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3 Labor Law Issues All Employers Should Follow*

By Jordan Faykus


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Law360, New York (June 26, 2017, 12:26 PM EDT) -- Three significant labor law matters are primed for major decisions in the near future. Later this year, decisions are anticipated regarding: (1) whether employee arbitration agreements containing class action waivers are enforceable under the National Labor Relations Act; (2) whether a company that does not exercise direct control over workers may be deemed a joint employer by the National Labor Relations Board; and (3) whether a union may carve out and seek to organize a subset "micro unit" of employees from a larger group, and if so, what the employer must prove to challenge the appropriateness of the unit.

Because all three issues affect both unionized and nonunionized work sites, and because the decisions will likely affect how businesses operate and manage employee risk, companies operating in the U.S. will want to closely monitor the decisions and understand their potential impact.

Enforceability of Employee Class Action Waivers

Earlier this year, the U.S. Supreme Court granted certiorari and agreed to consider whether arbitration agreements that include class action waivers are legally enforceable under the NLRA. Over the past decade, countless employers across the United States have implemented employee arbitration agreements that include class and collective action waiver provisions. More recently, though, depending on the jurisdiction in which the employees are located, those same class action waivers may have been held to be unenforceable.

While the Second, Fifth, and Eighth Circuits have held that arbitration agreements containing class action waivers are enforceable, the Sixth, Seventh and Ninth Circuits have held that the NLRA renders employee class action waivers unenforceable. The NLRB originally took the position, and continues to hold, that employee class waivers are illegal and unenforceable as they impermissibly waive employees' substantive rights under the NLRA to engage in protected concerted activities.

With the circuit split, the Supreme Court has agreed to review the issue and has consolidated the three related cases of: NLRB v. Murphy Oil USA Inc., Case No. 16-307; Ernst & Young LLP v. Morris, Case No. 16-300; and Epic Systems Corporation v. Lewis, Case No. 16-285. Briefing before the Supreme Court is scheduled to conclude in August 2017. Oral argument is scheduled for October 2017.

While there is no way to know how the Supreme Court will rule, many believe that the recent addition of Justice Neil Gorsuch could provide a swing vote in favor of holding that employment class action waivers are enforceable. Whatever the ultimate outcome, the Supreme Court's ruling should provide employers with guidance on the use of class action waivers on a nationwide basis.

The NLRB's Joint Employer Doctrine

The D.C. Circuit could soon be deciding whether the NLRB's expansive joint employer standard will

remain intact. In August 2015, the NLRB issued its controversial decision in Browning-Ferris Industries of California Inc., 362 NLRB No. 186 (2015), and held that a company may be found to be a joint employer even if it does not exercise direct and immediate control over the workers at issue. Instead, a company may be deemed a joint employer if it exercises indirect control over the workers, or even merely reserves the right to control the workers, whether or not that right is exercised. The board has stated that the new joint employer standard seeks to address the changing economy and the increasing use of subcontractors, temporary staffing agencies, and contingent workers.

In March 2017, the D.C. Circuit held oral argument in the appeal of Browning-Ferris. In addition to the challenges regarding the expansiveness of the Browning-Ferris standard, during oral argument, several questions were raised surrounding the vagueness and lack of clarity with the standard. While the NLRB issued its decision in 2015, it has not yet released any guidance regarding what specifically is needed for a company to be considered a joint employer. Because direct control is no longer required, there is no definite black and white standard, and businesses are often times left guessing. Recently, several members of Congress even sent a letter to the NLRB associate general counsel expressing concerns from the business community and seeking clarification regarding the board's joint employer standard as it relates to franchisors.

The D.C. Circuit's forthcoming decision could have significant implications on business. Whether or not the Browning-Ferris standard is upheld, the D.C. Circuit's opinion should provide some clarity as to when a company will be considered a joint employer. The decision is also important as it could influence various other government agencies, including the U.S. Department of Labor and the U.S. Equal Employment Opportunity Commission, and their respective joint employer standards and enforcement actions.

Appropriateness of "Micro Units" Under Specialty Healthcare

NLRB Chairman Philip Miscimarra recently signaled that the board's controversial 2011 decision in Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB 934 (2011) may be overturned in the near future. In Specialty Healthcare, the board placed a high burden on employers who wish to challenge the makeup of a proposed group of employees seeking to vote on union representation.

By way of background, when attempting to organize a group of employees, a union must first designate a legally appropriate and identifiable group of employees. Historically, the board has favored broader, more inclusive units and "wall-to-wall" units of employees, so long as the group of employees shared a "community of interests," such as common supervision, similar terms and conditions of employment, and functional integration and contact.

Under Specialty Healthcare, once the NLRB regional director finds the submitted unit to be appropriate, to challenge that finding, the burden is on the employer to prove that the larger proposed group of employees share an "overwhelming community of interests" with the included employees. According to the board, demonstrating that another larger unit is also appropriate, or even more appropriate, will not satisfy that burden. The Specialty Healthcare decision arguably makes it easier for a union to carve out a smaller subset of employees that would be eligible to vote for union representation. In doing so, the standard is thought to also make it easier for unions to receive a majority vote among the proposed unit, as the union can choose to exclude groups of employees that it believes will vote against

representation.

Miscimarra, however, has dissented in several cases applying the Specialty Healthcare standard, and recently wrote a dissent in which he stated that he believes "Specialty Healthcare was wrongly decided" and that he believed the organizing of the micro unit was concerning as it "promotes instability by creating a fractured or fragmented unit." See Cristal USA Inc., 365 NLRB No. 74 (2017). When combined with the strong likelihood that the NLRB will soon have a Republican majority for the first time in 10 years, Miscimarra's dissent could be a signal that Specialty Healthcare may be reversed by the NLRB in the near future.

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