Coalition for a Democratic Workplace

National Labor Relations Board Update

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JONES DAY®

RECENT INITIATIVES OF THE NATIONAL LABOR RELATIONS BOARD AND GENERAL COUNSEL

I. Recent Board Cases of Significance

Access

- *New York New York Hotel & Casino*, 356 NLRB No. 119 (March 25, 2011)

  The Board held that a property owner violated the Act when it denied off-duty employees of an onsite contractor access to nonworking areas open to the public to distribute handbills in support of their organizing efforts. The Board concluded that a property owner may lawfully exclude such employees only where the owner "demonstrates that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline (as those terms have come to be defined in the Board's case law)." The Board left open the possibility that, in some instances, property owners will be able to demonstrate that they have a legitimate interest in imposing reasonable, non-discriminatory, narrowly-tailored restrictions on the access of contractors' off-duty employees, greater than those lawfully imposed on its own employees.

  In carving out a new access rule that requires employers to show "significant interference" to justify denying access to non-employees, the Obama Board has placed the interests of non-employees seeking access for organizing purposes over the interests of employers in protecting their property rights. Property owners will now have to allow employees of a lessee to engage in Section 7 activity in nonworking areas of their property open to the public, unless they can show significant interference or some other legitimate basis for denying access. The changed landscape in the access area will open the door for unions to organize employers more easily in workplaces that, under the Supreme Court's decision in *Lechmere*, had been difficult to reach – and will likely result in more litigation over access as employers attempt to defend their property rights.

Maintenance And Application Of Policies During Elections

- *Jurys Boston Hotel*, 356 NLRB No. 114 (March 28, 2011)

  In a 2-1 decision released on March 28, 2011, the Board set aside a decertification election at a Boston hotel, in which the employer narrowly prevailed, based upon the employer's maintenance of certain policies in its employee handbook. Specifically, the Board found the employer's solicitation policy overly broad because it prohibited solicitation "on hotel property." The Board declared the "loitering" policy objectionable because it subjected employees to discipline for "[b]eing in an unauthorized area and/or loitering inside or around the Hotel without permission." And the Board concluded that the employer's grooming standards rule prohibiting

employees from "wear[ing] emblems, badges or buttons . . . other than the issued nametags or other official types of pins that form an approved part of [the employee's] uniform" also violated the Act.

- *Boulder City Hospital*, 355 NLRB No. 203 (September 30, 2010)

  In another 2-1 decision, the Board held that an employer violated the Act by posting a memo informing employees of its harassment policy during a card check campaign. Chairman Liebman and Member Pearce wrote that the employer's invocation of its harassment policy during the union campaign might have the potential of both (1) encouraging employees to report the identity of union card solicitors who approached employees in a manner that the employee found offensive and (2) discouraging card solicitors in protected organizational activities.

Unilateral Changes Post-Expiration

- *E.I. Dupont de Nemours & Co.*, 355 NLRB No. 177 (August 27, 2010)

  The Board held that an employer may not, post-contract expiration but pre-impasse, act on its long-standing and often-exercised management right to make annual insurance plan changes unilaterally, unless it can (a) show that it acted unilaterally during prior hiatus periods or (b) point to clear contract language giving it the post-expiration right to act unilaterally.

  This decision puts at risk what many employers have negotiated to preserve in their labor contracts and insurance plans: the right to change insurance benefits, on an annual basis, across all work units without having to bargain those across-the-board changes with each of its unions. It also places pressure on employers to reach deals, and avoid hiatus periods, when they need to implement significant insurance changes – unless they have clearly made prior changes during hiatus periods or have negotiated clear post-expiration rights.

- *Hacienda Resort Hotel & Casino*, 355 NLRB No. 154 (August 27, 2010)

  Notwithstanding Board precedent establishing that an employer may lawfully terminate dues check-off after contract expiration, the Board split 2-2 on the issue in this case. While current Board precedent remains in place, employers should expect the Obama Board to reverse that precedent if a future case presents the opportunity to the Democratic Board.

