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The NLRB's Pro-Union Regime: A Review of (Some!) Recent Regulations and Decisions

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Today's Topics

1. Regulatory Developments
    - Automated Management Issues
    - Joint Employer Rule Stalled
    - Ambush Election Rule Reinstated
2. Case Law Developments
    - Union Recognition: *Cemex Construction Materials Pacific, LLC*
    - Advocating for Non-Employees: *American Federation for Children*

Today's Topics (cont'd)

- Unilateral Action (No Contract): *Raytheon* Overruled
- Employer Work Rules: *Stericycle*
- Union Liability for Intentional Damage: *Glacier Northwest*

3. Captive Audience Speeches: An Endangered Species?
4. NLRB Round Up: A look at Other Key Decisions
5. Unilateral Action (Contract): "Contract Coverage" vs. "Clear and Unmistakable Waiver"

Regulatory and Sub-Regulatory Developments

Automated Management Issues

GC Memorandum 23-02 (Oct. 31, 2022)

- Cautions that automated management and electronic monitoring pose Section 7 issues.
  - New technological advances give employers more tools for surveillance of employees.
    - Examples: GPS trackers on delivery trucks, software tracking keystrokes and productivity on computers, and wearable cameras
- According to GC, employees may not be able to hide their interest or participation in protected activity.
- GC calls for regions to submit cases to Advice to explore widening the Act to further protect employees from electronic monitoring.

Automated Management Issues (cont'd)

- Reminders of violations under current law:
  - Instituting surveillance technology in response to employees engaging in protected activity
  - Disciplining employees based on monitored activity
  - Failing to bargain with a union when implementing new surveillance tools
- Potential additional violations (according to the GC):
  - Surveillance and tracking that is "intrusive and abusive," such as during break times, in non-work areas, or that reaches "beyond the workplace"
  - "Excessive work loads," driven by automated management tools, that "prevent workers from taking their breaks together or at all"
  - "Balancing" employer interests in productivity, etc., with employee right to engage in protected, concerted activity – "narrowly tailored"

Automated Management (cont'd)

- Recent decision casts doubt: *Stern Produce Co.* (D.C. Cir. 2024)
  - Delivery driver alone, with camera in cab of truck
  - Covered camera during lunch hour; supervisor warns by text that covering camera against rules
  - NLRB: warning created impression of surveillance
  - D.C. Circuit: Reversed!
    - A reasonable driver "would have no basis to think that he was being watched" for the purpose of determining if he was engaged in union activity.
    - "After all, a driver who knows he can be monitored (1) at any time, (2) without warning, and (3) for any reason, has every reason to expect to be watched while on the job – and, without more, no reason to assume that any particular instance of monitoring reflects an attempt by the company to weed out or suppress union activities."

Joint Employer Rule Stalled

- In 2023, the Biden Board issued a final rule to rescind and replace the Trump Board's 2020 rule with a new standard for joint-employer status.
- 2023 Rule: Two or more entities may be considered joint employers of a group of employees if each entity has an employment relationship with the employees, and if the entities share or codetermine one or more of the employees' essential terms and conditions of employment.
- The rule was supposed to take effect March 10, 2024.

Joint Employer Rule Stalled (cont'd)

- But, on March 8, 2024, in a case brought by the U.S. Chamber of Commerce, a Texas district court judge invalidated the rule, and prevented its enforcement.
- Rule is invalid because it would treat some companies as employers of contract or franchise workers even though they lacked any meaningful control over their working conditions.

Ambush Election Rule Reinstated

- The period between filing an initial petition for election and actual election is critical for employers.
- In 2014 the Obama Board created the “Quickie” or “Ambush” election rules.
- In 2019 the Trump Board rolled the election rules back.
- As of December 2023, the Biden Board has returned to the principles first contained in the 2014 Election Rule.

Ambush Election Rule Reinstated (cont'd)

Some features of the 2023 Election Rules:

- Notice posting obligation – 2 days after petition
- R case hearing – 8 days after petition – limited discretion to postpone
- Statement of Position – Noon the business day prior to opening of hearing
- Disputes over inclusion in unit or eligibility to vote "need not be litigated or resolved" before the election
- Post-hearing briefs permitted "only upon special permission" of the RD
- Election scheduled "for the earliest date practicable"

Significant Board Decisions

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Union Recognition: *Cemex Construction Materials Pacific, LLC*

- Union organizing drive begins.
- Employer responds with counter-campaign, including hiring consultants, distributing anti-union fliers, monitoring social media, etc.
- Union lost the election by narrow margin; filed objections and ULP charges.
- NLRB: finds that the employer engaged in more than 20 instances of objectionable or unlawful misconduct during the critical period between the filing of the election petition and the election.
- Determines conduct bad enough to warrant issuance of a bargaining order under Gissel
- So…case over, right?

