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What Are The Top 3 Issues To Watch At The NLRB In 2019?

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2018 was a busy year at the National Labor Relations Board (NLRB), and we saw many significant developments, such as class action waivers being green lighted in the wake of a U.S. Supreme Court decision. It appears more significant change is on the horizon at the labor board in 2019, so here are – in my opinion – the top three issues to watch at the agency this year.

1. Changes To The "Ambush Election Rule"

Few developments at the NLRB over the last decade caused as much consternation for employers as the agency's 2015 "ambush election rule." That rule significantly truncated the amount of time a company has to express an opinion on potential unionization to its workforce prior to an election. The NLRB announced on Dec. 12, 2017, however, that it was seeking input from the public regarding the rule. According to the agency's press release, the NLRB specifically is evaluating whether the rule should remain as is, be modified, or be rescinded in its entirety. The board extended the deadline for public feedback several times in 2018. The agency has yet to issue a proposed rule or formally announce what course of action it is considering on this front. I anticipate we will have clarity, and potentially even a final new rule, by the end of 2019. Rescission or changes to the ambush election rule that restore some balance to the process would be a huge win for U.S. private sector employers.

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2. The Joint-Employer Rule

The board's infamous *Browning-Ferris* decision in August 2015 significantly altered its standard for evaluating joint employment. In that case, the NLRB stated that it will no longer require that a company actually exercise control over a workforce's terms and conditions of employment in order to be deemed a joint employer; rather, "reserved" or "indirect" (i.e., potential) control is sufficient. This caused much concern among employers using contingent workforces and those under franchise business models, as it has made it easier for the NLRB to find companies in those contexts to be joint employers. In 2018, the NLRB released a draft joint-employer rule that would change its current standard regarding when two or more companies can be considered joint employers under the National Labor Relations Act (NLRA). If the proposed rule by the agency passes in its current form, it likely will make it more difficult for the board to impose joint employment on businesses. The board has extended the deadline for public comments on its proposed rule several times, but it is virtually certain we'll have finality on the new rule in 2019. A finding of joint employment under the NLRA on two or more companies with respect to a workforce can have significant consequences, such as shared liability for unfair labor practices as well as collective bargaining obligations, so this will be continue to be a hot issue.

3. Unfinished Business From Peter Robb's Dec. 1, 2017 Memo.

Shortly after being confirmed at the end of December 2017, NLRB General Counsel Peter Robb issued a memo identifying various categories of cases issued by the agency under the prior administration for which he may seek to overturn precedent. Virtually all of the cases noted in the memo are "pro-union" and harmful and/or burdensome to employers. For example, Robb identified an Obama-board decision granting employees the right to use employer-owned email for unionization purposes as a case that potentially should be revisited among many others. Many of the cases flagged in the memo have yet to be formally revisited, but that will likely change in 2019. Reversals of any or all of the cases noted in Robb's memo would be a huge victory for companies.

2019 should be an interesting (and potentially good) year for employers on the labor law front. Stay tuned to the blog to see what the year has in store on these and other happenings at the NLRB. Happy New Year!