From Dissent to Majority: What Labor Lawyers Might Expect From the NLRB

By: Wendy M. La Manque

I. Introduction

President Trump notably has the opportunity to fill the empty seat on the Supreme Court and more than 100 other vacant federal judgeships.[1] But labor law practitioners must also be aware of (and prepared for) Trump's ability to fill two vacancies on the National Labor Relations Board (the "Board"),[2] and to choose a new General Counsel when the current GC Richard Griffin's term expires in November 2017.[3] With a new balance of power at the Board, the general expectation is that the dissenting opinions of Member Miscimarra (now Acting Chair) in major decisions under the Obama Board will likely soon be the law of the land.

Although the Board cannot go out in search of cases upon which to rule, those who practice before the Board reasonably anticipate reversals in Obama-era precedent in several major areas. This article will address three areas likely to come before the Board in the next few years: the joint employer standard; whether graduate students enjoy collective bargaining rights under the National Labor Relations Act (the "Act"); and the procedures to be followed in Representation cases.[4]

II. The Joint Employer Standard—*Browning-Ferris*

Arguably one of the most consequential decisions under the Obama Board came in *Browning-Ferris Industries of California, Inc.*[5] In *Browning-Ferris*, the Board tackled the issue of joint employment, that is, when a business entity can be considered the employer (for purposes of the Act) of workers who are technically "employed" by another entity, such as a temporary hiring agency. In brief, the issue in *Browning-Ferris* was whether BFI, which owned and operated a recycling plant, was a joint employer with Leadpoint, an entity BFI contracted with to supply employees to work at BFI's plant.

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The Board majority (Chairman Pearce and Members Hirozawa and McFerran) determined that the joint employer standard then in existence—that to be a joint employer, the putative employer's control over workers must be "direct, immediate, and not 'limited and routine'"[6]—needed to be revisited, because, among other things, that standard was "narrower than statutorily necessary" in relation to the common law agency theory.[7] The Board concluded that a different test was appropriate, because over the past several decades, while "the Board's view of what constitutes joint employment under the Act has narrowed, the diversity of workplace arrangements in today's economy has significantly expanded."[8] The majority therefore announced a return to the "traditional" test used by the Board: that "[t]he Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment."[9]

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The Board majority found that BFI was indeed a joint employer with Leadpoint because, among other things, BFI codetermined who could be hired to work at BFI's plant by imposing specific conditions on the hiring process;[10] BFI possessed the right to "discontinue the use of any personnel" Leadpoint assigned to work at the plant;[11] BFI retained unilateral control over the speed of the production lines;[12] and BFI specified the number of workers it required, the timing of employees' shifts, and determined a maximum compensation rate.[13] The majority noted there would be no unfairness "in holding that legal consequences may follow" from BFI's decision to retain ultimate authority over these and other terms and conditions of employment,[14] and that because BFI had retained such authority, it was difficult for the Board to see "how Leadpoint alone could bargain meaningfully about such fundamental working conditions as break times, safety, the speed of work, and the need for overtime imposed by BFI's productivity standards."[15] In other words, to effectuate meaningful collective bargaining, BFI

must be considered a joint employer whose presence is required at the bargaining table.

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In light of Members Miscimarra's and Johnson's vociferous dissent in this case, however, it is likely that *Browning-Ferris* will be overturned by a Trump Board at its earliest opportunity. In the dissent's view, the Board majority had created "fundamental uncertainty"[16] by abandoning a longstanding test and replacing it with an ambiguous standard. The dissent argued that under the majority's view, indirect or potential control over terms and conditions of employment by the putative employer would now be dispositive of joint employer status, even if there is *no* evidence of actual, direct control of employees' terms and conditions of employment.[17] The dissent warned that "no bargaining table will be big enough" for all the entities that will qualify as joint employers under the majority's standard,[18] argued that the majority's test was out of line with common law agency principles,[19] and concluded that the Board had gone beyond its Congressional grant of authority by redefining the joint employer doctrine.[20]

Of particular concern to the dissent was how the *BFI* standard will affect business franchising and related federal law. The dissent cites as an example trademark law, as it relates to franchises, which requires that a company owning a trademark set up standards that must be met in order for the franchise to use the mark associated with its goods or services.[21] Developing these standards necessarily involves the trademark holder designating that the product be created by some sort of consistent method.[22] According to the dissent, the new joint employer standard could cause labor-related consequences for franchisors, whose designation of a standard method of operations may result in the franchisee becoming the "agent of its franchisor," something Congress did not intend.[23]

