Top Five Labor Law Developments for July 2017

By Philip B. Rosen, Howard M. Bloom, Richard I. Greenberg, Chad P. Richter, Douglas J. Klein and Christopher M. Repole

August 11, 2017

1. The U.S. Senate narrowly confirmed Marvin Kaplan to one of two vacant seats on the National Labor Relations Board on August 2, 2017. Kaplan was sworn in on August 10. Kaplan is a former counsel to the Commissioner of the Occupational Safety and Health Review Commission. His confirmation leaves one vacant seat on the five-member Board. President Donald Trump has nominated William Emanuel, a management-side lawyer working in private practice, for the remaining seat. The Senate is not expected to vote on Emanuel's nomination until after the Senate's August recess. If Emanuel is confirmed — the Senate Health, Education, Labor and Pensions (HELP) Committee approved his nomination on July 19 — the Board will have a 3-2 Republican majority for the first time since 2010. A full Board is expected to reverse many of the pro-labor rulings by the Obama Board, including those on class action waivers, joint-employer status, temporary workers, quickie elections, expansion of protected concerted activity (*e.g.,* its impact on workplace policies), the definition of appropriate bargaining units, and the status of college/university faculty and student athletes, among others.
2. The U.S. Supreme Court has scheduled oral arguments for October 2 in the consolidated case in which the Court is expected to resolve the circuit split over whether an arbitration agreement that requires an employee to waive his or her right to bring or participate in a class action violates the National Labor Relations Act. *Ernst & Young LLP et al. v. Morris et al.,* No. 16-300; *NLRB v. Murphy Oil USA Inc.,* No. 16-307; and *Epic Systems Corp. v. Lewis,* No. 16-285. The U.S. Department of Justice recently filed an amicus brief arguing for the legality of such mandatory arbitration agreements, reversing the DOJ's position as set out in the Obama-era certiorari petition in the matter, and taking a position opposed to the NLRB.
3. On July 19, the U.S. House Appropriations Committee approved a funding bill for Fiscal Year 2018 that would decrease discretionary spending at the Department of Labor and NLRB. The bill proposes cuts to DOL funding by about 11 percent and to NLRB funding of approximately 9 percent. House members attached several riders to the bill that would restrict the NLRB from enforcing its *Specialty Healthcare* decision, prevent the NLRB from making any determination of joint-employer status, and prohibit the NLRB from "provid[ing] employees any means of voting through any electronic means in [a representation] election." It remains to be seen whether the full House will pass the appropriations bill as currently written.
4. Bills introduced in both houses of Congress would limit the NLRB's authority substantially. On July 20, Republican Senators introduced the Protecting American Jobs Act (S. 1594), which would strip the NLRB of its authority to hear labor disputes and transfer that power to the federal courts. The bill also would strip the NLRB of much of its rulemaking power. On July 27, Rep. Bradley Byrne (R-Ala.) introduced the Save Local Business Act (H.R. 3441), which would amend the NLRA to allow a joint-employer determination only where one entity has direct and immediate control over another. The bill would effectively require the Board to return to the standard it applied prior to *Browning-Ferris Industries of California Inc.,* 362 NLRB No. 186 (2015). In *Browning-Ferris,* the Board held that organizations may be labeled joint employers, and therefore may be held jointly and severally liable for violations of the NLRA, where one exercises even indirect control over the other. While the U.S. House considers Rep. Byrne's bill, the U.S. Court of Appeals for the D.C. Circuit is considering an appeal of *Browning-Ferris* and is expected to issue its decision shortly. The D.C. Circuit case is *Browning-Ferris International v. NLRB,* Nos. 16-1028, 16-1063, and 16-1064.
5. An employer did not violate the NLRA when it fired an employee who shared with colleagues sexually suggestive text messages sent by a supervisor, an Administrative Law Judge has found. *Trey Harlin, P.C.,* 16-CA-171972 (July 1, 2017). When showing the messages to her coworkers, the employee boasted that she could never be fired because she could use the texts as evidence against her supervisor. While the evidence showed the employer was aware of the boasts at the time of the termination, the stated reason for the termination was the employee's poor performance. The ALJ held that complaints to colleagues about sexual harassment can constitute protected concerted activity, but that the fired employee did not engage in truly "concerted"

Meet the Authors

Philip B. Rosen

Principal
New York Metro
New York City 212-545-4001
Email

Howard M. Bloom

Principal
Boston 617-367-0025
Email

Richard I. Greenberg

Principal
New York Metro
New York City 212-545-4080
Email

activity, because she never asked for help from colleagues, and never suggested they engage in any sort of group response.

Please contact your Jackson Lewis attorney to discuss these developments and your specific organizational needs.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 950+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit https://www.jacksonlewis.com.

Chad P. Richter

Office Managing Principal
Omaha 402-827-4233
Email

Douglas J. Klein

Principal
New York Metro
New York City 212-545-4020
Email

Christopher M. Repole

Associate
New York Metro
New York City 212-545-4019
Email