  If the Obama Board changes this long-standing precedent, an employer would have to continue dues check-off arrangements post-contract expiration until reaching impasse, removing this economic weapon from the range of options that an employer has, after contract expiration, to pressure unions into taking reasonable bargaining positions and reaching a contract.

Bannering

- *Eliason & Knuth of Arizona, Inc.*, 355 NLRB No. 159 (August 27, 2010)

  The Board held that the union's display of large, stationary banners at the premises of a neutral employer -- announcing a "labor dispute" and seeking to elicit "shame on" the employer or persuade customers not to patronize the employer -- does not constitute unlawful secondary picketing or coercion.

  The Board's narrow definition of "picketing" and "coercion" significantly erodes the protections traditionally accorded to neutral employers in labor disputes. In doing so, the Obama Board has given unions another tool to bring pressure on primary employers by embroiling the neutrals with whom they do business into the labor dispute. Employers should expect more "shame bannering" involving neutrals.

Recognition

- *Dana Corporation*, 356 NLRB No. 49 (December 6, 2010)

  This is one of the few Obama Board decisions that could prove useful to employers. In *Dana II*, the Board upheld an employer's pre-recognition agreement with a union that established a framework for future collective bargaining in the event that the union achieved majority status, finding that it was not unlawful recognition of a minority union.

  The Board's decision allows employees to see what they might get if they choose union representation. Further, the decision will allow employers to know what it might find if it clearly will be a successor to an existing agreement. *Dana II* allows employers to condition their agreement to a pre-recognition framework agreement with the union that informs employees as to what they generally can expect if they choose union representation (e.g., a contract with insurance cost-sharing).

- *MV Public Transportation, Inc.*, 356 NLRB No. 116 (March 22, 2011)

  The Board affirmed the ALJ's application of *Hilton Inn Albany*, 270 NLRB 1364 (1984), which requires that, at the time of voluntary recognition of a union, the employer must: (1) employ a substantial and representative complement of its project workforce; and (2) be engaged in normal business operations. However, Member Becker would abandon the "normal business operations" prong of this test. In Member Becker's view, "[s]o long as a representative complement of employees has been hired, absent a bar resting on their prior choice, employees should be free to decide if they wish to be represented and when they wish to make that decision." Member Pearce declined to address the continued viability of the second prong because the employer failed to satisfy the first prong. Member Hayes would continue to adhere to both prongs of the *Hilton Inn Albany* test. Chairman Liebman, who was not a member of the panel in this case, questioned the continued viability of the

second prong of the *Hilton Inn Albany* test in her dissenting opinion in *Elmhurst Care Center*, 345 NLRB 1176 (2005).

The Obama Board appears inclined to jettison the second prong if the opportunity arises. That would mean that the lawfulness of voluntary recognition would be determined at any time after the employer had hired a representative complement of employees – without consideration of when the employer reaches normal business operations. This approach would give unions, and the employees they seek to represent, more control over the timing of their demand for recognition, even before the employer fully achieves normal business operations and even before it has completed hiring employees who may or may not be as supportive of union representation.

Protected Activity – Wearing Union-Related Apparel

- *AT&T East*, 356 NLRB No. 118 (March 24, 2011)

  The Board, in a 2-1 decision, held that the employer violated the Act by prohibiting employees from wearing shirts that said "Inmate #" and "Prisoner of AT$T." The Board rejected the employer's defense that the shirt's "special circumstances"—that it might give rise to concerns that the AT&T employees were actually prisoners. The Board wrote that "[e]ven if a customer would not immediately realize that the shirt was connected to an ongoing labor dispute, the totality of the circumstances would make it clear that the technician was one of the Respondent's employees and not a convict." Dissenting, Member Hayes would have found that the potential for alarm to customers and the related damage to the company's reputation would justify its regulation.

