Newsletter

Top Five Labor Law Developments for August 2023

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September 7, 2023

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1. *The National Labor Relations Board issued new election rules and a decision overhauling the unionizing process.* 88 Fed. Reg. 58076 (2023); 372 NLRB No. 130 (2023). The Final Rule amends and returns the Board's representation election procedures to the "quickie election" rules (first adopted by the Obama-Board in 2014 and later rescinded by the Trump-Board in 2019) that established tight timelines on hearing dates and elections. The Board also adopted a new framework for when employers must recognize a union without an election. Unions will no longer be required to file for an election with the Board if they claim a majority of employees in the proposed bargaining unit want to be represented. If a union demands recognition based on its claimed support of a majority of employees, an employer that refuses to recognize the union would violate the National Labor Relations Act unless the employer "promptly" files an RM petition with the Board requesting an election to test the union's majority status or the appropriateness of the unit. Further, if the employer commits certain ill-defined unfair labor practices (ULP), the Board will dismiss the petition without an election and order the employer to recognize and bargain with the union.

2. *The Board reaffirmed the general counsel (GC) can meet burden of proof in retaliation cases by relying in whole or in part on circumstantial evidence.* *Intertape Polymer Corp.*, 372 NLRB No. 133 (2023). The Board clarified its Trump-era decision, *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019), did not alter the GC's burden under the established Wright Line test, which requires the GC to first demonstrate that protected activity was a motivating factor in the adverse employment action alleged to be unlawful. While the GC argued *Tschiggfrie* heightened the burden by requiring a showing of "particularized" animus toward protected activity, the Board explained that the GC can satisfy this burden where the record as a whole supports a reasonable inference that protected activity was a motivating factor in the adverse employment action. Thus, the employer's motive can be inferred from direct or circumstantial evidence.

3. *The Board expanded employers' duty to bargain during first contract bargaining negotiations and following a collective bargaining agreement's expiration.* *Tecnocap LLC*, 372 NLRB No. 136 (Aug. 26, 2023); *Wendt Corporation*, 372 NLRB No. 135 (Aug. 26, 2023). The decisions overruled *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), and its progeny, which provided employers leeway to make unilateral changes during contract negotiations if such changes were based on past practice. The Board's decisions restrict an employer's ability to use past practice as a defense to a ULP charge over such discretionary unilateral changes unless they are consistent with a long-standing practice and do not require significant discretion. Further, employers can no longer rely on past practice for implementing unilateral changes to conduct authorized under an expired management-rights clause.

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4. *The Board expanded protections for employee advocacy in the workplace.* ***American Federation for Children****,* 372 NLRB No. 137 (2023); ***Miller Plastic Products, Inc.,*** 372 NLRB No. 134 (2023). In *Miller,* the Board returned to the "totality of the circumstances" test for determining when individual employee action constitutes protected concerted activity. Employee activity will be assessed using a holistic, fact-based approach to determine whether individual complaints or protests have a link to group action. The Board issued a subsequent decision in *American Federation* (returning to prior precedent) that protects statutory employees advocating on behalf of non-employees, such as interns or contractors. The Board said that by seeking to induce group support for non-employees, the activity is both "concerted" and "for the purpose of mutual aid or protection," therefore falling under the protections of the Act.

5. *The Department of Labor proposed a rule that would allow union representatives to participate in Occupational Safety and Health Administration (OSHA) inspections.* 88 Fed. Reg. 59825 (2023). The rule would amend OSHA's regulations to allow employee-authorized third-party representatives to accompany OSHA officials during facility inspections. The proposed regulation would pave the way for union representatives and interest groups to join the inspection, provided the OSHA official determines participation of the third party is "reasonably necessary." If approved, the rule would mark a return to the 2013 guidance rescinded under the Trump Administration after a federal judge told the agency it improperly circumvented notice-and-comment rulemaking by issuing a letter of interpretation on the issue.

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