Newsletter

Top Five Labor Law Developments for June 2022

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Labor Relations

1. The *National Labor Relations Board modified its electronic notice posting requirements for workplaces impacted by COVID-19.* ***Paragon Systems, Inc.,*** 371 NLRB No. 104 (June 2, 2022). The NLRB ruled that when employers that have either shutdown or lost a significant number of workers due to the COVID-19 pandemic violate the National Labor Relations Act (NLRA), they must electronically post the Board notices of such violations within 14 days after service by the regional office if the employers regularly communicate with employees by electronic means. Previously, employers that were found to have violated the NLRA were not required to post notice postings or distribute them electronically until after the facility reopened or the workforce returned, under *Danbury Ambulance Service,* 369 NLRB No. 68 (2020). The NLRB kept the *Danbury* schedule for physical posting, but found that, if an employer regularly communicates with employees electronically, it must also electronically post the notice within 14 days of service in order to properly effectuate the purposes of the NLRA under the realities of the current workplace environment. The two Republican Board members dissented, finding that requiring a separate electronic notice posting requirement from the physical requirement effectively makes the notice posting period 120 days, instead of the usual 60 days.

2. *The NLRB issued its spring rulemaking agenda, which focuses on joint-employer status and its Election Protection Rule.* The Board expects to issue a notice of proposed rulemaking (NPRM) in July 2022 for its Joint Employer proposal and will seek public input. The NLRB's joint-employer analysis has significant implications for employers, as it determines when one entity jointly employs another firm's workers. Among other results, a joint-employer finding makes both entities liable for each other's unfair labor practices. The Obama-era NLRB reversed decades of precedent in its 2015 *Browning-Ferris Industries* decision, finding joint-employment status even where one of the entities exercised only indirect control over another's employees or had the unexercised right of control over such employees. 362 NLRB 1599 (2015). The Trump-era NLRB issued a formal rule in 2020 setting the current employer-friendly standard, under which an entity must have direct and immediate control over employee terms and conditions of work to be considered a joint employer (NLRB Rules and Regulations, §103.40). Further, the NLRB anticipates issuing an NPRM in September 2022 for its Election Protection Rule, focusing on three amendments the Trump-era NLRB made to rules and regulations governing the Board's procedures on unfair labor practice charges blocking the processing of a representation election, an employer's voluntary recognition of a union as its employees' bargaining representative, and the formation of bargaining relationships in the construction industry.

3. *The NLRB's General Counsel (GC) issued a memorandum updating the make-whole remedies that regional offices can seek in settlement agreements, including the cost of baby formula.* Memorandum GC 22-06. The Memorandum issued by GC Jennifer Abruzzo listed a wide array of settlement terms Regions have obtained on behalf of

alleged discriminatees, including reimbursing fees for late car loan payments and late rent, payment of monthly interest on the loan an alleged discriminatee took out to cover living expenses, the cost of baby formula due to the loss of a workplace breast pumping station, and the cost of a retrofitting an alleged discriminatee's car to make it usable in a new job. The Memorandum also listed several unorthodox non-monetary remedies, including letters of apology to reinstated employees, training of supervisors and managers on employee rights under the Act, and permitting union use of employer bulletin boards. The Memorandum lauds regional offices for implementing the settlement approach the GC previously set forth in Memorandum GC 21-07, in which the GC required regional staff to insist on additional monetary and non-monetary remedies for settlement of unfair labor practice (ULP) charges, including consequential damages beyond the traditional backpay remedy. The NLRB is considering whether consequential damages should be awarded in unfair labor practice decisions. *Thryv, Inc.,* 371 NLRB No. 37 (2021).

4. *The NLRB's Buffalo regional office filed a petition in district court for a nationwide cease and desist order against Starbucks.* Region 3 issued a complaint against the coffee chain alleging more than 200 violations of the NLRA. The allegations include closing stores after they unionized, discriminating against union supporters, promising benefits to deter union support, and refusing to bargain with Workers United, the Service Employees International Union affiliate behind the nearly 300 petitions with the NLRB to represent Starbucks locations in 35 states. NLRB prosecutors can file for injunctive relief from federal courts while ULP cases are ongoing, but requests for nationwide court orders are rare. The petition also asked the court to order Starbucks to reinstate seven employees who were allegedly fired for their union activity and to bargain with Workers United at a store where it claims a fair election would be impossible due to numerous ULPs. The NLRB has ramped up its legal battle against Starbucks in recent weeks — including naming CEO Howard Schultz as having committed violations of the NLRA. The company has denied any wrongdoing. An Arizona federal court had rejected the NLRB's petition for injunctive relief to reinstate Starbucks workers at a Phoenix location. Another court injunction petition related to allegations of illegal firings at a Starbucks store in Memphis is also pending.

5. *Workers at a Chipotle Mexican Grill in Augusta, Maine, filed an NLRB election petition, trying to become the first unionized location for the restaurant chain.* The employees, calling themselves "Chipotle United," filed the petition with the NLRB's Boston regional office a week after they raised complaints to the company about staffing levels and engaged in a walkout over working conditions. Chipotle said in a statement that it took immediate action after the employees raised their concerns, shutting down the restaurant until it could address the staffing issues. The company has previously dealt with organizing following allegations of employee mistreatment. In 2019, the NLRB's GC filed a complaint alleging that Chipotle locations in New York City threatened workers who attempted to unionize and fired an employee who raised workplace concerns. Chipotle joins a swath of national chains dealing with employee organizing.

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