Union Recognition: *Cemex* (cont'd)

- Wrong! NLRB majority then goes on to review Linden Lumber, a Supreme Court-approved decision requiring a union to file an election petition to prove majority status
- New standard:
  - Employer violates § 8(a)(5) if, after receiving a union demand for recognition on behalf of a majority of employees in an appropriate unit, the employer fails to "promptly" file an RM petition
  - "Promptly" means, absent special circumstances, 2 weeks

Union Recognition: *Cemex* (cont'd)

- But wait, there's more!
- NLRB also guts Gissel
  - Standard: "[I]f the employer commits an unfair labor practice that requires setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order."
  - Because: Gissel orders are "insufficient" to both effectuate "ascertainable employee free choice" and deter "employer misbehavior"
  - But: appears to affirm standard for setting aside an election, and the criteria historically considered in that assessment

Union Recognition: *Cemex* (cont'd)

- What's missing?
  - Discussion of "hallmark" violations
  - Case law emphasizing the importance of a secret ballot vote in determining employee wishes
  - Pre-/post-petition distinction
    - Focus is on "the runup to an initial election"
    - And, new standard creates incentive not to commit ULPs "both before and after the filing of the election petition"

Union Recognition: *Cemex* (cont'd)

GC Memo 24-01 (Nov. 2, 2023)

- Follow-up to Cemex from the General Counsel, providing additional guidance to regions
- Addresses some of the issues left open in the decision, at least from perspective of how regional offices are instructed to handle them
- Can employer review evidence of majority support?
    - Yes, but does not toll the period to file RM petition

Union Recognition: *Cemex* (cont'd)

- What about disputes over the appropriate unit?
  - If employer files RM petition, then reference the union's claimed unit in Section 5, and submit its own position on the appropriateness of the unit
  - Employer retains the burden to prove that union's unit is inappropriate
- How does union make demand?
  - Could take many forms, including checking box on line 7a in an RC petition and noting that the petition serves as its demand
- Confirms pre-petition ULPs considered in determining if election should be invalidated

Advocating for Non-Employees

***American Federation for Children, Inc.*, 372 N.L.R.B. No. 137**

- An employee sought support from coworkers to ensure the rehiring of a former colleague.
- Former employee lost her work eligibility status due to changed circumstances in her immigration status.
- Former employee viewed as “valued colleague,” and so employer was sponsoring her for a work permit.
- New director (supervisor) hired, and employee began to think that new director did not value former employee; starts complaining about new director’s management style; tries to enlist support among colleagues to continue support of work permit.

Advocating for Non-Employees (cont'd)

- The employer decides to terminate employee for creating a "toxic atmosphere"
  - Meets with employee about the same, and tells her that director doesn't want to work with her anymore
  - Employee resigns, before employer fires her
- ALJ: no violation because conduct not concerted activity, relying on *Amnesty International*, 368 N.L.R.B. No. 112.
  - "Activity advocating only for non-employees is not for 'other mutual aid or protection' within the meaning of Section 7 and accordingly does not qualify for the Act's protection.'"

Advocating for Non-Employees (cont'd)

- NLRB: reversed – employee's activities were concerted
  - Contacted multiple employees, sometimes more than one at the same time, and not all of them were supervisors
  - And purpose was to have those employees lobby for former employee – *i.e.*, initiate group action among her co-workers
- Former employee was a statutory "employee," and so *Amnesty International* is not applicable
  - NLRB says former employee should be considered an "applicant" for a position with employer
  - Well-established precedent treats applicants as employees
  - Former employee's immigration status is irrelevant to their employee status under the Act.

Advocating for Non-Employees (cont'd)

- The concerted activities were for "mutual aid and protection"
  - Employee was attempting to get former employee returned to work; because she was viewed as a good employee, this would improve the working conditions of all employees
  - "Solidarity principle" – when an employee helps another employee, the first employee can expect reciprocal support in a future issue
- In the alternative, *Amnesty International* wrongly decided and overruled.
  - "[T]he scope of mutual aid or protection covers the efforts of statutory employees to help themselves by helping persons who are *not* statutory employees."
  - Solidarity principle still applicable!

Employer Unilateral Action During Contract Negotiations: *Raytheon* Overruled

***Raytheon Network Centric Sys.*, 365 N.L.R.B. No. 161 (2017)**

- Long history of collective bargaining with the union.
- Contract expired, and parties began bargaining for a successor contract.
- Employer unilaterally modified employee medical benefits and related costs post-expiration, but consistent with its how it had made such changes in the past.

