WORKSHOP C

WHAT CAN PRACTITIONERS EXPECT FROM A TRUMP BOARD?

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The last eight years have brought significant changes to labor-management relations under the NLRA: new R-case procedures, a new standard of joint employer status, collective bargaining rights for graduate students, employee access to employer e-mail, the duty to furnish witness statements, class waivers, and the General Counsel's initiative to revamp the Levitz Doctrine. How far will the pendulum swing? This workshop will re-examine the Obama Board's rulings on these and other issues, with special emphasis on the dissenting opinions in those cases, which could well become the majority view of a revamped NLRB.

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The Joint Employer Standard - *Browning-Ferris*

Arguably one of the most consequential decisions of the Obama Board came in *Browning-Ferris Industries of California, Inc.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015). In *Browning-Ferris*, the Board tackled the issue of joint employment, that is, when a business entity can be considered the employer of workers who are technically "employed" by another entity, such as a temporary hiring agency. In brief, the issue in *Browning-Ferris* was whether BFI, which owned and operated a recycling plant, was a joint employer with Leadpoint, an agency BFI hired to supply employees to work at BFI's plant.

The Board majority (Chairman Pearce and Members Hirozawa and McFerran) opined that the joint employer standard then in existence—that to be a joint employer, the putative employer's control over workers must be "direct, immediate, and not 'limited and routine,'" *id*. at 10—needed to be revisited, because, among other things, that standard was "narrower than statutorily necessary" under the common law agency theory, *id*. at 11. The Board concluded that a different test was appropriate, because over the past several decades while "the Board's view of what constitutes joint employment under the Act has narrowed, the diversity of workplace arrangements in today's economy has significantly expanded." *Id*. The Board therefore announced a return to the "traditional" test used by the Board: that "[t]he Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." *Id*. at 15. The Board majority found that BFI was indeed a joint employer with Leadpoint because, among other things: BFI codetermined who could be hired to work at BFI's plant by imposing specific conditions on the hiring process, *id*. at 18; BFI possessed the right to "discontinue the use of any personnel" Leadpoint assigned to work at the plant, *id*.; BFI retained unilateral control over the speed of the production lines, *id*.;

and BFI specified the number of workers it required, the timing of employees' shifts, and determined a maximum compensation rate. *Id*. at 19. The Board noted there would be no unfairness "in holding that legal consequences may follow" from BFI's decision to retain ultimate authority over these and other terms and conditions of employment, *id*. at 14, and that because BFI had retained such authority, it was difficult for the Board to see "how Leadpoint alone could bargain meaningfully about such fundamental working conditions as break times, safety, the speed of work, and the need for overtime imposed by BFI's productivity standards." *Id*. at 19. In other words, to effectuate meaningful collective bargaining, BFI must be considered a joint employer whose presence is required at the bargaining table.

In light of Members Miscimarra's and Johnson's vociferous dissent in this case, however, it is likely that *Browning-Ferris* will be overturned by a Trump Board at its earliest opportunity. In the dissent's view, the Board majority had created "fundamental uncertainty," *id*. at 23, by abandoning a long-standing test and replacing it with an ambiguous standard. The dissent argued that under the majority's view, indirect or potential control over terms and conditions of employment by the putative employer would now be dispositive of joint employer status, even if there is *no* evidence of actual, direct control of employees' terms and conditions of employment. *Id*. at 22. The dissent warned that "no bargaining table will be big enough" for all the entities that will be joint employers under the majority's standard, *id*. at 21, argued that the majority's test was out of line with common law agency principles, *id*. at 28, and concluded that the Board had gone beyond its Congressional grant of authority by redefining the joint employer doctrine, *id*. at 27-28.

Of particular concern to the dissent is how the *BFI* standard will affect business franchising and related federal law. The dissent sites as an example trademark law, as it relates

to franchises, which requires that a company owning a trademark set up standards which must be met in order for the franchise to use the mark associated with its goods or services. *Id*. at 45. Developing these standards necessarily involves the trademark holder designating that the product be created by a particular manner and method. *Id*. at 46. According to the dissent, the new joint employer standard may result in labor-related consequences for franchisors, whose compliance with trademark law may result in the franchisee becoming of "agent of its franchisor," something Congress did not intend. *Id*.