II. Board Rulemaking

- On December 22, 2010, the Board published in the Federal Register a Notice of Proposed Rulemaking that would require employers to notify employees of their NLRA rights by posting a notice. The stated purpose of the proposed rule is "to increase knowledge of the NLRA among employees, to better enable the exercise of rights under the statute, and to promote statutory compliance by employers and unions." Electronic distribution, such as by email, posting on an intranet or internet site, would also be required if the employer customarily communicates with its employees that way. The notice would be similar in content and design to the notice of NLRA rights that must be posted by federal contractors under a recent DOL rule. Sanctions for the failure or refusal to post the notice include: (1) finding the failure to be an unfair labor practice; (2) tolling the statute of limitations for filing unfair labor practice charges against employers that fail to post the notice; and (3) considering the knowing failure to post the notice as evidence of unlawful motive in unfair labor practice cases. The 60-day public comment period ended on February 22, 2011.

This proposed rule appears to reflect the Board's view that more employees would exercise their right to organize if they were made aware of that right. While that is a questionable hypothesis, it is illustrative of the agency's desire to give unions a boost in non-union workplaces. Note that under the proposed rule the failure to post a notice would be an independent unfair labor practice. Further note that despite the proposed rule's stated objective "to better enable the exercise of rights under the statute," the notice would not inform employees of their decertification rights.

III. Board Invitations To File Briefs

- *UGL-Unicco Service Co. and Grocery Haulers, Inc.* (August 31, 2010)

  The Board asked for *amici* briefs on whether the Board should modify or overrule *MV Transportation*, 337 NLRB 770 (2002), and whether and how *MV Transportation* otherwise applies in the "perfectly clear" successor situation.

  In *MV Transportation*, the Board overruled *St. Elizabeth Manor, Inc.*, 321 NLRB 341 (1999), and held that "an incumbent union in a successorship situation is entitled to – and only to – a *rebuttable* presumption of continuing majority status, which will not serve to bar an otherwise valid decertification, rival union, or employer petition, or other valid challenge to the union's majority status." 337 NLRB at 770 (emphasis in original). In seeking briefs in *UGL*, the Board has signaled interest in returning to a successor bar rule that gives an incumbent union an *irrebuttable* presumption of continued majority status in successorship cases – immune from any representation petitions – for a reasonable period of time.

  If the Board were to overrule *MV Transportation*, the Board would preserve the representational status of an incumbent union in a successorship context, even if the union has lost support. Neither a rival union nor employees would be able to test that status through a representation or decertification petition, and the employer would be required to recognize and bargain with the union even though it has a good faith doubt about the union's majority support. Again, the Obama Board is lending support to unions that, due to changed business conditions, have diminished support – and in the process is undermining employee rights to choose their representative or to choose not to be represented.

- *Lamons Gasket Co.* (August 31, 2010)

  The Board asked for *amici* briefs on whether to modify or overrule *Dana Corp.*, 351 NLRB 434 (2007) ("*Dana I*"), in which the Board modified its recognition bar principles. In *Dana I*, the Board held that, after an employer's voluntary recognition of a union based on authorization cards, employees in the recognized unit must receive written notice of the recognition and their right, within 45 days of the notice, to file a decertification petition or to support a representation petition filed by a rival union. A valid petition filed within 45 days of the posting of the notice will be processed. If the notice is posted and no petition is filed within 45 days, the

recognized union's majority status will be irrebuttably presumed for a reasonable period of time to permit the parties to engage in bargaining.

The Board appears poised to overrule *Dana I* and treat card-check recognition the same as secret ballot elections for purposes of an election bar. Without the *Dana I* 45-day rule in card-check recognition cases, employees and rival unions will no longer have even limited access to the Board's election machinery to test whether a majority of employees actually supports the voluntarily recognized union. Changing this rule will deal yet another blow to employee rights to choose representation, or not, through the Board's secret ballot processes.

