Podcast Transcript

NLRB Decisions on the Chopping Block: Expected Changes from the Board that May Affect Employers

Date: March 15, 2021

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Run Time: 23:55

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Kattman: Over the past several years we have seen the NLRB undertake a stunning reversal of many of the expansive decisions of the previous board. Now with a new administration, we can expect to see further efforts to make the National Labor Relations Act more reactive to the political winds, setting policy through its decisions and rule making authority. Employers can expect further shifts in the law. I'm Amy Kattman and you're listening to BakerHosts.

On today's episode, Jeremy Hart, an attorney in BakerHostetler's Labor and Employment group, discusses NLRB decisions on the chopping block and the potential consequences of the National Labor Relation Board's change in direction. He will break down what this all may lead to for employers. Welcome to the show, Jeremy.

Hart: Hi Amy. It's great to be with you today.

Kattman: To begin, let's talk about how do you expect the landscape of labor law and policy to change under President Biden's administration?

Hart: Well Amy, first, President Biden's administration is going to be far more friendly to organized labor than President Trump's was. There is just no question about that and now as you might know, President Biden made some comments during his campaign that he was going to be the strongest labor president ever, and whether he lives up to that remains to be seen. But early indications are that

strong support for labor is really a plank in the president's platform and not just an empty campaign promise.

We've seen some swift movement on the labor front in the early stages of this administration. For example, on his very first day in office he took the unprecedented step of firing the then current NLRB general counsel who had been appointed by President Trump. His name was Peter Robb, and he fired him before the end of his term. That had never been done before in the history of the National Labor Relations Board. On the same day he also switched up the leadership of the board itself, naming Lauren McFerran the lone democrat member of the NLRB as the new board chair in place of then current Chairman John Ring.

It doesn't stop there Amy. Shortly after, the president named former Region 13 Regional Director Peter Orr as the board's acting general counsel and has since nominated a union lawyer from the Commercial Communication Workers Union, Jennifer Abruzzo, as the new GC. She's currently awaiting Senate confirmation and we expect that is going to be forthcoming. But in the meantime the acting GC Peter Orr, he's been acting. He has withdrawn a number of guidance memoranda issued by former GC Robb and he has actually reversed the board's position in a number of pending cases, withdrawing the boards position in motions including a case involving the legality of unions' use of an inflatable rat named Scabby.

Kattman: There certainly has been a lot of action.

Hart: Absolutely.

Kattman: Are there specific NLRB precedents you expect to be overturned by President Biden's National Labor Relations Board?

Hart: Absolutely Amy. Now it's important to recognize a couple of things though. First, NLRB cases won't start to be overturned until the board majority flips. So currently there are three republican appointees and one democrat and that is Chairwoman McFerran and one empty seat on the five seat board. A member Emmanuel's term ends in August of this year. So, at that time the president will have an opportunity to put two pro-labor members on the board and create a pro-labor majority. Now whether he will be able to achieve that given the current situation in the Senate, we'll have to see.

But August is the earliest that we are going to see a change in the board majority, and we will see President Biden's NLRB make changes in case law. This happens every time the board majority swings from pro-labor to pro-employer and back, and really it is one of the big criticisms of the board and it prevents stability in national labor policy. And this time I would expect the board to be particularly aggressive in making changes in the law, as there is a perception that the Trump board aggressively attacked workers rights. So, I would expect some fireworks from the board starting later this year.

Kattman: So which NLRB precedents should employers expect to fall if addressed by a reconstituted NLRB?

Hart: Oh wow, Amy we could be here for quite a long time talking about all the issues that the board is likely to reverse its position on in the next few years. I think there will be many, but I'll highlight just a few for you that I think will be most significant for employers to be aware of. So first, I think we are going to see changes in the organizing context with regard to what constitutes an appropriate unit for bargaining under the NLRA. So in 2011 just for some context, the board issued a decision called *Specialty Healthcare*, and in that decision it said that the bargaining unit requested by a union and a representation petition filed with the board was appropriate under the act so long as that group of employees that the union wanted to represent was readily identifiable. That is, they shared common job titles, functions, skills, departments, work locations, and they shared a community of interest.

