Breakout Sessions – Series 1

A DEEPER DIVE INTO LABOR DEVELOPMENTS

THE FIRST YEARS OF THE TRUMP NLRB

C. Thomas Davis (Moderator) – Ogletree Deakins (Nashville)

Rodolfo R. (Fito) Agraz – Ogletree Deakins (Dallas/Raleigh)

David Rittof – Modern Management, Inc.

Thornell Williams, Jr. (Jackson/Atlanta)
When President Trump was elected, some pundits speculated that with a pro-management majority on the NLRB, many of the Board decisions issued during Mark Pearce’s tenure as Chair would be reversed. But that failed to take into account the Board’s decision-making process and the reality that many of these significant decisions were made during the later years of the labor-side majority Board. As a result, many key cases remain to be decided. This paper addresses the more significant developments.¹

I. CLASS ACTION WAIVERS – EPIC SYSTEMS

In a long-awaited decision, in May 2018 the United States Supreme Court ruled the National Labor Relations Act (NLRA) Section 7 statutory protection of “concerted activity” does NOT extend to the right to pursue class or collective actions; therefore, the NLRA does not bar employers from using arbitration agreements that include a class waiver. In Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018), the Supreme Court addressed a split in the Courts of Appeal and found that the Federal Arbitration Act requires federal courts to enforce contracts which require the parties to arbitrate employment disputes and specify the rules that will govern such arbitrations, including requiring individual actions rather than collective or class actions.

II. REPRESENTATION ELECTION RULES

After a 2011 attempt to adopt revised representation case rules were rejected by the District Court for the District of Columbia, Chamber of Commerce v. NLRB, 879 F. Supp. 2d (D.D.C. 2012), a final rule significantly changing the NLRB’s procedures for handling union representation elections went into effect on April 14, 2015, over the dissent of the Republican members. The ultimate goal of the revised procedures was to shorten the time between the filing of a petition and the subsequent representation election. That goal was achieved. The NLRB reported median time between petition and election in Fiscal Year 2017 declined to twenty-three (23) days from a median of 38 days in the five (5) years prior to the new rules. In Fiscal Year 2018, the median for all cases held steady at twenty-three (23) days. There was a slight uptick to twenty-three (23) days in cases with an election agreement from the Fiscal Year 2017 median of twenty-two (22) days. There was a more significant jump in contested cases to forty-one (41) days from thirty-six (36) days in Fiscal Year 2017. This may reflect a combination of an NLRB General Counsel being less inclined to insist on arbitrary election dates and employers identifying more significant voting unit issues after the NLRB’s decision in PCC Structurals, Inc., 365 NLRB No. 160 (2017). In PCC Structural, the Board overturned the controversial “overwhelming community-of-interest” test from Specialty Healthcare, 357 NLRB No. 83 (2011), and its progeny.

On Thursday, December 14, 2017, the Republican majority NLRB took issued a Request for Information, asking for public comment on whether the representation case final rule should be “(1) retained without change; (2) retained with modifications; or (3) rescinded, possibly while making changes to the prior Election Regulations that were in place before the Rule’s adoption.” 82 Fed. Reg. 58783 (Dec. 14, 2017). The comment period closed on Wednesday, April 18, 2018 and nearly seven thousand (7,000) comments were posted on the NLRB’s website.

¹ The authors wish to thank the following colleagues for their thoughts and written work product commenting on NLRB developments: Brian Hayes, Hal Coxson, Ron Chapman, Jr., Christopher Murray, Mark Kisicki, James Fowles, Sara McCreary, Bud Bobber and Jesse Dill. Each of these Ogletree lawyers has spent considerable time and effort in analyzing the NLRB’s decisions over the past few years and have contributed immensely to the substance of this article.
III. EMPLOYEE ACCESS TO EMPLOYER EMAIL

In 2014, a 3-2 majority of the NLRB concluded “employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems.” Purple Communications, 361 NLRB 1050 (2014). The business community was hopeful that new management majority Board would rescind this access right. And, NLRB General Counsel Robb has directed the NLRB Regional Directors that any prior effort “seeking to extend Purple Communications” to other electronic systems (e.g., internet, phone, instant messaging) if employees use those regularly in the course of their work” is “no longer in effect.” NLRB GC Memo 18-02. But the Purple Communications decision has not been modified or overruled.