The majority defended its decision against the dissent's criticisms, which the majority took as an attack on the very notion of joint employers generally, *id.* at 20, by insisting that "[i]t is not the goal of joint-employer law to guarantee the freedom of employers to insulate themselves from their legal responsibility to workers, while maintaining control of the workplace." *Id*. at 21. However, given Trump's business background and likely Cabinet nominations—including potential Secretary of Labor Andrew Puzder, CEO of CKE restaurants which owns or franchises over 3,300 fast food restaurants in the United States[1]—and what the dissent characterized as the "expansive, near-limitless nature of the majority's new standard," *id*. at 36, it is likely that the Board will endeavor to move to a much narrower standard which allows businesses to retain greater control over their operations and workforce without being considered joint employers under the Act.

Collective Bargaining Rights for Graduate Students - *Columbia University*

Another major Obama Board decision which will likely meet resistance from a Trump NLRB is *The Trustees of Columbia University in the City of New York and Graduate Workers of Columbia-GWC, UAW*, 364 N.L.R.B. No. 90 (2016), where the Board revisited the issue of

[1] *See* http://www.ckr.com/about.html.

whether graduate students are properly considered employees under the Act. In *Columbia*, the Board (Chairman Pearce and Members Hirozawa and McFerran) overruled the 2004 case of *Brown University*, 342 N.L.R.B. 483, which categorically excluded graduated students employed by their universities from coverage under the Act, and which itself overruled the 2000 case of *New York University*, 332 N.L.R.B. 1205, which held that certain graduate students *were* statutory employees.

In *Columbia*, the Board found that the *NYU* Board was on "very firm legal ground" when it concluded that graduate students were employees under the Act, given that the students had a common-law employment relationship with their university. 364 N.L.R.B. at 4. The Board in *Columbia* found that recognizing student assistants as employees would promote federal labor policy goals by permitting employee free choice to engage in collective bargaining, *id.* at 6-7; that doing so would not unduly infringe upon "traditional academic freedoms" as demonstrated in organized public university settings, *id*. at 7-9; and that there is ultimately no compelling reason to continue to exclude them from the Act's protection, *id* at 12. In light of the foregoing, and the fact that Columbia University "directs and oversees" grad students' teaching activities, *id*. at 15, the Board overruled *Brown University*, finding that here, graduate students were properly considered employees under the Act (noting, however, that the Board would not require *all* common-law employees to be considered employees under the Act). The Board held that the petitioned-for unit of undergraduates, master's degree students, and doctoral student assistants shared a community-of-interest and was an appropriate unit under *Specialty Healthcare*. *Id*. at 18-21. (More about that case in a moment).

Member Miscimarra, dissenting, argued that Congress never intended that graduate students would be covered by the Act, and that *Brown* was rightly decided. *Id*. at 23. Miscimarra

reiterated the Board's view in *Brown* that "[t]he 'business of a university is education," and students are not the means of production—they are the 'product'." *Id* at 34 (citations omitted). In Miscimarra's view, these graduate students have a relationship to the university which is "predominantly academic, rather than economic," and that Congress intended the Act to apply to conventional workplaces, not academic settings. *Id*. at 24-25. In accordance with the *Brown* decision, Miscimarra maintained that the work done by graduate students was in furtherance of obtaining a degree, and that introducing collective bargaining to this relationship would be detrimental to students' educational process and infringe upon academic freedom. *Id*. at 25. Miscimarra argued that the Board was disregarding the potential effects of the use of economic weapons in a labor dispute at a university, citing the possibility that students may lose academic credit or fail to satisfy graduation requirements in the event of a strike or lockout, while the student's tuition could be retained by the university. *Id*. at 29. Miscimarra also noted that the Board's processes related to representation cases and unfair labor practices can take months or years, and that the students may no longer be attending school by the time Board-ordered relief becomes available to the parties in a university-centered labor dispute. *Id*. at 31. Miscimarra would hold that in any event, because of "fundamental dissimilarities" between master's degree students, undergraduate students, doctoral students and course assistants in terms of their pay, duties, responsibilities, and expected length of service in their positions, the petitioned-for unit would be inappropriate under *Specialty Healthcare* or any community-of-interest test. *Id*. at 33.

