Podcast

The Year Ahead 2024: Construction

By Dion Y. Kohler

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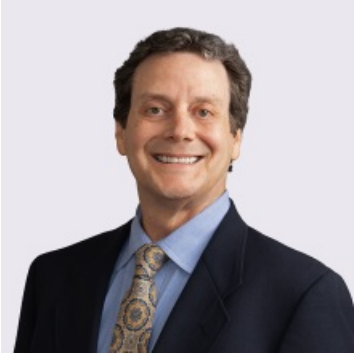
Meet the Authors



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Transcript

Alitia Faccone:

Welcome to We get work™ and The Year Ahead 2024 podcast series. Covering workplace issues from both subject matter and industry perspectives, the 19 episodes in our series provide both big picture trends and detailed tactics that can help employers achieve their workplace ideal, while remaining real about regulations, compliance challenges, and more in 2024. Jackson Lewis invites you and others at your organization to experience the report's legislative, regulatory, and litigation insights in full at our website, JacksonLewis.com, or listen to the podcast series on whichever platform you turn to for compelling content.

Dion Kohler:

Good afternoon, and thank you for joining us for this special episode of What to Expect in Labor Relations and Occupational Safety and Health in the Construction Industry in 2024. Today we are going to talk about what you as a construction industry employer need to be most aware of and what needs to be on your radar for the upcoming year.

I am here with my colleague Sean Paisan, who is of counsel with Jackson Lewis. I am Dion Kohler. I'm a principal in the Atlanta office of Jackson Lewis. We are co-leaders of our construction industry practice group.

The first topic I am going to talk to you about is a recent decision by the National Labor Relations Board. It is a significant decision, and I would characterize it as one of the most significant decisions by the Labor Board in decades. I say this because this decision has a significant impact on the election process of union organizing in construction and in all other industries.

What happened in that decision which involved a national construction company is the Labor Board changed the process for seeking and holding elections. What the board did which was different is once a union makes a demand for recognition to an employer, the burden is then on the employer to file a petition for an election if they want to contest the union status as the union's representative of employees.

For decades, if the union demanded recognition and the company declined that

demand, the burden was on the union to file a petition for an election. Now, based on this decision, if the company fails to file an election within 14 days, the union will automatically be certified as the representative of its employees without ever having a secret ballot vote.

What is also significant about this decision is that in the past, it was a high burden for the union to demonstrate that it was necessary to obtain a bargaining order instead of just a new election as a result of alleged misconduct by the employer prior to the vote.

Now, in this decision, the board changed that standard significantly. Now the board will ordinarily grant a bargaining order when it is demonstrated that the employer committed any unfair labor practice or objectionable conduct, which occurred prior to the vote, which could discourage employees from supporting the union. It is unclear exactly what this means, but conceivably this could include very minor and innocuous violations, such as an overbroad work rule in your employee handbook.

So this is a very significant decision and makes it very difficult for employers who want to stay non-union to go through the election process and stay non-union even if they win the vote, which is a good segway to the next thing I want to talk about, which is protected concerted activity. Protected concerted activity applies to all employers, whether you have a union or not, and protected concerted activity is the right under the National Labor Relations Act for employees to join together and engage in activities which relate to their wages, hours, and other terms of conditions of employment. Now, during the past administrations, the law has gone back and forth regarding employer rules of behavior and conduct, and depending on whether the Labor Board, which is appointed by the president, the positions are appointed by the president is majority Democratic or majority Republican, they tend to go back and forth about which exact rule is lawful or unlawful.

So you may have a rule that was lawful four years ago that is now the Labor Board would consider to be overbroad and unlawful. So the new Labor Board has indicated a broad approach and that they will look at work rules and policies that an employer has. And if a reasonable employee could read that rule or policy in a manner which would interfere with their right to engage in protected concerted activity, the rule is overbroad and it affects a very wide variety of topics. Things like confidentiality of information, being courteous with coworkers and customers, solicitation, use of social media, use of the employer's email system, and many, many other topics. Employers have many work rules they think have nothing to do with the union, and that may be their intent that this rule has nothing to do with union organizing. But if that rule can be read to interfere with employees' right to engage in union organizing or even outside the organizing context to just talk to each other about their workplace concerns and complaints, it could be unlawful.

So the bottom line there is, you may have had your handbook reviewed by a competent labor lawyer a few years ago, and what you were told then very well may not be the law today. So that's something that you should put on your list for 2024 that you need to do. One additional initiative that the Labor Board has started in 2023 that will continue in 2024 is seeking expanded remedies in unfair labor practice cases. As many of you know who have been involved in the process before, the Labor Board does not seek anything other than lost wages and interest for employees who are

terminated or otherwise suffer a loss as a result of an unfair labor practice. The General Counsel's office has for a long time thought that those remedies are inadequate, and they are starting to seek broader remedies in cases such as compensatory and other types of damages on behalf of employees who are aggrieved.

