LABOR RELATIONS IN THE AGE OF TRUMP

Michael Tedesco
Tedesco Law Group
miketlaw@miketlaw.com
866-697-6015
AREAS TO BE COVERED

• NLRB
• PUBLIC EMPLOYEE FEE PAYER ISSUES
• RIGHT TO WORK GENERALLY
• OVERTIME EXTENSIONS-FLSA
• HEALTH CARE ACT IMPLICATIONS
• INFRASTRUCTURE BUILDING PROJECTS
CAVEAT

• WHAT IS GOING ON IN DC IS CHAOTIC AT THE MOMENT.
• I WAITED UNTIL LAST WEEK TO FINALIZE THIS DUE TO THE PACE OF EVENTS.
• TAKE THIS ALL WITH A GRAIN OF SALT.
• ALSO, I ADMIT TO A SUBSTANTIAL BIAS.
NLRB-THE BOARD

• THE BOARD SHOULD (NORMALLY?) HAVE 5 MEMBERS.
• THERE ARE ONLY 3 AT THE MOMENT—2 DEMS AND 1 REPUBLICAN.
• THE ONLY THING THAT THE ADMINISTRATION HAS DONE, SO FAR, IS TO MAKE THE REPUBLICAN THE CHAIR.
NLRB-BOARD

• THERE ARE TWO PENDING VACANCIES.
• BOTH SEATS CAN BE FILLED BY REPUBLICANS-SO A MANAGEMENT SHIFT WILL LIKELY OCCUR.
• WHAT MAY HOLD THIS UP IS:
  • DEMOCRATIC OBSTRUCTION TO SENATE CONFIRMATION. (NOTE ALL SENATE FILIBUSTERS OF EXECUTIVE-BRANCH APPOINTEES WERE PROHIBITED BY HARRY REID.)
  • THE ADMINISTRATION’S INABILITY TO MOVE FORWARD ON APPOINTMENTS.
IMPLICATIONS OF THE CHANGE IN BOARD, WHEN IT HAPPENS, IS A ROLL BACK OF DECISIONS FROM THE OBAMA BOARD IN A VARIETY OF AREAS.

CHANGES IN OBAMA ERA RULES, PARTICULARLY AROUND SPEEDING UP REPRESENTATIONAL ELECTIONS.

40% quicker to hold a union election, according to The Wall Street Journal.
NRLB-DECISIONS IN JEOPARDY-
JUST SOME

• JOINT EMPLOYER CASES—SO CALLED MCDONALD AND BROWING-FERRIS DECISIONS.

• THE BOEING CASE WHERE A COMPLAINT WAS ISSUED FOR RETALIATION WHERE AFTER A STRIKE THE COMPANY MOVED THE WORK TO ANOTHER STATE.

• SPECIALTY HEALTHCARE-PERmits MULTIPLE BARGAINING UNITS WITHIN A WORK PLACE.

• PRE-FIRST CONTRACT DISCIPLINE CASES
NLRB-HISTORICAL VIEW

• THE BOARD HAS BEEN HYPER POLITICAL SINCE THE 1980’S -REAGAN YEARS.
• THE SWING FROM REAGAN TO CLINTON TO BUSH TO OBAMA IS NOTICEABLE, AND THIS IS A CONTINUATION OF THE TREND WE HAVE ALL LIVED WITH FOR OUR PROFESSIONAL LIVES.
• IT SHOULD BE NOTED THAT OTHER THAN FAVORING EMPLOYEE “CHOICE”, TRUMP DOES NOT APPEAR TO HAVE ANY VIEWS ON THESE ISSUES. THUS, REPUBLICAN ORTHODOXY IS LIKELY TO PREVAIL.
PUBLIC EMPLOYEE-FEE PAYER ISSUES

• THE PUBLIC SECTOR COLLECTIVE BARGAINING UNITS IN OREGON AND WASHINGTON CAN REQUIRE NON-UNION MEMBERS WITHIN A BARGAINING UNIT TO PAY FAIR SHARE FEES ASSOCIATED WITH COLLECTIVE BARGAINING.

• THIS IS IN RETURN FOR THE UNION’S OBLIGATION TO REPRESENT ALL BARGAINING UNIT MEMBERS, WHETHER THEY ARE UNION MEMBERS OR NOT.
CURRENT STATUS OF THE LAW

• SUCH FEES ARE PERMITTED BY VIRTUE OF THE SUPREME COURT’S DECISION IN ABOOD V DETROIT BOARD OF EDUCATION.

• THERE HAVE BEEN PERSISTENT EFFORTS TO OVERTURN OR LIMIT ABOOD.
IN LATE 2015, THE SUPREME COURT HEARD A CALIFORNIA CASE WHICH MAY WELL HAVE OVERTURNED ABOOD AND LIMITED, IF NOT, ELIMINATED A UNION’S RIGHT TO COLLECT FEES FROM NON-MEMBERS.

ESSENTIALLY THE COURT WOULD HAVE CONSTITUTIONALLY ELIMINATED FAIR SHARE.

