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Key Labor Law Developments Affecting All Employers

Sweeping changes to labor law, affecting both union and non-union employers, have continued as the National Labor Relations Board's (NLRB or Board) General Counsel's aggressive goals to expand the rights of workers and unions come to fruition. Such changes include making it easier for unions to organize workplaces, limiting employers' ability to propose broad confidentiality and non-disparagement provisions in employment agreements, expanding employees' ability to engage in certain concerted activity, limiting disciplinary action for unprofessional conduct in the workplace, and expanding employers' duty to bargain.

The NLRB Paves the Way for Unions to Organize More Workplaces

By doing away with the requirement to hold secret ballot elections before ordering an employer to bargain with a union, promulgating new rules that will expedite the time for union representation elections and allowing "micro" bargaining units, the Board has paved the way for unions to more easily organize workplaces.

A New Standard for When Employers Must Bargain With a Union

For decades, employees seeking to unionize had an opportunity to have a secret ballot election to prevent unionization based on potential fraud, duress and peer pressure that employees often experience when signing cards authorizing a union to be their collective bargaining representative. Secret ballot elections are no longer guaranteed. In August 2023, the Board announced a new framework for determining when employers must bargain with unions—even without an election or when a union loses an election.

In *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023), the Board concluded that once presented with a demand for recognition based on a union claim of majority support of employees in a proposed bargaining unit, an employer can either recognize the union or contest the claim of majority employee support by filing an election petition with the NLRB within *two weeks* of the union's demand (unless the union has already done so). In so ruling, the Board overturned a more than 50-year precedent and returned to a similar holding in *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949). *Joy Silk* required an employer to bargain with a union demonstrating majority support unless the employer had a good faith doubt of that support. In *Cemex*, however, the Board went a step further by requiring that an employer's election petition be set aside, the bargaining unit be certified, and the employer be ordered to bargain with the union if the Board concludes the employer engaged in an unfair labor practice that could have influenced the results of the election. Given the limited interpretation of *Cemex* thus far, it is conceivable that the Board could potentially view something as simple as an overboard handbook rule to have influenced the results of an election.

In a November 2023 Memorandum (GC Memo 24-01), the Board's General Counsel clarified unresolved issues from *Cemex*, including that demands for recognition need not be in a particular form (they may be written or verbal), need only to indicate a desire to bargain on behalf of employees, and may be made to any person acting as an agent of the employer under the National Labor Relations Act (NLRA); a union has no legal obligation to provide evidence to an employer that it actually has majority support; and a union can initially file an election petition and later demand recognition.

In light of the *Cemex* decision, employers should no longer assume that an election petition will be filed, and they then will have the ability to educate their employees about why a union is not needed or wanted in the workplace. Unions may establish majority support by secretly having authorization cards signed and then serve the employer with a demand for

recognition. Moreover, even if an employer is able to contest the demand for recognition, its actions and those of its supervisors and managers may create unfair labor practices that result in the NLRB certifying the bargaining unit without an election and ordering the employer to bargain.

New Election Procedures

In August 2023, the Board issued its Final Rule on Representation, which invalidated the Board's 2019 amended rule and streamlines the union representation process. For instance, the Regional offices of the NLRB will have less discretion in granting postponements of proceedings or extending filing deadlines, and litigation involving voting eligibility disputes will occur after, rather than before, an election. These changes will result in elections occurring between 10 days and several months sooner than before and will drastically reduce employers' ability to educate employees on the potential downsides of unionization prior to an election. As such, the Final Rule's expedited election timeline will likely result in more favorable election results for unions.

