Top Five Labor Law Developments for April 2018

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May 16, 2018

1. The U.S. Senate confirmed John Ring's nomination to the National Labor Relations Board (NLRB) on April 11. Shortly thereafter, President Donald Trump named Ring as Board Chairman. Ring was sworn in as Chairman on April 16, replacing Republican Marvin Kaplan in that role. Trump nominated Ring, a management-side labor and employment lawyer, on January 12 to fill the Board seat vacated by Philip Miscimarra, whose term ended on December 16, 2017. Ring's confirmation restores a 3-2 Republican majority to the Board. While Ring's confirmation was expected, his pre-nomination resume came under greater scrutiny than it might have otherwise, due to the controversy around Board member William Emanuel's work in private practice.

2. The period for the public to submit comments to the NLRB on independent contractor misclassification closed on April 30. In a case involving misclassification of employees as independent contractors, the Board invited interested parties to file amicus briefs on whether the act of misclassification is a violation of the National Labor Relations Act (NLRA). The request for amicus briefs arises from a case in which a Board administrative law judge (ALJ) ruled that a courier service violated the NLRA by misclassifying one of its couriers as an independent contractor instead of an employee. *Velox Express, Inc.,* No. 15-CA-184006 (Sept. 25, 2017). The ALJ reasoned that misclassification denies the misclassified individual the protections of the Act, since the Act applies only to "employees." The employer appealed the ALJ's decision to the NLRB.

3. The comment period for the Board's "quickie" election rule Request for Information closed on April 18. The Board received 6,943 comments. The Request for Information asked the public whether the 2014 ruling should be retained as-is, retained with modifications, or rescinded. The election rule changes, which took effect on April 14, 2015, allowed union organizing to move at an accelerated pace by significantly reducing the time between the filing of a representation petition and the election from an average of approximately six weeks to an average of 23 days. The responses to the Request are available on the Board's website. (Jackson Lewis submitted comments.) It is unclear what action the Board will take, if any, based on the information received.

4. On April 12, the NLRB's Division of Advice released a memorandum finding an employer did not violate the NLRA when it paid a 401(k) lump sum contribution only to unrepresented employees and declined to agree to the benefit during union contract negotiations. *Haier U.S. Appliance Solutions, Inc.,* No. 09-CA-206151 (Div. of Advice, Mar. 27, 2018, released Apr. 12, 2018). The employer stated during union contract negotiations that it was declining to include a lump sum 401(k) contribution in its proposals. After the contract was signed, the employer made a 401(k) lump sum payment to unrepresented employees only. The union filed unfair labor practice charges, alleging the employer violated the NLRA by providing the lump sum payment only to unrepresented employees. Recommending dismissal of the charges, the Division of Advice found the employer had no obligation to provide the same 401(k) benefit to represented and non-represented employees. The Division explained the complicated law in this area: "Absent an unlawful motive, an employer is generally privileged to give wage increases to its unrepresented employees at a time when its represented employees are seeking to bargain wages collectively. Thus, an employer acting without union animus is under no statutory obligation to make such wage increases applicable to represented employees in the face of collective-bargaining negotiations on their behalf involving much higher stakes.... Where a wage increase or other benefit has become an established term and condition of employment, on the other hand, the Board has found that withholding it from only represented employees may be 'inherently destructive' of employee rights, and therefore unlawful even absent a showing of anti-union motivation. For example, in *Arc Bridges, Inc. (Arc Bridges I),* the Board found that the employer's past practice of annually reviewing and granting across-the-board wage increases was an established condition of employment. The Board found that the employer's unilateral withholding of that established condition of employment from its represented employees following union certification was 'inherently destructive' of employee rights and unlawful."

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5. The Atlanta-based U.S. Court of Appeals for the Eleventh Circuit on April 13 enforced the NLRB's decision upholding the results of a re-run election supporting union representation, endorsing the union's argument that the employer's omission of P.O. Box addresses from the voter list required setting aside the original election result. *Transit Connection, Inc. v. NLRB,* No. 17-10294 (11th Cir. Apr. 13, 2018). Prior to the first election, the employer provided the union with a voter list that the union said improperly omitted employees' P.O. Box addresses, which were listed (along with home addresses) in 70 percent of voters' personnel files. After the union lost the election, the Board sustained the union's election objection that the list was defective because of this omission. The Board ordered a new election, which the union won. The employer refused to bargain with the union, arguing the Board improperly voided the first election result. The Board held the refusal violated the Act, reaffirming that the list defect required a new election. The appeals court affirmed, applying the Board's standard in *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966). *Excelsior* requires an employer to provide the union with "complete and accurate" voter addresses. The Court held that based on *Excelsior,* the employer should have provided all current address information in the personnel files, including P.O. Box addresses.

Please contact a Jackson Lewis attorney if you have any questions about these developments.

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