CONDUENT

Legislate®
Key Legislative Developments Affecting Your Human Resources US

Volume 8 | Issue 32 | August 21, 2017

Changes on the Horizon as NLRB Moves Closer to a Republican Majority

Earlier this month, Marvin Kaplan was sworn in as the newest member of the NLRB, filling one of two open seats. As the board's composition shifts from a Democratic to a Republican majority, it likely will look for opportunities to roll back a number of the Obama board's pro-labor decisions, and it will have allies in Congress. Recently introduced bills seek to overturn some of those same decisions, limit the NLRB's authority and cut its funding. Meanwhile, a bipartisan bill proposes new tax credits to encourage employers to provide paid family and medical leave, while other legislation would amend the FMLA to provide parental leave for educational and extracurricular activities.

Changes Ahead for the Labor Board

On August 2, the Senate confirmed Marvin Kaplan on a 50-48 party-line vote to fill one of the two open seats on the five-member National Labor Relations Board (NLRB). When Kaplan, formerly chief counsel to the commissioner of the Occupational Safety and Health Review Commission, was sworn in on August 10, the board moved a step closer to its first 3-2 Republican majority in nine years.

Although the Senate Health, Education, Labor and Pensions Committee approved President Trump's nomination of William Emanuel to the board in mid-July, Democrats have delayed moving the nomination forward, citing concerns over Emanuel's decades long career as a management-side attorney. The Senate is expected to vote for cloture following the August recess, with a final vote on confirmation scheduled sometime thereafter.

If, as expected, Emanuel's nomination is confirmed and the final vacancy is filled, the board would have a full complement of five members – but that may only be temporary. Philip Miscimarra, a board member since 2013, who was named its chairman by President Trump earlier this year, has

announced that he will not seek reappointment when his term expires on December 16, 2017. However, the administration is expected to nominate a Republican to replace Miscimarra, ensuring a Republican majority when that seat is filled. The administration is also expected to replace the current NLRB general counsel when his term ends on November 3, 2017.

After the board gains a more employer-friendly majority, it will likely look for opportunities to roll back many of the pro-labor decisions of the Obama board that expansively interpreted the National Labor Relations Act (NLRA). Among the issues that a Trump board may revisit are: NLRB standards for determining joint employment and appropriate bargaining units (including a review of the Obama board's *Specialty Healthcare* or "micro-units" decision); controversial changes to the union election process; and the status of college/university faculty and student athletes.

> **Comment.** On August 11, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit approved the board's use of the *Specialty Healthcare* "overwhelming community of interest" test in determining that a petitioned-for micro-unit of equipment "riggers" at Rhino Northwest LLC was appropriate for collective bargaining purposes. The court joined seven other circuits in finding that the test was consistent with board precedent, making it increasingly likely that it will be up to the Trump board or lawmakers to overturn *Specialty Healthcare.*

NLRB Funding

On July 19, the House Appropriations Committee approved a funding bill for FY 2018 that would cut NLRB funding by about 9%. The bill would restrict the NLRB from enforcing its *Specialty Healthcare* decision, applying its revised "joint-employer" standard in new cases and proceedings, and providing electronic voting in representation elections. Whether the House will pass the bill as currently written remains to be seen.

Legislative Activity

Since then, legislation has been introduced in both chambers to substantially limit the NLRB's authority, joining bills introduced earlier this Congress that seek to roll back Obama-era labor rules. (See, for example, our July 10, June 19 and June 5 issues of *Legislate* for more information on bills that target the 2011 *Specialty Healthcare* decision, which facilitated micro-unit organizing and the 2015 "quickie election" rules.)

On July 20, Sen. Mike Lee, R-Utah, introduced the Protecting American Jobs Act (S. 1594), which would transfer authority to hear labor disputes from the NLRB to the federal courts. While the NLRB would retain the power to conduct investigations, it would not be allowed to prosecute them. The bill would also strip the NLRB of much of its rulemaking power, expressly prohibiting it from promulgating rules or regulations concerning unfair labor practices and representation elections while limiting its rulemaking authority to rules concerning the internal functions of the board. The bill would also require the board, no later than six months after enactment, to review and revise all previously promulgated regulations to implement these changes. A related bill (H.R. 1722) was previously introduced in the House.

On July 27, Rep. Bradley Byrne, R-Ala., introduced the Save Local Business Act (H.R. 3441), which would amend the NLRA to allow a joint-employer finding only where a person directly, actually, and immediately exercises significant control over the essential terms and conditions of employment. The bill would effectively reverse the

Obama board's controversial *Browning-Ferris Industries of California Inc.* decision that turned upside down longstanding principles governing the determination of joint employer status, and return to the joint-employer standard the board previously applied. It would also amend the Fair Labor Standards Act of 1938 to provide that an entity may be considered a joint employer only if it meets the NLRA criteria. (See our September 25, 2015 *For Your Information* for more detail on the board's *Browning-Ferris* decision.) Legislation to reverse *Browning-Ferris* was also introduced in the prior Congress, but failed to make it over the finish line. (Please see our March 21, 2016 *Legislate* for more information.)

> **Comment.** On August 4, a three-judge panel of the D.C. Circuit refused to enforce an NLRB determination that CNN was a joint employer of a group of contracted technicians in a case the board decided five months prior to *Browning-Ferris.* The court held in the *CNN* case that the board did not follow – or explain why it did not follow – existing precedent for finding joint-employer status only where a company exercises direct, actual and immediate control over workers. However, it did not consider the indirect control standard articulated by the board in the *Browning-Ferris* case that is currently on appeal before the D.C. Circuit.

Efforts Underway to Expand Family and Medical Leave

Even as some lawmakers focus on labor issues, others are looking at family and medical leaves. Just before the August recess, Senators Deb Fischer, R-Neb., and Angus King, I-Maine, and Representatives Mike Kelly, R-Pa., and Terri Sewell, D-Ala., introduced a new version of the Strong Families Act (S. 1716 / H.R. 3595), which would amend the Internal Revenue Code (Code) to provide a credit to employers who provide paid family and medical leave. According to their joint press release, the bipartisan bill is intended to encourage employers to provide such leave by offering a five-year, 25% tax credit for employers who voluntarily offer up to 12 weeks of paid leave for family and medical reasons approved under the federal Family and Medical Leave Act (FMLA).

On July 28, Rep. Frederica Wilson, D-Fla., introduced the Family Leave for Parental Involvement in Education Act (H.R. 3631), which would amend the FMLA and the Code to allow private sector workers and federal employees to take, as additional leave, parental involvement leave to participate in or attend their children's and grandchildren's educational and extracurricular activities and for other purposes. Eligible employees would be allowed to take up to 8 hours of such leave during any 30-day period, capped at 48 hours during any 12-month period.

Looking Ahead

While both chambers are on recess through Labor Day, staffers continue to work so that lawmakers are prepared to address pressing matters when they return in September. Immediate priorities will include raising the debt ceiling before the Treasury exhausts its borrowing authority and funding government operations to stave off a government shutdown on October 1.

Authors
Nancy Vary, JD
Abe Dubin, JD

Produced by the Knowledge Resource Center of Conduent Human Resource Services
The Knowledge Resource Center is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, surveys, training, and knowledge management. For more information, please contact your account executive or email fyi@conduent.com.

CONDUENT