SBOT Labor and Employment Law Section

2018 Annual Update

Change As The Norm: The NLRA And The NLRB

August 24, 2018

John V. Jansonius
Jackson Walker LLP
2323 Ross Avenue, Suite 600
Dallas, Texas 75201
(214) 953-5970
jjansonius@jw.com

NLRB Members

NATIONAL LABOR RELATIONS BOARD

THE BOARD

John F. Ring, Chairman
William J. Emanuel
Marvin E. Kaplan
Lauren McFerran
Mark Gaston Pearce

NLRB General Counsel

NATIONAL LABOR RELATIONS BOARD

THE GENERAL COUNSEL

Peter B. Robb

Employer Rules

- *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), holding that facially neutral handbook rules that employees *would* "reasonably construe" to prohibit Section 7 activity violate the Act.

- 2008-2016: "would" became "could."
  - *T-Mobile USA, Inc.*, 363 NLRB No. 171 (April 29, 2016) (work rule requiring employees to treat each other with respect and encouraging a positive work environment in the *old* NLRB's view went too far — employees could think this means they could not complain about wages and working conditions).

Employer Rules (continued)

The New Rule About Work Rules

- *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017)
  - "Could" went back to "would," and the Board established a whole new approach to work rules cases.

- The *new* Board overruled *Lutheran Heritage Village-Livonia* and implemented a new standard that looks to two factors:

  (1) the nature and extent of the potential impact on NLRA rights; and

  (2) legitimate justifications associated with the rule.

Employer Rules (continued)

- Boeing's *no-photos/no-video* rule is permissible under Section 7.
  - Numerous business justifications for the rule, including compliance with required security protocols.
  - Adverse impact on NLRA-protected rights "comparatively slight."

Employer Rules (continued)

The Boeing Balancing Test

- Under this new balancing test employment rules fall into one of three categories:
  - Category 1: RULES THAT ARE *PER SE* LAWFUL, either because the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights, or because the potential adverse impact on protected rights is outweighed by the justification(s) for the rule.
  - Category 2: RULES THAT REQUIRE INDIVIDUAL SCRUTINY as to whether the rule prohibited or interfered with the exercise of rights protected under the NLRA and whether any adverse impact on NLRA rights was outweighed by the justification(s) for the rule.
  - Category 3: RULES THAT ARE *PER SE* UNLAWFUL because the rule prohibits or limits the exercise of rights under the NLRA and the adverse impact is not outweighed by the justification(s) for the rule.

Employer Rules, Internal Process At NLRB

- GC Memorandum 18-02 (December 1, 2017)
  - Rescinded several prior GC memorandums, including GC Memorandum 15-04. GC 15-04 addressed in voluminous detail the lawfulness of various types of employer rules under *Lutheran-Heritage Village-Livonia*, 343 NLRB 646 (2004).
  - GC Memorandum 18-02 requires submission of cases involving certain kinds of work rules to the NLRB Division of Advice before issuing a complaint. Examples include rules:
    (i) prohibiting disrespectful conduct;
    (ii) requiring employees to maintain confidentiality of workplace investigations; and
    (iii) restricting recordings in the workplace.

Class and Collective Action Waivers

- Three cases decided by Supreme Court on May 21, 2018:
  - *NLRB v. Murphy Oil USA*, No. 16-307
  - *Epic Systems Corp. v. Lewis*, No. 16-285
  - *Ernst & Young LLP v. Morris*, No. 16-300
- Do employment agreements requiring individual arbitration of employment-related disputes violate Section 7 of the NLRA?

United States v. United States

- Trump Administration (DOJ) advocated in favor of Epic, Murphy, and EY.
- The NLRB opposed the Trump Administration.

Epic Systems: Judge Gorsuch's Opinion For The 5-4 Majority

Epic Systems Corporation v. Lewis, 138 S.Ct. 1612 (2018)

- Class and collective action waivers in employment agreements with arbitration clauses are enforceable.
  - "The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act. Because we can easily read Congress's statutes to work in harmony, that is where our duty lies."

    138 S.Ct. at 1632

Constitutionality of Public Employee Agency Fees (An Issue Bigger Than It Seems)

- In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court held that a compulsory agency fee arrangement does not violate the constitutional rights of government employees who object to unions or to financially supporting union activities.
  - Mandatory fees do not violate the employees' constitutional rights insofar as the fees are used for collective bargaining, contract administration, and grievance adjustment purposes.
  - But, public sector employees may not be compelled to pay fees that do not relate to collective bargaining. That would violate their rights under the First and Fourteenth Amendments.
- *Abood* was always questioned as intellectually creative by First Amendment purists.

Janus v. AFSCME, 16-1466 (U.S. Supreme Court, June 27, 2018) (*Abood* Aborted)

5-4 Majority Opinion By Justice Alito

- "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. … *Abood* was wrongly decided and is now overruled."

