Top Five Labor Law Developments for May 2018

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

June 13, 2018

1. *The U.S. Supreme Court has ruled that class action waivers in employment arbitration agreements do not violate federal law. Epic Systems Corp. v. Lewis,* No. 16-285; *Ernst & Young LLP et al. v. Morris et al.,* No. 16-300; *National Labor Relations Board v. Murphy Oil USA, Inc., et al.,* No. 16-307 (May 21, 2018). The Supreme Court's decision resolves the circuit split on whether class or collective action waivers contained in employment arbitration agreements violate the National Labor Relations Act. They do not, the Court ruled in a 5-4 decision. Justice Neil Gorsuch wrote for the majority of the Court. Justice Ruth Bader Ginsburg dissented, describing the majority holding as "egregiously wrong."

2. *The National Labor Relations Board (NLRB) on May 22 commenced the process to establish a joint employer standard by rulemaking.* The Board filed a proposal in a federal report of rules being considered by governmental agencies, a procedural step that presumably will precede a notice soliciting public comments on what the joint employer standard should be. Following the Board's filing, U.S. Senators Elizabeth Warren (D-Mass.), Bernie Sanders (I-Vt.), and Kirsten Gillibrand (D-N.Y.) wrote to Board Chairman John Ring expressing opposition to the use of rulemaking to address the joint employer issue. The NLRB's current joint employer standard was set in *Browning-Ferris Industries,* 362 NLRB No. 186 (2015). In that case, the Board announced that it will find two entities are joint employers where one exercises direct or indirect control over the other's employees, or where one entity has reserved rights of control over the other's employees, even if unexercised. The *Browning-Ferris* standard was reinstated when the NLRB on February 26 vacated its decision in *Hy-Brand Industrial Contractors, Ltd.,* 365 NLRB No. 156 (2017). In the next edition of this monthly summary, we will discuss the Board affirming on June 6 its decision to vacate *Hy-Brand.*

3. *On May 4, applying its new standard for determining whether employees excluded from a proposed bargaining unit may be added to the unit, the NLRB decided against an employer. PCC Structurals,* 19-RC-202188 (May 4, 2018). In *PCC Structurals,* 365 NLRB No. 160 (2017), the Board rejected the Obama-era Board's standard for an employer to demonstrate that employees excluded from a petitioned-for bargaining unit should be added to the unit — a major victory for the employer. Under the Obama-era *Specialty Healthcare,* 357 NLRB No. 83 (2011), employers seeking to add workers to a petitioned-for unit were required to show the workers had not just a "community of interest" with those in the petitioned-for unit, but that the community of interest was "overwhelming." In 2017, in *PCC Structurals,* the Board returned to the community of interest standard, and remanded the case to a Board Regional Director (RD) to apply the reinstated standard. However, on remand, the RD upheld the union's petitioned-for unit of welders, finding the employer had not shown that all of the employer's production and maintenance employees should be included in the unit with the welders because they did not share a community of interest with the welders. As the union received a majority of the votes cast in the election, the RD certified the union as the representative of the welders. The employer appealed to the NLRB in Washington, D.C.

4. *On May 9, the NLRB held an employer did not violate the NLRA when the employer's safety manager recorded union activities while acting within the scope of his duties to record safety hazards. Brasfield & Gorrie, LLC,* 366 NLRB No. 82 (May 8, 2018). The employer, a construction engineering company, required its safety managers to record safety hazards on its construction site. When workers at the site picketed, the safety manager video-recorded employees blocking an employee entrance to the site, for a total of about five seconds. The employees did not have picket signs or any outward signs they were actually picketing, but they caused a number of non-picketing employees to turn away from work after being unable to enter the site. The Board held

Meet the Authors

Philip B. Rosen

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

Jonathan J. Spitz

Principal
Atlanta 404-586-1835
Email

Richard I. Greenberg

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

the safety manager was justified in taking the videos, since there was no evidence the recording was done for union surveillance purposes, and because the recording was within the scope of his job duties.

5. *The NLRB's Division of Advice released a memorandum on May 15 finding that an employer did not violate the NLRA when it refused to allow union representatives to record the employer's team meetings and investigatory interviews. GE Appliances, Haier,* 21-CA-202535 (released May 15, 2018). The Advice Division found the refusal did not violate the NLRA, because while employees may have a right to record such meetings, union representatives do not necessarily share that right. The Advice Division found that allowing recordings of such meetings would hamper future discussions between the employer and union and adversely affect the collective bargaining process.

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

Howard M. Bloom

Principal
Boston 617-367-0025
Email

Chad P. Richter

Office Managing Principal
Omaha 402-827-4233
Email

Christopher M. Repole

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