Newsletter

Top Five Labor Law Developments for April 2020

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1. *The National Labor Relations Board (NLRB) has signaled its intention to amend its criteria for ordering mail-ballot elections, even as some regional offices are directing mail-ballot elections due to the COVID-19 pandemic.* In *Western Wall Systems, LLC*, Case 28-RC-247464 (Apr. 16, 2020), the NLRB rejected an employer's appeal of a Regional Director's dismissal of objections to a mail-ballot election that included numerous reports of irregularities. Among other issues raised, ballots were received late, some voters received duplicate ballots, and at least one voter had difficulty receiving answers to questions posed to the NLRB about the election when calling a regional office. Reviewing the employer's appeal of the dismissal of the objections and noting its frustration with mail-ballot election irregularities, the NLRB stated, "In our view, … this is yet another case that reveals the many potential problems inherent in mail ballot elections. The Board is therefore open to addressing the criteria for mail balloting in a future appropriate proceeding." (On May 8, in *Atlas Pacific Engineering Co.*, 27-RC-258742, the NLRB reiterated its interest in reviewing the criteria for mail balloting. The NLRB also lifted its stay of a mail-ballot election that had been ordered by a Regional Director because of the COVID-19 pandemic. Further, it denied the employer's Request for Review of the Regional Director's decision to order a mail-ballot election.)

2. *The NLRB's final rule governing determination of joint-employer status under the National Labor Relations Act (NLRA) went into effect on April 27.* This restores the standard that was applied for several decades before the NLRB's decision in *Browning-Ferris,* 362 NLRB No. 186 (2015). Under the final rule, a business must possess and exercise substantial direct and immediate control over at least one essential term and condition of employment of another employer's employees to be found a joint employer. These essential terms and conditions of employment are wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. The final rule defines "substantial" direct control as actions that have "a regular or continuous consequential effect" on one of the eight core aspects of a worker's job listed above. Further, the final rule provides that even where an employer exercises direct control over another employer's workers, it will not be held to be a joint employer if such control is exercised on a sporadic, isolated, or *de minimis* basis.

3. *The NLRB explained that its recently adopted "contract coverage" standard does not apply unless the (CBA) contains language explicitly providing the relevant provision(s) survive the contract's expiration. KOIN-TV*, 369 NLRB No. 61 (Apr. 21, 2020). In this case, after a labor contract's expiration, the employer unilaterally made changes in posting employees' work schedules and implementing a new requirement that employees complete an annual motor vehicle background

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check. The union filed an unfair labor practice charge alleging the changes violated the NLRA. Subsequently, the NLRB, in *MV Transportation* [368 NLRB No. 66 (2019)], held that it will use a "contract coverage" standard to determine if an employer was privileged to make unilateral changes on a topic arguably covered by a CBA. To determine whether the CBA covers the change in question, the NLRB will "examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally." Interpreting the *MV Transportation* standard in *KOIN-TV*, the NLRB first held provisions in an expired CBA do not privilege post-expiration unilateral changes, unless the CBA contains language explicitly providing that the relevant provisions would survive CBA expiration. Applying that holding, the NLRB found the employer's changes violated the NLRA because, after the CBA expired, it had a duty to maintain the status quo, and the expired CBA did not explicitly make the relevant contract language effective beyond the expiration of the contract.

4. *The NLRB further relaxed restrictions on rules requiring confidentiality of ongoing workplace investigations. Securitas Security Services USA*, 369 NLRB No. 57 (Apr. 14, 2020). In *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019), the NLRB found that rules requiring confidentiality in connection with ongoing investigations are lawful "Category 1" rules under *The Boeing Co.* [365 NLRB No. 154 (2017)], where, by their terms, the rules apply only for the duration of any investigation. It also provided that, where a rule does not, on its face, apply for the duration of any investigation, a determination is made whether one or more legitimate justifications exist for extending the confidentiality requirement, and whether those justifications outweigh the impact on employees' NLRA-protected rights. In *Securitas Security*, the employer was charged with violating the NLRA by directing an individual employee to not discuss an internal investigation. Based on all the facts, the NLRB decided that the restriction was only for the duration of the investigation, primarily relying upon emails between the employee and a human resources manager, one of which said "employees are barred from talking during the time of the investigation in any circumstance." Employees still have Section 7 rights to discuss workplace issues that may be relevant to an investigation, and even the events at issue in the investigation. However, they may be restricted from discussing information they *learned* or *provided* during the course of the investigation. The NLRB also appeared to extend the scope of *Apogee*, by noting that post-investigation discussions of an investigation, while not banned, can lawfully remain subject to an employer's work rules prohibiting "disruptive, inappropriate or abusive" workplace investigation.

5. *The NLRB's Division of Advice found a union's dues check off authorization card violated the NLRA by unduly restricting an employee's right to resign union membership. Tutor-Perini Corp.*, No. 05-CB-229670 (issued July 29, 2019, released Apr. 10, 2020). The union's card stated an employee could revoke the dues check off authorization only during a short window period. The authorization card also said, "[f]or the effective period of this checkoff

authorization … I hereby waive any right I may have to resign my union membership." An employee filed an unfair labor practice charge against the union alleging it violated the NLRA by maintaining the resignation provision. The Division of Advice concluded the card violated the NLRA, because it "unlawfully requires unit employees to agree to an undue restriction on their right to resign union membership, and imposes the restriction when they may only want to waive their distinct right to cease dues check off." It noted the distinction between resigning union membership and revoking a dues check off authorization. Employees may want to resign union membership and free themselves of the obligations it imposes, while still wanting to continue financial support of the union. The Division of Advice stated "the Union cannot bootstrap the resignation waiver into its dues checkoff authorization, and thereby make resignation subject to the checkoff's revocation window period, without violating the voluntariness principle regarding union membership."

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