CLIENT ALERTS & INSIGHTS

NLRB Gives Employers Two Big Gifts This December

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Just before the holiday season, the National Labor Relations Board ("NLRB" or "Board") provided employers with two big wins. First, on December 13, 2019, the NLRB announced its long awaited final rule to relax the Obama-era quickie or ambush election rule. The second finally resolved the ongoing McDonald's joint employer dispute by directing an Administrative Law Judge to approve a settlement of the dispute.

Quickie Election

Since even before it took effect in April 2015, employers recoiled at the Obama NLRB's accelerated election timeline. Since the election of President Trump, employers have eagerly awaited a revision relaxing the condensed timeline established by the 2015 quickie election rule. Now, employers have finally received that gift.

On December 13, the NLRB issued changes to its representative election procedures in the form of a final rule scaling back the aggressive timeline established by the Obama Board. The intent of these "common sense rule changes" is to ensure "expeditious elections that are fair and efficient," according to Chairman John Ring. Notably, the NLRB did not issue a notice of proposed rulemaking, which would have triggered a comment period, because it deems the regulation to be "procedural" and thus within the Board's authority to change its own representation case procedures.

Highlights of the new rule include:

- Parties will now receive more than 2 weeks' (14 business days') notice prior to the holding of a pre-election hearing to resolve unit and other disputes - up from 8 calendar days - and regional directors have more discretion to postpone hearings.
- Employers must post and distribute the Notice of Election within 5 business days after service of the notice of hearing, rather than the 2 business days currently required
- The non-petitioning party's (generally, employers') statement of position must be filed within 8 business days after service of the notice of hearing - up from 1 day before the hearing, typically 7 calendar days after service - and regional directors will have greater discretion to grant extensions
- The petitioning party's (generally unions') statement of position is due at noon 3 business days before the hearing; current rules do not provide for such pre-hearing statements
- Unit scope and eligibility and supervisor status determinations will be litigated at pre-election hearings and resolved before an election is directed. Currently, such decisions until after an election.

- Post-hearing briefs are permitted for pre- and post-election hearings. Under the current rule, briefs are permitted only upon special permission of the regional director.
- Elections will now be scheduled not less than 20 business days after the ordering of an election. While the new rule does not restore the full 25-day waiting period that preceded the quickie election rule, it does offer some relief. The quickie election rule allowed the election as early as 4 days after the direction of election (and in most instances no more than 21 days after the date of the petition).
- Employers now have 5 business days to furnish voter lists, up from 2 business days.
- Generally, under the new rule, all deadlines are calculated as business days. The current rule was inconsistent.

The new rule greatly enhances an employer's ability to win union representation elections by removing the accelerated deadlines that made it difficult for employers to respond to NLRB pre-election procedural requirements while simultaneously educating its employees about the consequences of voting in a union.

This new rule is scheduled for publication to the public record on December 18, 2019, and will take effect 120 days thereafter.

NLRB Approves McDonald's Settlement, Dealing Blow to Fight for $15 and Joint Employer Arguments

Fresh off a Ninth Circuit ruling in October finding that McDonald's could not be held liable for wage and hour violations allegedly committed by a franchisee in California (see alert here), the NLRB granted McDonald's another joint-employer win on December 12. The NLRB ordered Administrative Law Judge Lauren Esposito to approve a settlement of a series of unfair labor practice charges pending against a number of McDonald's franchises and McDonald's USA, LLC. McDonald's USA had been alleged in the charges to be a joint-employer. ALJ Esposito had previously rejected the settlement in July 2018.

The ongoing litigation (active since December 2014) has played out in conjunction of the NLRB's ongoing evaluation of the Obama-era *Browning-Ferris* joint employer test. The NLRB overruled *Browning Ferris* in December 2017 (alert here), vacated that decision and reinstated *Browning-Ferris* in February 2018 (alert here), and then proposed a new joint-employer rule to reverse *Browning-Ferris* in September 2018 (alert here). The Department of Labor also proposed a joint-employer rule in April 2019 (alert here). These parallel efforts were significant in the NLRB's decision to direct approval of the McDonald's franchisees' settlement.

The McDonald's NLRB litigation was predicated on the employees' theory that McDonald's USA, as a franchisor, was liable as a joint-employer of its franchisees' employees for purposes of alleged unfair labor practices under the National Labor Relations Act. ALJ Esposito rejected the settlement in July 2018 in part because McDonald's USA's minimal role did "not begin to approximate" the effect of a ruling that the company is a joint employer.

In rejecting ALJ Esposito's position and directing her to accept the settlement, the NLRB found that any ruling on the joint-employer issue in this case would "have limited precedential value" given its recent rulemaking on that issue that would reinstitute the pre-*Browning-Ferris* test that limits finding joint-employer status to situations where the employer has "direct and immediate control" over another entity's workers.

The decision to approve the settlement continues to show the NLRB's focus on reversing *Browning-Ferris* and restoring a more reasonable and practical definition of joint-employer, narrowly limited to an entity that exerts direct and day-to-day control over another entity's employees. Similar to the revisions to the quickie election rule, employers have been hoping for this reversal since the election of Trump.

Interestingly, there had been speculation as to whether NLRB Chairman Ring and Board Member William Emanuel would be recused based on pre-NLRB work with management side law firms. Ultimately, Chairman Ring was not assigned to the case and Member Emanuel, after consulting with an agency ethics officer, determined that recusal was not required. Notably, the decision to overturn *Browning-Ferris* was vacated after it was determined that Member Emanuel should have been recused from that decision (alert here).

For more information on this topic, contact a member of the firm's Labor & Employment Practice Group.

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