On August 1, 2018, the NLRB invited briefing in Caesars Entertainment Corporation dba Rio All-Suites Hotel and Casino, 28-CA-060841. In its invitation for briefs, the Board identified the following areas of inquiry:

- Should the Board adhere to, modify, or reject the legal standard set forth in Purple Communications regarding rules or policies governing the permissible uses of employer email systems?

- If you believe it should be overruled, then what standard should the Board adopt?
  - Should the Board return to the Register-Guard standard (which held that facially neutral policies regarding the permissible uses of employers’ email systems are not unlawful simply because they have the “incidental” effect of limiting the use of those systems for union-related communications)?

- If you believe a return to the Register-Guard standard is correct, should exceptions be made for situations where employees have limited ability to communicate with each other, such as a geographically dispersed workforce?
  - If so, should the Board specify those exceptions or leave them to be determined on a case-by-case basis?

- Should the Board apply a different standard to the use of computer or electronic resources other than email (such as instant messages, texts, and postings on social media)?
  - If so, what should that standard be?

Briefs were initially due on September 5, 2018. The comment period was extended to October 5, 2018. A total of nineteen (19) briefs were filed by interested parties, including a professor, an individual, a United States Senator, unions and employer representatives.

IV. PROTECTED CONCERTED ACTIVITY AND HANDBOOK POLICIES – THE BOEING COMPANY STANDARD AND THE NLRB GENERAL COUNSEL’S GUIDANCE

The NLRB has for decades struggled with finding the appropriate balance between management rights to run their business and employee rights to engage in concerted activity protected by Section 7 of the NLRA. In Lutheran Heritage Village, the Board in 2004 quoted a 1998 decision when reviewing whether a particular set of work rules violated the NLRA, concluding “the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.” Lutheran Heritage Village, 343 NLRB 646 at 646 (2004); quoting Lafayette Park Hotel, 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir.
1999). The NLRB subsequently used this standard to find Section 7 violations in a wide array of situations:

- Confidentiality policies;
- Workplace rules prohibiting employee criticism directed at the company or its managers and supervisors – even if employees use inappropriate, disrespectful, negative or profane language and conduct;
- Company policies restricting communications or interactions among employees; prohibitions on communication with the media, government agencies or others outside of the workplace concerning unionization;
- Prohibitions on the use of company logos, copyrights and trademarks; restrictions on leaving work, restrictions on photos and recordings;
- Conflict of interest policies; and
- Social media policies.

In The Boeing Company, 365 NLRB No. 154 (2017), the Board overruled Lutheran Heritage and replaced it with a balancing test that weighs the employer’s justification for a rule or policy against its potential interference with activity protected by the NLRA. In reversing an NLRB Administrative Law Judge’s finding that Boeing’s no-camera rule violated the NLRB, the Board provided further guidance by establishing three categories for the review of employer policies. On June 6, 2018, in GC Memo 18-04, NLRB General Counsel Peter Robb provided guidance to the NLRB’s regional offices and examples of rules falling into each of the three categories:

- **Category 1 – Facially Lawful**
  - “[R]ules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.”
  - Examples in GC Memo 18-04:
    - General civility rules
    - No-photography and no-recording rules
    - Rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations
    - Disruptive behavior rules
    - Rules protecting confidential, proprietary, and customer information or documents
    - Rules against using employer logos or intellectual property
    - Rules requiring authorization to speak for the company
    - Rules banning disloyalty, nepotism, or self-enrichment
Category 2 – Rules Requiring Individualized Scrutiny

- “[R]ules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.”