Employer Unilateral Action (cont'd)

- Under *Raytheon*:
  - Employers could make discretionary, unilateral changes to the terms and conditions during negotiations for a successor contract after the expiration of a CBA.
  - The only caveat was that these unilateral changes were required to be "similar in kind and degree" with actions taken in the past.
  - *Raytheon* also authorized employers to act unilaterally after the expiration of an existing labor agreement if its action was consistent with a past practice established under the management rights clause of the expired contract.
- It took two decisions (*Wendt* and *Tecnocap*), but the Biden Board has overruled all of *Raytheon*

Employer Unilateral Action (cont'd)

Wendt Corp., 372 N.L.R.B. No. 135 (2023)

- Union newly certified as employee representative
- While negotiating with the newly elected union, the employer began making layoffs - which included laying off some of the new bargaining unit employees
- Employer: layoffs were consistent with the employer's past practices, citing five different layoffs over preceding 17 years, and invoking *Raytheon*

Employer Unilateral Action (cont'd)

Wendt (cont'd)

- NLRB: rejects employer position
- *Raytheon* not satisfied
  - Evidence showed 6 years in which there were layoffs, and 12 when not, and 2, 5-year periods of zero layoffs
  - Layoffs were episodic, rather than frequent and regular
  - Employees could not reasonably expect layoffs to reoccur on a consistent basis

Employer Unilateral Action (cont'd)

- In any event, *Raytheon* overruled.
  - Employers can "only make such unilateral changes when it 'has shown the conduct is consistent with a longstanding past practice and is not informed by a large measure of discretion.'"
  - Moreover: "Employers cannot justify a unilateral change that would otherwise violate the NLRA by relying on a past practice that was established before its employees organized."

Employer Unilateral Action (cont'd)

***Tecnocap LLC*, 372 N.L.R.B. No. 136 (2023)**

- After expiration of prior CBA, and during negotiations over a successor CBA, the employer made unilateral changes to employee work schedules.
- Need for changes was initially Covid-19; then moved towards employer production needs.
- Employer had history of making some changes to work schedules during (and after) the contract term, but no history in 30-year bargaining relationship of imposing a 12-hour schedule.
- The employer justified the unilateral action as a past practice under a management-rights clause in the expired CBA.

Employer Unilateral Action (cont'd)

- NLRB holds: employer unilateral action was unlawful
- Applies *Wendt* holding:
  - Employer decision was informed by a large measure of discretion. Therefore, past practice defense unavailable.
  - Past practice can only be used when the unilateral change is "fixed by an established formula based on nondiscretionary standards and guidelines."
- Evidence here showed employer exercised discretion:
  - Employer argued that its decisions were "unavoidable," and "necessary," and accommodated an "exceptional workload" are just the employer's "subjective judgment and evaluation at the time of the decision to implement."

Employer Unilateral Action (cont'd)

- Moreover, any practice properly relied upon must be one that occurred "with such regularity and frequency that employees could reasonably expect the practice to reoccur on a consistent basis."
  - Here: never used 12-hour shifts before; employees viewed the shifts as significantly different than in the past; union vigorously protested them
- Past practice that developed under the management rights clause in expired contract did not permit employer's unilateral action

Employer Work Rules: *Stericycle*

***Stericycle, Inc.*, 372 N.L.R.B. No. 113**

- The employer had several policies related to personal conduct, conflicts of interest, and confidentiality of harassment complaints.
- ALJ: Policies overbroad.
- NLRB: Affirmed, and *Boeing* overruled.
- *Boeing* test:
  - Balance two factors: 1) the extent of the potential impact on NLRA rights; and 2) legitimate justifications associated with the rule.
  - Over time, sort rules into three categories so as to avoid having to reexamine each rule in each case

Employer Work Rules: *Stericycle* (cont'd)

- Held: employer work rules that have a reasonable tendency to chill employee rights will now carry a presumption of unlawfulness.
- How can an employer overcome the presumption?
    1) The rule advances a legitimate and substantial business interest, and
    2) A more narrowly tailored rule would not advance that interest.

Employer Work Rules: *Stericycle* (cont'd)

- NLRB will interpret workplace rules from "the perspective of an employee who is economically dependent on the employer, and who also contemplates engaging in protected concerted activity."
- Retroactive application: Rules that would have been upheld under *Boeing* may require rescission and re-drafting.
- The new standard is based on, but revises, the *Lutheran Heritage Village-Livonia* (2004) standard.

Employer Work Rules: Policies to Review

- Investigation confidentiality (no presumption this is lawful)
- Non-disparagement (distinguish between policies prohibiting disparaging statements made to third parties [lawful] and those prohibiting disparaging statements among employees [unlawful])
- Outside employment (cannot be lumped together with rules on consulting, serving on boards, making non-passive investments, e.g.)
- Civility rules (categorically lawful under *Boeing*)
- Prohibition of media communications (categorically lawful under *Boeing*)
- Social media (categorically lawful under *Boeing*)

Employer Work Rules: But Wait! There's More!