PRIOR TO THE DECISION BEING ISSUED, JUSTICE SCALIA DIED. THE CASE WAS DEAD LOCKED 4-4.
CURRENT SITUATION.

• THERE IS ANOTHER CASE CHALLENGING ABOOD MOVING THROUGH THE SYSTEM. THE CASE IS CALLED JANUS AND WAS RECENTLY HEARD BY THE 7TH CIRCUIT WHERE A RULING WAS MADE IN FAVOR OF THE UNION.

• IT IS LIKELY TO GO TO THE SUPREME COURT WHERE CERT IS LIKELY TO BE ACCEPTED THIS FALL WITH ARGUMENT IN SPRING OF 2018, AND A DECISION ISSUED BY JUNE, 2018.
OUTLOOK FOR JANUS

• LOOK TO NEIL GORSUCH.
• IF HE MIMICS JUSTICE SCALIA, WHICH HE IS PREDICTED TO DO IN MOST INSTANCES, ABOOD MAY BE OVERTURNED A BIT MORE THAN A YEAR FROM NOW.
• DEPENDING UPON THE SCOPE OF THE DECISION, THE SYSTEM OF FAIR SHARE FEE PAYMENTS WILL BE A THING OF THE PAST.
RIGHT TO WORK GENERALLY

• THE REPUBLICAN SENATE HAS PROPOSED A NATIONWIDE RIGHT TO WORK BILL AS THEY HAVE DONE IN THE PAST.

• THIS TIME, HOWEVER, THEY HAVE A PRESIDENT WHO IS LIKELY TO SIGN IT, IF IT GETS TO HIM (DEPENDS WHO HE WAKES UP ANGRY AT, OF COURSE.)
RTW AND THE PROCESS

• A DEMOCRATIC FILIBUSTER CAN BE EXPECTED, THOUGH IT IS HARD TO JUDGE HOW EFFECTIVE IT WILL BE.

• FURTHER, IT IS HARD TO TELL IF THE REPUBLICANS WILL PUSH THIS, GIVEN THE SUCCESSES THAT THEY HAVE HAD GOING STATE BY STATE:
  • SEE MISSOURI, WISCONSIN, MICHIGAN, AND INDIANA
OVERTIME EXTENTION

• ON DECEMBER 1, 2016, OBAMA DOL PREVIOUSLY PROMULGATED RULES WORK HAVE EXTENDED OVERTIME PROTECTIONS TO OVER 4 MILLION WORKERS.

• THESE WORKERS WORK MORE THAN 40 HOURS IN A GIVEN WEEK AND EARNED LESS THAN $47,476 A YEAR.
REPEAL OF FAIR PAY AND SAFE WORKPLACES ORDER

• TRUMP SIGNED A BILL TO REPEAL THE OBAMA ADMINISTRATION’S FAIR PAY AND SAFE WORKPLACES EXECUTIVE ORDER.

• THAT RULE DISCOURAGED THE GENERAL SERVICES ADMINISTRATION FROM AWARDING FEDERAL CONTRACTS TO COMPANIES WITH A HISTORY OF STEALING THEIR EMPLOYEES’ WAGES, VIOLATING WORKPLACE SAFETY STANDARDS, AND/OR ILLEGALLY DISCRIMINATING IN HIRING OR PAY.

• THE ORDER ALSO REQUIRED CONTRACTORS TO PROVIDE THEIR EMPLOYEES WITH “THE NECESSARY INFORMATION EACH PAY PERIOD TO MAKE SURE THEY ARE GETTING PAID WHAT THEY ARE OWED.”
IMMIGRATION REFORM?

• LET’S REMEMBER THAT UNDOCUMENTED WORKERS ARE WORKERS.
• UNDOCUMENTED WORKERS PARTICIPATE AND VOTE IN NLRA ELECTIONS AND ARE ELIGIBLE FOR CONDITIONAL REINSTATEMENT.
• GENERAL COUNSEL MEMO 15-03, STATES THAT UNDOCUMENTED WORKERS ARE PROTECTED EMPLOYEES UNDER THE ACT EVEN IN THOSE CASES WHERE THEY ARE NOT ELIGIBLE FOR BACK PAY OR UNCONDITIONAL REINSTATEMENT.
• IT IS HARD TO IMAGINE THAT THE TRUMP ADMINISTRATION WILL FOLLOW THIS LINE.
NO MATCH LETTERS AND ICE

• UNDOCUMENTED WORKERS FIND WORK BY USING FICTITIOUS SSI IF THEY ARE WORKING FOR LEGITIMATE EMPLOYERS.
• USING THESE SSI NUMBERS IS ILLEGAL.
• IN THE PAST AN EMPLOYER WOULD GET A NO-MATCH LETTER AND THE EMPLOYEE WOULD BE NOTIFIED. GENERALLY, THERE WAS LITTLE FOLLOW UP.
• NOW, WITH INCREASED ICE ENFORCEMENT, THESE EMPLOYEES (SOME OF MANY YEARS) WILL RETREAT UNDERGROUND.
  • DAMAGING THE EMPLOYERS THEY LEFT AND LEAVING FAMILIES WITH A LOSS OF INCOME.
“SO-CALLED” FEDERAL JUDGES

• U.S. DISTRICT JUDGE AMOS MAZZANT III FROM NEVADA ENJOINED THE ENFORCEMENT OF THE OT RULE A WEEK BEFORE IT WAS TO GO INTO EFFECT.

