Newsletter

Top Five Labor Law Developments for July 2022

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Labor Relations

1. *The National Labor Relations Board clarified its rerun election procedures in cases of uncontested election misconduct.* ***Dynamic Concepts****,* 371 NLRB No. 117 (July 22, 2022). After losing an election to represent the employer's workers, the union filed objections alleging unlawful employer election conduct. The employer agreed to a rerun election, but the parties could not agree on stipulated election agreement language setting the rerun election terms. The union would not agree to the employer's proposal to limit the information on the Board's rerun election notice about the reasons for the rerun election. The regional director approved the agreement, but the union refused to sign it. The Board upheld the regional director's power to direct a rerun election over the union's objection, finding the regional director must schedule the vote for "an appropriate time." The Board also found that in the rare circumstance where the objecting party refuses to proceed to a rerun election despite the other party's consent, the Notice of the Rerun Election must inform the employees of the reasons for the rerun election, providing the language to be used in those narrow circumstances.

2. *Data shows union petitions rose 58% in just the first three quarters of FY 2022.* Unions and employees filed 1,892 representation petitions with the Board from October 2021 to June 2022. That number is not only more than the 1,197 petitions for the same period in the previous fiscal year, but more than the entirety of FY 2021. Unfair labor practice filings are up 16%, rising from 11,072 in 2021 to 12,819 in 2022. In a statement, Board General Counsel Jennifer Abruzzo said the increased petitions coincide with a staff and resource shortage at the Board, noting the agency's funding has not increased in nine years and field staffing has shrunk by 50% since FY 2022. President Joe Biden, who promised he would be the most union-friendly president of all time, requested Congress increase the Board's budget by 16% for FY 2023.

3. *The Board reached agreements with the Federal Trade Commission (FTC) and the Department of Justice's (DOJ) Antitrust Division to collaborate on enforcement of labor and antitrust laws.* The first memorandum of understanding (MOU), between the Board and the FTC, states that the agencies will share information and coordinate investigations, a move in line with President Biden's earlier executive order emphasizing government agencies working together to enforce his agenda. The agreement is likely to result in more intense investigations into companies that are being accused of anti-competitive actions that could violate both federal labor and antitrust laws. The tech industry and gig economy companies, in particular, have been targets of such scrutiny, given the current administration's concerns over employee misclassification and anti-competitive tactics. The MOU also states the agencies will work together to cross-train each other's agents to help them more easily identify violations of the other agency's applicable law. The second MOU, between the Board and the DOJ Antitrust Division, similarly permits the agencies to share information and coordinate investigations and calls for greater cross-training of agency staff. The pact comes just a few weeks after President Biden appointed

Celeste Drake, a former senior trade official for the AFL-CIO, to be his top labor advisor. Drake heavily influenced the Trump Administration in the negotiations of the U.S.-Mexico-Canada agreement, which strengthened union protections for Mexican workers to prevent corporations from undercutting U.S. labor costs.

4. *A group of staffing firms filed suit to prevent the Board General Counsel from limiting employers' use of "captive audience" meetings.* Board General Counsel Jennifer Abruzzo issued a memorandum in April targeting "captive audience" meetings — in which employers require employee attendance to convince them not to unionize — as potential violations of the National Labor Relations Act (NLRA). The lawsuit, filed in the U.S. District Court for the Eastern District of Texas, alleges the memo violates employers' First Amendment rights to free speech. Although captive audience meetings have been legal under Board precedent since the 1940s, unions have long-argued captive audience speeches give employers an unfair advantage in union elections. Since the memo's release, the General Counsel's office has alleged several companies have violated the NLRA by holding captive audience meetings. The lawsuit requests the court to set aside the memo as unconstitutional and block the Board from enforcing it.

5. *The D.C. Circuit vacated two Board orders declining to find joint-employer status, citing the Board's ever-changing standard.* ***Sanitary Truck Drivers and Helpers Local 350 v. National Labor Relations Board***, No. 21-1093 (D.C. Cir. July 29, 2022). The case centered on a union's 2013 petition to represent employees at Leadpoint, alleging it was a joint employer with Browning-Ferris. The Board revised its joint-employer standard in the first *Browning-Ferris* decision in 2015 *(Browning-Ferris I),* finding indirect control over employees can be used to establish joint-employer status. After Browning-Ferris refused to negotiate with the union, the Board's General Counsel's office issued an unfair labor practice complaint against the company. In 2020, the Board, on remand from U.S. Court of Appeals for the D.C. Circuit, found it would be unjust to apply the new joint-employer test retroactively to the employer *(Browning-Ferris II).* The Board also reversed *Browning-Ferris I*, amending the Board's rules to reflect the pre-2015 joint-employer standard. After the Board denied the union's motion for reconsideration *(Browning-Ferris III),* the union petitioned the court for review in the present case. Finding for the union, the D.C. Circuit noted that the Board's joint-employer test has been "anything but static." The court found the Board ignored the fact that previous Board standards had always considered indirect control when determining joint-employer status. Additionally, the court found the Board should have applied the standard retroactively to the employer in this case, as the Board failed to establish that its decision represented a clear departure from long-standing and settled law.

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