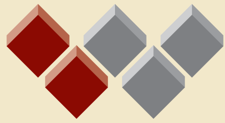
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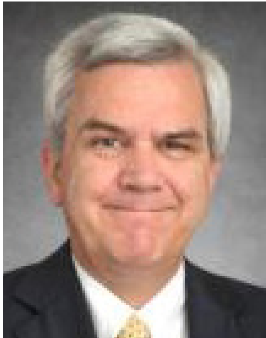
Briefly

June 2019 Volume 19, Issue 6

NLRB ANNOUNCES RULEMAKING AGENDA



Howard B. Jackson

"[R]ules have historically tended to swing in one direction or another depending on the majority party of [NLRB] Board members."

The National Labor Relations Board ("Board") is a five-member group located in Washington. The members are appointed by the President and confirmed by the Senate. The members serve five-year terms.

The Board, among other things, hears and decides upon appeals of cases initially heard by administrative law judges. Traditionally a significant number or principles under the National Labor Relations Act ("Act") have been set via Board case law decisions. As many have observed the rules have historically tended to swing in one direction or another depending on the majority party of Board members.

The current Board seems to be making an effort to reduce the amount of pendulum swinging at least in certain areas of law under the Act. Their method is to engage in regulatory rule making. As with any government agency that can establish regulations the process is long and cumbersome. Once established, however, the process for revising regulations is likewise long and cumbersome. The expectation is that having regulations can provide greater stability in the rules that govern employers and employees.

Last year the Board issued proposed rules for the joint employer standard. There has been an extended notice and comment period. The final rule has not been issued.

On May 22, 2019 the Board announced its rulemaking priorities going forward. In so doing the Board Chair, John Ring, noted that the Board has a "strong interest in continued rulemaking." Chairman Ring stated that engaging in rulemaking on "these important topics allows the Board to consider and issue guidance in a clear and more comprehensive manner."

The topics and brief comment on each are as follows. One topic is the Board's current representation-case procedures. Several years ago, the Board adopted what have been referred to as "quickie election" rules. It is widely anticipated that the proposed rule would modify that process and allow somewhat more time for elections as well as provide earlier opportunities to challenge the appropriateness of the petitioned-for bargaining unit.

Other topics include the Board's standards for blocking charges, voluntary recognition and the formation of Section 9 (a) bargaining relationships in the construction industry. "Blocking charges" are charges filed by a union that may delay a scheduled election, hence the term "blocking charges." A proposed rule would presumably provide guidance with respect to the nature of charges that will or will not block the election.

An employer may voluntarily recognize a union upon presentation of evidence of majority support in an appropriate bargaining unit. A proposed rule would provide guidance regarding what evidence suffices as proof of assent, and majority support, as well as what conduct by an employer amounts to voluntary recognition.

Section 9 (a) bargaining relationships require a showing of majority support by the employees. This is the section that governs the majority of employer-union relationships. The Act provides a mechanism under Section 8 (f) whereby employers in the construction industry can enter a "pre-hire" agreement with a union without a showing of majority support of the employees. A key difference in 9 (a) agreement versus an 8 (f) agreement is that the employer can end the 8 (f) arrangement upon expiration of the contract with the union. That is not so in the 9 (a) relationship. One question that has arisen repeatedly is when, how and under what circumstances can an 8 (f) relationship be converted to a 9 (a) relationship. The new rule would address and, hopefully, bring some clarity to that situation.

Another topic is the standard for determining whether students who perform services at private colleges or universities in connection with their academic program are

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Jerome D. Pinn

"What should employers do? Unfortunately, different branches of the federal government have different opinions on that."

HOW TO RESPOND TO SOCIAL SECURITY MISMATCH LETTERS

Many employers are receiving letters from the Social Security Administration (SSA) requesting correction of employees' Social Security Numbers. These are often referred to as "mismatch letters". The SSA stopped sending employers mismatch letters in 2012 because of complaints made by labor unions, immigrant supporters and businesses. Now, the SSA is sending these letters again, even if only a single employee's reported Social Security number does not match the SSA's records.

Many employers, on receiving such letters, assume that the employees whose names are on the report may be working illegally in the US. Some employers even terminate these employees after taking a second look at their I-9 work authorization documentation from the time they were hired.

However, it is important to keep in mind that having an employee's name on the letter does not necessarily mean that they are not authorized to work in the US. Legally, employers are not supposed to use a mismatch letter as a basis to take adverse action, such as suspending the employee without pay or terminating their employment. Social Security numbers may not match for various legitimate reasons, including typographical errors, use of different names, name changes, identity theft, etc.

So, what should employers do? Unfortunately, different branches of the federal government have different opinions on that. Immigration and Customs Enforcement (ICE) has told employers that receipt of an SSA mismatch letter creates a duty to investigate the reason for the discrepancy. If it becomes apparent to an employer that the employee presented a fake Social Security card when they were hired, ICE could later conclude that the employer had knowledge that the employee was not authorized to work, which could result in the imposition of penalties.

On the other hand, the Immigrant and Employee Rights section of the U.S. Department of Justice (DOJ) has stated that receipt of a mismatch letter, standing alone, does not mean that an employer has constructive knowledge of unauthorized employment, and taking action against an employee on that basis "may be considered an unfair documentary practice or evidence of discrimination based on citizenship, national original or immigration status." That could result in a discrimination lawsuit by the DOJ against the employer.

