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NLRB Update

American Foundry Society

Kara M. Maciel, Esq.
Labor • Employment
Conn Maciel Carey LLP

Kara Maciel

kmaciel@connmaciel.com • 202.909.2730

Kara Maciel is a founding partner at **Conn Maciel Carey LLP** and Chairs the Firm's national Labor & Employment Practice, where she represents employers in all aspects of the employment relationship:

- Defends employers in litigation at both the federal and state levels, including matters related to ADA, FLSA, FMLA, Title VII and affirmative action/OFCCP regulations
- Chief labor negotiator on contract negotiations with several unions. Represent employers in union elections and in NLRB representation and ULP hearings. Advise non-union employers on proactive employee relations strategies and programs to remain union-free.

National Labor Relations Board



National Labor Relations Board



Marvin
Kaplan,
Term expires
2020



William
Emmanuel
Term expires
2020



John Ring,
Chair
Term expires
2022



Mark Pearce
Term expires
Aug. 2018



Lauren
McFerran
Term expires
Dec. 2019

NLRB General Counsel

- NLRB General Counsel, Peter B. Robb, sworn in on November 17, 2017 for a 4 year term.
- December 1, 2017 memo:
 - Revoked a handful of prior guidance memos, including one on employer rules and settlement agreements
 - Requires the Regional Offices to submit any ULPs alleging certain topics to go to the GC's office
 - Handbook rules, electronic communications, off-duty employee access, Weingarten, joint employer

A New Approach to the NLRB

- New GC Robb has outlined potential significant changes
- Wants to launch a major restructuring of the Board's field office operations
- Possible reductions in staff and restructuring of role of Regional Directors
 - Reportedly considering reorganizing 26 regional offices into smaller number of districts overseen by officials who report directly to the general counsel

The Brief Return of An Employer-Friendly Board

- In mid-December, 3-2 Trump majority Board issued 4 decisions restoring pre-Obama law on important issues:
 - **Joint Employer:** Board overruled the expanded joint-employer standard that was established in *Browning-Ferris Industries*.
 - **Employer Handbooks:** Board reversed its prior standard for evaluating the legality of facially neutral workplace rules and policies in favor of a two-step test – which takes into account the employer’s legitimate justification for the policy.
 - **Micro-units:** Board reinstated traditional community of interest test away from the *Specialty Healthcare* standard
 - **Unilateral changes:** Board reinstated 50-year precedent upset by 2016 decision

Joint Employer

- In *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (December 15, 2017), the majority overruled a 2015 decision and reinstated the prior standard in place over several decades.
- Under the restored standard, two or more entities will be deemed joint employers only upon proof that one entity has directly and immediately exercised control over the terms of employment of the other entity's employees.

Joint Employer

- The Board also clarified that proof of
 - indirect control,
 - contractually-reserved control that has never been exercised, or
 - control that is limited and routine will not be sufficient to establish a joint-employer relationship.
- Big impact on franchises, contractors and temporary labor/staffing agencies

The Future of Joint Employer

- February 2018: *Hy-Brand* was vacated due to a conflict of issue with Board member Emmanuel
- Spring 2018 Regulatory Agenda
 - NLRB Rulemaking potential
- D.C. Circuit could rule on *Browning-Ferris*

Employer Handbooks and Policies

- In *The Boeing Company*, 365 NLRB No. 154 (December 14, 2017), overruled standard placing limits on employer policies which might be “reasonably construed” to limit workers’ rights protected by NLRA
- Under Obama administration, NLRB closely scrutinized various policies of even non-union employers, expansive approach to Sec. 7

Employer Handbooks and Policies

- When evaluating a facially neutral policy, rule or handbook provision the Board will now evaluate two things:
 - 1, the nature and extent of the potential impact on NLRA rights, and
 - 2, the employer's legitimate justifications for the rule.
- Where employer's legitimate justifications outweigh potential impact on protected rights, rule is lawful.
- Balancing test should impact many employer policies, particularly confidentiality, social media and non-disparagement provisions.

Micro Units

- In *PCC Structurals, Inc.*, 365 NLRB No. 160 (December 15, 2017), the majority reinstated the traditional community of interest standard that had prevailed for many decades before the Obama-era Board changed it in 2011.
- The 2011 decision in *Specialty Healthcare* gave much more leeway to unions to select the appropriate bargaining unit when attempting to organize an employer's employees.

Micro Units

- Under *Specialty Healthcare*, an employer challenging the union's choice had to prove that the excluded workers shared an "overwhelming community of interest" with the unit selected by the union.
- Now, the Board will again determine in each case whether the employees in a petitioned-for group share a community of interest "sufficiently distinct" from the interests of excluded employees to be separate unit

Micro-Units

- PCC Structurals – Part 2
 - After the case was remanded following the Board’s December 15th decision, Regional Director issued a Supplemental Decision on May 4th
 - Held: the welders do qualify as an appropriate bargaining unit because they are members of a specialized craft
 - Craft unit is one that is a group of skilled craftsmen who are engaged in the performance of tasks which require the use of substantial craft skills and specialized tools and equipment

Ambush Elections

- “Ambush Elections”
 - Request for Information seeking input regarding the 2015 changes to the union election procedures.
 - Board wants to evaluate whether to:
 - Retain rules without change;
 - Retain with modifications; or
 - Rescind, with making changes to the prior election rules
 - **Comments submitted March 19, 2018**
 - Spring 2018 Agenda includes rulemaking
- FY 2017 Election Data:
 - Median time between petition and election: 23 days
 - Unions won 940 elections out of 1,366 filed (68.8%)

Labor Management Trainings

- In light of *PCC Structural*s and the ambush election rules, employers should continue a 365 campaign of union avoidance with training managers and supervisors on how to avoid unionization and election campaigns
- Be aware of risks in unionization and review policies and procedures to minimize risks
- Find ways to integrate employees to avoid craft unit determinations

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Questions?



Kara M. Maciel

Chair, Labor • Employment Practice Group

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