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Another Overreach? NLRB Finds Company Violated The NLRA By Retaliating Against Former Employee For Filing FLSA (Not NLRA) Class Action

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From scrutiny of class action waivers to invalidating non-union employer handbooks, we've seen the National Labor Relations Board (NLRB) over the past eight years incrementally expand and encroach into areas companies never expected. This means companies have had to deal in totally different ways with the agency traditionally known for governing management-union relations. On May 16, the NLRB broke new ground yet again in its decision in MEI-GSR Holdings, LLC, 365 NLRB No. 76 (2017), where it held a casino violated the National Labor Relations Act (NLRA) by denying access to its property to a former employee who had filed a class action under the Fair Labor Standards Act (FLSA) – **a law the NLRB has no jurisdiction to enforce**. The NLRB held that the former employee's filing of the FLSA class action was protected activity under the NLRA because it was "concerted" in nature and dealt with "matters concerning the workplace." Based on its protected activity finding, the NLRB went on to hold that the company violated the NLRA when it informed the former employee that she was barred from entering company property while the FLSA litigation was pending. The NLRB majority reasoned that the company's motivation to ban the former employee from the property was directly tied to her protected activity (i.e., was "retaliatory"), and that such retaliation would "chill" other employees from engaging in protected conduct. NLRB Chairman Philip Miscimarra issued a dissenting opinion in the case, noting the majority's decision appeared to be an overreach in light of the fact that potential remedies may be available to the former employee under the FLSA – the federal statute at issue in the case. Miscimarra specifically noted: "I do not believe that Congress, when enacting the NLRA, intended to guarantee that every former employee would have a right of access to the private property of his or her former employer whenever he or she joined other employees in a non-NLRA lawsuit against that former employer… [T]he FLSA has its own anti-retaliation provision, and we are not permitted to 'tak[e] it upon ourselves to assist in the enforcement of other statutes. The Board was not intended to be a forum in which to rectify all the injustices of the workplace.'" Miscimarra's dissent may be a signal that the NLRB will revert to its more traditional, narrow view of governing management-union relations if/when Republicans gain a majority on the NLRB. (We previously reported that President Trump likely is to make NLRB appointments soon that will give Republicans a majority.) Until the composition of the NLRB changes, however, it appears the NLRB will continue to attempt to expand its reach into various types of workplace disputes it never previously touched.

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