GC Memo 24-04 (April 8, 2024)

- Remedies not adequate for employees "harmed" as a result of an unlawful work rule
- Normal remedy for unlawful work rule: recission of the rule, in addition to standard notice posting
- GC compares unlawful work rule cases to unionized employer unilateral change cases
  - Normal rule there: recission of rule AND expunge discipline under it
- So, regions instructed to seek settlements, or remedies, that obtain make whole relief for employees disciplined under a rule or who were "legal enforcement action targets" of the employer.

Union Liability for Intentional Damage: *Glacier Northwest*

***Glacier Northwest, Inc.*, 143 S. Ct. 1404**

- Glacier Northwest alleged that the union intentionally destroyed company property during a strike.
- The union called for a work stoppage while concrete was being mixed, resulting in the hardening of the concrete.
- The concrete batches in the trucks at time of strike were ruined and company trucks damaged.
- Glacier sued the union in state court. Union argued that because this was a labor dispute, the NLRA preempted any state court claims.

Union Liability for Intentional Damage: *Glacier Northwest* (cont'd)

- Washington State Court: Agreed union's actions protected.
- Washington Supreme Court: Affirmed.
- SCOTUS: Reversed and remanded.
  - Holding: Since union "took affirmative steps to endanger Glacier's property … the NLRA does not arguably protect its conduct."
  - The NLRA protects the right to strike but "it does not shield those who fail to take 'reasonable precautions' to protect their employer's property from foreseeable, aggravated, and imminent danger due to the sudden cessation of work."

Captive Audience Speeches: An Endangered Species?

- Captive Audience Speech: Employer delivers speech to employees, on company time, to discourage them from supporting union or sharing union-related information
  - Not allowed to be coercive
  - Not allowed to take place during “cooling off” period (24 hours before a representation election)
- For decades, captive audience speech has been permissible

Captive Audience Speeches (cont'd)

- In April 2022, General Counsel Jennifer Abruzzo issued GC Memoranda 22-04 taking the position that captive audience speeches are unlawful.
- Abruzzo argued the meetings are inherently coercive due to the power dynamic between employers and employees.

Captive Audience Speeches (cont'd)

- The NLRB has not commented on Abruzzo's complete captive audience ban.
- Several states have enacted their own bans on captive audience meetings, including:
  - Oregon, Connecticut, Maine, Minnesota, and New York.
- Several states have pending restrictions, including:
  - Colorado, Illinois, Maryland, Massachusetts, and Vermont.

Captive Audience Speeches (cont'd)

***NCRNC, LLC v. 1199 SEIU* (2024)**

- Case Summary:
  - Supervisors were told to distribute anti-union flyers to employees.
  - Supervisor then had one-on-one meetings to gauge employee reaction to the flyer and union activity.
  - The NLRB found the meetings to be coercive.

Captive Audience Speeches (cont'd)

The DC Circuit reversed.

- Holding: the one-on-one meetings were protected employer speech under the NLRA
- The Court further affirmed that non-coercive persuasion by managers is protected speech under the NLRA.

NLRB Round-Up: A Quick Look at Other Decisions

- ***Noah's Ark Processors, LLC*** – NLRB adopts extensive set of remedies for employer's labor law violations.
- ***Lion Elastomers LLC II*** – NLRB overrules *General Motors* and returns to setting-specific tests to evaluate the propriety of employee discipline.
- ***American Steel Construction*** – NLRB returns to the Obama Board's "micro-units" decision in *Specialty Healthcare*

NLRB Round-Up (cont'd)

- ***Miller Plastic Products, Inc.*** – NLRB reverses *Alstate Maintenance* and reinstates the totality of circumstances test for solo protests to be concerted activity.
- ***Tesla, Inc. v. NLRB*, 86 F.4th 640** – Overrules NLRB decision, and holds that employer's uniform policy was lawful, justified by a legitimate business purpose, and allowed other displays of union insignia in the workplace.

Issue to Watch: Employer Unilateral Action

- *MV Transportation* (2019) adopted the contract coverage standard to determine whether union waived its right to bargain over a mid-term unilateral change
  - The contract coverage standard permitted unilateral action if it falls within the compass or scope of certain contractual language in the CBA.
  - Rejected "clear and unmistakable waiver" standard, which had been in place for decades, but also repeatedly criticized by the D.C. Circuit

Issue to Watch: Employer Unilateral Action (cont'd)

- GC Abruzzo memorandum called for a shift back to the unmistakable waiver rule.
- The Biden Board has not reinstated the unmistakable waiver rule so far.
  - Chairman McFerran and Member Wilcox released statements saying the contract coverage standard from *MV Transportation* can reach the same result as the unmistakable waiver rule.

Questions?

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