Newsletter

Top Five Labor Law Developments for November 2021

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1. *On Nov. 19, 2021, the House passed a version of the Build Back Better Act that would vastly expand employer liability under the National Labor Relations Act (NLRA).* The bill adds aggressive "civil penalties," on top of the traditional National Labor Relations Board (NLRB) remedies of backpay and reinstatement, for certain violations of the NLRA by employers. Employers found to be in violation of the NLRA are subject to a fine up to $50,000. However, for certain repeat violations resulting in the discharge or "serious economic harm" to an employee, the fine can be up to $100,000. Additionally, any officer or director who "directed or committed the violation," established the policy leading to the violation, or had knowledge but did not act to prevent the violation may be personally liable, an unprecedented remedy under the NLRA. Likewise, the bill bans employer actions long held lawful under the NLRA, including, without limitation, the permanent replacement of economic strikers, employer lockouts, and entering into agreements not to engage in collective action or requiring employees to enter into such agreements. The bill was sent to the Senate for review and a vote. Proponents hope it will meet the standards for a budget reconciliation bill and, thus, avoid a filibuster.

2. *Effective Nov. 5, 2021, the NLRB Division of Operations Management issued Memorandum OM 22-03, outlining parties' bargaining obligations under the U.S. Department of Labor's COVID-19 Emergency Temporary Standard (ETS).* The ETS requires employers with at least 100 employees to "develop, implement, and enforce a mandatory COVID-19 vaccination policy." A carveout allows employers to adopt their own policy on vaccinations or regular COVID-19 testing in lieu of vaccination. After the ETS became effective, multiple suits were filed challenging it, and the U.S. Court of Appeals for the Fifth Circuit temporarily blocked its implementation. The ETS prompted NLRB General Counsel (GC) Jennifer Abruzzo to issue Memorandum OM 22-03. In it, she opines that "covered employers [] have decisional bargaining obligations regarding aspects of the ETS that affect terms and conditions of employment." She also states that the ETS affects terms and conditions of employment because of its potential to affect employees' continued employment. Employers have no duty to bargain over compliance with the law when a change in employment terms is statutorily mandated. However, the Memorandum OM 22-03notes the ETS allows employers "significant flexibility and latitude in implementing steps necessary for compliance." Under the NLRA, this discretion is subject to bargaining. Further, the Memo notes that covered employers must bargain over the effects upon employees of any new protocol implemented under the ETS.

3. *In a notice issued on Nov. 10, 2021, in Thryv, Inc., 371 NLRB No. 37 (2021), the NLRB*

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invited interested parties to submit briefs addressing whether the Board should expand its traditional make-whole unfair labor practice remedies to more fully account for employees' actual economic loss. The Board also indicated it will consider whether there should be a practice of awarding a fuller accounting of "consequential damages" on top of lost earnings and benefits for employees affected by unfair labor practices. The traditional NLRA remedy for unlawful termination requires employees be reinstated to their previous or a substantially similar position and be made whole by an award of lost earnings, benefits, and expenses incurred during the job search due to the employer's termination. The Board is requiring briefs to be filed on or before December 22, 2021.

4. *On Nov. 8, 2021, GC Abruzzo issued Memorandum GC 22-01, outlining rights and remedies for immigrant workers under the NLRA.* The GC stated she is "resolved to hold fully accountable those entities that, by targeting immigrant workers and their workplaces, undermine the policies of the NLRA and the nation's immigration laws." She specified case handling procedures that allow the Agency to effectively help immigrant communities. For example, the Memo notes that during investigations involving non-English speakers, Regions should be mindful of the difference between comprehension and speaking skills. It reminds Agency staff not to discredit a witness's testimony or decline to issue a complaint based on testimony of witnesses who might not be fluent in English. It also directs all Regions to seek full remedies for immigration-related threats and retaliatory conduct at every stage of an unfair labor practice case, including Section 10(j) injunctive relief. Where the charged party's counsel is involved in such unlawful conduct, the Memo instructs regions to refer counsel for misconduct under Section 102.177 of the Board's Rules and Regulations and consider referral to a state bar association for appropriate sanctions.

5. *The College Basketball Players Association, a new advocacy group, filed a charge with the NLRB against the NCAA, a case in which the Board may ultimately decide whether the NLRB will treat college athletes as employees. The National Collegiate Athletic Association (NCAA),* No. 25-CA-286101 (filed Nov. 10, 2021). The charge alleges the NCAA violated the NLRA by misclassifying its players as "student-athletes," rather than employees protected under the NLRA. In a 2015 case, the NLRB rejected a request to hold a unionization vote among football players, explaining that collective bargaining would be too difficult within the NCAA collegiate football structure. *Northwestern University,* 363 NLRB No. 167 (2015). However, the NLRB stopped short of deciding whether the players were employees covered by the NLRA. NLRB GC Abruzzo has since opined that at least some college athletes are in fact employees and "misclassifying [college athletes] as 'student-athletes' and telling [college athletes] they're excluded from labor law would itself be illegal." It appears that the case will ultimately present the issue again to the full NLRB.

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