The majority defended its decision against the dissent's criticisms, which the majority took as an attack on the very notion of joint employers generally,[24] by insisting that "[i]t is not the goal of joint-employer law to guarantee the freedom of employers to insulate themselves from their legal responsibility to workers, while maintaining control of the workplace."[25] However, given Trump's business background, his nomination of Andrew Puzder, CEO of CKE restaurants, which owns or franchises over 3,300 fast food restaurants in the United States,[26] to be Secretary of Labor,[27] and what the dissent characterized as the "expansive, near-limitless nature of the majority's new standard,"[28] it is likely that the Board will endeavor to move to a much narrower standard that allows businesses to retain greater control over their operations and workforce without being considered joint employers under the Act.

III. Collective Bargaining Rights for Graduate Students—*Columbia University*

Another major Obama Board decision that will likely meet resistance from a Trump Board is *The Trustees of Columbia University in the City of New York and Graduate Workers of Columbia-GWC, UAW*,[29] where the Board revisited the issue of whether graduate students are properly considered employees under the Act. In *Columbia University*, the Board majority (Chairman Pearce and Members Hirozawa and McFerran) overruled the 2004 case of *Brown University,*[30] which categorically excluded graduate students employed by their universities from coverage under the Act, and which itself overruled the 2000 case of *New York University*,[31] which held that certain graduate students *were* statutory employees.

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In *Columbia*, the Board found that in *NYU* the Board had been on "very firm legal ground" when it concluded that graduate students were employees under the Act, given that the students had a common-law employment relationship with their university.[32] The Board in *Columbia* found that recognizing student assistants as employees would promote federal labor policy goals by permitting employee free choice to engage in collective bargaining;[33] that doing so would not unduly infringe upon "traditional academic freedoms" as demonstrated in organized public university settings;[34] and that there is ultimately no compelling reason to continue to exclude graduate students from the Act's protection.[35] In light of the foregoing, and the fact that Columbia University "directs and oversees" graduate students' teaching activities,[36] the Board overruled *Brown University*, finding that here, graduate students were properly considered employees under the Act (noting, however, that the Board would

not require *all* common-law employees to be considered employees under the Act). The Board further held that the petitioned-for unit of undergraduates, master's degree students, and doctoral student assistants shared a community-of-interest and was an appropriate unit under *Specialty Healthcare*.[37]

Member Miscimarra, dissenting, argued that Congress never intended that graduate students would be covered by the Act, and that *Brown* was rightly decided.[38] Miscimarra reiterated the Board's view in *Brown* that "[t]he 'business' of a university is education," and students are not the means of production—they are the "product."[39] In Miscimarra's view, these graduate students have a relationship to the university that is "predominantly academic, rather than economic," and that Congress intended the Act to apply to conventional workplaces, not academic settings.[40] In accordance with the *Brown* decision, Miscimarra maintained that the work done by graduate students was in furtherance of obtaining a degree, and that introducing collective bargaining to this relationship would be detrimental to students' educational process and infringe upon academic freedom.[41] Miscimarra argued that the Board majority had disregarded the potential effects of the use of economic weapons in a labor dispute at a university, citing the possibility that students may lose academic credit or fail to satisfy graduation requirements in the event of a strike or lockout, while their tuition could be retained by the university.[42] Miscimarra also noted that the Board's processes related to representation cases and unfair labor practices can take months or years, and that the students may no longer be attending school by the time Board-ordered relief becomes available to the parties in a university-centered labor dispute.[43] Miscimarra would hold that in any event, because of "fundamental dissimilarities" between master's degree students, undergraduate students, doctoral students and course assistants in terms of their pay, duties, responsibilities, and expected length of service in their positions, the petitioned-for unit would be inappropriate under any community-of-interest test, including *Specialty Healthcare*.[44]

Member Miscimarra emphasized that, with the exception of the four-year period between the decisions in *NYU* and *Brown*, "the Board has consistently held that university student assistants are *not* employees," and their relationship with their university is "primarily educational."[45] It is likely, therefore, that a Trump Board would revert to a more restrictive interpretation of the Act that categorically excludes graduate students from its coverage.

