Labor & Employment Issues
In Focus

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NLRB APPLIES RETROACTIVE MANIFEST INJUSTICE STANDARD TO CLAW BACK UNION REPRESENTATION

According to the current U.S. National Labor Relations Board ("NLRB" or "Board"), the Board applies new precedent retroactively unless "manifest injustice" would result. *Leggett & Platt Inc*., 368 NLRB No. 132 (Dec. 10, 2019); *Cristal USA, Inc*., 368 NLRB No. 137 (Dec. 11, 2019). These two cases, decided within a day of each other, illustrate the Trump Board's eagerness to reach back to apply its anti-organizing decisions retroactively and thereby annul previously established representation.

In *Leggett*, the employer engaged in an "anticipatory withdrawal" of recognition, refusing to bargain with its longtime union pending labor contract expiration based upon a questionable petition from employees rejecting the union. The union subsequently proved majority support prior to contract expiration, but the employer refused to bargain, thus violating *Levitz Furniture Co.* 333 NLRB 717 (2001), among other unfair labor practices. The Board ordered Leggett to bargain, the company refused and appealed and the Board moved for enforcement, all in the District of Columbia Circuit Court of Appeals. Six months later, the Board abandoned *Levitz Furniture* in *Johnson Controls Inc*., 368 NLRB No. 20 (July 3, 2019), holding that an employer that engaged in an anticipatory withdrawal within 90 days prior to contact expiration need not bargain even if the union later proved majority support other than in an NLRB election. On remand from the DC Circuit, the Board declined to modify its order for Leggett to bargain. Citing the existing six month old final NLRB bargaining order, the Board decided that vacating the order "would not only disrupt the bargaining relationship … but also incentivize parties to delay compliance … in the hope or expectation of a change in the law." However, the Board emphasized that "our decision in this regard is limited to the circumstances presented here, as explained above, and that it does not preclude retroactive application of any other Board decision to cases pending in the courts of appeals …"

Just how far back and broadly the Trump Board plans to apply retroactive application in other cases came the next day in *Cristal USA, Inc*. In that case, the union won an election in 2016 for a "micro-unit" under existing Obama Board decisions such as *Specialty Healthcare*, 357 NLRB 934 (2011). The NLRB certified the union in 2017, but the employer refused to bargain, leading back to the Board on cross motions for summary judgment on the refusal to bargain charges. Here, the Board refused to follow the logic of *Leggett* decided one day earlier. Rather, the Board retroactively applied the NLRB's new unit standards from *PCC Structural Inc*., 365 NLRB No. 160 (2017) which overruled *Specialty Healthcare's* standard for upholding micro-units. Chairman Ring and Member Kaplan therefore dismissed the Complaint, even though the representation case had closed six months prior to *PCC Structural.* They explained that the Board must be sure of the bargaining unit despite the ensuing delay and having previously certified the union. Ring and Kaplan remanded the case to the Regional Director "for further appropriate action, including analyzing the appropriateness of the unit under the standard articulation in PCC …"

Dissenting, Member McFerran would have nothing of such a claw back. She observed that the Board sometimes permits relitigation of representation issues following a change in precedent but only where the prior rule was previously uncertain or under question by appeals courts. In this case, however, the courts had upheld the micro-unit rule upon which the employees and union had already invested substantial resources and reliance, so revisitation would in fact trigger manifest injustice. Furthermore, she added, "to overturn a unit that was certified 2 years ago under then-applicable law will be a public signal that a union and employees in the course of organizing cannot count on achieving employer recognition of a stable bargaining unit even after they win certification." McFerran then threw back the Republican members' words from *Leggett*: "This can only discourage organizing activity while encouraging speculative and unnecessary litigation as employers will be incentivized to test certification on any arguable basis in the hope that the Board will change the law and apply the change retroactively."

CENSORING EMPLOYEES' DISCUSSIONS OF WORKPLACE INVESTIGATIONS NOT A VIOLATION OF WORKERS' RIGHTS, SAYS NLRB

In yet another in a series of dramatic breaks with precedent, on December 16, 2019, the Trump NLRB held that employers do not *per se* violate workers' section 7 rights to act collectively when they ban employee discussions of workplace investigations.

A 3-1 majority of the Board held that such censorship is broadly legal so long as limited to active investigations. The decision eliminates a 2015 NLRB decision which prohibited employers from requiring confidentiality of investigative reports.

In the new case, *Apogee Retail*, 368 NLRB No. 144 (2019), the NLRB returns to its previous standard that presumes the legality of the maintenance of work rules requiring confidentiality of investigative interviews between an employer and employee. In *Apogee*, the employer maintained a workplace rule that required employees to cooperate in investigations truthfully and maintain confidentiality regarding the investigation, including not discussing the investigation or their interviews with other employees.

Under the rule the Board created in *Banner Estrella Medical Center*, 362 NLRB 1108 (2015), the NLRB General Counsel challenged the rule established by the employer in *Apogee* as a potentially impermissible restriction of employee rights under the National Labor Relations Act (Act).

In *Banner*, the Board held that ordinarily an employer was prohibited from instructing employees to not discuss ongoing workplace investigations with one another. The Board determined that employees have a section 7 right to discuss discipline or ongoing investigations involving themselves or co-workers. To lawfully restrict this speech, the employer must prove it has a legitimate and substantive business justification that outweighs the employees' rights under the Act. To meet that burden, the NLRB created a four part test:

- the prohibition was necessary in order to protect an employee from retaliation;
- evidence was in danger of being destroyed;
- testimony was in danger of being fabricated; and

- there was a need to prevent a cover-up of evidence.

