Podcast

2023 Mid-Year Report: Labor Update

By Jonathan J. Spitz & Daniel D. Schudroff

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Transcript

Alitia Faccone:

No matter the month or year, employers can count on one thing, changes in workplace law. Having reached the midway point of the year, 2023 does not look to be an exception. What follows is one of a collection of concise programs, as We Get Work™ the podcast provides the accompanying voice of the Jackson Lewis 2023 Mid-Year Report. Bringing you up-to-date legislative, regulatory, and litigation insights that have shaped the year thus far and will continue to do so. We invite you and others at your organization to experience the report in full on JacksonLewis.com, or listen to the podcast series on whichever streaming platform you turn to for compelling content. Thank you for joining us.

Jon Spitz:

Thank you for joining us today. I'm Jon Spitz. I'm the co-chair of the Labor Relations Practice Group at Jackson Lewis. I am joined by my colleague Daniel Schudroff, a terrific labor practitioner who works out of our New York City office. Today we're going to talk about the first six months of the year at the National Labor Relations Board. As expected, the NLRB and its general counsel have been extremely busy. As we have seen with past transitions from Republican to Democratic majorities at the NLRB, precedent and policy changes have been coming fast and furious and will continue to come throughout the year. We've seen the board digging deep into pending cases to make changes anywhere from assessing independent contractor status to the propriety of severance agreements to damages in board cases.

We're going to start, however, by discussing a rare appearance of a labor case at the

United States Supreme Court in Glacier Northwest versus International Brotherhood of Teamsters Local Union No. 174. The Supreme Court assessed a claim that any employer claim for damages during a union strike were preempted by the National Labor Relations Act, and the Supreme Court ruled that the National Labor Relations Act does not bar state tort claims against unions for intentional destruction of company property during strikes. It was an 8-1 decision overwhelmingly holding that the National Labor Relations Act is not preempt state law, which is pretty important because that's the typical defense when there's picket line misconduct. So the board has dismissed that. The labor board's also been busy. Dan, you want to talk a little bit about that?

Dan Schudroff:

Sure. Thanks, Jon. The board, as Jon mentioned, has been very busy in seeking to reverse certain Trump era board cases and board authority on a multitude of different issues. The first we're going to discuss today is the independent contractor standard, which Jon and I both find to be a very difficult standard in order to evaluate for clients just because it is so fact specific. Earlier this spring in the Atlanta Opera Inc. case, the board returned to the 2014 test, which was under the Obama administration for determining whether somebody is considered to be an employee versus an independent contractor. That Atlanta Opera Inc decision overruled a 2019 decision during the Trump administration in a case called SuperShuttle DFW, which focused on entrepreneurial opportunity for gain or loss being the primary factor for independent contractor employee determinations.

So now going forward, the entrepreneurial opportunity factor will depend on whether the individual is rendering services as part of an independent business or if the person is performing functions essential to the employer's normal business operations. I think the key to that is that any weight that's given to the entrepreneurial opportunity must be actual as opposed to theoretical. And that can be very difficult for clients to figure out or just employers in generally to figure out because of this fact specific analysis.

Jon Spitz:

Yeah, I think it's kind of a common sense rubber hits the road kind of analysis where the board is saying if there's no opportunity for profit and loss, then this person's really controlled by the employer and they're an employee. On the other hand, in assessing misconduct in protected concerted activities cases, I think the board has gone in the opposite direction. The Trump board had previously held in General Motors that when employers engage in misconduct that is entwined with complaints about workplace conditions, management conduct, terms and conditions of employment, the Trump board had held that it would apply the classic right line standard that assesses whether essentially the employee's participation and protected concerted activity was a substantial or motivating factor in the employer's decision to terminate the employee. And if in fact the board found that it was, the employer could then show that it still acted lawfully by asserting an affirmative defense that it would've taken the same action in the absence of protected concerted activity i.e. the employer applied facially neutral workplace policies and disciplined the employee irrespective of the protected

concerted activity.

In Lion Elastomers, the board granted employees leeway when they engage in "abusive conduct" that's entwined with PCA and is going to apply one of three different standards depending on the context of the outburst management social media posts or abusive picket line conduct. Without getting too deep in the weeds, there are going to be three different standards applied depending on what kind of misconduct actually occurred and the backdrop to that misconduct. It's going to be harder to assert affirmative defenses. And now more than ever, employers need to be very weary when employees are engaged in some kind of protected activity and they participate in some sort of abusive, or as the prior boards have called "animal exuberance" during their expressions of workplace concerns. So really a good idea when there are complaints about working conditions entwined with misconduct to reach out to outside counsel. And it's also a good idea now to reach out to outside counsel when preparing severance agreements and confidentiality and non-disparagement agreements in conjunction with employee discipline. As Dan will talk about, you just can't recycle things you've used in the past.

Dan Schudroff:

Right. I think that that's a good segue into not only separation and severance agreements, also employee handbooks to take this time from an employer standpoint to reevaluate all of those documents that an employer might have on its intranet or just on the shelf that it's time to review them. The case that Jon is talking about is McLaren McComb, which came out in February of 2023 and ruled that confidentiality provisions and non-disparagement provisions in separation/severance agreements must be narrowly tailored. Confidentiality provisions, according at least to the general counsel who issued a memo following the board's decision in McLaren McComb, found that employers can still limit confidentiality to the financial terms of an agreement, but as far as non-disparagement goes, where prior to February of 2023, an employer could have broad non-disparagement provisions in its settlement agreement saying that an employee or a former employee won't say anything negative about the employer or something of that sort.

