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Top Five Labor Law Developments for December 2019

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1. *The National Labor Relations Board (NLRB) has announced comprehensive changes to its election procedures, largely revamping the Obama-era "quickie" election rules.* The new rules will slow down the election process greatly. Currently, under the "quickie" rules, the median number of days between the filing of an election petition and the election date is 22 days (in cases in which election details are agreed) or 36 days (where a hearing and regional decision is needed). The new procedures relax these demanding timeframes. They also allow the parties more leeway to litigate essential questions, such as the composition of the bargaining unit and the eligibility of voters, and to determine issues of supervisory status. The new rules prohibit an election being held earlier than 20 days after a NLRB regional official orders an election, allowing more time for parties to appeal adverse rulings. Also, the Board will encourage its regional offices to resolve all relevant election questions before a vote is held, as opposed to the current practice of resolving most issues after an election. To facilitate the process, parties will receive more advance notice of pre-election hearing dates to resolve election issues, increased from eight calendar days to 14 business days (typically 18 calendar days). While the current rules require that employers file a burdensome "statement of position" regarding a petitioned-for unit, the new rules expand the time to file the statement, from seven calendar days to eight business days (usually 10 calendar days). The new rules also restore the right of parties to file briefs following pre-election hearings; the Obama-era rules allow briefs only if special circumstances exist. The Board has described these rule changes as procedural only, thus not subject to a lengthy public notice-and-comment period prior to implementation. While the scheduled effective date is April 16, 2020, a challenge alleging the absence of public input renders the new rules invalid is expected.

2. *The NLRB restored employers' right to control employee non-work use of its information technology and e-mail systems — with important exceptions — without violating the National Labor Relations Act (NLRA). Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino,* 368 NLRB No. 143 (Dec. 16, 2019). The Board reached its decision after reviewing briefs it invited the public to file on whether the NLRB should adhere to *Purple Communications,* 361 NLRB 1050 (2014). *Purple Communications* is the Obama-era case in which the Board ruled that employees who have access to the employer's email system for work-related purposes have a presumptive right to use that system for Section 7-protected communications. The Board's new standard applies retroactively. However, the Board set two important limits on an employer's ability to limit employees' non-work use of the employer's information technology and email systems. First, like all other employer rules, rules governing IT resources and email systems must not be enforced in a discriminatory manner. In other words, the employer cannot limit union-related use of email systems while allowing unlimited use for other non-work purposes. Second, the Board created what it called a "rare" exception permitting employees to use employer-owned IT systems for non-work purposes where there are no other reasonable means for employees to communicate.

3. *Rules requiring that employees keep workplace investigations confidential are presumptively lawful, the NLRB has held, as long as the confidentiality requirement is limited to the duration of the investigation. Apogee Retail LLC d/b/a Unique Thrift Store,* 368 NLRB No. 144 (Dec. 16, 2019). The decision overruled *Banner Estrella Medical Center,* 362 NLRB 1108 (2015), the Obama-era case in which the Board ruled that such confidentiality rules are presumptively unlawful. The NLRB will use its *Boeing* standard to determine a confidentiality rule's legality. *The Boeing Company,* 365 NLRB No. 154 (2017). If a confidentiality rule is properly limited to the duration of an investigation, the rule is presumptively lawful as a Category 1 rule under *Boeing.* Where a rule does not, on its face, apply for the duration of any investigation, the rule is analyzed as a Category

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2 rule under *Boeing, i.e.,* a determination is made whether one or more legitimate justifications exist for requiring confidentiality even after an investigation is over. If a legitimate justification exists, a determination is then made whether the justification outweighs the effect of requiring post-investigation confidentiality on employees' exercise of their Section 7 rights.

4. The NLRB held an employer has no obligation to continue deducting union dues from employee paychecks pursuant to a dues checkoff provision in a collective bargaining agreement after the agreement expires. *Valley Hospital Medical Center,* 368 NLRB No. 139 (Dec. 16, 2019). The decision reversed the Obama-era case in which the Board held an employer continues to have an obligation to deduct union dues from employee paychecks despite the expiration of a collective bargaining agreement containing a dues checkoff provision on which the deductions were based. *Lincoln Lutheran of Racine,* 362 NLRB 1655 (2015). In overruling that decision, the NLRB reinstates the standard set in *Bethlehem Steel,* 136 NLRB 1500 (1962), in which the Board held a dues checkoff provision was not part of the "status quo" that must be maintained after a contract expired. Returning to the *Bethlehem Steel* standard in *Valley Hospital Medical Center,* the Board acknowledged that its decision allows an employer, upon contract expiration, "to use dues checkoff cessation as an economic weapon in bargaining without interference from the Board."

5. *Two companies have sued the state of California, challenging the constitutionality of the state's new law requiring "gig economy" companies to treat independent contractors like employees.* California's A.B. 5, which went into effect on January 1, 2020, classifies workers as employees of a business, unless the business can prove the workers are free from the control and direction of the employer, perform work outside the hirer's core business, and that the workers "customarily engage[] in an independently established trade, occupation or business." The law has significant implications for companies like ride-shares and food delivery services, which rely heavily on independent contractors, who are not typically covered by laws on minimum wage, overtime, rest breaks, and medical insurance.

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

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