• IT IS HARD TO IMAGINE A WORLD WHERE THE NEW DOL, WHOEVER WILL BE RUNNING IT, WILL NOT REMOVE THIS RULE. SO SAD!
HEALTH CARE ACT
IMPLICATIONS

• HISTORICAL GROWTH IN PREMIUMS
(SEE CHART OF NEXT SLIDE)
Average Premium Increases for Covered Workers with Family Coverage, 1999-2014

- **1999 - 2004**: 72% (72%)
- **2004 - 2009**: 34% (34%)
- **2009 - 2014**: 26% (26%)

**Source:**

*Premium change is statistically different from previous period shown (p<.05).*
WHAT THE CHART TELLS US

- 72% TO 34% TO 26% OVER EACH FIVE YEAR PERIOD.
- WE WHO BARGAIN HEALTH CARE HAVE SEEN THE SLOWER INCREASE IN ANNUAL PREMIUMS WHEN COMPARED TO THE LATE 90’S.
PERCENTAGE OF UNINSURED AMERICANS UNDER AGE 65

• PRIOR TO ACA, NEARLY 1 IN 5 CITIZENS WERE UNINSURED.
• AT THE END OF THE OBAMA ADMINISTRATION NEARLY 1 IN 10 CITIZENS WERE UNINSURED.
• A CHANGE FROM 18.2% TO 10.5%.
• FROM 41 MILLION TO 28 MILLION.
Figure 1

Uninsured Rate Among the Nonelderly Population, 1995-2015

Source: CDC/NCHS, National Health Interview Survey, reported in
http://www.cdc.gov/nchs/health_policy/trends_hc_1968_2011.htm#table01 and
IMPACT OF TRUMP CARE OR TRUMP ACTION

- The Trump/Ryan care should it become law will mean that 24 million Americans will become uninsured.
- Further, Trump has ordered that the individual mandate in the ACA not be enforced.
- In January, he suspected government efforts to publicize the need for citizens to sign up for the plan. (So called “death spiral” is caused by what?)
IMPACT ON EMPLOYERS AND UNIONS

• HEALTH CARE COSTS WILL RISE.
• UNINSURED FOLKS STILL GET SICK, AND THEY HAVE TO BE TREATED, THOUGH THEY MAY NOT HAVE TO PAY—BECAUSE IN MOST CASES, THEY CAN’T.
• HEALTH CARE PROVIDERS ARE GOING TO HAVE TO ABSORB THAT COST, AS THEY DID IN THE PRE-ACA DAYS.
• THESE COSTS ARE PASSED ON TO THE INSURANCE PROVIDERS FOR THE REST OF US—MAKING PREMIUMS GO UP—IT IS THAT SIMPLE.
BARGAINING HEALTH CARE

• IT’S NEVER EASY.
• COSTS GO UP AND BENEFITS IN THE FORM OF DEDUCTIBLES.
• THE TRADE OFF WILL BE MADE AT THE BARGAINING TABLE AND INCREASED INSURANCE COSTS WILL LEAD TO BOTH LOWER EMPLOYER PROFITS AND LOWER UNION WAGES.
INFRASTRUCTURE PROJECTS

• TRUMP KEEPS SAYING THAT HE WANTS A MASSIVE INFRASTRUCTURE BILL. THIS IS AT ODDS WITH REPUBLICAN ORTHODOXY.

• AS USUAL, THERE IS NO ANNOUNCED PLAN FOR WHAT THIS WOULD LOOK LIKE AND WOULD LIKELY FACE SIGNIFICANT CONSERVATIVE OPPOSITION IF WHAT HE MEANS IS AN FDR STYLE PROGRAM.
ALTERNATIVES

- IT IS POSSIBLE A PUBLIC INFRASTRUCTURE BILL COULD GET THROUGH CONGRESS (THOUGH UNLIKELY), THAT DOESN’T RELY ON FEDERAL WORKERS, BUT RATHER, PRIVATE SECTOR CONTRACTORS.

- THE LEVEL TO WHICH SUCH CONTRACTORS WILL UTILIZE ORGANIZED WORKERS WILL VARY FROM STATE TO STATE AND COULD RESULT IN AN INCREASE IN PRIVATE SECTOR ORGANIZATION.
ANOTHER POSSIBILITY

• HOWEVER, IF FEDERAL WORKERS ARE USED, THEY WOULD IN THE BEST CASE BE ABLE TO FORM LABOR ORGANIZATIONS THROUGH THE FLRA.