That is they are subject to common supervision they are functionally integrated, had some common skills and training, there is job overlap. The board said that as long as the sought after group satisfied those factors it was good to go under the act, even if there were other additional employees in the workplace who could have been added to that group. Because maybe for example, they also had a lot in common with the petition for group. But unless those additional employees were so similar that there was no legitimate basis for keeping them out of the bargaining unit, they weren't allowed in.

So that standard allowed unions to organize micro-bargaining units made up of employees, lets say like in one job classification or one small department, even those small micro units don't make much sense from a collective bargaining perspective. In *PCC Structurals* which was later clarified by the *Boeing* case, the board overruled specialty healthcare and consistent with Section 9 of the act, return to a much more comprehensive assessment of bargaining units requested by unions in our case petitions.

So, under *PCC* and *Boeing*, to determine whether a requested bargaining unit's appropriate, the board, well the regional director actually will examine really three things, whether a petition for a unit itself shares a community of interest. So are the people that the union wants to represent, are they similar and do they share enough in common to collectively bargain. Second, whether the employees excluded from that sought after union but who for example the employer thinks should be included, are meaningfully different from the included employees from ways that outweigh their similarities.

And third, whether there any special considerations that should be taken into account given the industry involved. This standard, which considers the interest of all of the employees in the workplace, removes the controlling weight the *Specialty Healthcare* gave to petition for units. Unfortunately, it is likely to go away. Chairwoman McFerran strongly dissented in both *PCC* and *Boeing* and has made clear that she believes the standards in those cases are illegitimate and inconsistent with the act.

So, I expect as soon as the board with a majority of pro-labor appointees has an opportunity we're going to return to a *Specialty Healthcare* or something like it where the union seeking to represent employees will get to carve out the bargaining units that they want. Now taking a step back from the representation context to the more fundamental question of who is actually protected by the NLRA, the next issue that I'm looking for the reconstituted board to address pretty quickly is independent contractors.

This as you know has been a, it's a hot issue. In many areas of labor and employment law it's a big issue for many employers including all of those in the gig economy and it's a big issue for the board. The NLRA explicitly says that it only applies to employees and not to independent contractors. For 50 years the board distinguished between employees who are protected and contractors who are not by applying a non-exhaustive list of common law factors that was designed to reveal whether an individual is really an employee or a contractor. So those factors, they look at the extent of control exercised over the individual, over the details of the work, the skill required by the occupation, who supplies the tools used to perform the job, the length of time the person is working, whether you're paid by the hour or the job, and other factors.

But one of the hallmarks of the independent contractor test was whether the individual possessed what they call significant entrepreneurial opportunity for gain or loss. So the question is really looking through this lens of did the individual have the opportunity by hard work, dedication, effort, to go out and make more or if they chose less money or was that person constrained by their potential employer? In its 2014 *FedEx* case the board rejected the entrepreneurial opportunity consideration as a significant factor in the independent contractor analysis and as a result really narrowed the scope of the independent contractor status under the NLRA, which means more individuals were employees, more individuals had Section 7 rights to engage in protected concerted activity and more individuals could be represented by unions.

In 2019 in a case called *SuperShuttle* the board scrapped *FedEx* and returned to the classic test for independent contractors under the act. Again, looking to entrepreneurial opportunity as a big factor in determining in which side of the contractor-employee line an individual falls. So I expect President Bidens board to quickly move away from *SuperShuttle*. Then member McFerran, now Chairwoman McFerran wrote a very lengthy and passionate dissent in *SuperShuttle* which was as long or longer than the majority decision, setting out all of the reasons that she thought *FedEx* was the correct standard.

