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Employment Law Note

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Recent Developments at the NLRB Result in Employer-Friendly Changes in Key Areas

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The National Labor Relations Board ended 2019 and began 2020 with a bang by reversing Obama-era case law on several fronts, and by issuing new union election rules designed to make the playing field more level when a union seeks to unionize workers.

NLRB Issues Final Regulations on Joint Employers

The Board issued its final rule governing joint-employer status. The new rule will become effective April 27, 2020. As stated by the Board in its February 25, 2020 press release:

> To be a joint employer under the final rule, a business must possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees. The final rule defines key terms, including what are considered "essential terms and conditions of employment," and what does, and what does not, constitute "direct and immediate control" as to each of these essential employment terms. The final rule also defines what constitutes "substantial" direct and immediate control and makes clear that control exercised on a sporadic, isolated, or de minimis basis is not "substantial."
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> Evidence of indirect and/or contractually reserved control over essential employment terms may be a consideration for finding joint-employer status under the final rule, but it cannot give rise to such status without substantial direct and immediate control. Importantly, the final rule also makes clear that the routine elements of an arm's-length contract cannot turn a contractor into a joint employer.

The new rule reverses case law created in 2015 by the Obama Board in *Browning-Ferris Industries*, which adopted a more liberal test under which joint employer status was found if the putative joint employer possessed indirect influence and the ability (including through a reserved contractual right) to influence terms and conditions, regardless of whether the putative joint employer actually exercised control.

NLRB Allows Employers to Limit Use of E-Mail and IT Systems to Business Use Only

In Caesars Entertainment, 368 NLRB No. 143 (2019), the Board overturned its 2014 holding in *Purple Communications, Inc.* that had allowed employees to use an employer's e-mail for union organizing and other concerted activities. Overruling *Purple Communications*, the Board held in *Caesar's Entertainment* that employees do not have a statutory right to use employers' e-mail and other information-technology (IT) resources to engage in non-work-related communications. Rather, employers have the right to control the use of their equipment, including their email and other IT systems, and they may lawfully exercise that right to restrict the uses to which those systems are put, provided that they do not discriminate against union or other protected concerted communications. In short, employers may restrict the use of their e-mail and IT systems to business use only, provided they do not discriminate against employees who use the system for union-related and other protected activities.

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Employers May Discontinue Withholding Union Dues After Contract Expires

Many collective bargaining agreements contain provisions allowing employees to have their union dues automatically deducted from their pay and sent to the union by the employer. These provisions are commonly known as "dues checkoff" provisions. The question becomes, does a dues checkoff requirement continue after the collective bargaining agreement (and with it, the union security provision) expires? In *Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139 (2019), the Board overturned an Obama-era holding in *Lincoln Lutheran of Racine* which held that employers were obligated to continue to check off and remit union dues even after the expiration of collective bargaining agreements. Now, the Board has re-established that dues checkoff provisions are enforceable only for the duration of the contractual obligation created by the parties. In other words, dues checkoff ends when the contract expires. The effect of this decision will be interesting to watch, as it may result in the interruption of a significant revenue stream for many unions while contracts are being negotiated.

NLRB Restores Confidentiality of Workplace Investigations

In a case in which Matt Lynch of Sebris Busto James represented the employer, the NLRB overruled precedent and held that an employer may require employees to maintain the confidentiality of ongoing workplace investigations. *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019).

NLRB Issues Revisions to "Quickie" Election Rules

In 2015 the NLRB published revisions to its longstanding election rules that resulted in an outcry from the employer community because of the way the new rules hindered an employer's ability to combat a union organizing campaign. The Board took a step on December 13, 2019 to revise some of the 2015 changes by issuing new rules amending several provisions of the regulations that will add more time back into the union election process. The new rule was published in the *Federal Register* on December 18, 2019 and will take effect on or about April 16, 2020.

The most noteworthy changes in the new rules are as follows.

- Representation hearings will begin no sooner than 14 business days from the notice of the filing of the petition, as compared to 8 days;
- Employers will have 5 business days from service of the notice of hearing to post the Notice for Petition of Election (up from 2 business days);
- Employers in representation cases and unions in decertification petitions must file a written Statement of Position one day before the opening of the hearing (compared to 8 business days following the notice of hearing under the old rules). Coupled with the changes for notice of hearing, this will give the non-petitioning party roughly 6 more days to file its Statement of Position; and
- Voter eligibility and unit scope issues will again be litigated at a pre-election hearing, as opposed to after the election. Parties may continue to defer voter eligibility issues by agreeing to have certain individuals vote subject to challenge.

Several more NLRB initiatives are in store, meaning 2020 will bring with it more significant developments for employers. If you have any questions regarding what's happened and what's next, you can contact Matt Lynch at mlynch@sebrisbusto.com.

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