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BT Labor Relations National Labor Relations Board Decisions 2015 Year-in-Review

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Recent numbers show that unions currently only represent 6.6 percent of the private sector workforce. Despite that relatively small number, the National Labor Relations Board (Board) has been active this year, deciding many important cases impacting both union- and non-union employers alike. As the year comes to a close, it's a good time to take a look back and review some of the Board's more noteworthy and interesting decisions. We also included a few mentions to circuit court cases, especially where the judiciary has taken a different opinion from that of the Board. ***Browning-Ferris Industries*, 362 NLRB No. 186 (Aug. 27, 2015)** In *Browning-Ferris Industries,* the Board significantly altered its standard for finding "joint-employer status." The Board examined whether a user-company was a joint-employer of workers who were provided to it by a staffing agency. In finding that Leadpoint and Browning-Ferris were joint-employers, the Board announced that it was abandoning its old joint-employer test and setting forth a new one. The Board described its new test as follows: "[T]wo or more entities are joint employers of a single workforce if (1) they are both employers within the meaning of the common law; and (2) they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating whether an employer possesses sufficient control over employees to qualify as a joint employer, the Board will – among other factors – consider whether an employer has exercised control over terms and conditions of employment **indirectly** through an intermediary, or whether it has **reserved** the authority to do so." The new standard widens the scope, as employers previously had to **actually** exercise control over terms and condition of employment. From a practical perspective, this means that each joint-employer could have an obligation to bargain with a union over terms and conditions of employment and also could be held liable for the unfair labor practices of its co-employers. This is arguably the Board's most impactful decision of the year, as it will implicate a whole array of businesses – particularly those utilizing franchise models and those that use staffing agencies. ***Northwestern University and College Athletes Players Association (CAPA)*<, 362 NLRB No. 167 (Aug. 17, 2015)** In the closely-watched case filed by college football players from Northwestern University, the Board unanimously decided this year to decline jurisdiction and to dismiss the players' representation petition. The players have attempted to argue that they were school employees who should be allowed to bargain over terms of employment. The Board's 2015 decision overturns a 2014 regional director's ruling that found the athletes *were employees under federal law* and thereby could form a student-athlete union. Interestingly, the Board made clear that its decision to decline jurisdiction applied only to the Northwestern case, indicating that it might entertain potential future cases from other schools. ***Banner Health System*, 362 NLRB No. 137 (June 26, 2015)** In this case, the Board made it more difficult for employer's to impose confidentiality rules during workplace investigations. The Board found that an employer violated the National Labor

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Relations Act by asking an employee, who was the subject of an internal investigation, to refrain from discussing it while the investigation was pending. The Board held: "[T]o justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a **legitimate business justification** that outweighs employees' Section 7 rights." According to the Board, before telling employees to refrain from discussing an ongoing investigation, the employer has the burden to first determine whether in *any given investigation* one or more of the following issues is present: (1) witnesses needing protection; (2) evidence in danger of being destroyed; (3) testimony in danger of being fabricated; or (4) there is a need to prevent a cover-up. In *Banner Health*, the Board specifically said that an employer's general assertion of protecting the integrity of an investigation "clearly failed to meet" that burden. Thus, it appears the Board will require actual proof that one of the four potential issues it identified is in play before an employer can require that its ongoing workplace investigation remain confidential. **Note:** At least one federal court has looked at the *Banner Health* test with a small amount of skepticism. In *Hyundai American Shipping v. NLRB*, the D.C. Circuit Court appeared to question whether the Board got it right. *Hyundai America Shipping v. NLRB*, No. 11-1351 (Nov. 6, 2015). The employer argued that it has a legitimate and substantial business justification for imposing confidentiality rules – to ensure compliance with federal and state antidiscrimination statutes which require confidentiality in many investigations. While the Court seemed to agree that such a reason should be sufficient, it did not alter the outcome for Hyundai, nor does the ruling change the Board's standard going forward. ***Murphy Oil USA, Inc. v. NLRB*, No. 14-60800 (5th Cir. Oct. 26, 2015) & *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013)** Board cases this year have continued (and continued) to address the issue of class action waivers in arbitration agreements. The Board's 2012 decision in *D. R. Horton* started it all, when the Board held that arbitration agreements requiring employees to waive the right to pursue employment-related claims by class and collective actions in all forums constituted an unlawful restriction on an employee's Section 7 rights. The 5th Circuit Court rejected that ruling in 2013, holding that the use of class actions is not a substantive right under Section 7. The court clarified that agreements, rather, could not be misconstrued as prohibiting employees from filing a charge before the Board itself. Unpersuaded by the 5th Circuit's analysis, the Board issued a subsequent opinion in *Murphy Oil* and followed its precedent despite the contrary appellate court ruling. The 5th Circuit had the opportunity to review this case as well and followed its own *D. R. Horton* precedent. Handfuls of administrative law judge (ALJ) and Board decisions this year have applied *D. R. Horton* and *Murphy Oil* to find employer arbitration agreements to be unlawful. A small sample is listed below:

- *S. Xpress Enterprises, Inc.*, 363 NLRB No. 46 (Nov. 30, 2015)
- *Nijjar Realty, Inc ., 363 NLRB No. 38 (Nov. 20, 2015)*
- *Brinker Int'l Payroll Co. L.P.*, 363 NLRB No. 54 (Dec. 1, 2015)
- *Leslies Poolmart, Inc.,* 362 NLRB No. 184 (Aug. 25, 2015)

***Pier Sixty, LLC*, 362 NLRB No. 59 (March 31, 2015)** Employees' online activity, specifically when it involves social media, has made its way into

many areas of law, and labor law is no different. The Board decided another case this year involving employee social media use. *Pier Sixty* involved an employee's offensive Facebook post during a union campaign that ultimately resulted in termination. Two days before the union election, the employee posted the following on Facebook: *Bob is such a NASTY MOTHER F***ER don't know how to talk to people!!!!!! F*** his mother and his entire f***ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!* Finding the employer's decision to terminate the employee unlawful, the Board held that the post was protected, concerted activity and ordered that the employee be reinstated. ***200 E. 81st Restaurant Corp.* 362 NLRB No. 152 (July 29, 2015)** In this case, the Board was faced with the following question: can an employee be engaged in protected concerted activity when he files a lawsuit on behalf of himself and other employees. Although there is case law which says that a single employee acting on behalf of others can be engaged in protected concerted activity, this case was unique. The case involved a restaurant employee who filed a collective action in federal court under FLSA due to the restaurant's tip policy. The employee did not obtain the consent of any of the other employees whom he identified as *similarly situated* in his complaint, and the employee was the only named plaintiff. Nevertheless, the Board found that the employee acting on the behalf of others – even without their knowledge or consent – can still be engaged in protected concerted activity. This year has been anything but quiet for the Board, and we've seen how the Board can reverse its own long-standing precedent (e.g. joint employer test and employer handbook decisions). We've also seen the Board refuse to follow federal appellate court rulings and instead ramp up enforcement under its own, contrary precedent (e.g. class action waivers and the *D. R. Horton*/*Murphy Oil* line of cases). Don't be surprised when next year is just as eventful. The Board may have an opportunity to reverse another precedential ruling regarding whether graduate students can be "employees" of colleges and universities under the Act (see *The New School*, No. 02-RC-143009). We are also watching closely to see whether the Board will beef up its *Browning-Ferris* ruling by changing the rules to allow regular and temporary workers to form joint unions (see *Miller & Anderson, Inc.*, No. 05-RC-079249). As always, we'll be watching closely and providing you with the updates you need in 2016.