Member Miscimarra emphasized that, with the exception of the 4-year period between the decisions in *NYU* and *Brown*, "the Board has consistently held that university student assistants are *not* employees," and their relationship with their university is "primarily educational." *Id*. at 24 (emphasis in original). It is likely, therefore, that a Trump Board would

revert to a more restrictive interpretation of the Act which categorically excludes graduate students from its coverage.

Representation Case Procedures

In December 2014, the Board adopted revised election rules to govern the processing of Representation Petitions, and did so in an effort "to enable the Board to better fulfill its duty to protect employees' rights by fairly, efficiently, and expeditiously resolving questions of representation." Memorandum GC 15-06 (April 6, 2015). The rules were adopted through an agency rule-making process, *see* Representation-Case Procedures, 79 Fed. Reg. 74308 (Dec. 15, 2014) and went into effect on April 14, 2015. The Fifth Circuit and D.C. Circuit Courts of Appeals have upheld these rules as within the broad discretion entrusted to the Board under the National Labor Relations Act. *See Associated Builders & Contractors of Texas, Inc. v. NLRB,* 826 F.3d 215 (5th Cir. 2016); *Chamber of Commerce of United States of Am. v. NLRB,* 118 F. Supp. 3d 171 (D.D.C. 2015).

The election rule amendments touch on many different procedural issues arising in the context of Representation Petitions, including e-filing (the Board now permits the electronic transmission of election petitions, notices and voter lists); the standardization of timing of pre- and post-election hearings; and limiting the issues that can be raised at a pre-election hearing to disputes that are necessary to determine whether it is appropriate to conduct an election.[2] The majority of the Board contends that the rule modifications will remove some of the delays inherent in the Board's process and minimize the possibility of frivolous litigation. *See* 79 Fed. Reg. at 74308.

[2] For a comparison chart of the new and old election procedures, see: https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3317/Comparisontable.pdf

The rules were not adopted unanimously, however, and the 30-page dissent from Members Miscimarra and Johnson paints a very different picture, referring to the amendments to the rules as the "Mount Everest of regulations." *Id*. at 74430. The dissent contends that the new rules adopt an "election now, hearing later" approach, by delaying answering fundamental questions until after the election, and will encourage employees to "vote now, understand later" by shortening the "time needed for employees to understand relevant issue" and curtailing employers' rights to "engage in protected speech." *Id*. at 74430-1. Specifically, the dissent focused on changes which, in their view, constitute an unjustifiably greater burden on the employer, such as the requirement that employer's position be timely filed or forfeit litigating "any issue that must be contested at the pre-election stage," including questions of jurisdiction, the employer's operations, employee status, contract and other election bars, and what constitutes the appropriate unit. *Id*. at 74442-3. The dissent contrasts this burden on employers with the requirements on a petitioning union during the same period, arguing that the practices of obtaining pre-hearing information from the petitioning union are essentially voluntary and informal, and the same as prior to the amendments, while the practices concerning employers were "transformed into binding legalistic requirements" with significant negative consequences for failing to timely comply. *Id*. at 74443. Among a spate of other issues, the dissent also objects to the elimination of post-hearing briefs and mandatory board review of post-election disputes under stipulated election agreements as being without a rational basis. *Id*. at 74449.

The Board majority noted the multiple areas in which there was no substantive disagreement between the majority and the dissent—such as allowing for electronic filing and transmission of the petition and the Notice of Petition for Election if the employer customarily communicates with its employees electronically; providing that requests for review will not stay

action by a regional director unless the Board specifically orders otherwise; and requiring the employer to provide an electronic version of the voter list. *Id*. at 74422. Still, the dissent expresses the view that the overarching problems with these provisions "infect" the final rule as a whole, they "do not approve of *any* aspect of the Rule," and that the majority was "mistaken in suggesting that there exists a Board consensus on *any* specific provisions" of the rule. *Id*. at 74441 (emphasis in original).