- "In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay."

- "It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment."

Implications of *Janus*

1. As to Right-To-Work laws?

2. As to compelled speech arguments by employers (or others)? Impact on *Purple Communications*?

3. As to licensed professions?

   (*i.e.*, us.)

Texas Unionization

#44. Texas

Employed Population: 11,626,000

Members of unions: 543,000 (4.7% of employed population)

Workers represented by unions: 669,000 (5.8% of employed population)

msn.com *Money – The Most and Least Unionized States* by Ben Wittstein (06/29/18)

Expedited Election Rules

- Took effect April 14, 2015.

- Significant changes:
  - Hearings and reviews of RD rulings — Good Luck.
  - Employer position statements — 7 days to investigate, analyze, and brief.
  - List of eligible voters — More information more quickly.
  - Electronic filing — If you represent business, be sure to check your e-mail late Friday on holiday weekends.

- Electronic signatures accepted for union authorization cards – *GC Memo 15-08 (Revised)*.

Effect of Expedited Election Rules

- In fiscal year 2014 — the last full year under the old rules — the median time from a petition filed to election was 38 days (37 with an election agreement, 59 with contested cases).
- For fiscal years 2016 and 2017 — the median time from a petition filed to election was 23 days (23 with an election agreement, 35 with contested cases).
- Union win rate for elections remains steady.
  - FY 2017: 1193 Representation Elections
  - Union win rate: 71%

Trump Board's Request For Information On Election Rules

- On December 14, 2017, the Board published a Request for Information inviting submissions on three questions:
  - Should the 2014 Election Rule be retained without change?
  - Should the 2014 Election Rule be retained with modifications? If so, what should be modified?
  - Should the 2014 Election Rule be rescinded?
- Deadline for submissions was April 18, 2018.
- What to expect?

Micro Units

The Trojan Horse And The Fragrance Counter

- In *PCC Structurals, Inc.*, 265 NLRB No. 160 (Dec. 15, 2017), the Board overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011).
  - *Specialty Healthcare* changed the historical approach and standard for NLRB determination above appropriate bargaining units for union elections.
- *PCC Structurals* eliminated *Specialty Healthcare*'s "overwhelming community of interest" standard for determining when exclusion of employees from petitioned-for unit is improper.
  - Applied what the Board described as "traditional community of interest factors."

The Joint Employer Debacle

All In The Family

- It all began with *Browning-Ferris Indus. of California*, 362 NLRB 186 (2015).

- The Historical Standard: Alleged joint employer must exercise actual control over terms and conditions of employment of separate company's employees.

- The New (For Now) Definition: *Browning Ferris Indus. of California*, 362 NLRB No. 186 (August 27, 2015): A company that has the ability to directly or indirectly control any terms and conditions of another company's employees is a joint employer.

The New NLRB's Attempts To Undo *BFI*

- With the change in Administrations and new Republican appointees on the Board and in the General Counsel's office, *BFI* was among the top 2008-2016 decisions on the chopping block.

- *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017)
  - The Board found that two separate companies, Brandt and Hy-Brand, were joint employers, *because* they actually exercised joint control over essential employment terms involving Brandt and Hy-Brand employees, because the control was direct and immediate, and because the joint control was not limited and routine.
  - The 3 member majority expressly overruled *BFI*.

Joint Employer Redux (Conflicts, Real Or Perceived, Matter)

- The Board vacated its decision in *Hy-Brand* on February 26, 2018 based on new Member Emmanuel's participation in the Board's decision.
  - The OIG determined that Emmanuel should have been recused from *Hy-Brand* because of his prior law firm's representation of Leadpoint, a party in the *Browning-Ferris* case.
  - This is an expansive perspective on conflicts and recusal.

- *BFI* appeal is back and pending in the D.C. Circuit.

- Rulemaking as the Path of Least Resistance.

#MeToo And The NLRB (Signs The Board Gets It)

- *Colorado Symphony Association*, Case 27-CA-195026 (April 13, 2018) (employer violated section 8(a)(1) by refusing to provide information to union concerning pay equity — "investigating possible employer race or sex discrimination is a legitimate purpose related to a union's collective bargaining duties….").
- *Veritas Health Services, Inc.*, 31-CA-029713 (July 24, 2018) (employer policy prohibiting employees from speaking to the media "on behalf of [the company's] employees" and to direct all media inquiries to management violated section 8(a)(1)).
- *EZ Industrial Solutions*, 7-CA-193475 (Advice Memo., August 30, 2017) (released March 13, 2018) (employer violated sections 8(a)(1) and (3) by threatening and then discharging 18 employees who skipped work to participate in Day Without Immigrants march).

The End

Thank You

John V. Jansonius
Jackson Walker LLP
2323 Ross Avenue, Suite 600
Dallas, Texas 75201
(214) 953-5970
jjansonius@jw.com