Newsletter

Top Five Labor Law Developments for November 2020

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1. *The National Labor Relations Board (NLRB) provided guidance on the propriety of mail or manual ballot elections.* ***Aspirus Keweenaw***, 370 NLRB No. 45 (Nov. 9, 2020). In this case, the NLRB set forth the considerations regional directors should weigh in determining whether an election should be conducted by mail ballot, as opposed to an in-person manual ballot, because of the COVID-19-related conditions. The NLRB's longstanding policy strongly favors manual elections; however, since the onset of the COVID-19 pandemic, it has permitted mail-ballot elections under an "extraordinary circumstances" exception to the manual ballot preference. The decision outlines six situations related to the COVID-19 pandemic that, when at least one is present, normally will suggest the propriety of conducting an election by mail, rather than manual, ballot. Those circumstances are:

- The Agency office tasked with conducting the election is operating under "mandatory telework" status.
- Either the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is at least five percent.
- The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size.
- The employer fails or refuses to commit to abide by Memorandum GC 20-10, Suggested Manual Election Protocols (July 6, 2020).
- There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status.
- Other similarly compelling circumstances.

After the NLRB issued this decision, General Counsel Peter Robb provided guidance further elaborating on this framework. Memorandum GC 21-01, Guidance on Propriety of Mail Ballot Elections, pursuant to *Aspirus Keweenaw*, 370 NLRB No. 45 (2020) (Nov. 10, 2020).

2. *A federal appeals court ruled the NLRB made errors of law and fact when it certified a unit of zero employees.* ***NLRB v. Wang Theatre***, No. 20-1157 (1st Cir. Nov. 30, 2020). In 2016, the union sought to represent musicians the theater had hired to perform in shows independent producers brought to town. In response, the theater argued it had not employed any musicians for approximately two years because the producers were hiring their own musicians based on their union contract. Nevertheless, an NLRB regional director ordered an election in a bargaining unit of musicians that included musicians who had worked on two productions at the theater for a total of five days in

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the previous year or for 15 days in the preceding two years. The regional director cited the so-called *Juilliard School* test from a 1974 decision (205 NLRB 153) in which the NLRB certified a unit of stagehands because the employees, who had irregular, but repetitive patterns of employment, had a reasonable expectation of reemployment with the school in the near future. However, the U.S. Court of Appeals for the First Circuit vacated the decision, finding the regional director improperly departed from NLRB precedent without sufficient justification. The Court explained that NLRB precedent requires that a bargaining unit consist of at least two employees, and absent a showing of special circumstances, its "longstanding and most widely used test" to determine the membership of a bargaining unit at any given time is the formula set out in *Davison-Paxon,* 185 NLRB 21 (1970). Under this test, any employee who "regularly averages 4 hours [of work] or more per week for the last quarter prior to the eligibility date" in a particular bargaining unit is a member of that unit. It was undisputed that none of the musicians met this eligibility test. The panel explained the *Juilliard School* test applies in a narrow set of circumstances not present in this case. The school had relied on its stagehands to operate the costume, props, and makeup departments at the core of its function as a nonprofit teaching theater, while the Wang Theatre-related musicians had only a "tangential role" in the theater's operation; the sourcing of local musicians was merely a service for producers, and the theater operated as usual even though it had not employed any musicians since 2014. Accordingly, it was reversible error for the NLRB to certify a bargaining unit of zero employees.

3. *Publisher's tweet violated labor law, NLRB ruled, and employer's appeal raises questions about the line between First Amendment rights and labor law protections. FDRLST Media, LLC*, 370 NLRB No. 49 (Nov. 24, 2020). After a walkout by unionized employees at another online media network, the co-founder and publisher of the Federalist posted on Twitter: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." Thereafter, an individual who never had been an employee of the employer filed an unfair labor practice charge. The employer argued the tweet was meant to be satire and was solely an expression of the publisher's personal viewpoint on a contemporary topic of general interest. The employer also proffered affidavits from employees stating the tweet was funny and sarcastic and they did not feel it was a threat of reprisal. The NLRB agreed with the administrative law judge that, although the tweet was from the publisher's personal account, it was prefaced with the employer's name, it was "FYI" or "For Your Information," and clearly was directed to the employees and not to the general public. The NLRB found the employer violated the NLRA, noting that a statement by a supervisor or agent of an employer threatening a plant closure violates the NLRA, even if the speaker attempts to couch the statement as a personal opinion, and threats allegedly made in a joking manner also may violate the NLRA.

4. *Four union-side lawyers are leading candidates to fill open Democratic seat on the NLRB.* Kent Hirozawa, a former Obama-era Board member who practices at Gladstein, Reif & Meginniss in New York; Jennifer Abruzzo, a former deputy general counsel at the NLRB who is a special counsel to the Communication Workers of America; David Prouty, the general counsel for SEIU Local 32BJ; and Gwynne Wilcox, an attorney at Levy Ratner are the potential nominees to fill an open Democratic seat on the NLRB after President-elect Joe Biden's inauguration. If confirmed by the Senate, the NLRB

still will have a 3-2 Republican majority.

5. *An international gambling technology company lawfully offered severance agreements restricting former employees from disparaging the company.* *IGT d/b/a Int'l Game Tech.*, 370 NLRB No. 50 (Nov. 24, 2020). The employer had a practice of offering separation agreements to employees terminated as a result of the elimination of their positions. The agreements offered postemployment benefits to employees who agreed "to release IGT from all claims relating to [their] employment" and to refrain from certain postemployment conduct. Section 8 of the agreements was the allegedly unlawful "Non-Disparagement" provision, which stated: "You will not disparage or discredit IGT or any of its affiliates, officers, directors and employees. You will forfeit any right to receive the payments or benefits described in Section 3 if you engage in deliberate conduct or make any public statements detrimental to the business or reputation of IGT." An administrative law judge found this provision unlawful under the analysis set forth in *The Boeing Company*, 365 NLRB No. 154 (Dec. 15, 2017), because the provision was not limited to disparaging remarks that are malicious or reckless, and employees who received the agreement would reasonably interpret the provision to prevent them from making critical public statements about employment terms or practices. However, the NLRB reversed, citing *Baylor University Medical Center*, 369 NLRB No. 43 (2020), which distinguished voluntary separation agreements from work rules or policies that establish conditions of employment. The NLRB explained that because the agreement was entirely voluntary, it did not affect pay or benefits that were established as terms of employment and had not been proffered coercively. As a result, the provision would not tend to interfere with, restrain, or coerce employees in the exercise of their rights under the NLRA.

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

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