December 31, 2018

Labor Law: A Year in Review

2018 was a year of whirlwind changes in labor law. The Supreme Court issued two decisions dealing blows to organized labor, and the decisions and processes of the National Labor Relations Board became more employer-friendly, largely due to the arrival of President Trump's appointees. States have seemingly responded in an attempt to level the playing field, including New Jersey, which enacted legislation expanding striking employees' entitlement to unemployment benefits. Changes will likely continue into the future.

Supreme Court Decisions

Requiring Arbitration of Individual Claims Does Not Violate NLRA – In May, the Supreme Court settled the long-disputed issue of whether employers could require employees, as a condition of employment, to sign arbitration agreements that include class and collective action waivers. Under such agreements, employees would waive their right to jury trials and to bring claims with other employees. In a 5-4 decision, the Court concluded that there was no conflict between the Federal Arbitration Act's mandate favoring arbitration and the National Labor Relations Act (NLRA), which protects employees' right to unionize and collectively bargain. The Court further noted that the right of employees to bring claims together in class or collective actions is not found within or envisioned by the 85-year-old NLRA. *Epic Systems Corp. v. Lewis*, 138 S.Ct. (2018). While this decision is a clear win for employers, challenges to arbitration agreements continue on other grounds. Employers considering implementing arbitration agreements should confer with legal counsel to determine whether such agreements would be beneficial given their particular circumstances and to ensure that such agreements are appropriately drafted to increase the likelihood of enforceability.

Public Sector Employees Cannot Be Forced to Pay Agency Fees to Unions – In June, the Supreme Court overturned 40-year precedent and ruled that public employees who choose not to be union members but who were nevertheless represented by a union could no longer be required to pay fees to a union. *Janus v. American Federation of State, County, and Municipal Employees (AFSCME), Council 31, et. al.*, 138 S. Ct. 2448 (2018). In 1977, the Supreme Court held that requiring such employees to contribute "agency fees" to cover the cost of collective bargaining and other advantages of being represented by a union did not violate their individual rights as long as such contributions did not go toward the union's political or other ideological projects. *Abood v. Detroit Board of Education*, 97 S. Ct. 1782 (1977). In *Janus,* the Court explained that the justifications outlined in *Abood*, namely, labor peace and the need to avoid "free riders," did not outweigh employees' rights under the First Amendment of the Constitution. Specifically, the Court viewed the requirement for nonunion members to contribute money in support of a union whose ideas with which they fundamentally disagreed to be a form of compelled speech prohibited by the First Amendment. Despite the fact that this decision applies only to state action (i.e., unions representing employees in the public sector), it may nonetheless affect private sector employers, since unions may focus their attention and increase organizing efforts in the private sector to make up for the anticipated decline in membership and loss of fees in the public sector.

National Labor Relations Board Developments

Composition of the Board and Move Toward Rulemaking – The National Labor Relations Board saw the addition of a Republican member appointed by President Trump. The five-member Board is now comprised of three Republican and two Democratic members (one of whom was reappointed by President Trump and is awaiting Senate approval). Republican member John Ring was elevated to Chairman of the Board in April, after the departure of former Chair Phillip Miscimarra.

Peter Robb, a Republican, was also appointed by President Trump as the Board's General Counsel. Under the Board's new composition, it is expected that some Obama-Board positions and rulings will change. Indeed, Board Chairman Ring has stated that future labor law will be developed through the use of rulemaking, rather than the adjudication of individual cases. The rulemaking process includes the Board's publication of a proposed rule regarding compliance with the NLRA and a comment period soliciting feedback and insight from employers, unions and others regarding the proposed rule. Such process would provide much-needed guidance, rather than leaving parties to parse through decisions regarding other parties' unique issues and facts. Therefore, the Board will likely engage in more rulemaking in the future, including the revision of the Obama-Board rule establishing "quickie" elections.