She has since come out and publicly indicated her distaste for *SuperShuttle*, so I just don't expect it to live long. Employers should expect the board to once again narrow its view concerning the individuals who are covered by the act, and as a result you can engage in protected concerted activity including forming and joining a union for the purposes of bargaining with the employer over their terms and conditions of their employment, which an independent contractor model can really be problematic from a business perspective.

Kattman: Certainly. Jeremy, are there any cases employers who already have union represented work forces should be watching with this new board?

Hart: Absolutely, Amy, there are. So if we move from independent contractors to the world of bargaining obligations, we think that an employer whose employees are represented by a union, they have an obligation to bargain in good faith with that union over wages and hours and terms and conditions of those represented employees. This required bargaining process then leads to collective bargaining agreements. Now, when administering a collective bargaining agreement, it's not uncommon for situations to pop up that just aren't squarely addressed by the CBA, and the question becomes, hey, do I have to bargain with the union over what I want to do as an employer, or does a term in my bargaining agreement, maybe in a management rights clause, maybe elsewhere, satisfy my bargaining obligation?

So, in other words, can I do what I want to do under the CBA without bargaining with the union about it? So to answer this question, the board has long applied the clear and unmistakable waiver rule. And under that rule, a term in the CBA satisfied the employer's bargaining obligation over a disputed issue if the language evidenced that the union clearly and unmistakably waived the right to bargain over the issue. That is an incredibly exacting standard and one that's frankly unworkable and out of touch with the realities of collective bargaining. So the D.C. Circuit recognized this and for over 25 years refused to uphold board decisions based on the clear and unmistakable waiver rule. The D.C. Circuit said that a term in its CBA satisfied the employer's bargaining obligation and allowed unilateral action so long as the challenge conduct was covered by the contract. In 2019 the board finally aligned itself with the D.C. Circuit, and in a case called *MV Transportation* adopted the contract coverage rule.

So under the contract coverage rule, the board just simply looks to the plain meaning of the relevant CBA language and will find that it covers unilateral action if the action falls within the scope of that language understanding the realities of collective bargaining. And that often broad language is negotiated by the parties to cover a myriad of situations they can't anticipate when they're actually at the table bargaining. So while this is a far more workable and realistic standard and an approach to this difficult issue, the contract coverage standard is likely to have a short life. Chairwoman McFerrin again strongly dissented in *MV Transportation* and again has since publicly expressed her distaste for that decision, and as a result, employers with CBAs really should expect the reconstituted board to swing back to the clear and unmistakable waiver rule, which is going to require more precise language in bargaining to the extent that it's achievable in more mid-contact bargaining with unions when an employer's desired course of action isn't expressly addressed by their CBA.

Kattman: So Jeremy, let's switch gears a little bit. What about employers that don't have unions? Should they be watching any particular cases?

Hart: Oh, absolutely Amy. So I mean, employers who don't have unions nevertheless have employee handbooks and policies.

Kattman: Mm-hmm.

Hart: And for 13 years the board looked at those policies and handbooks and evaluated whether the maintenance of a neutral rule or handbook provision unlawfully interfered with an employee's exercise of Section 7 rights to engage in protected concerted activity under the Act by asking whether that rule would be reasonably construed by an employee to prohibit their exercise of protected rights. So basically they said, hey, what would a reasonable employee in my organization, or in this organization, understand this rule to prohibit? As you can imagine, this standard led to just a mess, and employers were unable to predict with any certainty whether their rules and handbooks and policies were lawful. In 2017 though, the board in another case that involved our airplane-making friends at Boeing, abandoned the reasonably construed standard, and they held that when evaluating facially neutral workplace rules and policies and handbooks, if those would violate the NLRA, that it would evaluate two factors.

First, the nature and extent of the potential impact of NLRA rights, so does this rule infringe on protected rights? How, how much? And second, what are the legitimate business justifications for this rule? And this was really important because it was the first time that the board really gave consideration to the employer's purpose for the rule, recognizing that all places of employment are different, they have different needs that they need to address through their policies and rules, and instead of allowing the legality of a rule to turn on what a reasonable employee, whatever that is, might understand to mean, they really took into consideration the full picture of the justifications for the rule.