Relaxed Standard for Organizing Micro Units

In *American Steel Construction*, 372 NLRB No. 23 (2022), the Board made it easier for unions to organize smaller bargaining units (i.e., micro units) within a workplace. Specifically, unions now are able to organize a small micro unit of employees by simply demonstrating the group has a community of interest sufficiently distinct from a larger group of employees. To rebut this showing, employers must now satisfy a higher burden and show an "overwhelming community of interest" between the employees in the petitioned-for micro unit and other employees. Previously, employers only needed to show micro units had meaningfully distinct bargaining interests that outweighed their similarities in order to rebut the union's position. Since it is typically much easier for unions to organize a smaller group of employees—for instance, the United Food and Commercial Workers Union was able to organize micro units of cosmetics employees at a Macy's store as opposed to all retail sales employees throughout that whole store—employers are encouraged to examine their workplaces to determine whether there are potential micro units that are vulnerable to union organizing.

The NLRB Broadens Employees' Rights and Restricts Employer Actions

Employee-Friendly Standard for Determining Whether Employer Rules Infringe on Employee Rights

In *Stericycle, Inc.*, 372 NLRB No. 113 (2023), the Board adopted a new legal standard for assessing whether employer work rules interfere with employees' rights under the NLRA. The Board created a two-part test to determine whether an employer work rule is lawful. First, the rule is examined to determine whether an employee "could reasonably" interpret the rule to chill the exercise of protected activity. If there is such a finding, the employer must prove that the rule advances a "legitimate and substantial business interest" and could not be replaced with a more narrowly tailored rule. Only if the employer can meet this burden will the Board find the rule to be lawful. Examples of work rules often subject to challenge include those involving confidentiality, employee conduct, third-party communications, use of company logos, photography and recording, leaving work, conflicts of interest, social media, solicitation and distribution, and cellphone use. Under the new standard, the Board will not interpret work rules that limit protected activities from the standpoint of a "reasonable" employee, but rather from the standpoint of an "economically dependent employee" who wants to engage in union activity but is fearful of doing so. Given this decision, employers should review their employee policies to ensure that they do not interfere with protected activities and advance a legitimate and substantial business interest.

Restrictions on Confidentiality and Non-Disparagement Provisions

In *McLaren Macomb*, 372 NLRB No. 58 (2023), the Board ruled that employers' mere proffer of certain broad confidentiality and non-disparagement provisions in severance agreements violated the NLRA by restricting employees' Section 7 right to engage in protected concerted activity. The Board ruled that confidentiality and non-disparagement provisions must be narrowly tailored so as not to require employees to relinquish their rights, including conferring with customers or others

regarding their workplace. In March 2023, the NLRB General Counsel issued a memorandum (GC Memo 23-05) setting forth her view that employers enforcing confidentiality and non-disparagement provisions against employees covered under the NLRA would violate the NLRA; that the *McLaren Macomb* decision could apply to other employer communications with employees, such as pre-employment or offer letters; and that other provisions in employee agreements, including those addressing no competition, no solicitation, no poaching, broad liability releases, and covenants not to sue, may also be unlawful. Given this decision, employers should review and update their employee agreements. Further, since this decision applies retroactively, employers should also review their prior agreements and consider alerting employees that agreements containing overly broad provisions will not be enforced.

Broader and Fact-Intensive "Totality of Circumstances" Test for Evaluating Misconduct Connected to Protected Activity

In *Miller Plastic Products, Inc.*, 372 NLRB No. 134 (2023), the Board returned to the broader and fact-intensive "totality of circumstances" test for determining whether an employee has engaged in protected concerted activity under Section 7 of the NLRA. In this case, an employee was discharged after voicing various concerns about the employer's COVID-19 policy and encouraging others to do the same. Despite this conduct clearly being protected concerted activity, the Board overruled *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019), which set forth a narrower test for whether conduct was concerted. The Board explained that *Alstate Maintenance* was "unduly restrictive" because it replaced the Board's traditional fact-sensitive approach with a checklist of factors. The totality of the circumstances test requires a thorough and detailed analysis of the specific facts, does not provide employers with guidance for their response to employee conduct, and will likely lead to more employee conduct found to be protected concerted activity. Given this, employers should carefully consider whether employee conduct is potentially protected concerted activity when making decisions to take adverse employment action.

