Keep Calm and Be Cautiously Optimistic – Recent NLRB Developments

Labor & Employment Law Update

By Beverly Alfon on September 25, 2018

The National Labor Relations Board (NLRB) is taking more steps towards positive, significant change for private-sector employers:

Joint Employer Standard

CURRENT LAW: The Board may find that two or more entities are "joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015). The primary inquiry is whether the purported joint-employer possesses the actual *or potential* authority to exercise control over the primary employer's employees.

DEVELOPMENT: On September 14, the Board issued a proposed rule that would consider an employer a "joint employer" of another employer's employees "only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision and direction." However, the purported joint employer "must possess and actually exercise substantial direct and immediate control over the employees' essential terms of employment in a manner that is not limited and routine." It reflects the current Board majority's initial view, and is subject to potential revision in response to public comments. Public comments are due by November 13, 2018.

Construction Industry Collective Bargaining Agreements – Section 9(a)

Most collective bargaining relationships between employers and unions are governed by Section 9(a) of the National Labor Relations Act, which requires a union to have the support of a majority of employees in the bargaining unit. In the construction industry, however, these relationships are presumed to be governed by Section 8(f) of the Act, which allows an employer to enter a collective bargaining agreement with the union without an election or other proof of majority support. Key distinction: An 8(f) relationship can be unilaterally terminated upon expiration of the agreement, but a 9(a) agreement obligates the employer to engage in good faith negotiations with the union for a successor contract.

Current law*:* A union can convert an 8(f) relationship to a 9(a) relationship based on contract language alone. *Staunton Fuel & Material*, 335 NLRB 717 (2001). Typical language in a one-page memorandum of agreement states that the union requested and was granted recognition as the majority or 9(a) representative of the bargaining unit, based on the union having shown, or having offered to show, evidence of its majority support – regardless of whether the union actually presented or offered to present such proof of majority.

DEVELOPMENT*:* On September 11, the Board invited the public to file briefs regarding whether or not it should revisit this standard. Construction industry employers should be pushing hard for this reevaluation. Briefs from interested parties must be submitted on or before October 26, 2018.

Employee Use of Company Email for Union Organizing

Current law: Employees may use company computer systems for the purpose of union organizing. *Purple Communications, Inc.*, 361 NLRB 1050 (2014). This applies to both union and non-union employers.

DEVELOPMENT: Last month, the Board invited briefs on whether they should uphold, modify or overrule *Purple Communications.* The public comment period has been extended to October 5, 2018. On September 14, the NLRB General Counsel filed an amicus brief in a pending case and took the position that employers should be allowed to restrict non-work use of its email systems in a non-discriminatory manner, as it does with other company-owned resources.

Be cautiously optimistic, but remain cognizant of the current law. Stay tuned.