So the *Boeing* case also established three categories of rules into which the board is going to kind of place rules as they were adjudicated into these categories so that employers would have some predictability about their rules. So category 1 are rules that are clearly lawful. Category 2 are those that are in a gray area, they require individual scrutiny. Category 3 were those rules that were clearly unlawful. And again, this is really just to provide some predictability in a very unpredictable area of law. However, again member McFerrin dissented in the *Boeing* case, calling the board's new standard worse, not better, than the old standard and she said that the ruling would damage the board's credibility and the rights of American workers. So I fear that *Boeing* is not long for this world once the board is reconstituted with President Biden's appointees. I think all employers, whether unionized or not, should expect the board to return to the reasonable employee standard and prepare for the associated uncertainty.

And Amy, finally in this same vein, we get to everyone's favorite subject. I actually mentioned it previously and that's protected concerted activity. So Section 7 of the NLRA gives employees the right to engage in protected concerted activities for mutual aid and protection. This right applies to all employees under that, not just those represented by unions. And historically, to engage in protected concerted activity an employee had to act in a concerted way. That's in a group of more than one or on the authorization of others, for the purposes of mutual aid and protection. And that is the purpose of the action, of the employee's action, had to be an effort to achieve better wages, hours or

terms and conditions of employment or really to address some aspect of their employment. In 2011 the Board, however, held that an individual's complaint to management in a group setting, just a complaint with other people around, was per se protected by the Act.

That was a drastic expansion of protected concerted activity under the Act. In *Allstate Maintenance* the board abandoned that position and held that individual complaints, even if made in a group setting are not per se protected. To be protected, the actions must be truly concerted in the sense that they were made with or on the authority or in an effort to initiate or induce or prepare for group action, and it also must be for the purposes of influencing the terms and conditions of employment. Without those characteristics, employee action is not protected by the act. So though this reading is consistent with Section 7, it's likely to be overruled. So the Biden board is likely going to seek to expansively interpret Section 7 of the act again, and the instances in which protected concerted activity exists will greatly expand. And employers should keep a close eye on the board's action in this area, so as not to unknowingly discipline employees for conduct that's protected under the act.

Now, Amy we've talked about four or five cases specifically. There are many others that I would keep an eye on. For example, *General Motors*, which concerns outbursts in the workplace are protected, *Apogee Retail*, which concerns an employer's ability to require confidentiality in investigations, *Caesar's Entertainment*, which concerns employees' right to use their employer's email systems for Section 7 activity, and really a trilogy of property access cases that talk about when a union can come on to an employer's property, or rather when an employer can keep a union off of its property. I would expect all of those cases to be addressed by the board in short order. So I'd keep an eye on those as well.

Kattman: As a final question Jeremy, how can employers proactively prepare for the changes in labor law that are likely to come from the Biden board?

Hart: Yeah, employers should start now, even though these changes aren't likely to come down until later in 2021, and then on into the Biden board's tenure. Employers should start now by looking at their workforce for organizing risk. Are there parts of their workforce that a union could easily carve off into a microunit if the board returns to a specialty healthcare type standard, for example? That's one thing an employer could do right now. Second, employers can assess their independent contractor relationships, making sure that they are clearly contractor relationships, not employee relationships so that that large segments of their workforce don't inadvertently fall into the definition of employee under the act and then give them those attendant rights and abilities to organize.

And finally, employers should really assess work rules in employee handbooks. Ask how would a reasonable employee in my organization understand this rule? Would they believe that it prevents them from engaging in activity that's protected by the NLRA? Because that it where we're going, and those are three simple

things, Amy, that employers could be doing right now in anticipation of some of these moves we expect the board to make.

Kattman: Jeremy, thank you for this very informative discussion.

Hart: Oh, it was my pleasure Amy. Thanks for having me.

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