- *Roundy's Inc.* (November 12, 2010)

  The Board asked for *amici* briefs on whether it should continue to apply the access standard in *Sandusky Mall Co.*, 329 NLRB 618 (1999), *enforcement denied*, 242 F.3d 682 (6th Cir. 2001), in which the Board held that an employer violated Section 8(a)(1) of the Act by denying union access to its property while permitting other individuals, groups, and organizations to use its premises for various activities; if not, what standard the Board should adopt to define discrimination in this context; and what bearing, if any, *Register Guard*, 351 NLRB 1110 (2007), *enforcement denied in part*, 571 F.3d 53 (D.C. Cir. 2009), has on the Board's standard for finding unlawful discrimination in non-employee access cases.

  The Board in *Roundy's* is unlikely to diminish access rules – and will likely erode the discrimination principle that the Board applied in *Register Guard.* Given the Obama Board's propensity to favor greater access to employer property for unions, the Board will likely, at a minimum, continue to require employers to provide access to its property to union organizers if it has allowed others to solicit or distribute on its property -- without regard to the nature of that solicitation or distribution and without regard to whether that solicitation harms the employer's business or reputation. It is possible that a limited "discrimination" rule may survive for isolated beneficent groups, like United Way. But the rational discrimination test articulated in *Register Guard* (an email case) -- which would allow an employer to limit access to its property for union representatives, even if it has allowed others to solicit or distribute on its property, so long as the employer does not engage in disparate treatment of union activities or communications of a similar character – may not survive *Roundy's*. This expected course is fully consistent with the Board's recent efforts to expand union access to employees for organizing purposes.

- *Specialty Healthcare* (December 22, 2010)

  The Board asked for *amici* briefs on whether it should modify or overrule *Park Manor Care Center*, 305 NLRB 872 (1991), in making unit determinations in the non-acute health care industry; whether the Board should modify its standard for determining appropriate bargaining units more generally; specifically, where there is no history of collective bargaining, whether the Board should hold that a unit of all

employees performing the same job at a single facility is presumptively appropriate; and whether the Board should find a proposed unit appropriate if, as found in *American Cyanamid Co.*, 131 NLRB 909, 910 (1961), the employees in the proposed unit are "readily identifiable as a group whose similarity of function and skills create a community of interest."

Under the *Park Manor* approach, referred to as the "pragmatic" or "empirical" community-of-interests test, the Board considers, in addition to traditional community of interests factors, information elicited in its rulemaking proceedings with respect to acute care bargaining units, as well as Board precedent pertaining to the type of facility involved or the type of unit sought. While the *Specialty Healthcare* case should be limited to non-acute health care facilities, the Board has made this a much bigger case by asking for briefs on unit standards in all industries, not just non-acute health care. Of significant concern is the Board's focus on the appropriateness of a unit of employees performing the "same job at a single facility" as a general matter. If a same job/single facility unit becomes a presumptively appropriate unit under Board law, employers face a significant proliferation of bargaining units as organizing becomes much easier for unions, and they face a far greater burden of disruption associated with negotiating multiple contracts of much smaller units.

- *Chicago Mathematics & Science Academy Charter School* (January 10, 2011)

The Board asked for *amici* briefs on whether a charter school is a political subdivision within the meaning of Section 2(2) of the Act, and therefore exempt from the Board's jurisdiction.

If the Board asserts jurisdiction over charter schools, that could lead to more union organizing in educational settings, particularly in jurisdictions where there is no right to collectively bargain today. As the experience of teacher negotiations in the DC Public Schools has shown, unions in educational settings too often stand in the way of merit-based teaching and school accountability, with the price paid by students.

- *Stephens Media, LLC d/b/a Hawaii Tribune Herald* (March 2, 2011)

The Board asked for *amici* briefs on whether an employer has a duty to provide a union with witness statements obtained in the course of its investigation of alleged employee misconduct. Board precedent has long established that the duty to furnish information to a union "does not encompass the duty to furnish witness statements themselves." *Fleming Cos.*, 332 NLRB 1086, 1087 (2000); *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978).