What Constitutes Joint Employment? – With regard to the issue of joint employment, the Board engaged in both adjudication and rulemaking. In December 2017, the Board issued a decision in *Hy-Brand Industrial Contractors Ltd. and Brandt Construction Co.*, 365 NLRB No. 156 (Dec. 14, 2017), overturning an Obama-Board decision regarding the standard for determining joint employment. The Board in *Hy-Brand* reverted to the prior standard which required *proof* that an employer exercised direct and immediate control in a way that was neither limited nor routine, rather than the mere authority to exercise such control. This ruling was challenged and subsequently vacated as a result of a determination by the NLRB that the newly-appointed Board member should have recused himself from the decision-making process. Since then, the Board has issued a proposed rule regarding the standard for determining joint employer status: "[A]n 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' terms and conditions of employment in a manner *that is not limited and routine*." (Emphasis added). The Board twice extended the comment period, now through January 14, 2019, to allow the largest number of public comments to be considered.

A More Balanced Approach to Employer Work Rules – The Board's decision in *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017), provided much-needed relief to employers. That decision balanced employee rights under the NLRA with employers' legitimate need for reasonable work rules. This decision clarified that neutral workplace rules, including no-recording/photography and civility policies, will no longer be found *per se* unlawful under the NLRA because an employee could "reasonably construe" such rules to interfere with their rights. After this decision, General Counsel Robb issued guidance (GC Memo 18-04) that categorized and explained what employer policies would pass muster under the NLRA. Through *Boeing* and Robb's follow up memo, the Board divided workplace rules into three distinct categories:

- **Category I** rules are generally lawful because (a) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of employee rights, *or* (b) the potential adverse impact on employee rights caused by the rule is outweighed by legitimate employer justifications.
- **Category II** rules are not patently lawful on their face and warrant additional consideration and balancing to determine whether there would be unlawful interference with employee rights, and if so, whether that interference is outweighed by employer business justifications. An example of a Category II rule would be broad confidentiality rules that encompass the "employer's business" or "employee information."
- **Category III** rules are clearly unlawful because they restrict or prohibit lawful employee conduct under the NLRA. Examples of Category III rules include confidentiality rules that restrict employee discussions of wages, benefits, or terms and conditions of employment, and rules that prohibit employees from joining unions. Notably, the Board and General Counsel distinguished between the legality of an employer's rule that is neutral on its face and the illegality of a neutral rule that is applied in a manner that interferes with employee rights under the NLRA.

Unemployment Benefits for Striking Employees

In August, New Jersey Governor Phil Murphy signed legislation expanding the circumstances under which striking employees are entitled to benefits under New Jersey's unemployment compensation law. The new law is applicable to all employers and applies to any striking employee who was or has become unemployed on or after July 1, 2018. Employees can now collect unemployment benefits, including when:

- Their unemployment is a result of an employer's failure or refusal to comply with an agreement, contract, collective bargaining agreement (CBA), or state or federal law relating to hours, wages or other conditions of work.
- Their unemployment is a result of a labor dispute, strike or other concerted activity by employees, whether or not sanctioned by a union representing those employees (requires a 30-day waiting period prior to the receipt of benefits).
- An employer engages in a lockout of employees.
- An employer hires permanent replacements for striking employees.

Employers may lawfully permanently replace employees participating in an economic strike (as opposed to an unfair labor practice strike) under the NLRA. This new New Jersey law, however, negates this powerful weapon and penalizes employers for doing so. Further, unless striking employees are specifically notified in writing that they can return to their former positions at the conclusion of the strike, employees hired during a strike will be *presumed* to be permanent replacements. Further, if the employer does not allow striking employees to return to work, the employees will be entitled to collect unemployment compensation benefits retroactive to the first day of the strike (the 30-day waiting period would not apply), and the employer would be fined $750 per employee per week, payable to the unemployment compensation fund administered by the state.

The new New Jersey law is similar to a New York law, which has been in effect since July 2010. Under the New York law, employees are entitled to unemployment benefits if a strike lasts for at least 49 days, or sooner if there is a lockout by the employer, permanent replacement workers are hired or the strike ends and employees are still unemployed. The New York law provides for the same presumption of permanency for employees hired during a strike (unless there is clear written communication to striking employees that their job remains open upon the conclusion of the strike) and the $750 per employee per week penalty to employers that refuse to allow employees to return to work after being notified that they would be permitted to do so.

The above developments are not all of the changes that have occurred in the prior year, and there will certainly be more in the coming year.

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Authors



Francine Esposito

Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com