NLRB 2020 Predictor: Its Good to be an Employer

PUBLISHED ON
January 27, 2020

As not just a new year but a new decade begins, we know from the closing days of 2019 that the National Labor Relations Board is rolling back pro-employee/union rulings issued during the Obama era, and will likely continue to do so. Not only does the labor law landscape look remarkably different today than it did at the end of the Obama-era administration, so do many other federal agencies and policies.

Throughout 2019, the NLRB reversed many previous administrations' decisions on labor-management relations and labor-law compliance. Current NLRB rule changes favor the interests of employers. These developments include election procedures, workplace rules, employer's email and computer usage, independent contractor standards, policies requiring employee confidentiality in workplace investigations, joint employer changes and more.

What can we expect in 2020? The same thing, but more of it.

Joint employer

The U.S. Department of Labor finalized its "joint employer" rule under the Fair Labor Standards Act, replacing the Obama-era joint employer guidance rescinded by the Trump administration in mid-2017 with clarification and examples. The DOL rules involve a four-part balancing test to determine whether multiple companies are joint employers, evaluating whether the potential joint employer hires or fires the employee, supervises and controls the employee's work schedule or conditions of employment, determines the employee's rate and method of payment and maintains the employee's employment records.

Employers also need to watch for changes to the joint employer standard under the NLRB. The board has been working on its review of the standard for more than a year, considering the almost 29,000 comments received in response to its Notice of Proposed Rulemaking. Pursuant to the board's notice, joint employer liability would be limited only to situations where the employer possesses - and actually exercises - "substantial direct and immediate control" over the employees' essential terms and conditions of employment in a manner that is not "limited and routine."

Not to be outdone, the Equal Employment Opportunity Commission also plans to clarify its interpretation of when an entity is a covered joint employer under the federal equal employment opportunity laws. The agency aims to issue its own Notice of Proposed Rulemaking, characterizing its rule as a "proposed amendment" to laws such as Title VII, the Americans with Disabilities Act and the Age Discrimination in Employment Act sometime soon with a likely 60-day comment period.

Handbooks

In the early 2010s, the NLRB started issuing restrictive decisions regarding workplace social media policies,

and unions successfully challenged social media policies as part of organizing efforts. The affected or proactive employers watered down their policies. However, the Donald Trump-appointed board's employer-friendly decisions in recent years, providing flexibility in many important areas, signals a return to normalcy by eliminating the presumption that all policies unlawfully restrict Section 7 rights and facially neutral rules are now more likely to be read as permissible direction to employees. This means employers should be carefully considering rules and policies in employer handbooks and making changes.

In another example, a December 2019 board decision ruled that employees do not have a statutory right under the National Labor Relations Act (NLRA) to use their employer's email system or other information technology resources for NLRA Section 7 purposes, such as union organizing. That overruled its controversial 2014 decision in *Purple Communications*. Employers who changed their computer policies because of previous decisions should immediately review those computer policies and once again prohibit employees from using the company's computer systems for nonbusiness purposes.

Other notable changes to handbooks may include adding or updating polices on medical and/recreational marijuana.

Confidentiality

In prior board decisions, employers had to demonstrate a specific need for confidentiality regarding a particular workplace investigation, such as witnesses that need protection, evidence in danger of destruction, testimony in danger of fabrication or a need to prevent a cover-up. However, in a decision at the end of December, the board restored the default of maintaining confidentiality to the extent possible and emphasized importance of confidentiality to both employers and employees during ongoing investigation.

Quickie Election Rules

The previous pro-union NLRB changed rules to reduce companies' opportunity to respond to union organizing efforts, created a new "Position Statement" requirement for employers, allowed more employees to vote under challenge and reduced time from petition to election from 38 to 23 days. The new rules, handed down by a pro-employer NLRB in 2019, take effect April 16 and still require the position statement. However, the new rule gives employers more time to prepare and requires the union to respond with their own. The new election rule also returns election hearing scheduling to the pre-2014 timeline - at least 20 days after election direction. It also gives employers more time to prepare for pre-election hearings, and restores flexibility with calling witnesses and preparing post-hearing briefs.

If you have any questions on the recent direction of the NLRB's rulings and how this could affect your business, please contact me or anyone in the Barley Snyder Employment Practice Group.