There are several options employers can take. First, the SSA has published a sample letter that can be given to employees whose names are on the mismatch report, advising them of what to do to correct the issue (assuming it is correctable). Another option is to do nothing, especially if only one name or a few appear on the letter. On the other hand, if a number of names are on the letter, that could increase the legal risk for the employer if they do not take any action. Taking some action to address the mismatch issue would put the employer in a better light if there is a later ICE audit.

One thing that employers receiving mismatch letters may be tempted to do is attempt to re-verify the employee's employment eligibility by running them through E-Verify, request that they complete a new I-9 form, or ask them to produce specific identity and/or work authorization documents to address the mismatch. Such actions may result in unintended adverse repercussions against the employer, and should not be considered without first seeking the advice of qualified counsel.

DOL PLANS TO REVIEW FMLA

Jerome D. Pinn

On May 23rd, the U.S. Department of Labor (DOL) announced as part of its regulatory agenda that it plans to seek comments on how to improve the Family and Medical Leave Act (FMLA). According to the DOL:

In this Request for Information, the Department will solicit comments on ways to improve its regulations under the FMLA to: (a) better protect and suit the needs of workers; and (b) reduce administrative and compliance burdens on employers to better protect workers and reduce administrative burdens on employers.

A formal DOL request for information from the public is expected by April 2020.

The FMLA is often viewed as a legal minefield for employers to navigate. DOL investigations and federal lawsuits are a regular occurrence for employers who do not precisely comply with the FMLA's complicated regulatory requirements.

Many employers have not trained managers or even HR staff on what to do when an employee requests time off that may qualify for FMLA leave. In addition, a majority of employers fail to provide FMLA-eligible employees with timely notices and fail to accurately track employees' use of leave. Our attorneys can provide assistance with a full range of FMLA compliance matters, including training, and also help those who may want to offer DOL suggestions on how to make FMLA compliance easier for them administratively.

TECHNOLOGY COMPANIES BESET BY EMPLOYEE PROTESTS OVER COMPANY OPERATIONS

Courtney C. Hart

"As workforces become more skilled and unemployment drops, certain industries have had to become more tolerant of outspoken employees."

Employee protests at technology companies have gone beyond common employee issues and expanded to important company business decisions. As workforces become more skilled and unemployment drops, certain industries have had to become more tolerant of outspoken employees. Over the last year, workers have protested at companies over military contracting, sexual harassment, and the treatment of temporary and contract workers. At Microsoft, employees are demanding that the company abandon a $480 million contract with the U.S. Army. Hundreds of Microsoft workers have signed a petition criticizing a contract with U.S. Immigration Customs Enforcement. At Facebook, employees are protesting the use of staffing firms to supply some 15,000 content reviewers. At Google, workers staged sit-ins at over a dozen offices protesting retaliation against workers involved in activism. Some 15 shareholder proposals at Amazon came from its own employees covering topics from food waste and facial recognition to the environmental effects of company locations.

These developments put company CEOs in a dilemma. Executives have duties to shareholders, which must be balanced against employee desires. Further, companies and CEOs themselves may generate some of this employee activism by "CEO activism" on certain public issues. Thus, CEOs and their companies can face backlash from employees and even from consumers who disagree with their point of view on current social and political issues. In this environment, CEOs should not be surprised when customers or employees disagree with their positions on issues. Careful planning is necessary so that CEOs won't be blind-sided on certain issues. CEOs should consider a public relations or corporate communications team to plan such responses to the next big issue.

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Mary Celeste Moffatt

Rule 31 Listed General Civil Mediator, Tennessee Supreme Court

865.546.1000
mmoffatt@wimberlylawson.com

J. Eric Harrison

Rule 31 Listed Family Law Mediator, Tennessee Supreme Court

423.587.6870
eharrison@wimberlylawson.com

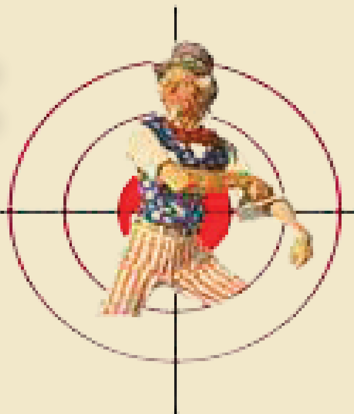
"employees" within the meaning of the Act. If so, they can form unions. If not, they cannot. Again, the rule would look to provide clarity and stability of analysis.

Finally, another topic is access to an employer's private property. This has been a much-litigated topic over the years. A recent example is the Purple Onion decision wherein the Board ruled that if an employer provides an employee with e-mail, the employee is presumptively entitled to use the employer's e-mail system for union organizing or other protected activities. There are also decisions relating to access when the employer is in a remote area or the employees are otherwise difficult to contact.

It will be interesting to observe whether the Board can issue proposed rules on these topics, receive notice and comment and issue final rules before the winds of change blow again. Stay tuned.

The 2019 Wimberly Lawson Labor and Employment Law Update Conference

TARGET: *OUT OF RANGE*



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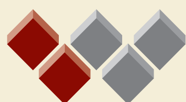

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Wright Daves & Jones, PLLC
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Knoxville	Cookeville	Nashville	Morristown
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