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Board Invites Briefing on Potentially Overturning "Johnnie's Poultry" Standard for Questioning of Employees About Putative Protected Activity

Labor Relations Update Blog on **March 2, 2021**

On Monday, the Board voted 3-1 to solicit public briefing on whether it should overrule the *Johnnie's Poultry Co.*, 146 NLRB 770 (1964) safeguards employees must receive if they are questioned by employers about their own or another employees' potentially protected concerted activity. Those safeguards include requiring the following:

- The employer must communicate to the employee the purpose of the questioning, assure the employee that no reprisal will take place, and obtain the employee's participation voluntarily;
- The questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and
- The questions must not exceed the necessities of the legitimate purpose by prying into other union matters, elicit information concerning an employees' subjective state of mind, or otherwise interfere with the statutory rights of employees.

In *Sunbelt Rentals, Inc. and Int'l Union of Operating Engineers Local 139, AFL-CIO*, No. 18-CA-236643 (May 13, 2020), the ALJ found the employer, a construction equipment retailer accused of several Section 8(a) violations, including failing and refusing to bargain collectively and in good faith, violated Section 8(a)(1) of the Act when its attorney interrogated employees in connection with their testimony in the case. Specifically, the ALJ found the attorney failed to 1) inform one employee that his testimony would not affect his employment and 2) inform the other employee that his participation was voluntary. The employer asked the Board to not apply *Johnnie's Poultry* , but instead apply a "totality of the circumstances" standard, considering the purpose of the interview, the entire statement made to the employee, and scope of questioning.

The Board majority observed that the Respondent is not alone in believing *Johnnie's Poultry* has outlived its utility, stating "several courts of appeal have disagreed with it," citing as one example *Tschiggfrie Properties, Ltd. v. NLRB*, 896 F.3d 880, 888 (8th Cir. 2018) (we previously reported on the Board's decision here). Given various appellate courts declining to apply the *Johnnie's Poultry* standard, the Board invited the parties and the public to file briefs addressing 1) whether the Board should adhere to or overrule *Johnnie's Poultry* and 2) if overruling *Johnnie's Poultry*, what standard the Board should adopt (e.g., totality of the circumstances, maintain some of the safeguards outlined under the existing standard).

Board Chair Lauren McFerran, promoted by President Biden on his first day in office, was the sole dissenter. Chair McFerran felt there was no "compelling reason" to consider alternatives to this 56-year old bright-line rule, stating the importance of protecting vulnerable employees' statutory rights as well as the Board's ability to enforce the Act.

Click here to read the notice and invitation to file briefs. Public briefs are due by April 5, 2021.

As always, we will continue to monitor developments in the composition of the Board. Subscribe to Proskauer's Law and the Workplace blog to stay current on the latest Biden administration developments impacting your business.

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