Newsletter

Top Five Labor Law Developments for November 2023

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1. *The National Labor Relations Board delayed the effective date for its new joint-employer rule from Dec. 26, 2023, to Feb. 26, 2024.* Issued in October, the rule broadened the Board's prior standard by allowing a finding of joint-employer status where an entity possesses the authority to control at least one of seven enumerated essential terms and conditions of employment, regardless of whether that control is actually exercised. The delay of the effective date comes on the heels of multiple legal challenges to the rule, including a coalition of business groups led by the U.S. Chamber of Commerce challenging the regulation in a Texas federal court. The business groups argue the regulation is unlawfully overbroad and would negatively affect parties engaged in industries such as franchising, contracting, and staffing. Conversely, the Service Employees International Union (SEIU) filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit aiming to broaden the rule even further. The SEIU, International Brotherhood of Teamsters, and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) also sent a joint letter to Congress opposing any effort to further weaken the rule from a legislative standpoint.

2. *The Board's General Counsel (GC) issued guidance on the Board's new voluntary union recognition framework.* Memorandum GC 24-01 (Nov. 2, 2023). The guidance suggests that, if an employer refuses to voluntarily recognize a union or file an RM petition for an election within two weeks after receiving a demand for recognition, the union can file an unfair labor practice (ULP) charge against the employer for its refusal to recognize and bargain. The Board also may consider ULPs that occurred before the employer files an RM petition when determining "whether the election was invalidated." This could be critical for employers given the Board's recent wave of precedent-shifting standards that often require a case-by-case analysis to determine the lawfulness of employer disciplinary actions or rules. Indeed, the GC's memo noted the new framework likely will lead to many more ULP charges because "even one" or "less serious (non-'hallmark') violations" can lead to a bargaining order.

3. *United Auto Workers (UAW) members ratified agreements with all "Big Three" automakers.* The agreements provided 25 percent increases in base wages through April 2028, cost-of-living-allowances, and improved retirement benefits. The deal brings employees' top wages to more than $40 per hour by the end of the four-year contracts. The UAW also won key concessions regarding job security, wage tiers, the transition to electric vehicles, and unionizing battery plants. Following the ratification votes, UAW President Shawn Fain stated he plans to keep up the momentum and expand the union's successes in its

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industries where workers are not yet unionized. Several non-union car automakers across the country have already increased workers' wages following the latest agreements.

4. *In a pending case, Board prosecutors urged the Board to find that the National Labor Relations Act does not require an "adverse action" in employee discrimination cases.* Board prosecutors assert that a showing of adverse action is not "a prerequisite to any finding of improper motive under the Board's *Wright Line* standard." The standard applies in cases regarding an employer's alleged animus toward protected activity under Section 7 of the Act. Instead, they assert that the GC's burden should be satisfied "by a showing of unlawfully motivated conduct that tends to interfere with employees' Section 7 rights – regardless of the specific effect on the alleged discriminatee involved." A highlighted example of unlawful "benevolent conduct" could be a promotion that chills protected activity or otherwise discourages union membership. If the Board adopts the argument, employer conduct could violate the Act even if there was no actual adverse action against an employee, but the conduct nonetheless was intended to discourage organizing activity.

5. *SAG-AFTRA members reached a new agreement with Hollywood studios, ending a months-long strike that shut down the entertainment industry.* The three-year agreement provides a 7 percent increase in minimum pay for actors plus additional yearly increases, bonus payments for popular shows on streaming services, and residuals. The union also won key concessions regarding the use of artificial intelligence, including performer consent and compensation for the use of members' image and likeness equal to the amount they would have received had they performed the work themselves. The union's roughly 170,000 members voted to ratify the agreement. Movies and tv shows had already resumed production during the vote. SAG-AFTRA's President Fran Drescher valued the deal at over one billion dollars.

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