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An Interview with Wilma Liebman: Liebman Knows Labor Law -- The Future of the National Labor Relations Board

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**SPECIAL PRESIDENTIAL INAUGURATION ISSUE 2017:
AN INTERVIEW WITH WILMA LIEBMAN**

**LIEBMAN KNOWS LABOR LAW: THE FUTURE OF THE
NATIONAL LABOR RELATIONS BOARD**

INTRODUCTION

Wilma Liebman, originally from Philadelphia, earned her J.D. (with honors) from the George Washington University Law School. From 1974 to 1980, she served as a staff attorney for the NLRB before transitioning to the role of legal counsel for two international labor organizations, the Teamsters, one of America's largest labor unions, and the Bricklayers and Allied Craftsmen. After gaining a decade of experience in that capacity, Ms. Liebman joined the Federal Mediation and Conciliation Service and became its Deputy Director. Then, in 1997, President Clinton appointed Ms. Liebman to the NLRB, where she served three terms. She was twice reappointed by President Bush and served during those years in the minority, writing many dissenting opinions. During her final term, President Obama designated Ms. Liebman as the Chair of the NLRB, on January 20, 2009, and she served as Chair until August 27, 2011, when her third term expired. Since completing her tenure at the NLRB, Ms. Liebman has entered academia, lecturing at the law schools and/or labor relations schools of George Washington University, University of Illinois, Cornell University, New York University, and Rutgers University. She joins us, kindly.

I. INTERVIEW

Samuel Feldman¹: Historically, what degree of impact have presidential elections had on the NLRB?

Ms. Liebman: The Board is known for flip flopping precedent (or more formally, "policy oscillation") after a new President is elected and makes appointments. That does happen, of course, but it has generally affected a relatively limited number of issues. The majority of cases are decided under long-established and stable doctrine. Nonetheless, a new President's appointees will very likely bring different perspectives on decision making.

¹ Samuel Feldman is a J.D. candidate '18 at Emory University School of Law.

Feldman: Now specifically, how do you anticipate the 2016 election results will affect the Board?

Liebman: To understand the full effect of the election results, we should consider what would have happened if the outcome had been different. With a Clinton presidency, we could have expected to see a continuing development of the Obama Board's approach to the law: rigorous enforcement of workers' rights and a commitment to dynamically exercise the Board's discretion to adapt established legal doctrines, within the limits of the law, to preserve worker protections in a relentlessly changing economy.

In contrast, and notwithstanding his populist appeals for working class support, a Trump Administration NLRB will likely mean fewer workers have fewer rights. I would expect to see a narrower view of protected, concerted activity, a subordination of workers' rights to countervailing business interests, a more *laissez-faire* view of good faith collective bargaining duties, weaker remedies, and an insistence on a formalistic approach to interpreting the law, rejecting recent attempts to update doctrine and turning away from the challenges that evolving workplace realities pose for labor policy.

Feldman: Can you think of any particular NLRB precedents that are in danger of being overruled?

Liebman: Certainly. Several key precedents come to mind, in each of which the Board was split. Dissenting opinions could be expected to guide an incoming Republican majority:

- The joint employer doctrine, as refined in the *Browning Ferris*² case and currently being litigated in unfair labor practice cases filed against McDonald's—under which lead companies may be held liable for unfair labor practices committed by their subcontractors, or franchisees, and allowing employees of subordinate companies to bargain with lead firms;
- The ruling in the *Murphy Oil*³ case that class action waivers imposed as a condition of employment violate the labor law's Section 7 protection of concerted activity. This issue is likely headed to the

² *Browning Ferris Industries, Inc.*, 362 N.L.R.B. No. 186 (2015), *petition for cert. filed*, *Browning Ferris Industries, Inc. v. N.L.R.B.*, No. 16-1028 (D.C. Cir. Jan. 20, 2016).

³ *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014), *cert. granted in part*, *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015), *petition for cert. filed*, *N.L.R.B. v. Murphy Oil USA Inc.*, No. 16-307 (Sept. 9, 2016).

