

BURR ALERT

The Board is Going to do *What*? A Look at the National Labor Relations Board: Could 2016 Bring Even More Change?

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The National Labor Relations Board ("the Board") had *quite* an eventful year in 2015. Just think, the Board has recently broken decades-old precedent in five different ways:

- 1) On December 11, 2014, the Board decided Purple Communications, Incorporated, overruling Sturgis,¹ thereby opening up employer email systems to employees to discuss workplace issues during nonworking time.
- 2) On March 18, 2015, the Board's General Counsel released its "Report of the General Counsel Concerning Employer Rules," which identifies specific employer policies it wishes to target that "chill" employee rights.
- 3) On April 14, 2015, the Board announced its wide-sweeping Election Rule changes, which dramatically speeds up the election process and facilitates expansive simultaneous changes to the post-petition process.
- 4) On August 27, 2015, the Board decided Browning-Ferris Industries of California, Inc.,² in which it broadly defined joint employment.
- 5) And, on September 1, 2015, the Board announced its E-Signatures and E-Cards changes, allowing for electronic union authorization cards and electronic signatures, making union authorization cards a virtual affair.

Of course, this enumeration is not exhaustive, as there is a litany of decisions affecting employers across the country, especially in the areas of social media and employer policies. As 2015 fades into the background, will the Board fade with it? Probably not. There is no reason to think that the current Board's trajectory is falling. Be on the watch for three more Board changes before the next Presidential Election.

¹ M.B. Sturgis, Inc., 331 NLRB 1298 (2000).

² 362 NLRB No. 186. On Tuesday, January 13, 2016, the Board found that the employers in the case (BFI and Leadpoint) unlawfully refused to bargain with the union. BFI will likely appeal this Board decision to a federal circuit court, seeking appellate review of the new joint employment standard.

- 1) The Board will likely reconsider its current precedent regarding temporary employee bargaining units. Currently, the Board will only certify a bargaining unit that includes employees of a host employer and a temporary services employer if both employers agree. In Miller & Anderson, Inc., 05-RC-079249, a case pending before the Board, the Board is deciding whether to “disallow[] inclusion of solely employed employees and jointly employed employees in the same unit absent consent of the employers, and if not, whether the Board should return to the holding of M.B. Sturgis, Inc., 331 NLRB 1298 (2000), which permits the inclusion of both solely and jointly employed employees in the same unit without the consent of the employers.”

If you use temporary employees, you should follow this case closely in 2016. A return to Sturgis will make it much easier for unions to organize temporary employees and host employer employees into a single bargaining unit – no employer agreement necessary.

- 2) The Department of Labor has finally submitted its proposed revisions of the “Persuader” Rule to the Office of Management and Budget for review. These proposed revisions, although much delayed, are now scheduled to take effect in March 2016. If accepted, the proposed revisions would change an employer's reporting requirements during a labor campaign under the Labor-Management Reporting and Disclosure Act (“the LMRDA”) by narrowing the advice exemption, which has been the law since 1959.

Under the LMRDA, employers in a labor campaign must report all labor consultants and/or attorneys retained to persuade employees about unionization *unless* the activity falls within certain exemptions. Current law retains the “advice exemption” “which distinguishes between direct and indirect contact and asks whether or not an employer is ‘free to accept or reject’ materials provided.”³ The proposed revisions,⁴ however, substantially change the “advice exemption” so that employers must report almost all labor attorney activity⁵ that could be considered “persuader conduct”, even where privileged legal advice is given. Keep an eye out for this final rule in 2016. This broad interpretation would have a drastic impact on the confidential nature of the attorney-client relationship; moreover, it would impose reporting obligations on law firms and employers.

³ 76 Fed. Reg 36182.

⁴ Id. The rule states, “[t]he Department proposes to revise its interpretation of the ‘advice’ exemption to such reporting, by limiting the definition of what activities constitute ‘advice’ under the exemption, and thus expanding those circumstances under which reporting is required of employer-consultant persuader agreements. . . .”

⁵ Id. The proposed rule would require reporting for all “actions, conduct, or communications that have a direct or indirect object to persuade employees.”

- 3) In addition, be on the lookout for mobile labor activism in 2016. During the 2014 Golden Globe Awards, Amy Poehler said, "[a] lot of nominated shows this year are actually on Netflix . . . Enjoy it while it lasts, Netflix. Because you're not going to be feeling so smug in a couple of years when Snapchat is up here accepting Best Drama." Extending this joke about the popularity of mobile apps to organized labor, soon, there might be an app for that.

On June 10, 2015, The Century Foundation called⁶ on app developers to create a mobile app for union organizing. Since our nation is digitizing nearly every aspect of work and life, the movements driving digital labor organization are no laughing matter. For the first time, the Oxford Dictionaries Word of the Year in 2015 was a pictograph. Yes, the word of the year in 2015 was not a "word" in the traditional sense at all, but 😊, the 'Face with Tears of Joy' emoji. With the Board's sweeping changes in 2015 making organizing more digitally and mobile friendly through electronic election notices, employee access to employer email systems and e-cards and e-signatures; it would come as no surprise if the Board continues digitizing pre-petition labor efforts by recognizing labor organizing apps.

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⁶ <http://apps.tcf.org/virtual-labor-organizing>