Top Five Labor Law Developments for October 2018

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1. *The deadline for submitting comments regarding the National Labor Relations Board's proposed rulemaking on the standard for determining joint-employer status under the National Labor Relations Act has been extended to December 13, 2018.* Under the Board's proposed rule, joint-employer status will be found only where two entities actually share or codetermine employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. If implemented, the rule would reinstate the traditional joint-employer standard the Board abandoned in its *Browning-Ferris* decision, 362 NLRB No. 186 (2015). The proposed rule has the potential to significantly affect companies that use or provide temporary or supplemental staffing services, as well as companies that regularly work with franchisors and franchisees or with subcontractors.

2. *The Office of General Counsel of the NLRB has directed the Board's field office staff to prosecute a broader range of cases than previously against unions that engage in negligent behavior toward their members.* The General Counsel memorandum, which became public in October, may make it easier for union members to show their union violated the "duty of fair representation" to members. These situations include: 1) where a union loses track of, misplaces, or otherwise forgets about a member's grievance; and 2) where a union fails to communicate its decisions about a grievance or fails to respond to inquiries for information from a member on the status of a grievance. While the memorandum is not controlling law (ultimately, the five-member Board issues controlling interpretations of federal labor law), because the General Counsel's office prosecutes cases filed with the NLRB, the memorandum may cause a considerable uptick in cases filed against unions.

3. *The NLRB held that it may process an employer's petition to hold a union decertification election even after agreement is reached on a labor contract with the union, so long as the petition is filed prior to the labor contract's effective date. Silvan Indus., a Division of SPVG,* 367 NLRB No. 28 (Oct. 26, 2018). The employer filed its petition after reaching agreement with the union during contract negotiations, but before the parties could execute the agreement. Opposing the employer's petition, the union argued the petition could not be processed because of the contract bar doctrine (the NLRB will generally decline to process an election petition filed during the term of a collective-bargaining agreement). The Board sided with the employer because the contract was not yet in effect, and therefore, no contract exists to bar the petition.

4. *While the NLRA allows states to enact right-to-work laws, it does not authorize local municipalities to do so, the U.S. Court of Appeals for the Seventh Circuit has held. I.U.O.E. Local 399 v. Village of Lincolnshire,* No. 17-1300 & 17-1325 (7th Cir. 2018). In 2015, the Village of Lincolnshire passed an ordinance that contained a right-to-work provision. Several unions challenged the ordinance in federal district court, arguing it was preempted by the NLRA. The district court ruled the NLRA preempted the ordinance, and the Village appealed. Striking down the ordinance, the Seventh Circuit held that while the NLRA cedes some power to the states to regulate labor relations, it does not allow the states to re-delegate that power to localities. The Seventh Circuit's decision in *Village of Lincolnshire* is contrary to the Sixth Circuit's holding in *United Automobile, Aerospace, and Agricultural Implement Workers of America Local 3047 v. Hardin County, Kentucky,* 842 F.3d 407 (6th Cir. 2016). This creates a circuit split that the U.S. Supreme Court may be called on to resolve.

5. *On October 9, unionized employees of the AFL-CIO voted unanimously to strike after the AFL-CIO implemented a contract that froze wages and cut benefits.* The AFL-CIO had been in contract negotiations with the Office and Professional Employees International Union (OPEIU), which represents AFL-CIO staff, including approximately 50 janitorial, secretarial, and accounting AFL-CIO staff members. The contract imposed by AFL-CIO management was one the employees previously had rejected unanimously. While the vote by OPEIU-represented employees authorizes a strike, the OPEIU leadership must call a strike before any work interruption occurs.

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