- Examples in GC Memo 18-04:
  - Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment … and do not restrict membership in, or voting for, a union
  - Confidentiality rules broadly encompassing “employer business” or “employee information” (as opposed to confidentiality rules regarding customer or proprietary information … or confidentiality rules more specifically directed at employee wages, terms of employment, or working conditions)
  - Rules regarding disparagement or criticism of the employer (as opposed to civility rules regarding disparagement of employees …)
  - Rules regulating use of the employer’s name (as opposed to rules regulating use of the employer’s logo/trademark …)
  - Rules generally restricting speaking to the media or third parties (as opposed to rules restricting speaking to the media on the employer’s behalf)
  - Rules banning off-duty conduct that might harm the employer (as opposed to rules banning insubordinate or disruptive conduct at work … or rules specifically banning participation in outside organizations)
  - Rules against making false or inaccurate statements (as opposed to rules against making defamatory statements)

“Category 3 – Unlawful Rules

- “[R]ules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.”

- Examples in GC Memo 18-04:
  - Confidentiality rules specifically regarding wages, benefits or working conditions (for example, a rule prohibiting employees from disclosing their salaries)
  - Rules against joining outside organizations or voting on matters concerning the employer

The Board’s more rational enforcement posture should encourage employers to review their employee handbooks, work rules and policies. However, there remains much room for case-by-case scrutiny. Employers should carefully assess and identify the concerns they seek to address and carefully tailor their policies to address those concerns. The more narrowly worded, the more likely the policy is to survive scrutiny, whether that review is by the current Board or a future Board that is less management friendly.
V. JOINT EMPLOYER — BROWNING-FERRIS, HY-BRAND AND RULEMAKING

For decades, the NLRB consistently held that an employer had to exert direct control over the essential terms and conditions of workers’ employment in order to be deemed a joint employer. In Browning-Ferris, 362 NLRB No. 186 (2015), the Board set aside that precedent and concluded it was enough for a company to have an indirect, or even reserved, right to control some employment conditions for individuals employed by a third-party contractor. In its December 2017 in Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (Dec. 14, 2017), the NLRB restored the prior standard and business representatives breathed a collective sigh of relief. But that was just the beginning of the tale.

The NLRB’s inspector general determined that Board Member William J. Emanuel should have recused himself from the Hy-Brand case on conflict grounds because his prior law firm had represented the staffing agency involved in the Browning-Ferris case. On March 1, 2018, the Board issued an Order vacating its Hy-Brand decision in light of a determination that Member Emanuel should have been disqualified from participating in that decision. Thus, Browning-Ferris currently remains the law. The vote to disqualify Emanuel apparently was held without Emanuel’s knowledge.

But the story continues. On September 14, 2018, the Board issued a proposed rule that would more narrowly define joint employment under the NLRA. In its accompanying fact sheet, the Board clearly stated its intent:

The proposed rule reflects the Board’s initial view, subject to potential revision in response to comments, that the Act’s purposes would not be furthered by drawing into a collective-bargaining relationship, or exposing to joint-and-several liability, the business partner of an employer where the business partner does not actively participate in decisions setting the employees’ wages, benefits, and other essential terms and conditions of employment.

The NPRM itself clearly stated the Board’s intent to restore the traditional “direct and immediate” standard for determining whether a business entity is a joint employer:

Under the proposed rule, an employer may be considered a joint employer of a separate employer’s employees only if the two employers share or codetermine the employees’ essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees’ essential terms and conditions of employment in a manner that is not limited and routine.

Three months after the NLRB issued its NPRM, the U.S. Court of Appeals for the District of Columbia added to the complexity of sorting out joint employer status in its decision considering Browning-Ferris on appeal. Browning-Ferris Industries of Cal., Inc. v. NLRB, No. 16-1028 (D.C. Cir. Dec. 28, 2018). The majority held that the Board’s consideration of indirect control “is consonant with established common law” and allowed the Board discretion to determine how much weight indirect control should be afforded. But the majority remanded the case to the Board, finding that the Board had exceeded the bounds of the common law because it “provided no blueprint for what counts as ‘indirect’ control.”
But wait … the saga continues. On January 8, 2019, the Democratic leadership of the House Education and Labor Committee wrote a letter urging the NLRB to withdraw its joint employer rulemaking and “abide by its current joint employer standard articulated in Brown


ning-Ferris.” In a response dated January 17, 2019, NLRB Chair Ring noted that the Court of Appeals had “expressly disapproved of the Board’s application” of the indirect control test and the Board’s failure in Browning-Ferris to provide a “blueprint for what counts as indirect control.”