The amended election rules are a likely target for a Trump NLRB. The Board could change the rules through another agency rule-making process, or the rules could be repealed through an Act of Congress. The Board could attempt to scrap the rules entirely, as suggested by the dissent's comment that they don't approve of "*any* aspect" of the rule. *Id*. Still, because of the arguably universally-beneficial aspects of some of the rule amendments—such as permitting the electronic filing and transmission of certain documents—it is possible that the Board may take a more targeted approach to repealing the amendments to the rules. For example, the dissent expresses its belief that it would be reasonable to have a minimum "guideline" period between the filing of the petition to the election of 30-35 days, and a maximum period of 60 days. *Id*. at 74459.

The dissent also argues that one of the biggest factors contributing to delays in resolving election-related issues was not addressed by the rule amendments: the Board's "blocking charge" doctrine, which permits parties to delay representation elections by filing certain kinds of unfair labor practices charges. *Id*. at 74459. The dissent suggests eliminating blocking charge deferrals for a three-year trial period in order to study its effects on reducing delay, which may obviate the need to change other election procedures to achieve that goal. *Id*. at 74459.

The dissent also hints at future attempts to limit *Specialty Healthcare* (357 N.L.R.B. 934, 941 (2011), which established that unions need only show that the proposed unit (in a non-acute healthcare setting), consists of a clearly identifiable group of employees, for the Board to presume the unit is appropriate. To overcome this presumption, an employer arguing that the unit should include additional employees must demonstrate that employees in a larger unit share an "overwhelming" community of interest with those in the petitioned-for unit. The dissent argues that under that standard, "[a]lmost any petitioned-for unit conforming to classification, department, craft, or group function may be viewed as presumptively appropriate." *Id*. at 74447.

Class Waivers: The *D.R. Horton* Circuit Split[3]

In *D.R. Horton*, 357 N.L.R.B. 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), the National Labor Relations Board ("Board") held that employee participation in class or collective actions that address terms and conditions of employment is protected concerted activity under the ("NLRA" or the "Act"). According to the Board, an employer violates Section 8(a)(1) of the Act when it requires employees to waive their right to bring or otherwise participate in such actions (in either an arbitral or judicial forum). Section 8(a)(1) prohibits employers from interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act – including the right to engage in "concerted activities for mutual aid or protection." 29 U.S. C. §§ 157, 158(a)(1).

In 2013, the United States Court of Appeals for the Fifth Circuit denied enforcement of the Board's *D.R. Horton* decision. Despite the Fifth Circuit's decision, the Board affirmed *D.R. Horton* a year later in *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *petition for cert filed*. The Fifth Circuit also declined to enforce the Board's decision in *Murphy Oil*. The Second and Eighth Circuits have agreed with the Fifth Circuit, and have refused to adopt the Board's position that class waivers are a *per se* violation of the Act.

In 2016, however, the Ninth and Seventh Circuits endorsed the Board's position in *D.R. Horton* and enforced Board decisions finding that class waivers violate the Act. *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *petition for cert filed*; *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *petition for cert filed*.

[3] The following sections have been prepared by Jessica Kastin a partner in Jones Day's New York office and member of the Firm's Labor & Employment Group. Jones Day represents management in all phases of labor and employment. The views expressed in this paper are solely those of the author and do not necessarily reflect the views of the Firm or its clients.

The Circuit split created in 2016 has resulted in three cert petitions pending now before the United States Supreme Court. Petitions for review of additional Board decisions on the class waiver issue are also pending in various other Circuit Courts, some of which will be deciding the issue for the first time should the petition for review be granted. *See, e.g.*, *Haynes Building Servs. LLC*, 363 NL.R.B. No. 125 (2016), *petition for review filed*, No. 16-1099 (D.C. Cir. May 3, 2016) (issue of first impression in D.C. Circuit); *The Rose Group, d/b/a Applebee's Restaurant v. NLRB*, 363 NLRB No. 75 (2015), *petition for review filed*, Nos. 15-4092, 16-1212 (3d Cir. Dec. 31, 2015) (issue of first impression in Third Circuit).

