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SPECIAL TRIPLE UPDATE

PUBLIC AND PRIVATE EMPLOYERS
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UNIONS MAY SUFFER A TEMPORARY SETBACK, BUT EMPLOYERS BEWARE, THE PRO-UNION MAJORITY OF THE NLRB IS WORKING QUICKLY TO MAKE ORGANIZING EFFORTS THAT MUCH EASIER FOR UNIONS

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Supreme Court Case May Invalidate Hundreds of Union-Friendly NLRB Decisions

The United States Supreme Court recently heard oral arguments for *NLRB v. Noel Canning*, a case that could invalidate hundreds of union-friendly rulings made by the National Labor Relations Board in 2012.

Case Summary:

After the DC Circuit Court of Appeals' January 2013 holding that President Obama did not have the authority to appoint new members to the National Labor Relations Board ("NLRB" or "the Board") during the January 2012 Senate recess, the Department of Justice appealed to the Supreme Court. President Obama had appointed three members to the NLRB during the 2012 recess in order to establish a quorum, which the Board must have by law in order to issue rulings. This recess-appointed Board served and made many labor-friendly decisions until a new Board was confirmed by the Senate in July 2013.

If the Supreme Court upholds the DC Circuit's ruling, it means that President Obama's recess appointees were unconstitutional and the NLRB lacked a quorum while they sat on the Board, rendering the hundreds of rulings made by this

recess-appointed Board invalid. As a result, all the cases decided by the old Board would have to be retried by the current, properly-selected Board. These rulings included: (1) increased protection for employees who complained about work on social media; (2) mandates that employers continue collecting union dues after a contract expires during labor negotiations; (3) that employers provide witness statements collected in an internal employee investigation to the union; (4) that off-duty employees have increased access to an employer's property; and (5) that employer policies against employee gossip were overbroad.

Observers note that although both the current Board and the recess-appointed Board have a majority of pro-labor members, there is no guarantee that the current Board will make identical decisions. Therefore, any of the hundreds of holdings and precedents may change upon further review. Obviously, the rehearing of hundreds of cases will create a significant backlog for the NLRB.

Supreme Court Hears Noel Canning Case in Test of President's Recess Appointments, Bloomberg BNA (January 14, 2014), Lawrence E. Dube. http://www.bna.com/supreme-court-hears-n17179881342/.

Noel Canning v. NLRB: The Decision, Its Potential Impact, and the Future of the National Labor Relations Board, JDSupra (February 4, 2013), Jeremiah Hart. http://www.jdsupra.com/legalnews/noel-canning-v-nlrb-the-decision-its-81089/.

Recent Federal Court Rulings Hold that Private Employers Are Not Required to Display Posters Reminding Employees of Their Right to Unionize

Private employers secured a victory when two federal courts overturned a decision of the National Labor Relations Board ("NLRB") and held that private employers are not required to display posters reminding employees of their rights under the National Labor Relations Act, particularly the right to unionize. The NLRB had previously held that employers were required to display the posters in prominent locations in the workplace or face an unfair labor practice charge.

NLRB Won't Pursue Notice-Posting Requirement for Most Private Sector Employers, Bloomberg BNA (January 13, 2014), Lawrence E. Dube.

http://www.bna.com/nlrb-wont-pursue-n17179881318/.

Pro Labor Changes Anticipated Now That The NLRB Has

The Necessary Quorum To Engage In Rule Making Again: Resistance to Union Organization Will Become More Difficult For All Employers

In April of 2012, the NLRB published a number of rules changes to speed up the time to effect a union election and to restrict an employer's ability to object to the appropriateness of a unit. The NLRB withdrew these changes when a court found the NLRB lacked the necessary quorum to make new rules. Now that the NLRB has a quorum again, the pro-union majority will most certainly republish its new election rules, which will effectively erase the ability of employers to respond effectively to union organizing once a petition for recognition has been filed.

One combination of rules changes will shorten the time between the filing of a petition and an election. Under some circumstances, the NLRB may permit an election to be conducted as short as 14 days after a petition is filed.

Another combination of rules changes may nearly eliminate the ability of an employer to litigate the appropriateness of a bargaining unit requested by the union and/or litigate voter eligibility in the hearing on the union's petition. The consequence here may be that an employer may be unable to stop an election in a unit that is as small as a single classification, even where it makes no operational sense to create the new unit.

Three decisions make resistance to union organizing especially difficult:

Specialty Healthcare

In *Specialty Healthcare* (357 NLRB No. 83 (2011)) the NLRB held that a unit of certified nurse assistants ("CNAs") in a nursing home constituted an appropriate unit for an election and bargaining. The employer had argued that a unit limited to CNAs was inappropriate and should include all nonprofessional employees, a common unit in nursing homes. In making its decision, the NLRB rejected its long-standing presumption in favor of large units, and suggested that units perhaps even as small as a single job classification, would be found appropriate.

Further, the NLRB declared that the burden of proof necessary for an employer to prove that the unit requested by the union was inappropriate, will not just be "persuasion," but the employer will be required to establish by "overwhelming evidence" that the requested unit would be inappropriate unless it included - or excluded - certain other employees. The result is that the appropriate unit for the election will almost always be the unit desired by the union and the issue of appropriateness of the unit is effectively off the table prior to the

Oakwood Healthcare and Croft Metals

These two cases (*Oakwood Healthcare*, 348 NLRB No. 37 (2006); *Croft Metals, Inc.* 348 NLRB No. 38 (2006)) are now being applied and reinterpreted to the

benefit of the union. In these two cases the NLRB narrowed the definition of "supervisor" significantly. Supervisors are not "employees" under the National Labor Relations Act ("NLRA") and, therefore, are not entitled to its protections. That means, supervisors have no protected right to engage in or to support a union and employers may count on supervisors to resist union organizing and can interrogate them with regard to what they know about such activity in the workplace. If the supervisors do not cooperate, they can be discharged from their employment without violating the NLRA. By narrowing the definition of a supervisor, employers are limited in who they can rely on during the course of a campaign.

One consequence of the narrowing of the definition of supervisor is that employers are left uncertain as to whether a particular individual is a supervisor until after the election. The alternative of including them as employer representatives during a campaign because the employer, in good faith, believes they are supervisors, therefore, places the employer at risk of having the election results overturned by the NLRB. Further, an employer who fears that an employee may be improperly classified as a supervisor may push that employer to reduce the number of individuals it may use as advocates against unionization and as sources of information, only to find that the votes of those whom the employer was conceding to be employees are challenged by the union on the basis that they are, in fact, "supervisors."

These new rules changes combined with the NLRB decisions referenced above will undoubtedly make organizing efforts much easier for unions.

As always, don't hesitate to contact any of our attorneys if you have any questions or comments.

Sincerely,

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