Unfortunately, the D.C. Circuit’s decision does little more than guarantee that the saga will continue for years to come. The court majority merely provided arguments for future challenges to any rule the Board is likely to adopt, effectively preventing the Board from conclusively returning by rulemaking to the stable definition of joint employment it had applied, consistently, for more than 30 years.

VI. INDEPENDENT CONTRACTOR – ENTREPRENEURIAL OPPORTUNITY

On January 25, 2019, the Board issued a decision friendly to businesses in another situation of determining who is an “employer” and who is an “employee” under the NLRA. In SuperShuttle DFW, Inc., 367 NLRB No. 75 (2019), the Board returns to the traditional independent contractor analysis and restores significance to a worker’s “entrepreneurial opportunity” for financial gain in determining whether the individual is an employee or independent contractor under the NLRA. That distinction matters because employees enjoy many rights and protections under the NLRA—whether they are represented by a union or not—whereas independent contractors do not. With this opinion, the Board reversed an Obama-era Board decision that minimized entrepreneurial opportunity in its independent contractor analysis and thus granted more workers NLRA rights by classifying them as employees.

Background

SuperShuttle DFW contracted with an airport to provide shared-ride services to airport travelers. The agreement between SuperShuttle DFW and the airport provided extensive terms that controlled SuperShuttle DFW’s business, including requirements to maintain a customer complaint procedure, to screen drivers for drugs and alcohol, to perform criminal background checks of drivers, and to train drivers.

SuperShuttle DFW also entered into franchise contracts, called Unit Franchise Agreements (UFAs), with individual drivers seeking to operate under the SuperShuttle name. These agreements established an initial fee the franchisee-driver paid SuperShuttle DFW for access to airports, a weekly system fee, and a decal fee. Under the UFA, SuperShuttle DFW also required franchisee drivers to incur the cost to purchase or lease a vehicle within specified requirements and to use its Nextel dispatch and reservation system to bid on passenger routes. While SuperShuttle DFW set the fares for passenger rides, the franchisees received all fares paid by customers. SuperShuttle DFW did not assign drivers to any schedule, so franchisees had the flexibility to work as much or as little as they preferred. Through the terms set by the SuperShuttle DFW’s contract with the airport, franchisees were also subject to general conduct guidelines while driving, such as acting in a reasonable manner, not using improper language, and refraining from the consumption of food or drink in plain sight.

The case arose after a local union sought to represent a unit of SuperShuttle DFW drivers. SuperShuttle DFW resisted by arguing that, under the NLRA, franchisee-drivers could not organize because they were independent contractors, not covered employees.
The Board’s Decision

The Board first reviewed the legal analysis for determining whether an individual is a covered employee under the NLRA. This inquiry requires the Board to examine a set of factors that include:

- The extent of control which, by the agreement, the master may exercise over the details of the work;
- Whether or not the one employed is engaged in a distinct occupation or business;
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- The skill required in the particular occupation;
- Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- The length of time for which the person is employed;
- The method of payment, whether by the time or by the job;
- Whether or not the work is part of the regular business of the employer;
- Whether or not the parties believe they are creating the relation of master and servant; and
- Whether the principal is or is not in business.

The majority writing for the Board then criticized and ultimately overturned its 2014 decision examining delivery drivers, finding that the prior decision did not give proper consideration to the significance of a worker’s “entrepreneurial opportunity for gain or loss.” The Board described that the prior decision “purported to ‘refine’ the independent-contractor test by confining the significance of entrepreneurial opportunity to ‘one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, rendering services as part of an independent business.’” The NLRB, in SuperShuttle DFW, concluded that this past analysis incorrectly limited the extent to which entrepreneurial opportunity impacts whether an independent contractor relationship exists.