IV. Representation Case Procedures

In December 2014, the Board adopted revised rules to govern the processing of representation petitions and elections, and did so in an effort "to enable the Board to better fulfill its duty to protect employees' rights by fairly, efficiently, and expeditiously resolving questions of representation."[46] The rules were adopted through an agency rulemaking process,[47] and went into effect on April 14, 2015. Both the Fifth Circuit and D.C. Circuit Courts of Appeals have upheld these rules as within the broad discretion entrusted to the Board under the Act.[48]

The revised rules touch on many different procedural issues arising in the context of representation cases, including e-filing (the Board now permits the electronic transmission of petitions, notices and voter lists); the standardization of timing of pre- and post-election hearings; and limiting the issues that can be raised at a pre-election hearing to disputes that are necessary to determine whether it is appropriate to conduct an election.[49] The majority of the Board contended that the rule modifications will remove some of the delays inherent in the Board's process and minimize the possibility of frivolous litigation.[50]

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The rules were not adopted unanimously, however, and the 30-page dissent from Members Miscimarra and Johnson painted a very different picture, referring to the amendments to the rules as the "Mount Everest of regulations."[51] The dissent contended that the new rules adopt an "election now, hearing later" approach, by delaying answering fundamental questions until after the election, and will encourage employees to "vote now, understand later" by shortening the "time needed for employees to understand relevant issues" and curtailing employers' rights to "engage in protected speech."[52] Specifically, the dissent focused on changes that, in their view, constitute an unjustifiably greater burden on the employer, such as the requirement that an employer's position statement be timely filed or forfeit litigating "any issue that must be contested at the pre-election stage," including questions of jurisdiction, the employer's operations, employee status, contract and other election bars, and what constitutes the appropriate unit.[53] The dissent contrasted this burden on employers with the requirements on a petitioning union during the same period, arguing that the practices of obtaining pre-hearing information from the petitioning union are essentially voluntary and informal, and the same as prior to the amendments, while the practices concerning employers were "transformed into binding legalistic requirements" with significant negative consequences for failing to timely comply.[54] Among a spate of other issues, the dissent also objected to the elimination of post-hearing briefs and mandatory Board review of post-

election disputes under stipulated election agreements as being without a rational basis.[55]

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The Board majority noted the multiple areas in which there was no substantive disagreement between the majority and the dissent—such as allowing for electronic filing and transmission of the petition and the required notice if the employer customarily communicates with its employees electronically; providing that requests for review will not stay action by a regional director unless the Board specifically orders otherwise; and requiring the employer to provide an electronic version of the voter list.[56] Still, the dissent expressed the view that the overarching problems with these provisions "infect" the final rule as a whole, they "do not approve of any aspect of the Rule," and that the majority was "mistaken in suggesting that there exists a Board consensus on *any* specific provisions" of the rule.[57]

The amended election rules are a likely target for a Trump Board. The Board could change the rules through another agency rulemaking process, or the rules could be repealed by Congress. The Board could attempt to scrap the rules entirely, as suggested by the dissent's comment that they "do not approve of *any* aspect" of the rule.[58] Still, because of the arguably universally beneficial aspects of some of the rule amendments—such as permitting the electronic filing and transmission of certain documents—it is possible that the Board may take a more targeted approach and repeal only elements of the rules. For example, the dissent expressed its belief that it would be reasonable to have a minimum "guideline" period between the filing of the petition to the election of 30-35 days, and a maximum period of 60 days.[59]

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The dissent also argued that one of the biggest factors contributing to delays in resolving election-related issues was not addressed by the rule amendments: the Board's "blocking charge" doctrine, which permits parties to delay representation elections by filing certain kinds of unfair labor practices charges.[60] The dissent suggested eliminating blocking charge deferrals for a three-year trial period in order to study its effects on reducing delay, which may obviate the need to change other election procedures to achieve that goal.[61]

The dissent also hinted at future attempts to limit *Specialty Healthcare*,[62] which established that unions need only show that the proposed unit (in a non-acute health care setting) consists of a clearly identifiable group of employees for the Board to presume the unit is appropriate. To overcome this presumption, an employer arguing that the unit should include additional employees must demonstrate that employees in a larger unit share an "overwhelming" community of interest with those in the petitioned-for unit.[63] The dissent argued that under that standard, "[a]lmost any petitioned-for unit conforming to classification, department, craft, or group function may be viewed as presumptively appropriate."[64]

