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Recent Developments Under the National Labor Relations Act

Rod Tanner
John V. Jansonius

Rod Tanner
Tanner and Associates, PC
Fort Worth, Texas
rtanner@rodtannerlaw.com
817.377.8833

John V. Jansonius
Jackson Walker, L.L.P.
Dallas, Texas
jjansonius@jw.com
214.953.6000

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I. NLRB'S MEMBERS AND GENERAL COUNSEL

A. Current Board Members

The current members of the National Labor Relations Board (NLRB) are Acting Chairman Philip Miscimarra and Members Mark Gaston Pearce and Lauren McFerran. Ms. McFerran is the most recently appointed Board member, as she replaced Nancy Schiffer, whose Board term expired on December 16, 2014.

The Board spent much of 2016 with a four-member complement, until Kent Y. Hirozawa's term expired on August 27, 2016. This leaves one Republican member, Mr. Miscimarra, and two Democratic members on the current Board.

On January 26, 2017, shortly after his inauguration, President Trump appointed then-Member Miscimarra Acting Chairman of the NLRB. The President is expected to nominate individuals to fill the Board's two vacant seats in order to return the Board to a Republican majority. Richard F. Griffin, Jr., who was sworn in as the Board's General Counsel under President Obama on November 4, 2013, will continue in his position until November 2017, at which point President Trump may nominate his successor.

B. U.S. Supreme Court Upholds Partial Invalidation of Lafe Solomon's Tenure as Acting General Counsel

On August 7, 2015, the D.C. Circuit Court found on a petition for review in *Southwest General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), that Lafe Solomon unlawfully served as Acting General Counsel of the NLRB while he was both the acting officer and the permanent General Counsel nominee in violation of the Federal Vacancies Reform Act (*FVRA*), 5 U.S.C. §§ 3345 *et seq.* The court therefore invalidated Solomon's tenure from January 5, 2011 to November 4, 2013,[1] and the Board order in that case was vacated because the complaint issued during Solomon's invalidated tenure.

The appellate court, however, noted that "this case is not Son of *Noel Canning*" and should not "retroactively undermine a host of NLRB decisions." 796 F.3d 83.[2] Indeed, the court held that Solomon's actions during his invalidated tenure as Acting General Counsel are *voidable*, not void, under the FVRA. The court then announced that the decision is to be narrowly applied to only those cases where the parties have raised a timely FVRA objection to complaints issued between January 5, 2011 and November 4, 2013.

[1] The court did not invalidate Solomon's tenure from June 2010 to January 2011, when he was serving as Acting General Counsel but had not yet been nominated for the permanent position of General Counsel.

[2] One year earlier, the U.S. Supreme Court ruled in *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014) that President Obama's January 2012 recess appointments of three Board members were invalid because Congress was not in recess at the time of the appointments. *Id.* at 2578. That decision voided all Board decisions issued between January 2012 and August 2013, including 98 cases pending in federal court. Since that time, the Board has issued decisions in cases remanded back to its docket and simply ratified many of the decisions nullified by *Noel Canning*, including the *Noel Canning* decision itself. It also ratified all administrative, personnel and procurement matters taken by the Board during that period.

On March 21, 2017, the Supreme Court affirmed the D.C. Circuit Court's ruling. *NLRB v. SW General, Inc.,* No. 15-1251, 590 U.S. ___ (Mar. 21, 2017). Writing for the majority, Chief Justice Roberts held that the FVRA's prohibition on an individual performing the duties of the position for which he is nominated while the nomination is pending clearly applies to persons performing those duties in an acting capacity, and it is not limited to first assistants who automatically assumed acting duties. *Id.* (slip op. at 2). The Court rejected the Board's contention that it had operated for many years on the understanding that this FVRA provision applied only to agency first assistants, concluding that "'historical practice' is too grand a title for the Board's evidence" where the FVRA was not enacted until 1998. *Id.* (slip op. at 17).

The question of whether Solomon's actions during his invalidated tenure were voidable rather than void *ab initio* was not raised, so the Supreme Court did not address it. *Id*. (slip op. 7 n.2). Justice Thomas wrote a concurring opinion, and Justice Sotomayor, joined by Justice Ginsburg, wrote a dissenting opinion. The dissent agreed with the Board that Section 3345(b)(1) of the FVRA should not be read broadly and should only be applied to first assistants who assumed their duties automatically. *Id.* (Sotomayor, J., dissenting).

This decision will likely impact how the president fills vacancies at federal agencies moving forward, as any individual already in an acting leadership position will be required to step down in order to be nominated to a permanent position requiring presidential appointment and Senate confirmation.

II. JOINT EMPLOYER STANDARD

The NLRB has long held that legally separate entities are joint employers only when they actually share the ability to control or co-determine essential terms and conditions of employment, as set out in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982), enforcing 259 NLRB 148 (1981). However, since that 1982 decision by the Third Circuit, the Board, without overruling any prior decisions, imposed additional requirements that narrowed the standard for joint employer status. Beginning with *TLI, Inc.*, 271 NLRB 798 (1984) and *Laerco Transportation*, 269 NLRB 324 (1984), the Board limited the application of the joint employer test by discounting a putative employer's reservation of the right to control workers and focusing exclusively on its actual exercise of that control, and by requiring that the exercise be direct, immediate, and not limited and routine.

For several years, General Counsel Griffin urged the Board to adopt a less stringent standard for determining joint employer status. On August 27, 2015, the Board finally revisited its joint employer standard and adopted a more inclusive standard in *Browning-Ferris Indus. of California, Inc.,* 362 NLRB No. 186 (Aug. 27, 2015). That case is currently under judicial consideration.

A. *Browning-Ferris Industries*

Browning-Ferris operates a recycling business and Leadpoint, a subcontractor, provides staff to Browning-Ferris to sort recyclable items from waste and to clean the facility. *Browning-Ferris Industries of California,* Case No. 32-RC-109684 (Regional Director's Decision and Direction of Election, Aug. 16, 2013) at *1. The Teamsters sought to represent a unit of

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