Supreme Court as there is now a circuit split over the Board's position;

- The *Specialty Healthcare*⁴ ruling, clarifying what constitutes an appropriate bargaining unit (condemned by critics as permitting “micro-units,” a hyperbolic inaccuracy);
- The *Columbia University*⁵ ruling that graduate teaching assistants are “employees” entitled to the law’s protections and the right to organize and bargain collectively. This issue has been highly contested, especially by Ivy League schools, and has “flipped” a few times;
- Perhaps also the NLRB’s most recent clarification of “employee” v. independent contractor status in the *FedEx* case,⁶ currently pending before the D.C. Circuit on FedEx’s petition for review. The majority’s decision broadens the test for employee status to allow evidence of direct *and* indirect control, and of the right to control as well as actual control, focusing on whether (or not) the person is truly an independent business.

Feldman: Aside from possible threats to these established precedents, what other changes should we be alert to?

Liebman: In the last few years, the NLRB also completed a rulemaking that revised the rules for representation case proceedings. These rules were subject to overheated attack by the business community, but they survived appellate challenge. A new majority on the Board might seek to rescind these rule changes, but that would entail a very involved, protracted proceeding, as the new rules themselves did, and it is not clear to me that the new rules disadvantage employers at all, or enough to bother with a new rulemaking. To me, the new rules have triggered a lot of rhetoric (“ambush election”) but not much substantive objection.

Legislation has been introduced over the last several years to reverse the joint employer doctrine and the representation case rules. Various other legislative proposals have been made to limit the Board’s authority, including its (already weak) remedial authority. With the new administration, and a Republican majority in both houses of Congress, some of these legislative

⁴ *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B. No. 83 (2011).

⁵ *The Trustees of Columbia University*, 364 N.L.R.B. No. 90 (2016).

⁶ *FedEx Home Delivery*, 361 N.L.R.B. No. 55 (2014), *petition for cert. filed*, *FedEx Home Delivery v. N.L.R.B.*, No. 14-1196 (D.C. Cir. Oct. 8, 2014).

initiatives presumably could become law. Enacting a national right to work law is also mentioned as a possibility. But any legislation would, of course, be subject to filibuster, which still remains for legislation. It is not at all clear to me what, if any, legislative rollbacks to worker collective rights are likely to be enacted.

Feldman: A question on the Board's prospective timeline: how rapidly might these changes occur?

Liebman: If the past is any guide, it will take a while—perhaps up to a year—before a new Trump majority is installed at the NLRB (two vacancies presently exist), even though the Democrats ended the filibuster for appointees below Supreme Court level. Once new appointees are seated, overruling cases does not happen overnight, and of course must await a case actually being presented to the Board. The Board does not initiate its own cases. Although it is free to engage in rulemaking, that is a long and protracted process, and one that the Board has rarely used in its history.

The current General Counsel—who acts as a prosecutor—also has a year remaining on his term, so as long as he sits, there will not be any unfair labor practice cases arguing for a reversal of precedent that would roll back worker rights. Representation cases also come to the Board without going through the General Counsel, so employers could start presenting arguments for reversal of precedent in those cases.

Feldman: Ms. Liebman, we have truly appreciated the insight. Your perspective will be invaluable to this project. Any final thoughts?

Liebman: It has been my pleasure. Thank you for bringing me on board.

CONCLUSION

Any hope for progressive change in labor law will undoubtedly have to wait for another day at the federal level, but we can expect local and state initiatives to continue, at least in worker friendly states (for example, minimum wage hikes and the Seattle ordinance that would give Uber type drivers, as well as taxi drivers treated as independent contractors, the right to unionize and bargain collectively). As Justice Louis Brandeis said 100 years ago, the states are the laboratory for democracy. Inevitably, labor law preemption challenges will be made against these initiatives. (And in the case of the Seattle ordinance, antitrust law challenges.)

But, the public policy challenges we face—the harsh consequences of globalization and technological change, decades of stagnant wages, increasing income inequality, and obvious worker discontent—all call for multi-tiered experimentation and innovation, with both public and private strategies, especially at the state and local levels. I remain hopeful that re-energized worker collective action, as we have seen, for example, over the last few years with fast food workers’ “Fight for \$15” movement, will catalyze progress in dealing with these challenges.