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Management's Inside Guide to Labor Management Relations Law

NLRB Implements Changes to Case Processing – Announces Early Retirement and Voluntary Separation Programs for Professional Staff

By Steven M. Swirsky on August 14, 2018

POSTED IN NLRB DEVELOPMENTS, PRACTICES AND PROCEDURES

Since earlier this year, **reports have circulated that National Labor Relations Board ("NLRB" or "Board") General Counsel Peter Robb planned to introduce changes** in its case handling processes and organizational structure that would move certain authority away from the Regional Directors and transfer substantive decision making authority to Washington. While the General Counsel denied the specifics, he acknowledged that as the

Board was faced with a reduced case load and budgetary pressures, some changes would be necessary and appropriate. It now appears safe to say that change is indeed coming to the NLRB and that more is likely.

Changes to NLRB Case Processing – Part 1

On July 30, 2018, the Division of Operations-Management in the General Counsel's Office issued **Memorandum ICG 018-06**, addressed to the agency's Regional Directors, Officers-In-Charge and Resident Officers, entitled Changes to Case Processing Part 1, outlining a series of steps intended to "streamline" certain aspects of the processing of representation petitions and the investigation and determination of unfair labor practice charges.

As the memo points out

> Please note that this is not intended to be a final report with respect to the initial memo. Rather it focuses on a limited number of the 59 items, with the expectation that some of the other items in the **January 29 memo** will be addressed in one or more memos soon to follow.

The changes announced in the memo were effective immediately and fall in four main areas.

Representation Case Decision Making

While the number of representation cases in which hearings take place to resolve issues such as which employees share a community of interest, whether employees are supervisors and/or managers thus should or should not be included in a bargaining unit, and therefore eligible to vote in a representation election continues to be limited, the memorandum adopts changes in how decisions are written in those cases, with the goal of making the process "more efficient," and addressing what the memorandum refers to as "wide disparities" in the length of time that passes between the close of a hearing and the issuance of a Decision and Direction of Election or a Decision dismissing a petition without ordering an election.

A new centralized approach will be followed in the drafting of post representation case hearing decisions, with the task delegated to regional and district teams. The new system provides for the designation of a limited number of attorneys and/or field examiners in each

of four Districts who will be assigned to serve as the primary decision writers in each District for an initial term of one year, working under a manager of decision writing in that District.

The Memorandum notes that not all representation case decision writing will necessarily be assigned to the new teams, and that "Regions may decide to keep particular matters in-house." No guidance is offered as to when and in what circumstances Regions may keep matters in-house.

Streamlining Advice Branch Submissions

The Memorandum also adopts a new and streamlined process for submission of cases to the Division of Advice in Washington for guidance. As noted on the **Board's website**,

> The Division of Advice provides guidance to the Agency's Regional Offices regarding difficult and novel issues arising in the processing of unfair labor practice charges, and coordinates the initiation and litigation of injunction proceedings in federal court under Section 10(j) and (l) of the National Labor Relations Act.

The Memorandum points out that "Delays in processing cases submitted to Advice has been a cause of criticism" both within the NLRB and outside the agency. Often, until now, when a Region and/or the General Counsel's Office in Washington have determined that an issue or matter warranted review and consideration by Advice, the Region would have to prepare and send to Washington a detailed legal and factual memorandum, preparation of which could be time consuming.

Under the Memorandum, the Regions are encouraged to adhere to following process instead:

- "Regions may submit short form memos to Advice.
- The form of that a short form memo may take will vary depending on the particular matter.
- In some cases, e.g. questions about work rules, the submission may be as simple as an e-mail, as explained in **GC 18-04**, the General Counsel's June 6, 2018 Memorandum "Guidance on Handbook Rules Post-Boeing.

- In other cases, where all the necessary evidence can be found in the FIR (Final Investigative Report) or Agenda Minute, a memo incorporating those document, and emphasizing any factual or legal issues that the Region believes are important.

Streamlining Ethics Issues

The Memorandum describes certain steps that the General Counsel's Office will be taking to make what it refers to as "ethics guidance memos that could be useful in other cases" part of an internal data base organized by subject matter for access by NLRB personnel.

Changes to Post Investigation Decision Making at the Regional Level

Perhaps the most significant change adopted in the Memorandum is the establishment of what it refers to as the delegation of "appropriate case-handling decision-making authority to supervisors" in the Regional Offices, a responsibility that has traditionally been vested almost exclusively with the Board's Regional Directors. According to the Memorandum,

> such decision-making authority may include approving dismissals, withdrawals, or settlements in appropriate situations.

The Memorandum explains that in those cases where the investigator and her or his supervisor "agree on the merit or lack thereof in a case, this is the final decision." The Memorandum suggests that this will allow Regional Directors "to focus on higher priority, more complex case-handling matters." All merit decisions, that is, cases in which there is a decision to issue an unfair labor practice complaint, "should be made by the Regional Director or his/her designee.

While the Memorandum states that "the extent of this delegation will be left to a Director's discretion," it makes clear that Regional Directors will be expected to regularly exercise their discretion to delegate such decision making authority, pointing out that doing so will be considered in the Regional Directors' annual performance appraisals.

