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Welcome To The NLRB Labor Law Time Machine, Step Right In…

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Everything that is old is starting to become new again. This past week, President Trump's new NLRB appointments began to take action to return federal labor law to what it was before the eight years of pro-union rulings of the Obama-era boards. **Monday, Dec. 11** A 3-2 NLRB decision restated a board precedent that allowed administrative law judges to accept settlements over the objections of NLRB general counsel and the charging party, if the settlement proposal was reasonable based upon factors that had been in use since 1987 the *Independent Stave* factors. This overruled a 2016 decision of the NLRB that permitted so-called unilateral settlements only if the settlement provided "a full remedy for all violations alleged in the complaint." **Tuesday, Dec. 12** Then, by a 3-2 vote, the board requested information about the quickie election rules that were implemented in 2014, significantly shortened the amount of time between the filing of an election petition, and limited the ability of employers to present evidence and arguments prior to the conduct of an election. The board is requesting public comment about whether:

1. Should the 2014 Election Rule be retained without change?
2. Should the 2014 Election Rule be retained with modifications? If so, what should be modified?
3. Should the 2014 Election Rule be rescinded? If so, should the board revert to the Representation Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the board make changes to the prior Representation Election Regulations? If the board should make changes to the prior Representation Election Regulations, what should be changed?

This bodes well for, at a minimum, easing some of the more onerous provisions of the NLRB's election rules. However, employers should be prepared to respond to these questions because one would expect that labor groups will attempt to overwhelm the board with comments seeking to have the Obama-era rules retained. **Wednesday, Dec. 13** The board rested. **Thursday, Dec. 14** The board then issued two more decisions that rolled back Obama-board actions. First by a 3-2 decision (see a pattern here?), the NLRB issued a decision that set aside a 2004 standard that held that facially-neutral employer policies (i.e. policies that did not have anything to do with union issues) were unlawful to *maintain* if they could be "reasonably construed" by an employee to prohibit the exercise of NLRA rights. This standard had been used in recent years to find unlawful policies that prohibited cameras in the workplace and even policies requiring employees to behave "civilly." In its place, the board adopted three categories of policies that employers can think of as being analogous to the green, yellow and red lights on a traffic signal.

- One category are policies now deemed lawful if (i) the rule, when *reasonably interpreted*, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights

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is outweighed by justifications associated with the rule. The new board held that rules prohibiting cameras or requiring civility fall into this category of rules.

- The second category of rules are those that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

- The third category of rules are those that the board will designate as unlawful to *maintain* because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. The NLRB provided an example of such a rule as one that prohibits employees from discussing wages or benefits with each other.

Thus, while some rules would be unlawful to maintain, for many rules that are designed to make for an orderly workplace, the board took away the threat of violation for merely maintaining a rule if its application did not implicate NLRA rights. Also on Thursday, the board did away with the 2015 *Browning-Ferris* joint employer test that created potential liability for companies because of the actions of their sub-contractors because they maintained "indirect control" over the contractor or had unexercised or routine authority over that contractor. This decision had created much consternation for franchisors, but had implications in the economy as a whole. In its place, the board restored the test that had been in place prior to *Browning-Ferris.* **Friday, Dec. 15** On Friday, a 3-2 decision overruled a 2016 test that obligated an employer to provide a union with the opportunity to bargain over changes in working conditions that were consistent with past practice or if they were done under a management rights clause. Returning to the standard established by a line of cases dating back to 1964, the NLRB held that actions do not constitute a change if they are similar in kind and degree with an established past practice consisting of comparable unilateral actions. The board also held this principle applies regardless of whether (i) a collective bargaining agreement (CBA) was in effect when the past practice was created, and (ii) no CBA existed when the disputed actions were taken. Finally, the NLRB ruled such actions consistent with an established practice do not constitute a change requiring bargaining merely because they may involve some degree of discretion. Next, the board issued a 3-2 decision over-ruling the 2011 so-called "micro-unit" rule which allowed unions to pick off small groups of employees where those employees shared an "overwhelming community of interests" even where other employees shared sufficient community of interests to be included in the bargaining unit under the standards used by the NLRB from 1935 to 2011. This flurry of activity, while a good start, will likely take a pause because the Republican majority on the NLRB will take a hiatus now that Chairman Miscimarra's term has expired. This will result in a 2-2 board until President Trump's next appointment. In the meantime, NLRB General Counsel Peter Robb has announced an agenda of items he wants to review and have the NLRB reconsider. This agenda announced on Dec. 1. This agenda announced at least 26 different Obama-era decisions that the general counsel wants to reconsider as well as holding out the possibility of other changes in the law. So while the NLRB ended 2017 with a strong move toward returning to the standards that pre-dated the Obama administration, it is likely that this is just the beginning.