With this decision, the Board has restored entrepreneurial opportunity to greater prominence in the independent-contractor-or-employee analysis. It reasoned that “entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor’s independence to pursue economic gain.” Thus, under the Board’s new standard, all common-law factors will be evaluated “through the prism of entrepreneurial opportunity” when the circumstances make this analysis appropriate. In effect, the Board made entrepreneurial opportunity an important, overarching consideration in the analysis.

Applying this new analysis, the Board concluded that the SuperShuttle DFW franchisee-drivers were independent contractors to whom the NLRA does not apply. Thus, those drivers had no right to organize and be represented collectively by a union. The Board gave significant weight to the little control that SuperShuttle DFW exercised over the franchisees, including that they were free to set their own schedules, could choose where to work, and could select what passenger routes to accept. The Board also determined that the fact SuperShuttle DFW did not share in the profits from fares with the drivers, the drivers bore the cost of the vehicles they drove, and the general lack of supervision exercised by SuperShuttle DFW over the drivers all strongly supported that they were independent contractors. Based on these facts, the Board
concluded that the drivers had “significant entrepreneurial opportunity,” which “strongly point[s] toward independent-contractor status.” In short, the structure of the relationship was such that the drivers were each running their own business, rather than working for SuperShuttle DFW as employees.

Key Takeaways

The SuperShuttle DFW decision expands the definition of “independent contractor” under the NLRA, which is significant when determining to whom this law applies. This decision likely offers the greatest benefit to businesses that engage workers to provide temporary or short-term services. These types of businesses, including those providing services in the “gig economy,” are now more likely able to avoid union organization and charges of unfair labor practices under the NLRA. While SuperShuttle DFW involved an attempt to unionize workers, this analysis could also apply to determine whether a putative employer violated Section 7 rights to engage in protected, concerted activity, such as publicly criticizing management with or on behalf of others.

Employers may want to keep in mind that this decision relates only to the NLRA, and the analysis to determine whether a worker is an employee or independent contractor varies under different employment laws, such as the Fair Labor Standards Act, state unemployment compensation laws, and others. But this decision is certainly a welcome change for businesses that offer workers substantial flexibility to earn as much or as little as they choose.

VII. CONCLUSION

The current Board has begun to issue decisions reversing the changes in Board law made during the prior administration perceived by management to be favorable to labor. But it continues to be a slow process. NLRB General Counsel Robb has clearly outlined his goals for reversing many of these decisions and the Board is utilizing the Rulemaking device and amicus brief invitations to further develop more management friendly interpretations of the law. Patience is required.
A Deeper Dive Into Labor Developments: The First Years of the Trump NLRB

Presenters
Rodolfo R. (Fito) Agraz (Dallas/Raleigh), David Rittof (Modern Management, Inc.), and Thornell Williams, Jr. (Jackson)

Moderator
C. Thomas Davis (Nashville)

The National Labor Relations Board

John F. Ring, Chairman
(4/16/18 – 12/16/22)

Marvin E. Kaplan
(8/10/17 – 8/27/20)

William J. Emanuel
(9/26/17 – 8/27/21)

Lauren McFerran
(12/17/14 – 12/16/19)
The National Labor Relations Board

The General Counsel

Peter B. Robb
Term expires: November 2021

Class Action Waivers

- Ended circuit split and six-year standoff with the NLRB
- Waivers enforceable under the Federal Arbitration Act
- Rejected Board’s position that waivers nonetheless unlawful under the NLRA
UNION ORGANIZING TRENDS: Representation Election Rules

- December 2017: Request for Information
- November 2018: “Long-term” action item
- Expect issue-by-issue rulemaking, not entire rule
- First such change anticipated this winter