So it remains to be seen whether the courts will uphold these efforts to expand these remedies, but it is certainly something you were likely to see in charges that you are working on in the upcoming year. Two more subjects I want to talk about before turning the floor over to Sean is the Labor Board's reinstatement of what's called quickie elections. Back in 2015, the Labor Board put in place rules so that elections would be expedited so that they would be held in 30 days rather than approximately 42 days from the date that an election is ordered. That is a significant shortening of the period of time when an employer has available to communicate with their employees about their position on unions and the costs and risks of having a union. Now, the Trump Board eliminated that and went back to the old rules of 42 days before the vote was held.

These new rules put in fact by the Biden Board took place on December 26th of last year, and they again shortened the time period before a vote will be held, which gives employers less time to communicate. It also defers, after the election, any type of hearings and issues that need to be litigated regarding employee eligibility. In the past, the election might be delayed while those were determined by the regional director of the NLRB, but now that will all be deferred and the election will proceed. The last topic I want to talk about is the final rule regarding project labor agreements. The last executive order, which was issued in 2022, required that project labor agreements, which are union-only agreements, be applied on all federal projects where there is at least $35 million in federal money involved.

The new rules which implement that executive order will take effect on January 22nd, 2024, so all new contracts for construction that will be awarded where $35 million or more of federal government money is involved will be required to have a project labor agreement, which means if a contractor does not agree to be bound by a collective bargaining agreement with the unions that apply to its crafts, it cannot work on the project at all. That is very significant, as it essentially cuts out 80% of contractors out of that work. So that's what we expect to see in 2024. Now, we all know there's a presidential election coming up, so we do not know how long all of these new things will be in place or if there will be a new administration to give us a different agenda and different topics to talk about in 2025. Sean, why don't you tell us what's going on and what employers in the construction industry can expect in occupational safety and health?

Sean Paisan:

Sure. Thanks, Dion. Well, as you guys all know, construction has always had extra attention from OSHA. Although the construction industry represents only 8% of all workers, OSHA conducts more than 50% of its inspections on construction employers. The extra focus is only going to continue as OSHA ramps up its enforcement efforts to coincide with the passage of the Bipartisan Infrastructure Law, which will be injecting a tremendous amount of money into construction over the next seven years. OSHA will be focusing its enforcement efforts on construction projects

related to roadways, bridges, airports, railways, ports, waterways, and power and water systems. According to OSHA's Directorate of Construction, Director Scott Ketcham, the infusion of money into this sector will result in newer, smaller companies competing for jobs. These companies may not have the safety resources that has established larger companies, enjoy. A specific area of focus for OSHA will be trench work.

If there is any type of trench work being performed on your projects, be very careful. This is because Director Ketcham has noted that there has been a disturbing increase in the rate of trench fatalities, and as such, OSHA will be stepping up its enforcement efforts on excavations and trenches. We've already seen an uptick in citations in this space. However, more importantly, we've seen an uptick in willful citations being issued, and this is primarily because protective equipment for an open trench is typically on site, such as a trench box. It's just not in the trench itself. Another area where OSHA will be focusing is on PPE, or personal protective equipment. Now, this focus will be primarily on ensuring that women have access to PPE that fits them properly. This has historically been a problem with respect to women being smaller and finding equipment such as hard hats and fall protection that fits them properly.

This is part of OSHA's overall strategy to advance its DEI agenda. On a related topic of PPE, OSHA itself has transitioned its inspectors from regular hard hats to safety helmets, also known as a hard hat with a chin strap. This pilot program is premised on the belief that a safety helmet is much more effective than a regular hard hat during a fall. Although there is no current regulation requiring safety helmets in construction, OSHA may use the experiences it has with this pilot program to propose new rules on this topic. Finally, although it's finally beginning to feel like winter in most of the country right now, I would be remiss if I did not mention that OSHA will be continuing its National Emphasis Program, or NEP, on heat illness in the coming year. While most construction companies have had some form of heat program in place long before the NEP was announced, employers should revisit their programs in light of this NEP.

OSHA hopes to reduce or eliminate worker exposures to heat-related hazards that result in illnesses, injuries, and death by targeting industries and work sites where employees are exposed to heat-related hazards and have not been provided adequate protection. Employers should revisit their programs to ensure that temperatures begin to rise. Their employees have access to cool water, shade, and cool-down breaks. Employees should also be trained and provided with a climatization period or a period where they are allowed to get used to heat when they first start working in a high-heat area or at the start of a heat wave. Now, with that, I believe I've covered some of the issues that construction employers should focus on in the coming year.

Dion Kohler:

Well, thank you all for joining us today. We look forward to working with you in 2024, and if you have any questions or would like to discuss these or any other topics with Sean or I, you can reach us through our website at JacksonLewis.com. Thank you again.

Alitia Faccone:

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