Connecticut Law Tribune

January 26, 2015 ctlawtribune.com An ALM Publication

The NLRB: A Brief Year in Review

Key cases revolve around email, college athletes and union elections

By JARED M. LUCAN

The year 2014 was one of change for the National Labor Relations Board. The board overruled precedent regarding employee use of company email to engage in activity protected by the National Labor Relations Act, possibly extended the protection of the act to college athletes, reconsidered long-established principles for determining whether parties are joint employers and finalized amendments to its union election procedures.

Back in 2007 (the good old days for employers), the board held in its *Register-Guard* decision that employees had no rights under the NLRA to use an employer's email system, let alone to use it for statutorily protected communications, such as union organization efforts, as long as the restrictions placed on the email system by the employer were nondiscriminatory.

In December 2014, the board overruled *Register-Guard*, declaring that it was incorrectly decided. In its *Purple Communications* case, the board held that "employee use of email for statutorily protected communications on non-working time must presumptively be permitted by employers who have chosen to give employees access to their email system." Put differently, if an employer has allowed its employees to use its email system for nonwork-related reasons (i.e., incidental personal use), then an employer must also allow those employees to use its email system for communications protected under the NLRA, such as communications about union organization efforts or the scheduling of solidarity marches to protest the employer's conduct. The decision, however, does give an employer who allows incidental personal use of its email system the option of completely banning nonwork use if it can point to special circumstances warranting such a prohibition. Because such a decision would likely decrease employee morale and productivity, it begs the question whether the board left employers with any option at all.

Back in March, Peter Sung Ohr, the Chicago-based regional director of the NLRB, issued a decision concluding that grant-in-aid scholarship football players at Northwestern University are "employees" of the school, at least as that term is defined by the NLRA.

According to Ohr's decision, school football players generate tens of millions of dollars per year for Northwestern. In return, they receive "compensation" from Northwestern in the form of scholarships. "That the scholarships are a transfer of economic value is evident from the fact that the employer pays for players' tuition, fees, room, board, and books for up to five years," Ohr wrote.

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He also found that the football players are subject to the control of Northwestern. The players signed "tender" agreements on acceptance of a scholarship that set the duration and conditions under which their "compensation" will be provided to them. They are subjected to rigorous practice, travel and competition schedules and are limited (by NCAA and Northwestern rules) in their ability to make their own living arrangements, apply for outside employment, drive personal vehicles, travel off campus, post items on the Internet or speak to the media.

Northwestern has filed a request for

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review of Ohr's decision with the board. Nevertheless, the request for review did not prevent the grant-in-aid football players from voting whether to join a union on April 25, 2014. The results of that election, however, will not be tallied until the board has dealt with the request for review. Thus, it may be some time before we know whether the College Athletes Players Association has been chosen by the players to represent them in dealing with Northwestern concerning grievances, labor disputes, rates of pay, hours of employment and conditions of work.

If two entities are determined to be joint employers, both entities can be jointly liable for violations of the NLRA. In its simplest form, a joint employer relationship can exist when two seemingly separate companies actually share control of the employment relationship, including joint involvement in hiring, firing and wage and benefit decisions. The test for whether two entities are a joint employer has been followed by the board for 30 years.

Despite the long-standing precedent, in March, the board issued a public notice inviting parties to file amicus briefs in a pending case pending, *Browning-Ferris*, regarding their position on the current test for determining joint employer status, and, more important, to propose a new test that the board should consider when such cases are brought before it.

Although it is unclear at this point how *Browning-Ferris* will be decided, the board's Office of General Counsel submitted a brief arguing that a joint employer determination should be based on the totality of the circumstances by examining direct, indirect and "potential" control of one employer over the employees of another employer. In its brief, the general counsel's office argues for a more expansive definition of the term "employer" under the NLRA.

Following the board's request for briefs in *Browning-Ferris*, the office declared that it intended to issue numerous complaints against fast-food giant McDonald's USA LLC and its franchisees stemming from unfair labor practice charges pending across the nation.

On Dec. 19, 13 complaints were issues based on 78 charges naming McDonald's and numerous franchisees as joint employers. The complaints allege, among other things, discriminatory discipline and discharges against franchisee workers who participated in nationwide fast-food worker protests over the past two years. Certainty, how the NLRB rules in *Browning-Ferris* will have an impact on how the MacDonald's issues are analyzed and resolved by the board.

Stay tuned.

In December, the board finalized its procedures for streamlining the union election process. These amended election procedures will, among other things, (1) shorten the time period between the filing of a petition for an election and the holding of the election; (2) require an employer to file a "statement of position" by noon on the day before a representation hearing begins (the statement of position must include all arguments and defenses or the employer may be deemed to have waived them in the future); (3) allow a hearing officer to substantially limit the issues an employer can present at a hearing, and prevent preelection litigation over voter eligibility and inclusion issues; (4) permit regional directors the discretion to deny parties the opportunity to file posthearing briefs on disputed issues; and (5) require that additional contact information of petitioned for unit employees, including personal email addresses and phone numbers, be provided to the union.

While the board has described its actions as modernizing the representation elections process and ensuring that the process is not marred by unnecessary litigation, duplication and delay, many employers (and management attorneys) view the board's actions as undermining their ability to adequately present a case against unionization. Indeed, once an employer receives the election petition, it will have a very short time period to assess the appropriateness of the bargaining unit and prepare for a representation hearing. Further, if an employer does not become aware of a union organizing campaign until after it receives the petition, it will have less time to make an effective case against unionization. The amendments, therefore, will undoubtedly make it easier for unions to win representation elections.

There are legal questions as to the NLRB's authority to implement these changes and whether they are consistent with congressional intent. Barring a court injunction, the amended procedures are scheduled to go into effect in April.

Given the board's willingness to overrule, amend and challenge existing precedent and rules, there is no reason to believe that this trend will not continue in 2015.

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