Newsletter

Top Five Labor Law Developments for July 2021

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1. *The Senate confirmed Jennifer Abruzzo to the National Labor Relations Board (NLRB) General Counsel post and Gwynne Wilcox and David Prouty as NLRB members.* Approved on July 21 by a narrow 51-50 vote, with Vice President Harris casting the tie-breaking vote, Abruzzo will oversee the NLRB's field offices and will shape the interpretation and application of the National Labor Relations Act (NLRA) by determining which cases to bring to trial and which legal theories to present. In public statements, Abruzzo has stated she believes "vigorous enforcement of the [NLRA] will help level the playing field for workers and their freely chosen representatives." On July 28, the Senate confirmed two union-side lawyers — Prouty and Wilcox — to fill open seats on the NLRB. Prior to her appointment to the Board, Wilcox was a partner at Levy Ratner P.C., a union-side law firm in New York, and served as associate general counsel for 1199SEIU United Healthcare Workers East, the largest healthcare union in the United States. She fills the seat that has been vacant since former Chair Mark Pearce's term expired in 2018. Like Wilcox, Prouty has a long background serving unions — he most recently was General Counsel of SEIU 32BJ, the largest union of property service workers in the United States. These confirmations establish the NLRB's 3-2 Democrat majority as of August 27, when Member William Emanuel's term expires.

2. *Unions support mandatory COVID-19 testing, but appear divided over vaccine mandates.* As more companies and municipalities implement COVID-19 testing and vaccination measures, while unions have generally supported mandated COVID-19 testing, many unions oppose rules that would require members to be vaccinated in order to keep their jobs. For example, DC 37, New York City's largest public sector union, represents workers who will fall under the city's new mandate requiring certain unvaccinated healthcare workers to submit to a weekly COVID-19 test beginning August 2. While the organization supports increased testing requirements, it is against mandating vaccinations, a position shared by other labor leaders in the healthcare field. The New York State Nurses Association, which represents registered nurses employed at public hospitals, has supported voluntary vaccination. 1199SEIU, which represents healthcare workers, has supported measures short of mandating vaccines to address the rising infection rate while meeting concerns of labor leaders over vaccine mandates. The American Federation of Teachers had said it would oppose any plan that does not preserve the choice of workers and unions on whether to get vaccinated. However, a week later, it reversed course, supporting mandating vaccines or testing. On July 27, the AFL-CIO, the nation's largest labor federation, said it fully supports mandatory vaccines to safeguard the economic recovery, contradicting the statements from some of its constituent unions.

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3. *Rejecting the Trump-era NLRB's bid to exterminate "Scabby the Rat," the NLRB approved a union's use of the rodent.* ***Int'l Union of Operating Eng'rs, Local 150***, 371 NLRB No. 8 (July 21, 2021). The NLRB ruled unions can continue using Scabby the Rat and similar inflatables in demonstrations at businesses that do not employ those unions' workers. The case arose from Local 150's demonstration in 2018 near the entrance of an RV trade show. Local 150 had a labor dispute with a company that did business with an RV supplier featured at the show. The company targeted by the union brought an unfair labor practice charge against the union. The NLRB invited the public to weigh in on the case, receiving more than 20 briefs, a large share coming from unions representing construction workers. The Board ultimately dismissed the charge against the union, citing potential conflicts with the First Amendment and noting that the U.S. Supreme Court has protected more offensive displays than a balloon rat, such as flag burning and the Westboro Baptist Church's funeral protests. In dismissing the charge, the Board reversed course from the position set by former NLRB General Counsel Peter Robb. Robb believed the Scabby's presence at protests was an unlawful attempt to threaten and coerce "neutral" parties, *i.e.,* those not directly involved in a labor dispute.

4. *An employer violated the NLRA by enforcing its email policy selectively against an individual engaged in union organizing.* ***Communication Workers of America, AFL-CIO v. NLRB***, Nos. 20-1112 and 20-1186 (D.C. Cir. July 23, 2021). In this case, an employee sent emails during breaks using the employer's computer and email system to groups of her coworkers, inviting them to join union organizing efforts. The employer reprimanded her for sending the emails, and management sent out a facility-wide email prohibiting mass emails using the company email system for non-business purposes. However, the company permitted other employees' use of mass emails for personal reasons, like searching for a lost cellphone charger or gathering signatures for a birthday card. The NLRB found the employer did not violate the NLRA by reprimanding the employee, because while there was evidence the employer previously permitted mass emails, those were not similar in character to the employee's email. Reversing the Board, the D.C. Circuit Court noted that even under the NLRB's employer-friendly precedent allowing employers to restrict use of email systems, employers may not target certain email uses because of their pro-union messages. Applying that precedent, the Court found the Board's decision failed to account for statements made by employer representatives that showed the company was targeting union content by reprimanding the employee.

5. *The Board held an employer did not violate the NLRA when denying a union's request for information including questions the employer planned to ask during an upcoming investigatory interview.* ***United States Postal Service***, 371 NLRB No. 7 (July 21, 2021). After an employee failed to report to work, the employer notified the union it planned to interview the employee regarding the absence. In

response, the union requested information, including the questions to be asked in the interview. The employer refused the request. The NLRB adopted an administrative law judge's conclusion that the employer's refusal violated the NLRA. However, reversing the judge's decision in part, the NLRB found the employer was obligated to provide the information only after the conclusion of the investigation, not prior to the investigatory interview, as required by the judge. The NLRB wrote that, for requests for relevant information concerning an investigatory interview, "the employer may refuse to disclose such information while the investigation is ongoing, but must provide it at the conclusion of the investigation."

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