Newsletter

Top Five Labor Law Developments for March 2020

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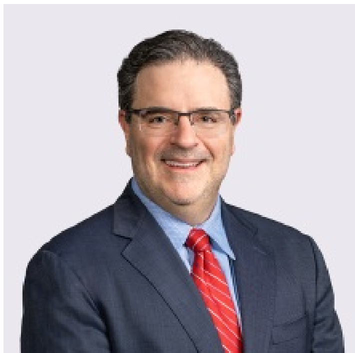

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1. *Employers affected by the COVID-19 pandemic may receive some financial relief from the Coronavirus Aid, Relief, and Economic Security (CARES) Act, but the assistance comes with union-related strings attached for some employers.* The CARES Act, signed into law on March 27, provides that the Secretary of the Treasury may create a loan program for mid-size companies, including non-profit organizations, that employ between 500 and 10,000 employees. Under that provision, eligible businesses would have to remain neutral in any union organizing effort for the term of the loan. For unionized employers, receipt is conditioned on agreeing not to "abrogate" existing collective bargaining agreements for the term of the loan and two years following loan repayment, although the statute does not define what it means to "abrogate" a labor agreement. The neutrality provision does not require employers to forego a secret ballot NLRB election in favor of a union "card check" procedure, a common feature insisted on by unions as part of many neutrality agreements. Receipt of the loans also comes with restrictions on recipients' ability to lay off or outsource workers.

2. *The National Labor Relations Board (NLRB) finalized changes to its election procedures on blocking charges, the voluntary recognition bar, and construction industry collective bargaining relationships.* The amendments, originally published in the Federal Register on April 1, were set to take effect on May 31, but the effective date was delayed to July 31, due to the COVID-19 crisis. The NLRB proposed the amendments in August 2019 in a Notice of Proposed Rulemaking. The blocking charge amendment reverses the NLRB's current policy of suspending processing of an NLRB representation petition if a "blocking charge" is filed by the union that filed the representation petition. The new rule directs that elections will held as scheduled, regardless of a pending charge, with ballots impounded until the charge is disposed of as without merit, or a determination made that the alleged unlawful conduct occurred and was sufficient to warrant voiding the election (without counting the votes) and rerunning the election. The voluntary recognition rule change provides employees greater opportunity to petition the NLRB for a secret-ballot election after an employer voluntarily recognizes the union, providing a 45-day window after voluntary recognition during which employees may file a petition for an NLRB election to determine whether a majority of the employees wish to be represented. The construction industry bargaining amendment addresses industry employers' right to establish a collective bargaining relationship by the mere recitation (without evidence) in a collective bargaining agreement that the employer recognized the union based on a card majority. The amendment would mandate that such recognition be based upon a contemporaneous showing of majority support.

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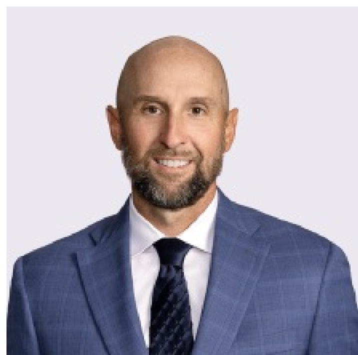

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3. *The Board found an employer did not violate the National Labor Relations Act (NLRA) by offering a departing employee a separation agreement requiring confidentiality, non-disparagement, and non-participation in claims against the employer. Baylor Univ. Medical Ctr.,* 369 NLRB No. 43 (Mar. 16, 2020). The employer offered a terminated employee a separation agreement that included a "No Participation in Claims" provision, which stated the employee would not "pursue, assist, or participate in any Claim brought by any third party against … [the employer]." The agreement also included a non-disparagement provision and a provision barring the disclosure of confidential information the employee learned during employment. Applying *The Boeing Company* standard for assessing the lawfulness of work rules [365 NLRB No. 154 (2017)], an administrative law judge found the non-disparagement provision was a lawful "civility" rule. However, the judge found the No Participation provision was too broad, because it ostensibly banned individuals from participating in NLRB investigations. Likewise, the judge found the confidentiality provision violated *Boeing* by prohibiting protected communications between employees about terms and conditions of work. Partially reversing the judge, the NLRB found *Boeing* was inapplicable because *Boeing* applies to mandatory work rules, while acceptance of the separation agreement terms was optional. Moreover, the NLRB said, the agreement concerned post-employment activities only, and therefore did not affect terms and conditions of work covered by *Boeing*. Accordingly, the NLRB upheld the legality of the non-disparagement provision and, reversing the judge, found the confidentiality clause and the no-participation provision did not violate the NLRA.

4. *An employer violated the NLRA by maintaining and enforcing an overbroad media policy, but the rule became lawful later, the NLRB held, when the employer added a savings clause exempting protected concerted activity from the rule's coverage. Maine Coast Regional Health Facilities,* 369 NLRB No. 51 (Mar. 30, 2020). The employer maintained a rule stating, among other things, that employees were prohibited from contacting the media without the direct involvement of management. An employee filed an unfair labor practice charge against the employer after she was fired for violating the rule. In response, the employer amended the media rule to include a savings clause stating the rule "does not apply to communications by employees not made on behalf of [the employer] concerning a labor dispute or other concerted communications for the purpose of mutual aid or protection protected by the National Labor Relations Act." The NLRB found the original rule was unlawfully overbroad under *Boeing,* and therefore the termination was also unlawful. However, it found the amended policy was a lawful Category 1(a) rule, because, when reasonably interpreted, there was no potential interference with the exercise of Section 7 rights.

5. *According to a Bloomberg Law report, average pay raises in collective bargaining agreements fell for the first two months of 2020, even before the extent of the COVID-19 crisis became apparent.* Union-negotiated average wage increases fell to 3.4 percent in early March, following previous drops in 2020. The latest decrease stemmed from contracts ratified earlier in 2020, prior to the COVID-19

crisis becoming widespread in the U.S. According to experts cited in the report, the decreases were a correction from unusually high average wage increases achieved by unions in previous reporting periods.

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