The Obama Board is likely to overrule that precedent and replace it with a balancing test that requires the employer to prove a "legitimate and substantial" confidentiality interest and to seek an accommodation of that interest with the union's need for the information. Exposure of witness statements raises significant concerns about harassment, intimidation and coercion of witnesses – the same concerns that have led

the Board itself to limit FOIA access to witness statements. Wholly apart from these considerations, employers often secure witness statements as attorney work product during an investigation, putting that confidentiality at risk as well.

IV. General Counsel Initiatives

- GC Memo 10-07 (September 30, 2010)

  Announced an initiative to seek Section 10(j) relief for all discriminatory discharges during organizing campaigns (so-called "nip-in-the-bud" cases) and developed a program to streamline and expedite the administrative processing of "nip-in-the-bud" cases to allow for quicker Board approval of Section 10(j) authorization requests.

  This memo reflects the General Counsel's belief that organizing campaigns are too often "nipped-in-the bud" by discriminatory discharges and that the agency should quickly seek preliminary injunctive relief to remedy the situation. Expect to see 10(j) petitions more often and sooner in such cases.

- GC Memo 11-01 (December 20, 2010)

  Announced an initiative to seek alternative remedies for unfair labor practices committed during organizing campaigns and authorized Regions to seek notice-reading remedies in "nip-in-the-bud" cases and union access remedies (bulletin boards and employee names and addresses) in cases where there is an adverse impact on employee/union communication.

  This memo reflects the General Counsel's belief that traditional remedies have not been effective in remedying unfair labor practices committed during organizing drives. Expect to see such alternative remedies routinely sought for unfair labor practices committed during organizing drives.

- GC Memo 11-04 (January 12, 2011)

  Instructed Regions to routinely include default language in all informal settlement agreements and all compliance settlement agreements so that, in case of a breach, the General Counsel will reissue the complaint and file for summary judgment with the Board. In those cases, the allegations in the complaint will be deemed admitted and any answer withdrawn, and the only issue that may be raised before the Board is whether the charged party defaulted on the terms of the settlement agreement.

  Employers beware. Employers that sign a settlement agreement containing this default language will effectively waive their right to a trial and be deemed to have admitted liability based on the allegations in the underlying complaint.

- GC Memo 11-05 (January 20, 2011)

Announced an initiative to urge the Board to modify the standard for deferral to arbitral awards and grievance settlements in Section 8(a)(1) and (3) cases. In *Olin Corp.*, 268 NLRB 573 (1984), the Board held that it would defer to an arbitral award if the contract and statutory issues were "factually parallel" and the arbitrator was "presented generally with the facts relevant to resolving the unfair labor practice." The General Counsel will ask the Board to modify *Olin* by requiring the party urging deferral to demonstrate that (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the case. If the party urging deferral makes that showing, the Board will defer unless the award is clearly repugnant. The Board will not defer to a pre-arbitral-award grievance settlement unless the parties themselves intended the settlement to also resolve the unfair labor practice issues.

This memo reflects the General Counsel's view that, under current Board law, the Board has abdicated too much authority to arbitrators to resolve statutory issues and has left employee rights inadequately protected. If the Board modifies *Olin* in the manner sought by the General Counsel, employers can expect far fewer cases of post-arbitral deferral, leaving employers exposed to proceedings in dual forums.

- GC Memo 11-06 (February 18, 2011)

Continued former General Counsel Meisburg's remedial initiative in first contract bargaining cases and authorized the Regions to seek notice-reading, certification-year-extension, and bargaining-schedule remedies without first submitting the case to the Division of Advice. Remedies seeking reimbursement of bargaining expenses or reimbursement of litigation expenses still must first be submitted to the Division of Advice for authorization.

This memo reflects the General Counsel's belief that employers too often go through the motions of bargaining with no actual intent of reaching an agreement in an effort to have the union decertified after the expiration of the certification bar. Expect to see routine certification-year-extension remedies in first contract bargaining cases.

