The NLRB Comes Bearing Gifts for Employees

Posted in Alert on December 20, 2022

What can the National Labor Relations Board (the "Board") give employees who already have a banner jobs market, with record job openings and the largest wage growth in decades? Last week, the Board stuffed stockings with three decisions favoring employees. Employers, however, may feel they have been Scrooged! It is no secret that the Biden administration would like to help unions continue their recent momentum, expanding the types of employers and geographic areas they traditionally have targeted. The cases underscore the need for employers to review their practices so that their employees do not feel they need union representation and to prepare their gameplan in case a union does target them.

The Ghost of Christmas Past: Smaller Bargaining Units

The Board's ruling in *American Steel Construction Inc.* (Amended Board Decision.pdf) is a re-gift from the Obama-era Board's 2011 *Specialty Healthcare* decision, which the Trump-era Board had exchanged with its 2017 ruling in *PCC Structurals*. Each case addresses the test for an appropriate "bargaining unit" when unions file petitions to represent employees.

Under the National Labor Relations Act (the "Act"), a bargaining unit should consist of a clearly identifiable group of employees who share a "community of interest." Employers may challenge the bargaining unit that a union proposes, and the scope of a unit may foretell the election outcome. Imagine, for example, a Democrat trying to win an election limited to Nashville, as opposed to a statewide election in Tennessee. Similarly, a union may feel that it can appeal successfully to a select group of employees but not to an entire facility or even broader workforce. The Trump Board shifted the burden to unions to show that workers in a proposed unit have "sufficiently distinct" interests from those excluded. Now, the Board has returned to the prior test, which requires employers seeking to broaden a bargaining unit to show that excluded workers have an "overwhelming" common interest with included employees.

Another Ghost of Christmas Past: Workers' Access to Property

The Board's decision in *Bexar County Performing Arts Center Foundation* (Board Decision (1).pdf) also returned to a prior standard. The ruling involves Section 7 of the Act, which protects employees engaged in protected concerted activity for mutual aid. Such activity may include union organizing or other activity involving two or more employees asserting a common interest, even in the absence of union representation or a union campaign.

The case involves on the rights of workers to access property their employer does not own. Specifically, unionized San Antonio Symphony performers protested when a Ballet San Antonio performance that used recorded music, rather than live accompaniment. The Performing Arts Center told them, "Get off my lawn," so to speak. In 2019, the Trump-era Board ruled against the workers, finding that they could not picket on property unless they "regularly and exclusively" work on the property and the owner cannot show that the works have a "reasonable nontrespassory" means of protest. The American Federation of Musicians, which represents the performers, won a court appeal, and the case was sent back to the Board. Last week, the Board issued a new decision, returning to the prior *New York New York* standard. Now, the property owner can only exclude the workers if their activities "significantly interfere" with the use of the property, or if the owner has "another legitimate business reason" to remove them. This standard would apply in various scenarios, such as malls or hotels where employees work on property not owned by their employer.

The Ghost of Christmas Future: Expanded Remedies for Employees

The Board in *Thryv Inc.* (Board Decision.pdf) went beyond past precedent in expanding remedies that employees may recover. The Act requires employers to make employees "whole" for the unfair labor practices ("ULPs"). Traditionally, the Board has awarded reinstatement, back pay, and payment of dues and fines. The new ruling, however, opens the door for employees to recover "all direct and foreseeable pecuniary harms," including financial harms that "would not have been incurred but for [employers'] unlawful conduct or were the foreseeable consequence of that conduct." Though the Board declined specifically to define the scope of this new remedy, it listed loss of a home, increased transportation and childcare costs, out-of-pocket medical expenses, credit card debt, and reasonable search-for-work and other interim employment expenses as examples. On the other hand, it affirmed that workers still cannot recover for emotional distress or pain and suffering. As a reminder, both unionized and non-unionized employers can face ULP charges.

Please feel free to contact Brad Harvey, Erin Steelman, or another attorney in our Labor & Employment Practice Group if you have questions about any of these cases or general labor relations and union avoidance practices.