the operative law in this area to reflect that the relationship that these students have with their schools is predominantly educational rather than economic. The public comment period for these new rules has since closed. The new rules should issue in 2020.

These are just some of the interesting issues that the board is likely to address this year in a way that is friendlier to management. Stay tuned. The watching will be interesting.

---

[21] 332 NLRB 1205 (2000), https://apps.nlrb.gov/link/document.aspx/09031d45800c0b35.
[22] 342 NLRB 483 (2004), https://apps.nlrb.gov/link/document.aspx/09031d45800076ac.
[23] 364 NLRB No. 90, https://apps.nlrb.gov/link/document.aspx/09031d45821c20d4.