Board orders in unfair labor practice charge proceedings are not self-enforcing. The Board must petition either the D.C. Circuit, the Circuit in which the alleged unfair labor practice occurred, or any other Circuit in which a party to the charge transacts business for enforcement. 29 U.S.C. § 160(e). When a Circuit Court denies enforcement of a Board order, the Board often follows a policy of defiance whereby it does not abide by the Circuit Court decision. The Obama Board has followed a policy of defiance with respect to *D.R. Horton* and its progeny. In fact, the Board has expanded *D.R. Horton* holding that all forms of joint, class or collective action waivers applicable to employees covered by the Act are unlawful regardless of the form of the waiver, or whether the waiver is a condition of employment. *See On Assignment Staffing Servs.*, 204 L.R.R.M. 1288 (2015) ("[a]ny binding agreement that precludes individual employees from pursuing protected concerted legal activity in the future amounts to a prospective waiver of Section 7 rights--rights that 'may not be traded away,' . . . "), *enforcement denied* 2016 U.S. App. LEXIS 12750 (5th Cir. June 6, 2016).

Should a Republican Board revisit the class waiver issue prior to a Supreme Court decision on the issue, Members Johnson's and Miscimarra's various dissenting opinions

including dissents in *Murphy Oil* and *On Assignment Staffing*, as well as the Circuit Court decisions refusing to enforce the Board's position provide a basis for the Board to change course.

Those disagreeing with the Board have argued, for example, that: under the Federal Arbitration Act ("FAA") and interpreting U.S. Supreme Court law, arbitration agreements must be enforced according to their terms with limited exception (not applicable to the NLRA); the NLRA does not dictate or prescribe any particular procedures governing non-NLRA claim adjudication, therefore the Board lacks authority to conclude that class waivers violate the Act; the NLRA gives employees the right to adjust grievances on an individual basis, so taking away the right to enter into waiver agreements is contrary to the Act; and, Section 7 is not intended to protect access to various class or representative procedures derived from other laws and such access is not protected activity covered by the Act.

In *Murphy Oil*, the Board responded to these arguments finding that they are unpersuasive because the Board believes, *inter alia*, that pursuit of legal claims is a substantive right protected by Section 7; the FAA, as described by the Supreme Court, has limits; and, the courts and the Board must accommodate both the FAA and the NLRA while taking seriously national labor policy that protects employee rights.

Employee Use of Employer Email Systems: *Purple Communications*

In *Purple Communications, Inc.*, 361 N.L.R.B. No. 126, 2014 NLRB LEXIS 952 (Dec. 11, 2014), the Board reversed course by holding that employees have a presumptive right to use employer-provided email systems for protected concerted activity (including union organizing) during non-working time. The Board previously held in *The Guard Publishing Company d/b/a The Register-Guard*, 351 N.L.R.B. 1110 (2007) ("*Register Guard*") that, absent a discriminatory

policy, employees did not have a statutorily-protected right to use an employer's email system for non-work purposes. *Id.* at 1116.

> The Board included the following parameters on use of employer e-mail:
>
> (a) The presumptive right to use employee email applies only to employees who already have access to their employer's email system and does not create a right to access where one does not exist.
>
> (b) In theory, the presumption may be overcome under special circumstances (e.g., where the employer demonstrates that its ban is "necessary to maintain production and discipline").
>
> (c) An employer may continue to monitor employee computers and email "for legitimate management reasons, such as ensuring productivity and prevent…harassment or other activities that could give rise to employer liability."

2014 NLRB LEXIS 952, at *4. The Board also recognized that *Purple Communications* leaves open questions regarding access to employer e-mail systems by non-employees such as union representatives, and regulation of other modes of workplace communication.

