

TRADITIONAL LABOR & IMMIGRATION LAW: THE CONTINUING EFFECTS OF THE TRUMP ADMINISTRATION ON AGENCY ACTIONS

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The National Labor Relations Board

- The Board is (typically) comprised of five members
 - Five-year staggered terms
- On most occasions, decisions are issued by a three-member panel
 - Three members is the minimum number to issue a decision
- Existing precedent can be overruled by three or more members
- Because members are nominated by the President, the Board generally reflects the political leanings of the White House
 - Leads to much more change more quickly than in the judiciary

The Current Board

- The current Board has only four members
 - John R. Ring (Chairman)
 - William J. Emanuel
 - Marvin E. Kaplan
 - Lauren McFerran
- Political composition
 - 3 Republications and 1 Democrat
 - McFerran was nominated by President Obama
 - Ring, Emanuel, and Kaplan were nominated by President Trump

The NLRA and Protected Concerted Activities

- Section 7 of the National Labor Relations Act gives employees—both union and non-union—the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection”
 - Section 8(a)(1) makes it unlawful for an employer to, among other things, “interfere with, restrain, or coerce employees in the exercise” of these rights
- The scope of these protected concerted activities has changed quite a bit over the years and encompasses more than activities related to union organizing

What Is “Concerted Activity”?

- More recently, Section 7 has generated a great deal of attention as it pertains to social media
- Recent decisions related to the scope of “concerted activity” suggest that this definition is contracting, particularly given the current political composition of the Board and the Supreme Court
 - *Alstate Maintenance* (NLRB)
 - An individual complaint, albeit in the presence of other employees, is not concerted activity
 - *Epic Systems Corporation* (Supreme Court)
 - Section 7 does not displace the Federal Arbitration Act

Employee Handbooks: A Brief History

- Handbooks have been in the spotlight in recent years
 - Not necessarily an issue with enforcement of unlawful rules, but rather, simply the maintenance of rules that *might* be construed as having a “chilling effect” on Section 7 activities
- Interpretive turning points
 - 2004: *Lutheran Heritage Village-Livonia*
 - 2017: *The Boeing Company*
 - 2018: General Counsel Memo

2018 General Counsel Memo

- The memo, which was issued by the NLRB’s General Counsel, expanded upon the Board’s decision in *Boeing*
 - Emphasized that *Boeing* not only added a balancing test, but also significantly modified its jurisprudence with respect to the interpretation of handbook rules in light of the NLRA
 - Noted that ambiguities should not always be interpreted against the employer
 - Confirmed, however, that the *Boeing* decision applies to situations involving the *maintenance* of *facially neutral* policies

Category 1: Generally Lawful

- Civility rules
- No-photography/no-recording rules
- Rules against insubordination
- Disruptive behavior rules
- Rules protecting confidential, proprietary, or customer information

Category 1: Generally Lawful (cont.)

- Rules against defamation or misrepresentation
- Rules against the use of employer logos and other intellectual property
- Rule requiring authorization to speak on behalf of the company
- Rules banning disloyalty, nepotism, or self-enrichment

Category 2: Warrants Individualized Scrutiny

- Broad conflict-of-interest or confidentiality rules
- Rules regarding disparagement of the employer (as opposed to employees)
- Rules limiting the use of the employer's name (as opposed to its logo or trademarks)
- Rules restricting communications with the media or third parties generally
- Rules banning off-duty conduct that may harm the employer
- Rules against making false or inaccurate statements

Category 3: Generally Unlawful

- Confidentiality rules regarding wages, benefits, or working conditions
- Rules against joining outside organizations or voting on matters related to the employer

Joint Employer Rule

- Recent history
 - *Browning-Ferris* (NRLB)
 - *Hy-Brand*
 - *Browning-Ferris* (D.C. Circuit)
- In some respects, the D.C. Circuit's decision only prolonged the confusion of the issue of joint employment

Joint Employer Rule: What's Next?

- The NLRB issued a notice of proposed rulemaking on September 14, 2018
 - Under that proposed rule, "an employer may be considered a joint employer of a separate 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"
- The deadline for submitting comments to this proposed rule has been pushed back a number of times, but replies to comments submitted during the initial period were to be made by February 11, 2019

IMMIGRATION UNDER TRUMP ADMINISTRATION

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I-9 Enforcement

- ICE's worksite enforcement will continue to focus on employers
- Increased ICE targeting of larger employers due to discovered compliance failures on a local level
- I-9 inspections to continue in "blasts" in all 50 states
- ICE has issued more than 5,200 I-9 audit notices since January 2018

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Buy American, Hire American

- The stated purpose is to create higher wages and employment rates for U.S. workers, and to protect their economic interests by rigorously enforcing and administering the laws governing entry into the United States of foreign workers.

Buy American, Hire American

- Directed the Secretaries of State, Labor and Homeland Security, as well as the Attorney General, to propose new rules and issue new guidance to protect the interests of U.S. workers in the administration of our immigration system.

Buy American, Hire American

- Proposed elimination of B-1 in Lieu of H-1B/H-3
- Proposed elimination of H-4 work authorization
- Unprecedented level and depth of H-1B and L-1 “RFEs” and denials

Buy American, Hire American

- Crack-down on H-1B workers at third-party locations
- Elimination of deference given to prior approvals
- Proposal to redefine “specialty occupation”
- Proposed H-1B Cap pre-filing registration

Buy American, Hire American

- The U.S. Citizenship and Immigration Services (USCIS) Office of Fraud Detection and National Security (FDNS) occasionally conducts unannounced on-site visits of employers who sponsor foreign workers for nonimmigrant visa statuses, including H-1B, L-1, TN and E-2. FDNS investigators also occasionally phone or email employers who sponsor foreign workers.

Buy American, Hire American

- FDNS Site Visits
 - Immigration regulations specifically provide that while it is adjudicating a petition or application for benefits, USCIS may conduct an on-site inspection, including a tour of the employer's facilities, interviews of the employer's officials, a review of selected organizational records, and an interview or inspection of any other document or person pertinent to the integrity of the petitioning employer.

Buy American, Hire American

- The stated primary objectives of the FDNS site visits are:
 - Verification of the existence of the petitioning employer
 - Verification of the stated employer/employee relationship between the petitioner and beneficiary
 - Verification that the beneficiary is or will be employed in the capacity specified and at the location(s) specified in the application or petition
 - Verification that the beneficiary has the requisite experience and/or qualifications
 - Reconciliation of any perceived discrepancies
 - Verification of the existence or nonexistence of multiple and/or duplicate filings by the same petitioner

Additional Insanity

- Mandatory in-person interviews for all employment-based applicants for permanent resident status
- Massive delays in the adjudication of both immigrant and non-immigrant petitions
- Immediate denials without issuing “Request for Evidence” or “Notice of Intent to Deny” first
- Issuance of “Notices to Appear” upon denial of employment-based benefits request
- Unlawful presence for F-1 students

Questions?



Thank You!

This presentation provides information of a general nature. None of the information contained herein is intended as legal advice or opinion relative to specific matters, facts, situations or issues. Additional facts and information or future developments may affect the subjects addressed in this presentation. You should consult with a lawyer about your particular circumstances before acting on any of this information because it may not be applicable to you or your situation.