Early Retirement Buyout Program

The following week, on August 7, 2018, the Board announced it was creating a **Voluntary Early Retirement Authority ("VERA") program and a Voluntary Separation Incentive Payment ("VSIP") program**. The Board has described these programs as intended to "to

better manage its caseload and workforce needs," address what the Board has described as a "current staffing imbalance by allowing it to "realign Agency staffing with office caseload" and "reallocate its limited resources and to, among other things, provide employees with the tools they need, including training and improvements in technology."

What Comes Next?

The Memorandum makes clear that this is but a first and indeed an interim step as the General Counsel continues to attempt to better utilize the agency's limited resources while fulfilling the agency's responsibilities to the public.

As is explained in footnote 1, the Memorandum "is not intended to be a final report" and that additional memoranda addressing some or all of the ideas identified in the January 29 memo **January 29 memo** are "soon to follow."

This was a featured story on *Employment Law This Week* – **watch it here**.

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Supreme Court Holds Requiring Public Sector Employees to Pay Representation Fees Is Unconstitutional – Violates Government Employees' First Amendment Rights

By Adam C. Abrahms & Steven M. Swirsky on June 28, 2018

POSTED IN COLLECTIVE BARGAINING AGREEMENTS, NON-UNION, PRACTICES AND PROCEDURES, UNION ORGANIZING CAMPAIGNS

In its long awaited decision in ***Mark Janus v. American Federation of State, County and Municipal Employees,*** the United States Supreme Court clearly and unequivocally held that it is a violation of public employees' First Amendment rights to require that they pay an "agency fee" to the union that is their collective bargaining representative, to cover their

"fair share" of their union representative's bargaining and contract enforcement expenses. The *Janus* decision overturns the Court's own 1977 decision in ***Abood v. Detroit Board of Education***, which had found state and local laws requiring public sector employees to pay such fees to be lawful and constitutional. Commentators expect the decision to have **serious economic consequences** for unions in the heavily organized public sector.

While the Court in *Abood* had previously found that such laws requiring employees to pay representation or agency fees if they elected not to become dues paying members were permissible justified and to be upheld on the grounds that (1) they "promoted labor peace" and (2) that the effect of "free riders," that is workers who benefitted from a union's efforts but did not contribute to its efforts on their behalf justified mandating employees contribute, the *Janus* majority rejected both of these legal underpinnings in finding *Abood* had been improperly decided.

In *Janus*, Justice Samuel Alito concluded that the fears of interference with labor peace were unfounded based on the experience since 1977, and in any case, that these concerns, even if supported by evidence, could not satisfy the Court's "exacting scrutiny" test that the majority held should be applied to circumstances such as these, where a state or local government entity sought to compel employees to subsidize the speech of others, *i.e.* their union representative and union member co-workers, who may endorse or support a union's goals and objectives in collective bargaining and in its dealings with the employer. Notably, the analysis made clear that the speech in question was not political speech or campaign activity by unions, but rather speech in connection with positions taken in collective bargaining and labor relations. The Court also found that even if the agency fee statutes were evaluated under the less rigorous "strict scrutiny" test, it would have concluded that they were unconstitutional under that test as well.

What Does Janus Mean for Public Sector Employers and Workers?

At this time there are some 22 states in which agency fees are permitted by state or local law and an additional 28 states where they are not authorized. Under federal sector labor laws, the unions that represent employees of federal agencies and entities are not permitted to require employees to pay agency fees or become union members as a condition of continued employment.

With the *Janus* decision, simply put, provisions in collective bargaining agreements that require public employees to become union members, pay union dues or pay agency or representation fees as a condition of continued employment have been found to be unconstitutional and to impermissibly interfere with public employees' freedoms of speech and assembly.

What is not yet clear is precisely how and when public sector employers and unions will be applying the decision. However, it is likely that as public employees who object to paying representation fees or paying union dues learn of this decision and the fact that they can no longer be compelled to pay agency fees or dues, employees will tell their employers to discontinue withholding fees and dues and paying them over to unions.

What is also already apparent is that there is likely to be resistance. Already, within hours of the release of the Janus decision, **New York's Governor Andrew Cuomo issued his own statement** signaling his views and opposition to the decision. He also announced his intention to issue an executive order shielding the addresses and phone numbers of public employees to make it more difficult for advocates to reach out to state employees and notify them of their options.

What Does Janus Mean for Public Sector Unions?

Simply put, if public employees exercise their right to stop paying agency fees to the unions that represent them, the unions will feel an immediate and substantial hit in their revenue and all that comes with that. The amounts at stake are substantial. According to a **report by the Empire Center for New York State Policy**, approximately 200,000 public workers in New York State alone are presently paying agency fees of more than $110 million dollars annually.

The Court was not unmindful of the financial and other impacts that the decision will have on unions that represent public employees. As Justice Alito wrote

> **We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members. . . "But we must weigh these disadvantages against the considerable windfall that unions have received" until now.**

The impact in other states like California, Illinois (where the plaintiff in Janus is employed) and other states will clearly be substantial.

What Does Janus Mean in the Private Sector?