The Board premised its decision to overrule *Register Guard* on evolving technology and widespread use of e-mail communication in the workplace, noting that: "In overruling *Register Guard*, we seek to make national labor policy . . . responsive to the enormous technological changes that are taking place in our society." *Id.* at *75-*76 (internal quotation omitted). *Purple Communications* relies heavily on the dissent in *Register Guard*, which described the *Register Guard* majority as confirming that the Board was "the Rip Van Winkle of administrative agencies," by "fail[ing] to recognize that e-mail ha[d] revolutionized communication both within and outside the workplace" and by unreasonably contending "that an e-mail system is a piece of communications equipment to be treated just as the law treats bulletin boards, telephones, and pieces of scrap paper." 351 N.L.R.B. at 1121 (dissenting opinion) (internal quotes omitted).

The dissenting opinions in *Purple Communications* by Members Miscimarra and Johnson, various *amici* brief, and the Board's decision in *Register Guard*, outline the basis for a Republican Board to potentially change its position on employee access. For example, the dissenting opinions in *Purple Communications* raise the following issues, among others:

- Social media, texting, and personal e-mail accounts constitute adequate alternative means for employee communication, belying any argument by the majority that limits on company e-mail constitutes an unreasonable impediment to organizing or other protected activity. *Id.* at *24, *79;
- Employers will experience increased costs for data storage, maintenance, and retrieval if employer e-mail systems are used for section 7 activity. *Id*, at *37, n36;
- Employee productivity will suffer as a result of increased e-mail use. *Id*. at *66;
- Employees will be denied their statutory right to refrain from engaging in concerted activity. *Id.*;
- The Board majority has failed to adequately balance employer property rights. *Id.* at *98; and
- The new standard creates obligations that are inconsistent with other legal requirements (e.g., surveillance of protected activities) and replaces a clear rule with a hard-to-apply standard. *Id*. at *84.

Withdrawal of Recognition: Push to Revisit the *Levitz* Framework

In *Levitz Furniture Co. of the Pacific*, 333 N.L.R.B. 717 (2001), the Board changed the decades-old standard an employer must meet to lawfully withdraw recognition of an incumbent union. The prior test focused on an employer's "good faith doubt" as to the union's majority status. *Celanese Corp.*, 95 NLRB 664 (1951). *Levitz* requires "objective evidence" that the union has actually lost majority support. The *Levitz* Board noted that it would revisit this

framework if experience showed that it did not effectuate the purposes of the Act. 333 N.L.R.B. at 726.

In a May 9, 2016 General Counsel Memorandum (GC Memo 16-03), the Board's General Counsel, Richard Griffin, instructed all Regions to follow a new procedure before deciding to go to complaint alleging that an employer has violated Section 8(a)(5) of the Act by withdrawing recognition from an incumbent union absent objective evidence that the union has lost majority support.

Griffin notes that the *Levitz* Board rejected the then-General Counsel's position that employers should not be permitted to withdraw recognition absent the results of Board elections. He also notes that the Board changed the standard instead anticipating that employers would be likely to withdraw recognition only if the evidence "clearly indicate[d]" that a union had lost majority support. *Levitz*, 333 N.L.R.B. at 726; GC Memo 16-03 at 1.

Griffin uses the Memo to express his view that the *Levitz* framework has proven problematic because it "has created peril for employers in determining whether there has been an actual loss of majority support for the incumbent union, has resulted in years of litigation over difficult evidentiary issues, and in a number of cases has delayed employees' ability to effectuate their choice as to representation." GC Memo 16-03 at 1.

Based on this view, he instructs the Regions to request that the Board adopt a rule that, absent an agreement between the parties, an employer may lawfully withdraw recognition from a Section 9(a) representative based only on the results of an RM or RD election. An RM petition is an election petition filed by the employer testing the union's majority support. An RD petition is a decertification petition filed by bargaining unit employees who longer wish to be represented by the union.