Now it's limited to either maliciously untrue or defamatory statements. That's really the outer boundary of what will be considered to be permissive. And of course, this decision applies only to people who are considered to be employees under the National Labor Relations Act. It doesn't apply to bonafide supervisors or independent contractors as Jon alluded to at the outset. But this is, again, just when you think you may have closure with a particular case or with a particular employee, this is another consideration to think about to make sure that once you have closure, that you don't end up right back at the Labor Board.

Jon Spitz:

Yeah. I think this was no surprise to labor practitioners. It's kind of an extension of theories that have been applied in the past that it chills protected activity. A lot of what the current board is doing is sort of what's old is new again, in Noah's Ark Processors that the board talked about remedies for repeat violators that might include a more detailed notice posting requiring a company official to read that

posting, mailing the posting to employees homes, reimbursement of union bargaining expenses and bad faith cases. This is stuff we've seen before, not really a new outer range of the envelope, just probably more of a consistent pushing of that envelope and seeking extreme remedies. Same thing in the Thrive case where the board provided more extensive consequential damages against employers for the termination of employees.

And then in Sunbelt Rentals, a reaffirmation of the Johnnie's Poultry standard, essentially the labor law version of Miranda Rights. If an employee is being questioned during an employer investigation about workplace misconduct that might be entwined with protected concerted activity. An employer in a unionized workplace has to read to the employee a Johnnie's Poultry statement saying that, "You have the right not to talk to me. You have the right to talk to me," and reaffirming that the employee's decision not to participate is protected. And this would also apply in a non-union workplace where it's entwined with union activity. We've seen this stuff before. It's not a surprise. I think we've got the traditional flip flopping back and forth between standards that are applied when there's a Republican board and a Democratic board, for example, with respect to the access to employer property. Dan, you want to talk a little bit about that?

Dan Schudroff:

Yeah, sure. So this is the Tobin Center, the Bexar County, which we used to pronounce as Bexar, but realizing that it is Bexar, which is the county in which the city of San Antonio is located. This case reverses New York New York, and again, this is the flip flop again. The board reinstated the prior standard of providing a more expansive of off-duty contractor employees to access publicly accessible areas of a primary employer's workplace. So in other words, if there is an employer that doesn't have exclusive right to the premises and is working on the premises of another employer, if it's publicly accessible, the employees of that second employer have the right to engage in organizing activity on the publicly accessible part of the primary employer's site. Again, this issue has gone back and forth at least four or five times over the last 15 years. Just now employers with that type of arrangement need to be mindful of that. And Jon, on that point, on the organizing standpoint, why don't you touch on American Steel dealing with the overwhelming community of interest standard?

Jon Spitz:

Sure, Dan. When unions try to organize employers or try to seek to get into a new workplace, very often employers take the position that the union can't break off a small group and that a wall-to-wall production, maintenance or other larger group is the only appropriate group. The board has bounced back and forth on how easy or difficult it is to expand that group and for employers to push back on what are very often artificial groupings that the union tries to gerrymander in order to organize a group where it perceives that it's going to be easier to win an election.

In American Steel, the board ruled that an employer needs to show an overwhelming community of interest standard essentially to overrule the grouping that was sought by the union in the first place. So it's difficult to expand that initial group that a union seeks to organize and employers would be well served to assess

now what possible groupings a union might try to organize in their workplace and get a better handle on the facts and potentially make tweaks to how it runs its operations to ensure that any grouping that a union seeks to organize is something that's going to make operational and functional sense.

Those are the main cases that we've seen this year. Moving forward, the General Counsel of the Labor Board, Jennifer Abruzzo, will continue to seek change. She determines what types of cases to prosecute. She determines theories under which to prosecute those cases, and she presents to the Labor Board her angle in why something should be deemed unlawful, her arguments as to what standards should apply. And obviously the current Democratic board is more receptive to adopting her theories, so we expect to continue to see change. Dan, any thoughts on specific types of cases that you see coming down the board or any things that are likely to be ruled on in the near future?

Dan Schudroff:

Yeah, there's one memo that came out pretty recently within the last, I would say, four to six weeks about non-compete agreements. I know that's a hot button issue right now with the FTC involved with a lot of state legislatures involved. I know where I am in New York, there's a bill with the Governor's signature right now, whether or not she'll sign it or not is uncertain, but it has to be done soon, to see whether or not non-compete agreements would be running afoul of Section 7 of the National Labor Relations Act. General Counsel Abruzzo takes the position generally that they are, and we could see a case coming out in the future that would find that, the absence of there being some narrowly tailored provision within the non-compete that would satisfy Section 7's concerns. But we will see. These things are coming out and stay tuned.

Jon Spitz:

Yeah, I think we just have to remember that there's an activist general counsel, an activist labor board, and we need to be mindful that the National Labor Relations Act applies in both union and non-union settings. So stay tuned. Continue to check out our postings on our blog and our website and our future podcast. Thanks for joining us today. We appreciate it. Have a great day.

Dan Schudroff:

Thanks everybody.

Alitia Faccone:

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