

PUBLICATION

Will Trump-Era NLRB Overrule Recent Decisions?

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The party that holds the White House gets to nominate, subject to approval by the U.S. Senate, a majority (three) of the five National Labor Relations Board's ("NLRB") members. President Trump has nominated, finally, a majority of Republicans to the NLRB. Those nominees, however, have not yet been confirmed. The two nominees are Marvin Kaplan, counsel to the Occupational Safety and Health Review Commission, and William Emanuel, a private attorney representing management. Add to those nominees the current Republican chairman, Philip Miscimarra, and the NLRB will have a Republican majority for the first time since George W. Bush was President. Once the NLRB is fully staffed, it will have the opportunity to overrule many of the recent decisions that the NLRB issued when Democrats were the majority.

First, a little background. Thirty Regional Directors under the NLRB's structure are located in major cities throughout the country. The NLRB's General Counsel has delegated authority to Regional Directors to issue complaints against parties alleged to have violated the National Labor Relations Act; obtain settlements of unfair labor practice charges; handle NLRB petitions for elections; and obtain compliance with decisions by administrative law judges, the NLRB Board, and federal courts.

If an unfair labor practice charge is filed against an employer and a Complaint is issued because there is reasonable cause to believe the National Labor Relations Act has been violated, absent settlement, a hearing will be set before an Administrative Law Judge (ALJ) and a trial will ensue. Keep in mind that a trial can take days, or in some cases, weeks. The ALJ's decision is appealable to the NLRB in Washington, D.C. The NLRB does not have enforcement powers. Its decisions can either be appealed by the NLRB or the employer to a United States Court of Appeals.

Regional Directors, who lead the field offices where each NLRB case begins, must follow current NLRB law and its subsequent decisions. This includes the current NLRB laws on graduate students being able to unionize, the current NLRB decisions on joint employer, and all current Board decisions on social media and handbook work rules.

For example, the NLRB recently revised its standard for determining joint employer status in a decision involving Browning-Ferris Industries of California. The NLRB held that a temp agency and Browning-Ferris were joint-employers. Browning-Ferris appealed the NLRB's decision to the United States Circuit Court for the District of Columbia Circuit. Those oral arguments were heard back in the spring and a decision is expected momentarily.

In another example, the NLRB recently overruled a prior decision regarding whether students who perform services at a university are employees under the NLRA in a case involving Columbia University graduate students. In that case, the NLRB allowed graduate assistants to vote in union elections. However, that case may be overruled in a case pending before the NLRB in a decision concerning Yale University's graduate assistants who were seeking to be represented by a union. As a practical matter, some graduate assistants have voted for unions and even by now have collective bargaining agreements. Should the NLRB overrule Columbia University, what will be the status of those collective bargaining agreements?

Once cases are appealed to the fully staffed NLRB, it can decide the issue before it. Thus, for example, the joint employer issue established in *Browning-Ferris* could be overruled by a majority vote of the five-member Board.

Certain rulings may be difficult to overrule, especially after a federal court of appeals has approved those NLRB rulings. For example, the NLRB issued a decision in *Specialty Healthcare & Rehabilitation Center of Mobile* that allowed unions to form micro-bargaining units, overruling years of prior NLRB precedent. The decision in *Specialty Healthcare* was affirmed by the U.S. Court of Appeals for the Sixth Circuit, while the U.S. Court of Appeals for the Fifth Circuit affirmed the NLRB's decision regarding another micro-unit in a Macy's department store.

To summarize, the NLRB has some 360 cases pending before it. Those cases pending will give the NLRB the opportunity to overrule some of the most egregious decisions of the Democratic-controlled NLRB. Keep in mind that today the NLRB still has two Democratic members and one Republican member, leaving two openings for President Trump to fill.