- GC Memo 11-07 (March 11, 2011)

Authorized Regions to seek reversal of *Grosvenor Resort*, 350 NLRB 1197 (2007), and *St. George Warehouse*, 351 NLRB 961 (2007), and to argue that a discriminatee's receipt of unemployment benefits establishes a reasonable search for work. In *Grosvenor Resort*, the Board imposed new job search requirements on discriminatees by establishing a two-week deadline to initiate a search for new work without reduction of backpay. In *St. George Warehouse*, the Board shifted the burden of production of evidence of adequate search for work, requiring the General Counsel to produce evidence of a reasonably diligent search once the respondent has shown the availability of suitable jobs for the discriminatee.

This memo reflects the General Counsel's concern that the burden shifted to him by the Bush Board in order to obtain backpay has proven to be a difficult one to satisfy. Expect the Obama Board to shift that burden back to employers.

- GC Memo 11-08 (March 11, 2011)

  Outlined new methods for calculating backpay that includes daily compounded interest as ordered by the Board in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010); authorized Regions to calculate search-for-work and work-related expenses separately from backpay and to charge those expenses to respondent regardless of whether the discriminatee received interim earnings and without limit to the amount of backpay a discriminatee may be entitled to receive; and authorized the Regions to seek reimbursement of the excess federal and state income taxes incurred by a discriminatee as a result of having received a lump sum backpay award covering more than one year of backpay.

  This memo reflects the General Counsel's view that backpay calculations often do not make employees whole. Expect to see larger awards as a result of daily compounded interest and other expenses incurred by employees attributable to their discharge.

IV. Other General Counsel Developments

- GC Announces Intention to File Suit Against States (April 22, 2011)

  In a letter to the attorneys general of Arizona, South Carolina, South Dakota, and Utah, the General Counsel announced his intention to initiate lawsuits seeking to invalidate provisions of the Arizona and South Dakota constitutions. Both states recently amended their constitutions to require that whenever an election, designation or authorization for employee representative is required or permitted by state or federal law, the election must occur by secret ballot. The forthcoming lawsuits will argue that those provisions are preempted by the National Labor Relations Act. The General Counsel noted that he still believes that similar provisions in all four states are preempted, but he has brought suit against only two states to conserve resources.

- GC Files Complaint Against Boeing Company For Unlawfully Transferring Work (April 20, 2011)

  The General Counsel filed a complaint alleging that Boeing Company improperly decided to move work from a unionized facility in Washington to a non-union facility in South Carolina as retaliation for union activity at the Washington facility. The Complaint also alleges that Boeing failed to negotiate with the union over the decision to move the work from Washington to South Carolina. The Complaint requests not only that Boeing have the Washington bargaining unit perform the work at issue, but also that one of Boeing's "high level officials" publicly read any notice that issues in this case, and that the reading be broadcast on the Company's intranet.

The General Counsel's decision to file a complaint in this matter is surprising given that certain core entrepreneurial decisions such as whether open, close, or transfer operations have long been held to be management prerogatives and not mandatory subjects of bargaining.

- GC And Regional Offices Focus On Facebook Postings As Protected Activity

  In October 2010, the NLRB's Hartford regional office filed a complaint against American Medical Response of Connecticut, alleging that the company violated the NLRA when it discharged an employee who posted comments about her supervisor on Facebook and responded to further comments from co-workers. The regional office alleged that the activity was protected concerted activity and that the employee was terminated for engaging in that activity. The company settled the matter after agreeing to revise its rules and promising that employee requests for union representation would not be denied in the future. Build.com settled similar allegations after an employee filed a charge alleging that she was terminated for posting comments on Facebook about the company and her perception that it had violated state labor code. While the settlement did not require reinstatement, the employer agreed to notice posting and that they would not punish other employees for such conduct in the future. Additionally, it has recently been reported that, absent settlement, the Board intends to file a complaint over comments an employee posted on Twitter. The Board clearly has a focus on social media and informal communication as a new field where protected activity may occur.