Top Five Labor Law Developments for April 2021

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1. *The National Labor Relations Board (NLRB) declined to modify its "contract bar" rule.* Under NLRB procedure, once a collective bargaining agreement (CBA) is executed, the Board will not process a request for a representation election concerning the employees in that bargaining unit unless the petition is filed within a 30-day "window period" (typically, between the last 60-90 days prior to the CBA expiration), or after the contract expires, or after the third anniversary of any CBA that is longer than three years. This is referred to as the "contract bar" rule. In *Mountaire Farms*, 370 NLRB No. 110 (Apr. 21, 2021), the NLRB considered whether it should rescind or modify the contract bar doctrine. After considering the parties' briefs and briefs submitted by the public, it declined to modify the doctrine. While the NLRB expressed concern that the "window period" provided by the doctrine may not be readily ascertainable to employees, which could negate the efficacy of the window period, it stated that a sufficiently compelling case had not been made for rescinding or modifying the rule or its window period.

2. *The NLRB declined to rule on whether the agency's Acting General Counsel was legally appointed.* In the wake of numerous employer challenges to the Inauguration Day termination of Trump-era General Counsel Peter Robb and the appointment of Acting General Counsel Peter Sung Ohr, the NLRB in *Nat'l Ass'n of Broadcast Employees & Technicians*, 370 NLRB No. 114 (Apr. 30, 2021), did not decide whether the appointment was legal. The NLRB held that federal courts were responsible for answering such questions and explained that the agency cannot remedy an invalid general counsel appointment without effectively shutting down the agency's operations and, thereby, failing to carry out its duty to administer federal labor law. Accordingly, the issue appears to be destined for the U.S. Supreme Court. In 2017, the Court reviewed the validity of an NLRB general counsel appointment in *NLRB v. SW General,* 137 S. Ct. 929 (2017). It held that Lafe Solomon was not eligible to serve as General Counsel after he was nominated for the role, because he had served in the post in an acting capacity.

3. *While union membership declined significantly in 2020, Vice President Kamala Harris is set to lead the Biden Administration's task force promoting unions and labor organizing.* According to an April 14 report from *Bloomberg,* at least 13 of the largest unions in the United States lost members during 2020. Overall union membership declined by 2.2% in 2020, but Bureau of Labor Statistics reports show which unions suffered most. Among them, UNITE HERE, representing workers in hospitality, was the hardest hit, losing 56% of its members. The Teamsters, fourth largest in the nation, saw a 9% membership drop, or 123,000 workers. The International Association of Machinists and Aerospace Workers, representing employees at Boeing and other companies, shed 13% from its roll, or 44,000 workers. In response to union membership decline, President Joe Biden created a task force by executive order to promote labor organizing. Vice President Harris will lead the group and Labor Secretary Marty Walsh will serve as vice chair. The task force includes the leaders of 20 federal agencies, as well as cabinet officials, such as Defense Secretary Lloyd Austin, the White House economic advisers Cecilia Rouse and Brian Deese, the White House climate adviser Gina McCarthy, and Treasury Secretary Janet Yellen. According to an April 31 White House statement, "The President and Vice President believe that the decline of union membership is contributing to serious societal and economic problems in our country. Widespread and deep economic inequality, stagnant real wages, and the shrinking of America's middle class are all associated with the declining percentage of workers represented by unions."

4. *The NLRB held that employees were lawfully instructed to keep investigative interviews confidential. Alcoa Corp.,* 370 NLRB No. 107 (Apr. 16, 2021). After receiving reports that an employee made racist comments and subjected others to disrespectful treatment, the employer conducted employee interviews, telling each interviewee to keep the interview conversation confidential, including from

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supervisors and other employees. Based on the results of the investigation, the employer suspended the employee for three days, pending further action. Under NLRB precedent, investigative confidentiality rules that, by their terms, apply only for the duration of the investigation are categorically lawful under the *Boeing Co.* framework. Applying *Boeing*, an administrative law judge (ALJ) found the employer violated the National Labor Relations Act (NLRA) by issuing the confidentiality directive because, on its face, it was not limited to particular times or places. Reversing the ALJ and finding the instruction was lawful, the NLRB held there was no evidence the directives were given pursuant to a general company policy or rule, or that they applied to anyone other than the employees interviewed during the specific investigation. Thus, the NLRB found employees would reasonably understand the confidentiality restriction was limited to the duration of the investigation.

5. *A Las Vegas production company's maintenance of a blogging work rule, a solicitation/distribution rule, and a signature-block rule did not violate the NLRA. David Saxe Productions, LLC*, 370 NLRB No. 103 (Apr. 5, 2021). The employer maintained a blogging work rule banning employees from posting blogs that "may harm or tarnish the image, reputation and/or goodwill" of the employer. The rule also prohibited "any discriminatory, disparaging, defamatory or harassing comments when blogging." The NLRB found the work rule might adversely affect activity protected under Section 7 of the NLRA, but held the company's legitimate interests in preserving its reputation and goodwill outweighed that potential impact. The company also banned solicitation and distribution by third parties. The NLRB found the solicitation rule did not violate the NLRA because, on its face, the rule applied only to solicitation by "outside people or organizations," which employers can lawfully restrict. Finally, the Board found the employer lawfully maintained an email policy that prohibited customized signature lines. The rule did not permit any alteration of the signature-block wording, regardless of whether the email was for business or personal purposes, and the NLRB rejected any analogy of the signature-block ban to the wearing of union insignia. The NLRB's decision did not evaluate the legality of any discipline issued pursuant to the policies.

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

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