CLIENT ALERTS & INSIGHTS

NLRB Brings Holiday Cheer to Some, Jeers to Others in Flurry of End-of-Year Rulings

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In what is becoming a holiday tradition, consequential National Labor Relations Board rulings continue this December. First, after nearly six decades, the Board has conformed to a rigid test in evaluating whether an employer has coerced a worker about union activity while preparing for an unfair labor practice hearing. The test, set forth in 1964 by Johnnie's Poultry, 146 NLRB 770 (1964), requires employers to explain the purpose of any questioning, assure workers that they won't face retaliation, and get employees to voluntarily participate. In a 3-2 Democrat-majority opinion, the Board upheld its longstanding rule.

In *Sunbelt Rentals, Inc.*, Case No. 18-CA-236643, the Board reaffirmed the *Johnnie's Poultry* standard, writing that it "builds a sturdy barrier against a type of interrogation that is particularly likely to be coercive, while providing a well-defined and easily accessed gate through which the employer can pass to engage in this necessary but sensitive questioning." Board Chairwoman Lauren McFerran highlighted the standard's balance of employer and employee rights. The decision "maintains a well-understood 58-year standard that has proven successful in balancing employer needs and employee rights, while protecting the integrity of the Board's process," she said in a statement. "Because of the strong possibility of coercion in an employer interview about unfair labor practice issues, employees need protection. This familiar, bright-line test is easy for employers to comply with and brings certainty to the administration of the Act." The Board's two Republican members dissented, arguing that *Johnnie's Poultry*'s requirements exceed the Board's authority, notwithstanding those members' acknowledgment that workers should be protected against coercion.

In another 3-2 decision controlled by the Board's Democrat majority, the Board imposed a heightened standard on property owners seeking to exclude employees of contractors from protesting on their property. In *Bexar Cnty. Performing Arts Ctr. Found. d/b/a Tobin Center*, Case No. 16-CA-193636, the Board concluded that property owners may prohibit off-duty contract workers from participating in labor protests on their property only where the protest activity "would significantly interfere with its use of the property," or where excluding the employee is "justified by a legitimate business reason." The Board's decision in *Bexar* comes after the U.S. Court of Appeals for the District of Columbia rejected the Board's 2019 ruling (see prior alert on *Bexar*), which concluded that a property owner can prohibit employees unless (i) those employees work both regularly and exclusively on the property and (ii) the property owner does not have one or more reasonable non-trespassory alternative means to communicate their message.

These decisions cap off a busy week for the Board and come on the heels of other impactful Board decisions that reintroduced "micro-units" for collective bargaining and expanded potential remedies for unfair labor practices to permit recovery of consequential damages (see our prior week's alert here). Employer conduct that violates the Board's principles in *Sunbelt Rentals* and *Bexar* may give rise to unfair labor practice charges whose penalties may become far steeper following the Board's recent ruling in *Thryv* to permit consequential damages. Accordingly, employers should be diligent in ensuring that their practices do not risk running afoul of the National Labor Relations Act, and should stay abreast of impactful decisions in what continues to be a busy term for the NLRB.

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