UNION ORGANIZING TRENDS: The Latest Data

Source: https://www.nlrb.gov
## UNION ORGANIZING TRENDS: The Latest Data

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Won by Union</th>
<th>Percent Won By Union</th>
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## Median Number of days with Election Agreement with Contested Cases

| FY09 | 37 | 37 | 67 |
| FY10 | 38 | 38 | 66 |
| FY11 | 38 | 37 | 64.5 |
| FY12 | 38 | 37 | 66 |
| FY13 | 38 | 37 | 59 |
| FY14 | 38 | 37 | 59 |
| FY15 | 33 | 32 | 55.5 |
| FY16 | 23 | 23 | 35 |
| FY17 | 23 | 22 | 36 |
| FY18 | 23 | 23 | 41 |

Source: https://www.nlrb.gov

## NLRB Representation Elections 2008 – 2017

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NLRB Election Data by Industry 2017 Elections

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<td>Transportation, Comm. &amp; Utilities</td>
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<td>Manufacturing</td>
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UNION ORGANIZING TRENDS: R-Case Strategies

- The evolution of the union “micro-unit” strategy ...
UNION ORGANIZING TRENDS:
Campaign Strategies

- Issue creation
- Corporate campaign
- Salting
- Public shaming
- Walk-outs

UNION ORGANIZING TRENDS:
Campaign Strategies

- Social Media
  - Text messaging
  - Facebook
  - Twitter
  - YouTube
UNION ORGANIZING TRENDS: Other Strategies

- From Day 1 of the Trump Administration, unions appeared to turn focus to the states
- Leveraging assets in geographic areas and specific industries ...

UNION ORGANIZING TRENDS: Targeted Industries

- Healthcare
- Education
- Food manufacturing
- Defense contracting
- Logistics/distribution
UNION ORGANIZING TRENDS: Illinois Healthcare

- Political campaign support for Governor and Chicago Mayor
- Legislative initiatives
- Public media campaign
- Statewide organizing

EMPLOYER “RULES OF ENGAGEMENT”: Employee Access to Company Systems

- August 1, 2018, the Board invited briefs on whether to overrule Purple Communications (2014)
EMPLOYER “RULES OF ENGAGEMENT”: Protected Concerted Activity

- Handbook Policies
  - Workplace decorum
  - Use of trademarks or logos without permission
  - No cameras/no recording
  - Confidentiality

EMPLOYER “RULES OF ENGAGEMENT”: Protected Concerted Activity

- Other issued identified by General Counsel Robb:
  - One-employee concerns
  - Walking off the job
  - Obscene, vulgar, racist, or other highly inappropriate conduct
Joint Employer Standard

- **Browning-Ferris Industries, Inc. (2015)**
  - Overturned 30 years of precedent

- **Hy-Brand Industrial Contractors, Ltd. (2017)**
  - Vacated on March 1, 2018, reinstating *Browning-Ferris*

- Notice of Proposed Rulemaking (NPRM) in September 2018

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Joint Employer Standard

- **Browning-Ferris Industries, Inc., No. 16-1028 (D.C. Cir., December 28, 2018)**
  - Partially ok’d Obama NLRB test
  - More uncertainty?

- Board further extended comment period on rulemaking through January 28, 2019
Independent Contractors

- **SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338 (January 25, 2019)**
  - Overturned an Obama NLRB ruling
    - “Rendering services as part of an independent business”
  - Restored focus on a worker’s “entrepreneurial opportunity for gain or loss” as the “animating principle”

Independent Contractors

- What about gig economy enterprises?
- State and local laws (particularly in light of unions’ ramped up focus)?
  - Legislation setting hourly wage floors (NYC ordinance; UAW-backed Connecticut measure)
  - Seattle ordinance gives rideshare drivers right to unionize
    - Currently challenged in federal antitrust lawsuit
A Deeper Dive Into Labor Developments: The First Years of the Trump NLRB

Presenters
Rodolfo R. (Fito) Agraz (Dallas/Raleigh), David Rittof (Modern Management, Inc.), and Thornell Williams, Jr. (Jackson)

Moderator
C. Thomas Davis (Nashville)