Concerted Employee Advocacy on Behalf of Non-Employees Is Protected When It Can Benefit Employees

In *American Federation for Children, Inc.*, 372 NLRB No. 137 (2023), a case involving an employee discharged after advocating for the rehire of an employee who had lost her authorization to work in the United States, the Board reversed its decision in *Amnesty International*, 368 NLRB No. 112 (2019), and returned to long-standing precedent that concerted advocacy by employees on behalf of non-employees is protected when it can benefit employees. In *Amnesty International*, the Board ruled that advocating for non-employee interns to be paid was not protected activity since it was not for mutual aid or protection. In reversing *Amnesty International*, the Board explained that standing in solidarity with others can be a protected act, despite the lack of employment status of those with whom employees stand. The question the Board will look at is whether employees can reasonably expect future reciprocal support. Therefore, employers should carefully consider any adverse employment action based on employee support of non-employees.

Employees Must Be Given Some Latitude for Their Abusive Conduct While Engaging in Protected Concerted Activity

In *Lion Elastomers LLC II*, 372 NLRB No. 83 (2023), an employer disciplined and discharged a union representative for his conduct during grievance meetings. The Board found that the employer violated the NLRA. In so ruling, the Board returned to setting specific standards to determine whether employee misconduct committed while engaged in protected concerted activity is sufficiently egregious to lose protection. As such, rather than focusing on an employer's disparate treatment of employees engaging in misconduct while engaged in protected concerted activity, the Board's standard to determine the legality of an employer's adverse action against an employee will differ depending on, for instance, whether an employee's misconduct occurred in the workplace, during a grievance meeting, on social media, during a strike, or on a picket line. As such, employers may not have clear guidance in their decisions to discipline employees for misconduct while engaging in protected concerted activity.

The NLRB Expands Employers' Responsibilities for Additional Workers

New Independent Contractor Standard Makes More Workers Employees

In *Atlanta Opera, Inc.*, 372 NLRB No. 95 (2023), the Board overturned *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), and returned to the independent contractor test articulated in *FedEx Home Delivery (FedEx II)*, 361 NLRB 610 (2014). The Board sided with hair and makeup artists at the Atlanta Opera who were classified as independent contractors, and held that they were employees entitled to unionize. In doing so, the Board ruled that its independent contractor analysis is no longer predominantly based on "entrepreneurial opportunity," but also on a list of other traditional common law factors, such as the level of control and supervision, skill, duration of relationship, method of payment, and intent of the parties.

Whether an individual is an employee has great significance under labor law, including because it governs whether two or more employees may join together to unionize. Employers should expect challenges to classifications going forward because workers who are not true independent contractors may be entitled to the NLRA's protections.

New Joint Employer Rule Makes Employers Responsible for Others' Violations

In October 2023, the Board adopted a Final Rule, which will become effective February 26, 2024, for determining joint employer status under the NLRA. Entities will be considered joint employers if each entity has an employment relationship with employees and they share or both decide at least one of the employees' essential terms and conditions of employment. The prior rule set a higher threshold that a putative joint employer must "possess and exercise ... substantial direct and immediate control" over essential terms and conditions of employment. However, the new rule is expected to result in more joint employer determinations because it considers the alleged joint employers' authority to control essential terms and conditions of employment, regardless of whether such control is exercised, or whether it is direct or indirect. The Board will conduct a fact-specific analysis to determine whether two or more employers meet the standard.

As Board Member Marvin Kaplan stated in his dissent to the Final Rule, "virtually every client of a staffing firm predictably will be the joint employer of that firm's supplied employees" because the client will maintain authority to control at least one essential employment term and condition of employment. Further, the Final Rule raises the possibility that even ordinary commercial terms could be interpreted as conferring direct or indirect control over employment terms. Accordingly, employers should examine any terms and conditions in their staffing agreements to try to avoid joint employer liability.

