

# Top Five Labor Law Developments for January and February 2020

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1. *The Trump Administration announced its intent to re-nominate National Labor Relations Board (NLRB) member Marvin Kaplan and former member Lauren McFerran.* President Donald Trump is preparing a nomination package to ensure the NLRB does not lose its quorum this summer. Currently, the NLRB is operating with only three members, the minimum it needs to maintain a quorum. Member Marvin Kaplan's term is set to expire in August 2020, and his departure would leave the NLRB without a quorum. President Trump plans to re-nominate Kaplan, as well as Obama-appointed NLRB member Lauren McFerran, whose term expired in December 2019. If the nominations take place as reported, McFerran will again be the lone Democrat on the NLRB.
2. *The NLRB's top lawyer advocated for expanding damages imposed on unions found to have breached their duty to fairly represent members.* The NLRB's General Counsel (GC), Peter Robb, stated his position in a motion filed in a matter commenced by a union member alleging his union breached its duty of fair representation, in violation of the National Labor Relations Act (NLRA). *See American Postal Workers Union Local 1901, Case 10-CB-231385.* The case arose after a union failed to process its member's grievance regarding her termination from the U.S. Postal Service. After the member filed an unfair labor practice charge against the union, the GC issued a complaint and notice of hearing against the union. The union did not respond to the action. In support of his default judgment motion, the GC argued the union should pay all damages a worker may have suffered as a result of a union's failure to process grievances. While granting the default judgment motion, the NLRB issued a more limited damage award against the union, confined to damages that could be linked to the union's malfeasance, the NLRB's typical measure of damages in such cases. Declining to expand the damages award, the NLRB reasoned that the appropriateness of such an expanded remedy should be resolved after a full briefing by the affected parties, and "there has been no such briefing in this case." While not successful in this case, the GC's position suggests he may seek increased damages against unions in similar future cases.
3. *On February 18, Kickstarter employees voted to join a union, reportedly becoming the first white-collar tech industry workers to do so.* A bargaining unit of 88 accountants, creative content directors, and senior software designers were among the employees who voted, 47-36, for union representation. The organizing campaign at Kickstarter, an online crowdfunding company, began in 2018, after management removed from the company's website a campaign for a comic book called "Always Punch Nazis," after the comic book received negative news

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### Labor Relations

coverage. The decision to remove the campaign was controversial among employees and reportedly contributed to the union organizing. Kickstarter refused the union's request for voluntary recognition, instead opting for an NLRB election, in which the union prevailed. Among the union's stated goals for a first contract are a more equitable compensation structure, greater diversity and inclusion in hiring, more professional growth opportunities, and greater employee input in product development.

- The NLRB found that an employer who took over a unionized company could set new initial employment terms governing the predecessor's workforce, despite committing NLRA violations when taking over the new company. Stein, Inc., 369 NLRB No. 10 (Jan. 28, 2020).* The employer took over an operation comprised of employees in three bargaining units, represented by separate unions. When the employer won the contract to perform the work, it decided to merge the three bargaining units into one unit represented solely by the union that represented most of the predecessor's employees. The employer recognized that union as the sole representative and provided the employees with a handout setting forth new terms and conditions of employment. After the employer and the recognized union entered into a collective bargaining agreement covering all employees, one of the former unions requested recognition and demanded to bargain, which the employer refused. The former union filed an unfair labor practice charge against the employer and the recognized union. Relying on existing NLRB law, an administrative law judge (ALJ) found the employer forfeited the right to set initial terms and conditions of employment, because it committed a prior unfair labor practice charge, i.e., failing to recognize the existing unions. While the NLRB agreed with the ALJ that the employer violated the NLRA by failing to recognize the existing union, it reversed the ALJ, finding the employer could still set initial terms and conditions of work. Unlike NLRB cases where an employer completely repudiated employees' Section 7 rights, the NLRB said the employer merely "questioned the trifurcation of the employees into three separate bargaining units." Accordingly, the NLRB found the employer could set initial terms and conditions of work, but it must bargain with the existing union.
- The NLRB found an employer did not violate the NLRA by removing union flyers from its bulletin boards in employee breakrooms, based on the employer's contention that the flyers violated a provision in an expired collective bargaining agreement. Valley Health System, LLC, 369 NLRB No. 16 (Jan. 30, 2020).* The employer and union were party to expired collective bargaining agreements (CBAs) that permitted the union access to bulletin boards in employee breakrooms regularly utilized by bargaining unit employees, provided the union did not post material critical of the hospital or employees. During bargaining for a successor agreement, the union posted flyers criticizing what it perceived as the employer's slow pace during negotiations. The employer removed the flyers, citing the CBA provision. An ALJ found (among other things) that the employer acted unlawfully, notwithstanding the CBA provision, because the provision allowed the employer unfettered discretion to control the union's messages, in violation of the NLRA. Reversing the ALJ in relevant part, the NLRB found the

employer did not violate the NLRA and the CBA provision must be upheld as the status quo, because the provision was the product of a mutual agreement between the parties and there was no basis to ignore it until the parties agreed on a different CBA provision.

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

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