V. Conclusion

These three Board issues are hardly the only ones affecting workers' rights that are likely to receive scrutiny from the Trump administration. At the NLRB, practitioners may also reasonably anticipate changes in the standards governing class action waivers,[65] employee use of employer email systems,[66] employer withdrawal of recognition of an incumbent union,[67] and the disclosure of confidential witness statements from workplace investigations,[68] to name a few possibilities. To paraphrase Samuel L. Jackson's warning words in the film *Jurassic Park*: "Hold onto your [hats]."[69]

Endnotes

1. *See* http://www.uscourts.gov/judges-judgeships/judicial-vacancies (last visited February 12, 2017).
2. *See* https://www.nlrb.gov/who-we-are/board (last visited February 12, 2017).
3. *See* https://www.nlrb.gov/who-we-are/general-counsel/richard-f-griffin-jr (last visited February 12, 2017).
4. The following is adapted from Ms. LaManque's contribution to a joint paper and presentation by Ms. LaManque and Jessica Katsin, partner at Jones Day, at the 2017 New York State Bar Association Labor and Employment Law Section Annual Meeting.
5. 362 N.L.R.B. No. 186 (Aug. 27, 2015).
6. *Id.* at 10.
7. *Id.* at 11.
8. *Id.*
9. *Id.* at 15.
10. *Id.* at 18.
11. *Id.*
12. *Id.*
13. *Id.* at 19.
14. *Id.* at 14.
15. *Id.* at 19.
16. *Id.* at 23.
17. *Id.* at 22.
18. *Id.* at 21.
19. *Id.* at 28.

20. *Id.* at 27-28.
21. *Id.* at 45.
22. *Id.* at 46.
23. *Id.*
24. *Id.* at 20.
25. *Id.* at 21.
26. *See* http://www.ckr.com/about.html (last visited February 12, 2017).
27. At the time this article was submitted for publication, Andrew Puzder was still the nominee for Secretary of Labor. On February 15, 2017, Puzder withdrew from consideration after several Republicans expressed doubts over voting in favor of his nomination. According to the *New York Times*, Puzder had seen intense opposition from "Democrats and liberal groups who accused him of mistreating his workers, opposing the minimum wage and supporting automation in the workplace. The attacks on his policy views were compounded by an intense scrutiny of his personal life, including allegations that he abused his ex-wife in the 1980s." The New York Times (February 15, 2017), available at https://www.nytimes.com/2017/02/15/us/politics/andrew-puzder-withdrew-labor-secretary.html.
28. *Id.* at 36.
29. 364 N.L.R.B. No. 90 (2016).
30. 342 N.L.R.B. 483 (2004).
31. 332 N.L.R.B. 1205 (2000).
32. 364 N.L.R.B. No. 90 at 4.
33. *Id.* at 6-7.
34. *Id.* at 7-9.
35. *Id.* at 12.
36. *Id.* at 15.
37. *Id.* at 18-21.
38. *Id.* at 23.
39. *Id.* at 34 (citations omitted).
40. *Id.* at 24-25.
41. *Id.* at 25.
42. *Id.* at 29.
43. *Id.* at 31.
44. *Id.* at 33.
45. *Id.* at 24 (emphasis in original).
46. Memorandum GC 15-06 (April 6, 2015).
47. *See* Representation-Case Procedures, 79 Fed. Reg. 74308 (Dec. 15, 2014).
48. *See Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2016); *Chamber of Commerce of United States of Am. v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015).
49. For a comparison chart of the new and old election procedures, *see:* https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3317/Comparisontable.pdf (last visited February 12, 2017).
50. *See* 79 Fed. Reg. at 74308.
51. *Id.* at 74430.
52. *Id.* at 74430-1.
53. *Id.* at 74442-3.
54. *Id.* at 74443.
55. *Id.* at 74449.
56. *Id.* at 74422.
57. *Id.* at 74441 (emphasis in original).
58. *Id.* (emphasis supplied).
59. *Id.* at 74459.
60. *Id.*
61. *Id.*
62. 357 N.L.R.B. 934, 941 (2011).
63. *Id.* at 944.
64. 79 Fed. Reg. at 74447.
65. *See D.R. Horton*, 357 N.L.R.B. 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013).
66. *See Purple Communications, Inc.*, 361 N.L.R.B. No. 126 (Dec. 11, 2014).
67. *See Levitz Furniture Co. of the Pacific*, 333 N.L.R.B. 717 (2001); GC Memo 16-03.
68. *See American Baptist Homes of the West d/b/a Piedmont Gardens*, 362 N.L.R.B. No. 139 (June 26, 2015).
69. Jurassic Park (Universal Pictures 1993).