The Court's decision in Janus is limited in its direct and immediate impact to public sector and does not apply to private sector employees who are covered by collective bargaining agreements containing union security clauses. Those clauses, which are only found in contracts in states that are not right to work states, require employees to become union members or pay agency or representation fees as a condition of continued employments.

That said, it is highly likely that the Janus decision will have spill-over effects in the private sector. **As we reported last year**, unions have a duty to make clear to employees who they represent under contracts containing union security clauses, that employees have rights and are not required to pay the same amount as agency fees as those who are members.

Additionally, the past few years have seen a **resurgence in states passing laws** to become right to work states and outlaw mandatory membership and/or agency fees. It can be anticipated that the Janus decision will likely result in more states and advocacy groups considering such legislation.

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NLRB Proposed Rule Will Redefine Joint-Employer Status – Rule Will Overrule Browning-Ferris and Require "Direct and Immediate Control"

By Steven M. Swirsky & Adam C. Abrahms on September 14, 2018

POSTED IN NLRB DEVELOPMENTS

The National Labor Relations Board has **announced publication** of a proposed rule that will establish a new and far narrower standard for determining whether an employer can be held to be the joint-employer of another employer's employees. The rule described in the Notice of Proposed Rulemaking **published in the Federal Register** on September 14, 2018, will, once effective essentially discard the Board's **test adopted in *Browning-Ferris***

Industries ("Browning-Ferris") during the Obama Administration, which substantially reduced the burden to establish that separate employers were joint-employers and as such could be obligated to bargain together and be responsible for one another's unfair labor practices.

The Proposed New Standard

Under the proposed new rule, the Board will essentially return to the standard that it had followed from 1984 until 2015. **As the Board explained** when it announced the proposed new rule

> Under the proposed rule, an employer may be found to be a joint-employer of another employer's employees only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine. Indirect influence and contractual reservations of authority would no longer be sufficient to establish a joint-employer relationship.

Under ***Browning-Ferris***, the Board held that indirect influence and the ability to influence terms and conditions, regardless of whether exercised, could result in an employer being held to be the joint-employer of a second employer's employees.

As a practical matter, **the new standard should make it much more difficult to establish that a company is a joint-employer of a supplier or other company's employees**. The new standard will mean that a party claiming joint-employer status to exist will need to demonstrate with evidence that the putative joint-employer doesn't just have a theoretical right to influence the other employer's employees' terms and conditions but that it has actually exercised that right in a *substantial, direct and immediate manner*.

This new standard is likely to make it much more difficult for unions to successfully claim that franchisors are joint-employers with their franchisees, and that companies are joint-employers of personnel employed by their contractors and contract suppliers of labor such as leasing and temporary agencies.

The New Standard Marks a Return to that Announced in *Hy-Brand Industrial Contractors, Ltd.*

As readers may recall, in December 2017, in *Hy-Brand Industrial Contractors, Ltd*. ("Hy-Brand"), in a 3-2 decision joined in by the Board Chairman Miscimarra and Members Emanuel and Kaplan, the Board overruled *Browning-Ferris* and adopted a standard that required proof that putative joint employer entities have actually exercised joint control over essential employment terms (rather than merely having "reserved" the right to exercise control), the control must be "direct and immediate" (rather than indirect), and joint-employer status will not result from control that is "limited and routine."

Hy-Brand however, was short-lived. On February 26, 2018, in a unanimous decision by Chairman Marvin Kaplan and Members Mark Pearce and Lauren McFerren, the Board **reversed and vacated *Hy-Brand***, following its finding that a potential conflict-of-interest had tainted the Board's 3-2 vote in *Hy-Brand*.

The standard announced this week however marks an attempt by the Board to breathe life back into *Hy-Brand*.

What Happens Now?

Under the Administrative Procedures Act, the public and interested parties will now have sixty days to **submit comments** "on all aspects of the proposed rules" for the Board's consideration.

Democratic Senators Elizabeth Warren, Kirsten Gillibrand, and Bernard Sanders previously announced in a **May 2018 letter**, when the Board indicated it was looking into rulemaking concerning the test for determining joint-employer, that it was their view that the same conflicts of interest that resulted in the Board's decision to vacate *Hy-Brand* at least raised ethical concerns.

> While there is nothing inherently suspect about an agency proceeding by rulemaking, it is impossible to ignore the timing of this announcement, which comes just a few months after the Board tried and failed to overturn *Browning-Ferris*, and appears designed to evade the ethical constraints that federal law imposes on Members in adjudications. The Board's sudden announcement of rulemaking on the exact same topic suggests that it is driven to obtain the same outcome sought by Member Emanuel's former employer and its clients, which the Board failed to secure by adjudication.

According to Politico, Senator Warren has now renewed her concerns about the proposed rule and the conflict issues that resulted in the Board vacating *Hy-Brand*. "**After getting caught violating ethics rules the first time, Republicans on the Board are now ignoring these rules and barreling towards reaching the same anti-worker outcome another way.**"

Given these considerations, it is quite foreseeable that opponents of the proposed rule may seek to at least delay, if not defeat the proposed rule's taking effect by litigation.
