

Report from the NLRB

A Board Member's Perspective



Philip A. Miscimarra
Chairman
National Labor Relations Board

June 27, 2017

This presentation refers to various NLRB decisions and orders. However, the actual decisions and orders should be regarded as the exclusive source of guidance regarding relevant issues.



The NLRB as an Agency in Transition











The NLRB as an Agency in Transition



The Obama NLRB (mid-2015)

Republicans		Democrats		Democrat
				
Philip A. Miscimarra <i>(end of term 12/16/2017)</i>	Harry I. Johnson III <i>(end of term 8/27/2015)</i>	Kent Hirozawa <i>(end of term 8/27/2016)</i>	Lauren McFerran <i>(end of term 12/16/2019)</i>	Richard Griffin Jr. <i>(end of term 10/31/2017)</i>
				
		Chairman		
		Mark Pearce <i>(end of term 8/27/2018)</i>		

Board Members ————— General Counsel



The NLRB as an Agency in Transition



The Obama NLRB (late 2016)

Party	Name	End of Term
Democrats		Vacant (end of term 8/27/2021)
		(end of term 12/16/2019) 8/27/2018
	Chairman	(end of term 8/27/2018)
Democrat	Richard Griffin Jr.	(end of term 10/31/2017)


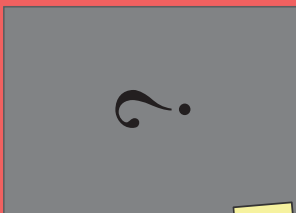



Board Members — General Counsel



The NLRB as an Agency in Transition



The Trump NLRB


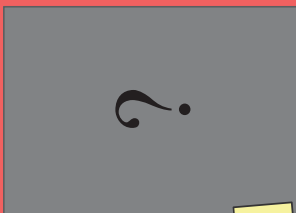
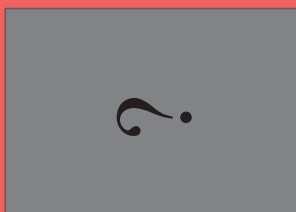



Republicans		Democrats		Democrat	General Counsel
					General Counsel
Philip A. Miscimarra (end of term 12/16/2017)	Vacant (end of term 8/27/2020)	Lauren McFerran (end of term 12/16/2019)	Mark Pearce (end of term 8/27/2018)	Richard Griffin Jr. (end of term 10/31/2017)	
Chairman	Vacant (end of term 8/27/2021)	Republicans	Democrats	Democrat	



The NLRB as an Agency in Transition



The Trump NLRB

Board Members		General Counsel	
Republicans			
			
Philip A. Miscimarra (end of term 12/16/2017)	Vacant (end of term 8/27/2020)	Vacant (end of term 8/27/2021)	Vacant on 11/1/2017 (four-year term)
Democrats			
			
Lauren McFerran (end of term 12/16/2019)	Mark Pearce (end of term 8/27/2018)		



Lots of Change, Across a Broad Range

1. Changes in nearly all **election procedures** affecting representation elections (the Election Rule)
2. Broad **invalidation of neutral employee handbooks, policies and rules** (William Beaumont)
3. Expanding the **definition of “joint employer”** (Browning-Ferris Industries and CNN)
4. Requiring mixed **multi-employer/non-employer bargaining** where two entities are “joint employers” of some employees but other employees have no “employee” relationship (Miller & Anderson)
5. More narrowly construing **“independent contractor” status** (FedEx Corp.)
6. Approving **smaller bargaining units** unless excluded employees have an “overwhelming community of interests” (Specialty Healthcare and Macy’s)
7. Permitting **on-premises employee picketing/work stoppages** (Walmart and Capital Medical Center)
8. Employer **investigations**
 - A single employee complaint regarding an **individual statutory right** is protected concerted activity involving “mutual aid or protection” under the NLRA (Fresh & Easy Neighborhood Markets)
 - An employer **cannot lawfully request confidentiality** during investigative meetings, with only narrow case-by-case exceptions (Banner Estrella)
 - An employer **must disclose confidential witness statements** if requested by a union, with only narrow case-by-case exceptions (Piedmont Gardens)
9. Employees have a **statutory right to use employer email systems** for union organizing and other protected concerted activity (Purple Communications)
10. University **graduate assistants** (and other student assistants) are employees (Columbia University)
11. Non-NLRA **class waiver agreements** unlawfully interfere with NLR rights (Murphy Oil, D.R. Horton)
12. Unionized employers must engage in **discipline-bargaining before imposing discipline**, with narrow case-by-case exceptions (Total Security Management, reinstating Alan Ritchey)
13. Unionized employers must engage in **bargaining before continuing any “past practice”** if the prior practice arose under a labor contract that has expired (DuPont)
14. Unionized employers must **continue dues-checkoff** after contract expiration (Lincoln Lutheran)
15. NLRB **will not defer to arbitration** in Sec. 8(a)(3) cases with narrow exceptions (Babcock & Wilcox)



Difficult Standards, No Clear Answers



1. What entities are **joint-employers** based on “reserved” authority? What happens when multiple “employer” entities disagree between themselves about bargaining issues? (*Browning-Ferris Industries*)
2. When the Board approves a **multi-employer/non-employer bargaining unit** under *Miller & Anderson*, what entities must bargain about what subjects? What happens when multiple “employer” entities disagree between and among themselves about bargaining issues?
3. What **employment policies, rules and handbook provisions** are lawful versus unlawful? (*William Beaumont* and many more)
4. What circumstances justify lawful case-by-case **requests for confidentiality during workplace investigation meetings**? (*Banner Estrella*)
5. What circumstances warrant lawful non-disclosure of **confidential employee witness statements**? (*Piedmont Gardens*)
6. When employees send **non-business emails** under *Purple Communications*, which non-business emails are “protected” and which are “unprotected”? How can an employer and employees know the difference when non-business emails are being sent?
7. Who constitutes a **supervisor**? (*Buchanan Marine, G4S Government Solutions and many more*)
8. When can **permanent replacements** be hired without an “independent unlawful purpose”? (*Piedmont Gardens*)
9. In the new type of **discipline bargaining** required under *Total Security Management (Alan Ritchey)* . . .
 - precisely when can discipline be implemented while bargaining remains under way, and
 - how can employers and unions have confidence that the Board will agree that an employee presented a “serious, imminent danger” warranting removal before bargaining occurs?
10. Under *DuPont*, when **past practices** span multiple years, multiple contracts and/or periods between contracts . . .
 - which past practices are “extracontractual” (meaning they must be continued without bargaining)?
 - which past practices must be disregarded and cannot be lawfully continued without bargaining?



Twitter



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