

Top Five Labor Law Developments for September 2017

By Philip B. Rosen, Howard M. Bloom, Richard I. Greenberg and Christopher M. Repole

October 19, 2017

1. An employer violated the National Labor Relations Act when it discharged an employee who protested an unlawful confidentiality policy, even though the employee protested without the involvement of any coworkers, the U.S. Court of Appeals for the Second Circuit has held. *NLRB v. Long Island Ass'n for AIDS Care, Inc.*, No. 16-2325 (2d Cir. 2017). The employer, an HIV/AIDS treatment center, required employees to sign a confidentiality statement that prohibited the disclosure of patient and other information, such as wages, salaries, and working conditions. An employee protested the requirement to keep wages and working conditions confidential and he was discharged. The employee filed an unfair labor practice charge alleging the confidentiality rule and the termination violated the NLRA. The National Labor Relations Board upheld the unfair labor practice charge. Upon appeal to the Court, the employer admitted the policy was unlawful, but argued the employee was not engaged in any "concerted" activity protected by the NLRA. The Court rejected the employer's argument, holding an employer may not require even one individual employee to abide by unlawful restrictions as a condition of employment.
2. The U.S. Senate has confirmed Marvin Kaplan and William Emanuel to fill the two vacant seats on the NLRB. The Senate confirmed Emanuel on September 25 after confirming Kaplan on August 2. Kaplan is a former counsel to the Commissioner of the Occupational Safety and Health Review Commission, and Emanuel was a management-side lawyer working in private practice. Kaplan's term runs through August 27, 2020, and Emanuel's runs through August 27, 2021. Kaplan and Emanuel will serve with fellow Republican Board appointee Chairman Phillip Miscimarra, whose term expires on December 16, 2017. Kaplan and Emanuel also join Democrats Mark Gaston Pearce and Lauren McFerran on the Board. Board Member Pearce's term expires on December 16, 2018, and Board Member McFerran's term expires on December 15, 2019. With a 3-2 Republican majority, the Board is expected to reverse many Obama-era pro-employee rulings, 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.
3. On September 15, President Donald Trump nominated Peter B. Robb to become the Board's next General Counsel. Robb is a long-time, management-side labor law attorney. Robb has completed his confirmation hearing, but the Senate has yet to announce a date for his confirmation vote. If confirmed, Robb will succeed Richard F. Griffin, Jr., who has been GC since November 2013. Griffin's term expires on November 4, 2017. Among other responsibilities, the GC investigates and prosecutes unfair labor practice cases. Through the process of deciding which unfair labor practice cases should be litigated and potentially reach the five-member Board for decision, the GC controls the cases the Board prioritizes and pursues. When a case reaches the NLRB for decision, the GC can ask the Board to change existing precedent. While Robb's representation of employers and public statements criticizing several of the Obama Board's decisions have been widely reported, it remains to be seen what impact, if any, that background will have on his chances of being confirmed.
4. The U.S. Supreme Court has heard oral argument 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 NLRA. *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 question is the subject of a circuit split. The Sixth, Seventh, and Ninth Circuits have held that class and collective action waivers violate the NLRA, while decisions of the Second, Fifth, Eighth, and Eleventh Circuits have upheld the legality of such waivers. The Obama Administration had argued against the legality of mandatory class and collective action waivers, but the Trump Department of Justice reversed course, arguing the waivers are lawful, taking a position the NLRB opposed.
5. On September 28, the U.S. Supreme Court agreed to hear a case on the constitutionality of an Illinois law allowing public sector unions to require employees covered by a collective bargaining agreement to pay "agency fees" as a condition of employment. *Janus v. AFSCME, Council 31*, No. 16-1466. The named plaintiff, an Illinois state employee, alleged the Illinois law violated the First

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

Amendment of the U.S. Constitution by requiring him and his co-plaintiffs to pay mandatory fees to an organization they do not support. The plaintiffs argue that the Supreme Court should reverse its decision in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), which upheld the legality of such mandatory fees. A similar challenge was before the Court in *Friedrichs v. Cal. Teachers Ass'n*, but the passing of Justice Antonin Scalia left the Court divided equally, resulting in an automatic affirmance of a lower court decision upholding the constitutionality of the fees. No. 14-915 (Mar. 29, 2016). Justice Neil Gorsuch's appointment to the Court may mean *Abood* will not stand.

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



Christopher M. Repole

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

©2020 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

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>.

©2020 Jackson Lewis P.C. All rights reserved. Attorney Advertising. Prior results do not guarantee a similar outcome. No client-lawyer relationship has been established by the posting or viewing of information on this website.

*The National Operations Center serves as the firm's central administration hub and houses the firm's Facilities, Finance, Human Resources and Technology departments.