The NLRB Reduces Employers' Ability to Act Unilaterally and Other Developments Affecting Bargaining

Employers May Not Be Able to Rely on Past Practices

In *Wendt Corp.*, 372 NLRB No. 132 (2023), the Board overruled *Raytheon Network Centric Systems, 365 NLRB No. 161* (2017), and held that employers cannot make unilateral changes affecting a unionized workforce during the negotiation of a first contract. In this case, the employer conducted a layoff during initial contract negotiations and had previously conducted layoffs on several prior occasions, the last of which had been three years prior. Finding that the employer "undermined the pro-bargaining policies of the NLRA," the Board found a past practice of discretionary unilateral changes irrelevant unless the past practice occurs with such regularity that employees could reasonably expect the practice to continue or reoccur.

In *Tecnocap LLC*, 372 NLRB No. 132 (2023), the Board overruled a different part of *Raytheon*, holding that an employer's past practice of unilateral changes implemented under a management rights clause during the term of a collective bargaining agreement does not permit unilateral changes made after the agreement expires and while bargaining for a successor agreement. In this case, an employer unilaterally changed employee work schedules during bargaining for a successor agreement, claiming that it had a past practice of doing so. The Board, however, found that allowable unilateral conduct during bargaining must be supported by an "automatic" and "non-discretionary" long-standing practice.

These decisions increase unions' leverage by limiting employers' ability to act unilaterally during contract negotiations. Employers will now have to bargain, including to impasse if need be, decisions to change the terms and conditions of their union-represented employees' employment. Moreover, depending upon the practice, it could be questionable as to whether it was "automatic" or "non-discretionary," and could create a precarious position for employers in having to assess whether there is a duty to bargain before making changes.

Employer Obligation to Continue Dues Deductions After Contract Expiration

In *Valley Hospital Medical Center, Inc.*, 371 NLRB No. 160 (2022), the Board once again overruled precedent and held that employers must continue to honor dues deduction arrangements contained in a collective bargaining agreement after the agreement expires. A "dues deduction" provision usually requires an employer to deduct union dues from employees' paychecks and remit them to the union. Employers' prior ability to unilaterally stop this dues deduction and remission provided them with an economic weapon to use during the bargaining process—essentially forcing unions to either more seriously consider the employer's proposed terms for a new contract or risk losing employees' union dues, which unions use to fund their operations. Now, employers must continue with the prior dues deductions, even after the expiration of a contract, until a new contract has been ratified or a lawful impasse on an employer proposal to stop such deductions has been reached.

State Expansion of Employee Entitlements During Labor Disputes

In April 2023, New Jersey enacted a law that provides unemployment insurance benefits to employees while they participate in labor disputes, lockouts or strikes. Specifically, the law permits employees to receive unemployment insurance benefits during an employer lockout of employees, regardless of whether a strike preceded the lockout. Further, striking employees now have to wait only 14 rather than 30 days to receive unemployment benefits. Most notably, there is no waiting time if the employer hires replacement workers or if the employer's failure to comply with an agreement caused the labor dispute.

In October 2023, Connecticut enacted a law making employees who participate in labor disputes, lockouts or strikes eligible to enroll in any qualified healthcare plan offered through Connecticut's health insurance exchange.

Given the greater availability of unemployment and healthcare benefits (as well as potential union strike benefits), employees will not have the same disincentive to strike as in the past, providing more leverage to unions during contract negotiations.

Bottom Line

Given the numerous developments outlined above, as well as prior changes relating to increased remedies available for violations of the NLRA and difficulty in resolving unfair labor practice charges with the NLRB, employers should be cautious when navigating this new legal landscape. Employers may be the target of union organizing drives and unknowingly find themselves obligated to bargain with a union because they did not educate their employees, did not timely act to challenge an alleged showing of majority employee support for the union, or unknowingly committed an unfair labor practice that would have potentially affected an election. Further, employers may be liable for significant damages for taking action against employees for their protected activity under the Board's new standards, failing to bargain when required, and for actions relating to independent contractors or joint employers. Accordingly, employers should continue to monitor legal updates and confer with experienced labor counsel to understand the new and differing challenges they face.

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