Top Five Labor Law Developments for August 2020

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1. *The National Labor Relations Board (NLRB) upheld an administrative law judge's (ALJ) ruling directing an unfair labor practice trial to be conducted by videoconference because of the COVID-19 pandemic. William Beaumont Hospital*, 370 NLRB No. 9 (Aug. 13, 2020). Prior to a trial scheduled to be heard by videoconference due to the pandemic, the employer requested a delay to allow an in-person proceeding. The employer cited an NLRB rule providing that parties have "the right to appear at a hearing in person, by counsel, or by other representative." The employer also cited its concerns with the use of videoconferencing, including witness demeanor assessment, prejudice to the employer's ability to examine and cross-examine witnesses, issues with introducing documentary evidence, and possible technological glitches. The ALJ denied the request and the employer appealed to the NLRB, which upheld the ALJ. The NLRB held that the employer's concerns were speculative, and if those or other issues came to fruition, the ALJ had the discretion to deal with them. The NLRB held that, although pandemic concerns are becoming less acute, it is within the ALJ's discretion to rule that the pandemic amounts to "compelling circumstances" allowing use of videoconferencing. The decision is likely to be cited to support the use of videoconferencing in unfair labor practice trials at least through the duration of the pandemic. Based on the NLRB decision, the NLRB General Counsel issued a Memorandum on August 25, 2020, directing regional officials to "move forward in scheduling remote unfair labor practice hearings," as long as: (1) there are no "unusual aspects" of the case that would make video hearing "unfeasible"; and (2) necessary witnesses are able to utilize the video technology platform.

2. *Employees laid off due to the COVID-19 pandemic were not eligible to vote in an NLRB election, the NLRB has held. NP Texas LLC d/b/a Texas Station Gambling Hall and Hotel*, 370 NLRB No. 11 (Aug. 31, 2020). A Regional Director (RD) ordered an election among laid off employees during a time when the employer had indefinitely suspended its operations due to the COVID-19 pandemic. The NLRB granted the employer's request for review of the Regional Director's Decision and Direction of Election. The NLRB found that the RD erred in ordering an election among employees who "have no reasonable expectation of recall," making them ineligible to vote under NLRB rules and precedent. As there were no eligible voters other than those on layoff, the NLRB found the "best course of action" was to dismiss the petition, without prejudice, "subject to reinstatement when the employer resumes its operations."

3. *An employer's social media rule requiring civility when making public statements about the employer was lawful, the NLRB has ruled, based on the employer's need to protect its reputation. Bemis Co., Inc.*, 370 NLRB No. 7 (Aug. 7, 2020). The employer's social media policy required (in relevant part) employees to be "respectful and professional" when discussing their employer. The purpose of the rule was to "effectively safeguard the reputation and interests" of the employer. During an organizing campaign, the union filed an unfair labor practice charge alleging (among other things) the policy violated the National Labor Relations Act (NLRA) by restraining employees' discussions about their working conditions. An ALJ found the policy violated the NLRA, but the NLRB reversed. The policy was presumptively lawful under the standard of *The Boeing Co.*, 365 NLRB No. 154 (2017), the NLRB held, because "an objectively reasonable employee would understand" the policy was meant to protect the reputation of the company, a legitimate purpose under *Boeing*, and was not meant to chill NLRA-protected speech. While the NLRB found the rule could have been written more narrowly to restrict only publicly damaging statements (as opposed to private statements made to coworkers), the NLRB found the possibility of drafting a narrower rule is not a valid basis to invalidate a rule under *Boeing*.

4. *On August 13, the NLRB's Division of Advice issued five advice opinions addressing employers' obligations during the COVID-19 pandemic.*

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- The Division of Advice found the employer lawfully refused to bargain about paid sick leave and hazard pay, because the parties' collective bargaining agreement expressly covered leaves of absence and wage issues, and included broad management rights language and a "zipper clause," which permitted the employer to refuse to engage in midterm collective bargaining. (The clause stated, "It is agreed that all matters deemed by the parties to be proper subjects for collective bargaining between them are included in this Agreement; and during the term of this Agreement including any extension term, no further or other matters shall be subject to further collective bargaining.")
- The Division of Advice found the employer did not violate the NLRA by refusing to provide financial information requested by the union about the decision to temporarily close and lay off all staff due to the COVID-19 pandemic. The Division of Advice found the union was not entitled to the information, including information about government loans and financial assistance, because it was requested for the purpose of challenging the employer's decision to temporarily close the hotel. Finding the decision was an entrepreneurial business decision not amenable to resolution through bargaining, the NLRB decided the information requested was not relevant to the union and, therefore, did not need to be furnished.
- The Division of Advice found a unionized employer that laid off employees due to the COVID-19 pandemic did not violate the NLRA when it declined to provide the union with communications between the employer and its clients related to the layoff. The Division of Advice found there was no duty to provide the information because it did not relate to unit employees' terms and conditions of work and, thus, was not presumptively relevant to bargaining.
- The Division of Advice recommended dismissal of an unfair labor practice charge alleging the employer violated the NLRA by laying off an employee for voicing concerns at a group meeting about the lack of hand sanitizer on the worksite. While finding the employee engaged in NLRA-protected concerted activity by raising the concern, the Division of Advice found there was insufficient evidence of the employer's animus toward or knowledge of the protected activity to prove a *prima facie* case. The Division of Advice relied on *Alstate Maintenance*, 367 NLRB No. 68 (2019). (For details of *Alstate Maintenance*, see our article, Labor Board Narrows What May Be Considered Concerted Activity.)
- Despite an abundance of evidence suggesting group activity, the Division of Advice found the employer did not violate the NLRA when it terminated two nurses after they refused to work due to safety concerns connected to the COVID-19 pandemic. The employer terminated one nurse after she refused to work with shared gowns. There was evidence that the nurse and the other charging party nurse discussed the shared gown issue. The Division of Advice decided there was no evidence that "the object of the conversation was initiating or inducing or preparing for group action in the interest of employees, as opposed to simply discussing that the nurses now had to share gowns." The other nurse was terminated after refusing to work due to the potential for exposure to COVID-19 at the employer's facility. The employee had conversations with others about her fear for her own and her family's safety, but there was no evidence those conversations "intended, referred to or even contemplated group action as a result."

5. *The U.S. Department of Labor (DOL) is advancing a rule that would require increased public financial disclosures by labor unions.* The DOL's Office of Labor-Management Standards has sent what is called a draft of a new rule on financial disclosures by unions to the White House for its review. While details are yet to be announced, the DOL's abstract states, "The Department will review modernization of the annual financial reports filed by labor organizations." The rule would follow the Trump DOL's previously announced rule changes increasing scrutiny of unions' finances, including expanded annual reporting requirements and greater reporting for union trusts.

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

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