A model argument developed by the Office of the General Counsel for inclusion in all briefs to administrative law judges and the Board in withdrawal of recognition cases was distributed with the Memo, urging that the Board require employers to utilize the election procedures rather than act unilaterally when there is reason to believe that the union has lost majority support. The principle points included in the model argument are: 1) experience under *Levitz* has demonstrated that employers are not withdrawing recognition only when the evidence "clearly indicates" a loss of majority support, causing protracted litigation; 2) a rule prohibiting withdrawal of recognition absent certification of results of an RM or RD election best effectuates the policies of the Act and better accomplishes the Board's goals in *Levitz*; and, 3) the proposed rule is even more appropriate today than when *Levitz* was decided, given the Board's revised representation case rules streamlining the election process.

Griffin's term expires in November 2017. It remains to be seen whether his successor will continue the directives in GC Memo 16-03, and ultimately how a Republican Board will come down on the issue. However, this is an issue to watch under the new administration.

Disclosure of Confidential Witness Statements – *Piedmont Gardens*

In *American Baptist Homes of the West d/b/a Piedmont Gardens,* 362 N.L.R.B. No. 139, 2015 NLRB LEXIS 500 (June 26, 2015) ("*Piedmont Gardens*"), a divided Board again reversed decades of Board precedent by holding that, going forward, employers are required to disclose confidential witness statements gathered during the course of a workplace investigation to union representatives processing employee grievances, absent a legitimate and substantial interest in confidentiality outweighing the union representative's need for the information. Prior to *Piedmont Gardens,* the Board held in *Anheuser-Bush, Inc.,* 237 N.L.R.B. 982 (1978), that such confidential statements were an exception to employers' general disclosure obligations.

Subsequent to *Piedmont Gardens*, the Board applies the U.S. Supreme Court's decision in *Detroit Edison v. NLRB*, 440 U.S. 301(1979), to confidential witness statements as it does to assess the validity of confidentiality assertions in connection with refusals to provide information other than witness statements. Applying *Detroit Edison*, the Board balances the union's need for requested information against any legitimate and substantial confidentiality interests established by the employer.

The Board has long-held that employers have a broad-based obligation to furnish unions with relevant information necessary to the union's performance of its duties as collective bargaining representative. When determining whether information is "relevant," the Board looks at whether there is "probable" or "potential" relevance. *Transport of New Jersey*, 233 N.L.R.B. 694, 694 (1977). "[T]he information need not be dispositive of the issue between the parties but must merely have some bearing on it. In general, the Board and the courts have held that information that aids the arbitral process is relevant and should be provided." *Pennsylvania Power*, 301 N.L.R.B. 1104, 1105 n5 (1991).

Members Miscimarra and Johnson, in separate dissents, outlined various concerns about the Board's decision in *Piedmont Gardens*. Specifically, they each argue that the rule under *Anheuser-Busch* served the important purpose of protecting witnesses from harassment or retaliation. *See generally* 2015 NLRB LEXIS 500 at *31. Furthermore, Miscimarra argued that the confidentiality of witness statements encourages employees to step forward to report misconduct and participate in investigations. *Id.* He was particularly critical of the majority's decision to replace *Anheuser-Busch*'s bright-line rule with a balancing test, requiring employers to describe the "confidentiality interest." *Id.* And, Member Johnson expressed concern over the

"unpredictable results" likely to flow from the application of *Detroit Edison* to witness statements. *Id.*

The Board considered and rejected the dissents' arguments, noting that it does not believe that the new test will result in adverse consequences. It believes that "the *Detroit Edison* balancing test takes into account any legitimate and substantial confidentiality interest that an employer may have, which would include concerns about witness intimidation." *Id.* at *22. The Board also rejected the dissents' arguments that the decision in *Piedmont Gardens* "makes it more difficult for employers to conduct effective investigations," and admonished the dissenters' "narrow focus on the employer's interests in conducting investigations," which the majority viewed as giving little, if any weight, "to the statutory interest of employees in exercising and preserving their contractual rights." *Id*.

Given the reversal of decades-old law regarding the treatment of confidential witness statements, this issue is another to watch under a Republican Board, which may look to Members Miscimarra's and Johnson's dissents as a basis to return to the *Anhueser-Bush* standard.