

Top Five Labor Law Developments for December 2020

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1. *Directing a union election among dockworkers and clerks at a California distribution center, a National Labor Relations Board (NLRB) official rejected the employer's argument that an appropriate unit must also include drivers working out of the same facility. [XPress Global Systems LLC and Teamsters Local 70](#) 32-RC-268597 (Dec. 15, 2020). The union filed a petition to represent a unit of roughly seven dockworkers and clerks at the distribution center, but the employer contended that a proper unit must also include seven drivers based at the same facility. Rejecting the employer's argument and directing an election among the dockworkers and clerks, the acting Regional Director (RD) of the NLRB's Oakland office found the drivers do not share enough in common with the dockworkers and clerks at the facility, because the drivers made significantly more money than the clerks and dockworkers and because there was no evidence the two groups of workers ever performed each other's job duties. The RD found the delivery drivers shared little in common with the dockworkers and clerks other than working out of the same facility and receiving some of the same training. For example, drivers spent almost their entire workday outside the warehouse and away from the clerks and dockworkers, and drivers were not involved in the process of customers picking up orders, but clerks and dockworkers were. The RD also ordered the vote be conducted by mail in light of the COVID-19 pandemic.*
2. *During a strike, the employer's distribution of a leaflet warning employees about threats from union supporters was not a unilaterally implemented new anti-harassment rule, the NLRB found. [S & S Enterprises, LLC d/b/a Appalachian Heating v. Sheet Metal Air Rail and Transportation Workers, Local Union No. 33](#) 370 NLRB No. 59 (Dec. 17, 2020). During an organizing campaign and a resulting strike, the company mailed a leaflet, titled "Tired of Union Threats?," with employees' pay stubs. The leaflet stated, "We are being told that some sheet metal union supporters are threatening some of our workers." In bullet points, the leaflet said that it was a violation of federal labor law and the company's anti-harassment policy for a labor union to threaten employees, and that any person making such threats could be criminally prosecuted. Thereafter, the union filed an unfair labor practice charge alleging the leaflet constituted the unlawful promulgation of a new rule. Affirming an administrative law judge's dismissal of the charge, the NLRB found the leaflet did not amend the existing policy to include greater punishment for violators. Moreover, the leaflet would not be "reasonably understood as a statement of or promulgation of a new rule," the ALJ wrote in the decision adopted by the NLRB.*

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3. *An employer unlawfully refused a union's request for relevant information, and the cost of producing the information did not impose an undue financial burden on the employer, the NLRB found. [Murray American Energy, Inc.](#), 370 NLRB No. 55 (Dec. 15, 2020).* During the parties' ongoing dispute over subcontracting, the union requested information related to the use of contractors at the employer's mines. The union sought a description of all work performed by contractors, the number of contractors hired, and copies of contractor invoices over various time periods. The employer declined to produce the information, instead asking the union for an explanation of the information's relevance, more time to respond, and that the union share in the production costs. In declining to negotiate over the cost, the union filed an unfair labor practice charge alleging the employer violated the National Labor Relations Act (NLRA) by conditioning production of the information on the union paying for the production and by questioning the relevance of the union's request. The NLRB concluded the union satisfied its burden to demonstrate relevance because, in light of the parties' ongoing dispute over subcontracting, the relevance of the information should have been apparent. Further, the NLRB found, the union clearly and repeatedly identified the relevance of the requested information. Moreover, the NLRB noted that, where requested information is relevant, "the onus is on the employer to show that production of the data would be unduly burdensome." In this case, the \$299.27 cost of producing the information did not impose an undue financial burden on the employer.
4. *At 3.1%, average first-year union wage increases for 2020 were only slightly lower than last two years, but higher than averages for 2016 and 2017.* According to a year-end report by *Bloomberg Law* based on a total of 828 contracts, the average first-year wage increase for union employees was 3.1%, while the year-end average for 2018 and 2019 was 3.4% and 3.3%, respectively. Despite this slight drop, the figures still showed unions were in a better bargaining position in 2020 than in the decade-long period following the Great Recession when, for example, first-year raises in 2017 were 2.7% and 2.8% in 2016. According to Bloomberg's labor analyst, the slight decrease was driven in part by contracts in the healthcare industry, where hospitals have maintained "strong restraints on wage increases," despite the ongoing, high demand for such front-line workers.
5. *The United Auto Workers union, with the oversight of an independent monitor, agreed to overhaul its process for electing its leaders.* On December 21, 2020, the U.S. Department of Justice announced a Consent Order requiring the union to take steps to overhaul how it elects leaders and to pay \$1.5 million to the Internal Revenue Service to settle the federal government's corruption and fraud probe, all under the watch of a third-party monitor. Such monitoring will continue for six years. The settlement ends the investigation into the UAW, which represents more than 400,000 members. Currently, the union elects its president and other executive board members through a delegate system. The referendum requires a direct election system so that the entire UAW membership will vote for the union's top officers.

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