In the new case, the Board rejected this standard and concluded that ordinarily an employer's instruction of confidentiality would be presumed lawful. In doing so, the Board returned to its previous standard on the issue in *Caesar's Palace*, 336 NLRB 271, 272 (2001). There, the Board held the NLRB must "balance" the employees' and employer's interests and the employer's business justifications must be considered. The current Board criticized the *Banner Estrella* standard as being one in which "the employer's interests are not even considered unless and until the employer demonstrates that witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, and there was a need to prevent a cover-up." The Board criticized the previous standard as being "push-button law," when an employee's section 7 rights are the only interest to take into account and factors favoring non-disclosure receive no weight at all. Thus, the Board held that "investigative confidentiality rules are lawful ... where by their terms the rules apply for the duration of any investigation."

Democrat Lauren McFerran, whose term expired the day of the decision, dissented, saying that, for example, a sexual harassment victim could be fired for warning colleagues about a harasser or seeking outside help, and union activists who suspect they're the target of an unfair probe may not huddle with their union or their co-workers for fear of punishment. "Again reversing precedent without notice or good reason, the majority now permits American employers to hold gag rules over their workers if the rule is linked to an open investigation," she said.

NATIONAL LABOR RELATIONS BOARD TO EMPLOYERS – YOU CAN RESTRICT YOUR EMPLOYEES' USE OF E-MAILS

On December 17, 2019, the National Labor Relations Board ("NLRB") in *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, reestablished that an employer has the right to restrict employee use of their email system for nonbusiness purposes, so long as the restriction is nondiscriminatory. This decision overrules an Obama era NLRB case, *Purple Communications, Inc.* (2014), which held that employees have a presumptive right to use email, on nonworking time, for communications protected by Section 7 of the National Labor Relations Act ("NLRA") and effectively reinstates the holding of a Bush era NLRB decision, *Register Guard (2007*).

In the 3-1 decision, the NLRB held that Caesars didn't run afoul of the National Labor Relations Act when it imposed the rule. The majority in *Caesars Entertainment* held that employees do not have a statutory right to use their employer's email and other information-technology ("IT") resources to engage in non-work related communications. The NLRB reasoned that employers have the authority to control the use of their equipment, including email and other IT systems. "Employees have no statutory right to use employer equipment, including IT resources, for [NLRA] Section 7 purposes," the majority said. Conversely, in *Purple Communications*, the Board found that employees could generally use their employers' email systems to organize or engage in other concerted activities protected by Section 7 of the National Labor Relations Act, overturning the 2007 ruling in *Register Guard*. *Purple Communications* did, however, find that an employer may justify a complete ban on nonwork use of email if it can point to "special circumstances" that make such a prohibition necessary.

The *Caesars* decision effectively reinstates the *Register Guard* ruling, which said policies against using work email for company business are illegal only to the extent they treat unions differently than similar outside organizations. But the new decision adds an exception letting workers use company email when it is "the only reasonable means for employees to communicate with one another," thus nominally defending employees' Section 7 rights.

In dissent, outgoing NLRB Member Lauren McFerran said the majority's decision "aims to turn back the clock" on workers' ability to discuss their jobs, which the NLRA protects. "Today, the majority overrules *Purple Communications* and, in its place, resurrects an approach that not only is out of touch with modern workplace realities, but that also contradicts basic labor law principles, long reflected in the decisions of the Supreme Court," McFerran said.

FEDERAL COURT STAYS IMPLEMENTATION OF LONG SOUGHT NEW YORK STATE FARM LABOR LAW

In response to a motion for a preliminary injunction filed on December 30, 2019 by the Northeast Dairy Producers and the New York State Vegetable Growers Association, a Federal Court on December 31, 2019, the day before the law's implementation, issued a temporary restraining order blocking the New York State Farm Laborers Fair Labor Practices Act. *New York State Vegetable Growers Association Inc. et al v. Cuomo et al*., 19 CV 1720 (LJV)(W.D.N.Y.) Judge Lawrence Vilardo of the Federal District Court for the Western District of New York, sitting in Buffalo, blocked three sections of the Act from taking effect pending a hearing on whether the law conflicts with federal law by including farm owners, family members and supervisors in the same class as laborers.

The Act, passed in June 2019, was the result of decades of advocacy on behalf of farm workers, and gives farm workers the right to unionize, the right to at least one day of rest every week and the right to overtime pay of at least one and a half times the regular rate of pay if farm workers choose to work on their day of rest or works for more than 60 hours per week. All of these items, routine in the vast majority of workplaces, were specifically exempted by Federal and New York State Labor Law since the 1930s.

Specifically, the injunction temporarily blocks three parts of the Act from going into effect: the section requiring that supervisory agricultural employees and agricultural employees distantly related to the employer be treated as farm workers entitled to the rights granted by the Act; the section preventing employers from changing family and supervisory employees' pay on seven days' notice; and the section imposing criminal liability for violations of the family and supervisory employees provisions. The measure also makes farm workers eligible for unemployment insurance, paid family leave and workers' compensation benefits.

The injunction hearing is scheduled for January 24, 2020.

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