

Johnnie's on the Spot; Board Reaffirms Standards for Employer Interrogations of Employees in Preparation for NLRB Proceedings

Labor Relations Update on December 16, 2022

On the eve of the last day of Member Ring's term, and in the third in a string of significant rulings by the National Labor Relations Board ("NLRB" or "Board") (which we reported on [here](#) and [here](#))—with potentially more to come—the Board, in *Sunbelt Rentals, Inc.*, [372 NLRB No. 24](#) (2022), affirmed the standards applicable when an employer interrogates an employee in the course of preparing a defense to an unfair labor practice ("ULP") charge, which were established in a case decided more than 58 years ago, *Johnnie's Poultry*, 146 NLRB 770 (1964).

Johnnie's Poultry Standard

Over the years, the Board has consistently applied the *Johnnie's Poultry* procedures, balancing the "inherent danger of coercion" in employer questioning of employees in preparation for Board proceedings, while also acknowledging that employers have a countervailing "legitimate cause to inquire" to prepare their defense to ULP allegations.

Johnnie's Poultry established that during such interviews, employers must (1) communicate to the employee the purpose of the questioning; (2) assure the employee that no reprisal will take place; and (3) obtain the employee's participation on a voluntary basis. The Board has held that failure to provide these safeguards renders the interrogation *per se* unlawful.

While courts reviewing NLRB decisions on this issue have generally agreed that whether *Johnnie's Poultry* safeguards have been provided in advance of questioning is a relevant consideration in determining whether the employer violated the Act, some courts have disagreed with this bright-line approach and have instead applied a "totality of the circumstances" test, finding that whether such questioning is given is only one of potentially several factors to consider.

NLRB Reaffirms Bright-Line Johnnie's Poultry Requirements

In *Sunbelt*, the Board found that while a [totality of the circumstances test](#) is used for analyzing most allegations of coercive employer questioning, a different standard must apply where an employer questions employees for the purpose of investigating facts relevant to a ULP complaint because of the unique interests at stake. On one hand, there is an inherent danger of coercion in such questioning, but on the other, employers have a countervailing legitimate cause to inquire in order to prepare to defend themselves at the ULP hearing.

The *Johnnie's Poultry* standard, according to the Board, appropriately balances these interests by permitting the employer to question employees on matters that involve Section 7 activity without incurring liability if the employer observes the particular safeguards that are meant to minimize the coercive impact of the interrogation. The Board also found that the simplicity and predictability of the *Johnnie's Poultry* standard encourages employer compliance, and the bright-line nature of the safeguards offer stability and clarity in the law.

The Board rejected the totality of the circumstances test because it risks insufficiently weighting the heightened risk of coercion that is present when an employer questions employees before a hearing, as it would treat that risk “as just one among numerous factors, with no guidance as to how much weight any individual factor carries.”

Additionally, unlike the prophylactic effect of the *Johnnie's Poultry* standard, the totality of the circumstances test “would not affirmatively prevent unlawful coercion because it relies on an after-the-fact analysis to determine whether the questioning was coercive.”

The dissenting members (Ring and Kaplan) proposed adopting a rebuttable presumption standard, under which an employer's failure to provide the *Johnnie's Poultry* safeguards would be presumed coercive, but the employer would then be provided an opportunity to rebut that presumption by showing, by a preponderance of the evidence, that the questioning was not coercive under the totality of the circumstances. The majority rejected this suggestion because such an approach “fails to ensure that employer questioning...is noncoercive, invites employers to provide post hoc rationalizations, and opens the door for employers to probe into employees' union sympathies.”

Finally, the Board majority rejected the argument, advanced in an Eight Circuit case that overturned a [Board decision](#) finding the employer liable for failing to give *Johnnie's Poultry* assurances, that the standard infringes on free speech rights under Section 8(c) of the NLRA. The Board reasoned that the *Johnnie's Poultry* standard actually allows the employer to engage in a broader range of questioning than the Board permits in other contexts "because the assurances mitigate employee concerns about potential retaliation."

Takeaways

The Board reaffirmed what had been a well-settled rule under NLRB precedent, despite many reviewing courts having taken a different approach: when employers question employees in connection with defending against a ULP proceeding, employers must give *Johnnie's Poultry* assurances or risk a *per se* violation of the Act regarding the questioning.

Importantly, while departing from the bright-line safeguards results in a *per se* violation, if an employer simply provides these assurances at the outset, it does not wholly insulate an employer from a subsequent ULP charge of coercive questioning. That will, of course, depend on the actual questions asked.

Finally, always get *Johnnie's Poultry* assurances in writing. In addition, defense of an unfair labor practice is not the only proceeding where the assurances should be given. It is the safe and prudent course of action to give the proper assurances when interviewing any union-represented employee as part of a workplace matter, whether it be a sexual harassment investigation or in preparation for an arbitration under a collective bargaining agreement.

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