

Top Five Labor Law Developments for October 2022

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Labor Relations

1. *The National Labor Relations Board modified its test for determining if COVID-19-related conditions warrant mail ballot union elections, potentially signaling a return to mostly in-person votes. [Starbucks Corp.](#), 371 NLRB No. 154 (Sept. 29, 2022).* The Board's long-standing policy strongly favors in-person, manual elections; however, since the onset of the COVID-19 pandemic, the Board had permitted mail-ballot elections under an "extraordinary circumstances" exception to the manual ballot preference. The Board previously outlined six COVID-19-related situations that, when one or more was present, would normally suggest the propriety of conducting an election by mail, rather than manual ballot. *Aspirus Keweenaw*, 370 NLRB No. 45 (Nov. 9, 2020). Modifying that standard in *Starbucks Corp.*, the Board replaced the former "community transmission" element — which focused on the positivity rate and number of new cases in the county where the vote would occur — with the Centers for Disease Control and Prevention's (CDC) Community Level system, which tracks hospitalization rates. Under the new standard, Board regional directors would not abuse their discretion by ordering a mail-ballot election where the CDC community level is "high."
2. *The Board General Counsel (GC) issued a memorandum giving regional offices authority to reach interim settlement agreements with employers, instead of seeking injunctive relief.* Section 10(j) of the National Labor Relations Act authorizes the Board to petition a U.S. district court for temporary injunctions to remedy alleged unfair labor practices while a case is pending. Pursuant to the GC's memo ([GC 23-01](#)), parties accused of violating the Act will have the option to voluntarily agree to an interim settlement agreement, pending final resolution of the case, in lieu of the Board filing a Section 10(j) petition. If the employer ultimately wins the case, the interim agreement will be absolved. If parties do not reach an interim agreement or settlement, if it would be futile to seek a settlement or agreement, or if a party violates the respective terms, the Board maintains the option of pursuing a petition for relief in a district court under the standard Section 10(j) procedures to enforce the Act.
3. *The Board's GC issued a memorandum advocating limiting electronic surveillance of employees.* In the memo ([GC 23-02](#)), GC Jennifer Abruzzo requested the Board adopt a broader legal framework for determining the lawfulness of monitoring employees through electronic means, citing concerns that such monitoring could interfere with organizing efforts. Abruzzo urged the Board to find that employers presumptively violate the Act if their technology tends interfere with or prevent employees from engaging in protected concerted activity. The memo also suggests that, if an employer establishes "narrowly tailored" practices to address "legitimate business needs," the Board would weigh the employer's interests against its employees' interests. Even in cases where the employer's interests outweigh the employees', the GC would require employers to disclose how employees are being

monitored, absent special circumstances. The memo's proposed standard would apply to all employers subject to the Act, not only unionized employers.

4. *Union election petitions increased by 53% in the past year, according to a Board report.* Petitions increased from 1,638 in fiscal year (FY) 2021 to 2,510 in FY 2022. Unfair labor practice charges also increased from 15,028 filings to 17,988 – an increase of 19%. The Board noted its funding and staffing shortages have strained its ability to process the increased petitions and charges. Nonetheless, the data report highlighted that processing time between the assignment of an unfair labor practice charge and the issuance of a decision decreased by 14%, while processing time for election-related matters decreased 42% – down from 74 days to 42 days. Union election win percentage also increased from 54% in FY 2021 to 71% in FY 2022.
5. *Two unions have rejected a tentative agreement with the National Carriers' Conference Committee (NCCC), increasing the likelihood of a railway workers strike.* Seven unions have agreed to a tentative agreement with the NCCC after months of negotiations and subsequent intervention by President Joe Biden. However, a full agreement is needed among all 12 unions involved to reach a deal and avert a nationwide strike. A division of the International Brotherhood of Teamsters was the first union to reject the agreement, citing displeasure with working conditions and compensation. The parties will continue bargaining and remain in a “status quo” period until early December. Three more unions are scheduled to vote on the tentative agreement.

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

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