Legal Update Article

Top Five Labor Law Developments for October 2019

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1. *The National Labor Relations Board (NLRB) has clarified its standard for evaluating the legality of employers' facially neutral policies, rules, or handbook provisions. LA Specialty Produce Co.,* 368 NLRB No. 93 (Oct. 8, 2019). Overturning the Obama-NLRB standard, the NLRB in *Boeing Co.* provided a roadmap for how it will analyze the legality of employer work rules and policies. As it reviews them, the NLRB will place rules in one of three categories. Rules in Category 1 are lawful to maintain. Rules in Category 2 require individualized scrutiny. Rules in Category 3 are unlawful. As the NLRB determines in its decisions the category placement of various types of rules, employers will come to know how their similar rules may fare were the NLRB to review them. The NLRB in *LA Specialty Produce* clarified that, under the *Boeing* framework, the NLRB's General Counsel (GC) has the burden of proving a facially neutral rule, reasonably interpreted by an objectively reasonable employee, may interfere with the exercise of rights under the National Labor Relations Act (NLRA). If the GC fails, the NLRB's inquiry ends, and the rule is considered lawful (Category 1(a)). If the GC meets his burden, the NLRB must balance the nature and extent of the rule's impact on Section 7 rights against the employer's legitimate justification(s) for the rule. If it determines the justification(s) outweigh the impact on Section 7 rights, the rule is lawful (Category 1(b)). If it finds the justification(s) do not outweigh the impact on Section 7 rights, the rule is unlawful (Category 3). If it is not possible to draw any broad conclusions about the legality of a particular rule, the rule will require individualized scrutiny (Category 2). For more on this decision, see our article, Labor Board Clarifies *Boeing* Work Rules Decision, Finds Confidentiality, Media Contact Rules Lawful.

2. *The NLRB found that a "wildcat" strike was not protected by the NLRA once the striking employees became aware the union disapproved of and disavowed the strike. CC1 Limited Partnership d/b/a Coca Cola Puerto Rico Bottlers,* 368 NLRB No. 84 (Sept. 30, 2019, released in Oct.). After the company terminated two shop stewards, they led employees in a wildcat strike -- a strike not authorized by union leadership. The company suspended or fired some strikers who continued the work stoppage even after being informed that the union disavowed the strike as unauthorized. In a 2015 decision, the NLRB found the strike was protected by the NLRA and the discipline against strikers was unlawful. On appeal, the U.S. Court of Appeals for the D.C. Circuit remanded the case to the NLRB for further explanation of its conclusion that the wildcat strike was protected activity. On remand, the NLRB reversed its 2015 decision and found the wildcat strike was not protected once the striking employees became aware that their union disapproved of and disavowed the strike. The unauthorized strike, the NLRB found, interfered with the union's ability to act as the exclusive bargaining representative for the employees. For more on this decision, see our post, NLRB:

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Labor Relations

Wildcat Strike Loses NLRA Protection Following Employee Knowledge of Union Disavowal, Disapproval.

3. *The General Counsel's Division of Advice found that an employee engaged in NLRA-protected concerted activity when discussing pay with coworkers, even though none of the colleagues voiced support for the worker's complaints. Gallup, Inc.,* 14-CA-234530 (Jul. 24, 2019, released Oct. 18, 2019). An employee voiced concerns in group meetings and conversations with colleagues about the employer's decision to reclassify employees as non-exempt under the Fair Labor Standards Act and to decrease employees' base salary. While other employees may have shared the employee's displeasure over the change, they apparently did not express that opposition to the employer or each other. The employer later terminated the complaining employee for "talking about [] pay to others." The employee filed an unfair labor practice charge alleging his termination was an unlawful response to protected concerted activity. The Division of Advice found the employee's statements to coworkers were concerted because they were made to incite group action over the pay changes, even if other employees did not voice support. The employee took steps (such as asking colleagues to speak up) to induce group support. That the employee was unsuccessful was irrelevant. The Division of Advice also distinguished the facts in this case from those in the NLRB's decision in *Alstate Maintenance,* 367 NLRB No. 68 (2019). For more on that decision, see our article, Labor Board Narrows What May Be Considered Concerted Activity.

4. *NLRB Chairman John Ring has suggested that additional changes to the NLRB's election rules may be near, as the NLRB continues to receive public comments on existing proposed election rule changes.* In comments at an event for labor and employment attorneys and HR professionals, Ring stated that a broad overhaul of the Obama-NLRB "quickie" election rules is in the works, but he did not state when such changes can be expected. The 2014 rules significantly shortened the time for responding to union election petitions, among other changes. The NLRB already is considering proposed changes to its election rules, including rules governing voluntary recognition, "blocking" charges (unfair labor practice charges that block processing of union election petitions), and rules governing the formation of bargaining relationships in the construction industry. The NLRB has extended the time for the public to submit comments on those existing proposed rule changes to December 10, 2019. For more on the existing proposed rule changes, see our post, NLRB Issues Proposed Rules To Modify Portions Of Its Election Procedures.

5. *The NLRB has extended the deadline for the public to respond to a proposed rule to exclude student workers at private colleges and universities from NLRA coverage.* Comments must be submitted on or before December 16, 2019. In September, the NLRB issued a "Notice of Proposed Rulemaking" to establish that "students who perform any services for compensation, including, but not limited to, teaching or research, at a private college or university in connection with their studies are not 'employees' within the meaning of Section 2(3) of the [National

Labor Relations] Act." In other words, if the rule is adopted, unions could not petition the NLRB to represent student workers. (The proposed rule would not bar colleges and universities from voluntarily recognizing a union as the representative of student workers.) The proposed rule would "overrule extant precedent and return to the state of law as it existed from shortly after the NLRB first asserted jurisdiction over private colleges and universities in the early 1970s to 2000 and, with brief exceptions, for most of the time since then." For more on the proposal, see our article, NLRB Proposes Rule to Exclude Student Workers at Private Colleges, Universities from NLRA Coverage.

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