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Labor Law Updates of Concern to All Employers

National Labor Relations Board General Counsel Jennifer Abruzzo is making good on her promise to use her position to expand the rights of workers and unions and to increase the penalties for employers that engage in unfair labor practices. The General Counsel has done so through guidance to the Board's Regional Offices and by urging the Board to overturn long-standing precedent and increase the breadth and scope of the National Labor Relations Act (NLRA). The Board has issued key decisions or is in the midst of deciding matters related to remedies for unfair labor practices, union organizing, continuation of dues deductions after contract expiration, joint-employer status and protected concerted activity. All employers—both union and non-union alike—should be aware of these events or they may unwittingly end up violating the NLRA.

Expanded Remedies for Unfair Labor Practices

Through her memos, the General Counsel has advocated for uncommon expanded and make-whole remedies in the settlement of unfair labor practice charges and litigation, including letters of apology, video readings of notice postings to be distributed to all employees, consequential damages (such as payments for out-of-pocket healthcare expenses, credit card fees or the loss of a home or car), liquidated damages, front pay and punitive damages (see GC Memos 21-06 and 21-07). She has also advocated for the greater use of injunctive relief to stop employer actions pending adjudication (see GC Memo 21-05).

The remedies in failure-to-bargain cases in particular normally would not be monetary, but would include a direction for the employer to bargain in good faith and to post a remedial notice. However, this is no longer the case. In *Pathway Vet Alliance, LLC, D/B/A Thrive Pet Healthcare and IAMAW,* 03-CA-291267 (General Counsel's Brief filed February 25, 2022), the General Counsel urged the Board to require employers found to have refused to bargain in good faith to pay what employees likely would have been entitled to had the employer bargained in good faith. Specifically, the General Counsel encouraged the Board to take the extraordinary step of using comparable circumstances as a basis to calculate a speculative estimate of monetary damages. However, she did not provide a standard for "comparable circumstances" or "comparable bargaining units."

Following the General Counsel's lead, the Board has held and the Ninth Circuit has affirmed a decision requiring an employer found to have failed to bargain in good faith to reimburse the six-figure legal costs a union incurred during the collective bargaining process. *NLRB v. Ampersand Publishing, LLC*, 43 F.4th 1233 (9th Cir. 2022) (*affirming Ampersand Publ'g*, 370 NLRB No. 119 (April 29, 2021)). The Board concluded that the employer's discontinuance of its merit pay raise program, transfer of bargaining unit work to non-union temporary employees without notice, discharge of two employees and bad faith bargaining were "unusually aggravated misconduct sufficient to warrant more than a traditional remedy."

Given these extraordinary potential new and costly remedies, employers must fully understand the nuances of their obligations under the NLRA, including their duty to bargain in good faith, and should confer with experienced labor counsel regarding the shifting interpretations of the NLRA.

Obligation to Continue Dues Deductions After Contract Expiration

In a blow to employers' leverage during bargaining, the Board recently overruled precedent and held that employers must continue to honor dues-deduction arrangements contained in a collective bargaining agreement after the agreement has

expired. *See Valley Hosp. Med. Ctr., Inc.*, 371 NLRB No. 160 (2022). This case overruled *Valley Hospital Medical Center*, 368 NLRB 139 (2019), which permitted employers to unilaterally end dues checkoff arrangements post-expiration.

A "dues deduction" or "dues checkoff" provision in a collective bargaining agreement requires an employer to deduct union dues from employees' paychecks and transmit them to the union. The ability to unilaterally cease dues deductions provided employers with an economic weapon to use during the bargaining process—essentially forcing unions to more seriously consider the employer's proposed terms or risk losing dues collections, which unions use to fund their operations. Employers have lost this leverage. Now, employers must continue with the prior dues deductions, even post-agreement expiration, until a successor collective bargaining agreement has been ratified or a lawful impasse has been declared. Specifically, if the employer wishes to cease dues deductions post-agreement expiration, it must provide the union with the opportunity to bargain on that issue and reach a lawful impasse on that issue before unilaterally stopping any dues deduction.

Potential Increased Liability for Employers Due to Proposed New Joint Employment Standard

On September 6, the Board introduced its proposed rule to replace the revoked Trump-era test for determining when one entity jointly employs another entity's workers. Under the proposed rule, employers would be considered joint employers if they "share or codetermine those matters governing employees' essential terms and conditions of employment," such as scheduling, wages, benefits and discipline. If adopted, the revised rule would expand the factors that establish a joint employment relationship to include a second employer's indirect and unexercised control over the terms and conditions of an employer's employees.

The Board's proposed rule presents several potential consequences. For instance, it increases the likelihood that one company will share liability for the other company's unfair labor practices and bargaining responsibilities. It also exposes both companies to union picketing or other economic pressures if there is a labor dispute at one company. All businesses, regardless of whether their employees are represented by a union, should be paying close attention to this proposed rule and its impact on the workplace. Whether or not the proposed rule will be adopted remains open.

Increased Union Activity and Easier Workplace Organizing

This year has seen an uptick in union activity and a revival of pro-union sentiment throughout the United States. For instance, the Board experienced a 53% increase in election petition filings this year, compared to the same time period last year, and Gallup polls from August show 71% of Americans approve of labor unions—the highest approval of labor unions since 1965. Younger adults (ages 18 to 34) also approve of unions at a high rate of 77%, contributing to the current resurgence.

The Board also experienced a 19% spike in the number of unfair labor practice charges filed this fiscal year compared to last year. Overall, the annual increase in petitions and unfair labor practice charge filings combined is 23%—the largest increase since 1976.

Given these numbers, potential policy changes relating to union organizing are more concerning to employers. Earlier this year, the General Counsel issued a memo (GC Memo 22-04) proposing to make illegal "captive audience meetings," currently an effective tool for employers in union avoidance. During these mandatory meetings, employers have the right to educate employees and share their views regarding unionization. The General Counsel seeks to make these meetings unlawful given the potential that employees who refuse to attend will be disciplined. A decision to make captive audience meetings unlawful would not only eliminate an effective union avoidance tool, but it would require employers to find other ways to educate and persuade employees about whether being in a union is in their personal best interests.

The General Counsel also wants to reinstate the *Joy Silk Mills* standard relating to secret ballot elections that the Board abandoned more than a half-century ago. *See Cemex Construction Materials Pacific, LLC, and International Brotherhood of Teamsters*, Case No. 28-RC-232059 (Brief in Support of General Counsel's Exceptions filed April 11, 2022); *see also Joy Silk Mills, Inc.,* 85 NLRB 1263 (1949). Currently, employers are entitled to demand a secret-ballot election when a union presents a majority showing of union authorization cards signed by employees in a proposed bargaining unit. If the *Joy Silk Mills* standard is reinstated, employers may no longer refuse to recognize a union that presents a majority of signed authorization cards. Instead, to seek a secret-ballot election, employers would have the burden to demonstrate a good faith doubt as to the

union's majority status, such as due to the union's coercion or fraud. Such a burden may be difficult for an employer to meet, thereby making it significantly easier for unions to organize a workplace.

NLRA Protections Relating to Wearing Union Insignia

The Board has also recently overturned precedent and expanded the scope of employees' protected concerted activity under the NLRA when it comes to wearing union insignia at work. *See Tesla, Inc.*, 371 NLRB No. 131 (2022) (*overturning Wal-Mart Stores, Inc.,* 368 NLRB No. 146 (2019)). Specifically, the Board found that Tesla's requirement that employees wear only black Tesla-logoed or plain shirts interfered with workers' right to use "insignia to advocate for their workplace interests." The Board ordered Tesla to change its dress code to allow employees to wear black union shirts, finding that Tesla had not demonstrated the "special circumstances" needed to justify its restrictions on pro-union apparel. In reaching this conclusion, the Board rejected Tesla's arguments that its uniform policy was needed to aid in visual management and the pro-union shirts increased the risk of damage to the vehicles. This ruling is somewhat surprising, given the Board's 2019 *Wal-Mart* decision, which held that the special circumstances test applies only when an employer completely prohibits union insignia as opposed to imposing fewer restrictions. As voiced by the dissent, the *Tesla* decision distorts decades of precedent and effectively declares illegitimate any employer uniform policy or dress code that prohibits employees from substituting union apparel for the required clothing. Ultimately, this new *Tesla* holding limits employers' ability to restrict union insignia at work. Therefore, employers should review their dress policies in order to avoid potential unfair labor practice charges.

Takeaways

Given the above, all employers—union and non-union—should review their current policies and intended actions to evaluate the potential risks presented by the uptick in union organizing and/or the ever-changing interpretations of the NLRA. Stay tuned for additional updates as changes continue.

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