Wimberly, Lawson, Steckel, Schneider & Stine, P.C.
Suite 400, Lenox Towers, 3400 Peachtree Road, N.E., Atlanta, Georgia 30326
E-MAIL:Lawyers@wimlaw.com
(404) 365-0900 FAX (404) 261-3707

EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

VOLUME XXXX, Issue 10 OCTOBER 2022

LABOR BOARD EXPANDS EMPLOYEE RIGHTS TO WEAR PRO-UNION SHIRTS AT WORK

The National Labor Relations Board (NLRB) with its new Democrat majority, issued a major ruling on August 29, 2022, expanding employee rights to wear pro-union shirts and the like at work. "Wearing union insignia, whether a button or a t-shirt, is a critical form of protected communication," NLRB Chairman McFerran said in a statement. "For many decades, employees have used insignia to advocate for their workplace interests - from supporting organizing campaigns, to protesting unfair conditions in the workplace - and the law has always protected them." The 3-2 NLRB majority found that Tesla violated the Labor Act by restricting employees from wearing such pro-union shirts, overturning a Trump-era precedent.

Tesla had a company policy requiring production workers to wear black shirts with the Tesla logo, or occasionally all-black shirts when a supervisor gave permission. The majority concluded that this policy interferes with worker's rights. Tesla had argued that its dress code was meant to prevent clothing from damaging cars, and the two-Republican dissenting members accused the majority of "distorting decades of precedent," and said the ruling "effectively declares illegitimate any employee uniform policy or dress code that prohibits employees from substituting any apparel for the required clothing."

In contrast, the new majority ruling states: "When an employer interferes in any way with its employees' right to display union insignia, the employer must prove special circumstances that justifies its interference." In the Trump-era NLRB ruling, the Republican majority did not require employers to show "special circumstances" to justify barring employees from displaying union insignia on the job, instead choosing to balance the rule's impact on workers' rights against the company's reasons for maintaining it. Thus, in that case Walmart's rule was upheld requiring non-company insignia to be "small" and "non-distracting," saying it met the company's desire to ensure that employees are identifiable while preserving workers' rights to show union support. The Republican dissenters to the current ruling would draw a line between employer policies that "prohibit the display of union insignia" and less restrictive, facially neutral, and non-discriminatory dress clothes like Tesla's.

Editor's Note: The new Democrat majority at the NLRB and its General Counsel are carrying out President Biden's promise to be the most "pro-union President" in history, and the current *Tesla* ruling allowing employees to wear union attire on the job is only a starter. Pro-union activists are going to use these principles to post pro-union materials not only on their persons, but on various places around employer facilities. Employers would be wise to have policies to limit such postings to certain locations or ban them entirely. This writer remembers litigating an NLRB case over 40 years ago in which pro-union activists put union stickers all over a company's tow trucks. Issues can come up dealing not only with whether employers have a no-posting policy, but also whether they have consistently enforced such policy.

Another issue that is expected to be addressed in NLRB case law is whether employers can restrict non-work communications on digital equipment. The Trump-era NLRB in 2019 ruled workers do not have a legal right to use work email and other IT systems to talk about union matters and other non-work issues. The rationale was that employers have a right to regulate the use of company property. Other cases are expected to arise dealing with access by union organizers to company property. At the same time, the NLRB General Counsel is trying to prohibit employers of the right to conduct so-called "captive audience" meetings in which employees are required to listen to "union-free" and other such presentations.

UNION APPROVAL AT 57-YEAR HIGH

Union approval was at its all-time high around the end of World War II, but then began a long-term decline, but recently is rising again. In August, a Gallup poll showed that public approval of labor unions reached 71% in 2022. This is the highest level since 1965. Some say recent labor activity in the wake of the coronavirus, particularly at certain well-known national companies, seems to have raised the public's perception of unions. The current Administration has certainly worked to achieve this perception as well.

Over the last decade, public approval of unions has increased nearly 20 points. The increase in public approval has occurred even though only approximately 6% of private sector workers are union members, although 16% live in a household with at least one union member.

Although public approval for unions is high, it is interesting that the Gallup poll also shows that less than half of union members said union membership was "extremely important" to them. Nearly two-thirds of such members said their motivation for joining was better pay and benefits, followed by employee rights and job security. In the case of non-union workers, 58% said they are "not interested at all" in joining a union, while 11% said they were "extremely interested."

USE OF LIGHT-DUTY WORK ONLY FOR COMPENSABLE INJURIES UPHELD

Many employers offer light-duty programs which are primarily designed to lower the cost of workers' compensation claims. Such programs create controversial issues as to whether pregnant females or those with disabilities should have access to such programs, even though they are not related to on-the-job injuries.

In a major Supreme Court ruling on the issue in 2015, *Allen v. UPS*, the U.S. Supreme Court found problems in light-duty programs which offer accommodations to workers who were limited in their ability or inability to work for virtually every reason except pregnancy. In the current case, *EEOC v. Wal-Mart Stores East*, (C.A. 7, August 16, 2022), the court rejected the EEOC's claim that Wal-Mart's temporary light-duty program discriminated against pregnant workers by making light-duty assignments available only to those with on-the-job injuries.

The *Wal-Mart* case dealt with pregnancy discrimination under the Pregnancy Discrimination Act, which precludes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." The key to the ruling was that Wal-Mart could not have discriminated against pregnant workers because the light-duty assignments were limited to those with on-the-job injuries. However, if an employer takes that action, it may come into conflict with other current EEOC guidance. Such guidance provides that employers may be required to provide light-duty to workers without on-the-job injuries when no other effective accommodation is available, as part of the employer's obligations under the Americans With Disabilities (ADA), absent an undue hardship. The problem is that when an employer grants light-duty to disabled workers without occupational injuries, to meet its obligations under the ADA, claims could occur under the Pregnancy Discrimination Rules if light-duty is unavailable to pregnant workers as well. It was key to *Wal-Mart's* success in the current case that it strictly excluded workers that did not have on-the-job injuries. The court in *Wal-Mart* made clear that

the result may have been different if the EEOC had shown that Wal-Mart provided light-duty to any employee not injured on the job.

Editor's Note: Some commentators have suggested a solution to this dilemma created by the limitation of light-duty programs under the pregnancy and disability discrimination rules. The solution would be to have an express program limiting light-duty to those with on-the-job injuries in order to lower workers' compensation costs. The policy should be a little more explanatory, but the idea is to avoid the pregnancy discrimination concept under the rationale of the *Wal-Mart* case, while trying to avoid the ADA liability because of the undue hardship concept. This resolution is interesting but is not entirely free from legal doubt, because of the ADA's requirement of a reasonable accommodation. Also, state or local laws may apply as well, and it must be remembered that complications of pregnancy can constitute disabilities under the ADA.

WIMBERLY & LAWSON SECURES INJUNCTION FOR ITS CLIENTS IN FEDERAL CONTRACTOR VACCINE MANDATE CASE

Wimberly & Lawson represented the Associated Builders & Contractors (ABC) in securing an injunction against the enforcement of President Biden's Federal Contractor Vaccine Mandate. While the District Court had issued a nationwide injunction, the Eleventh Circuit Court of Appeals narrowed the injunction to include only members of ABC and the state agencies from seven states that were part of the same suit.

The Court of Appeals agreed with the District Court that Congress did not vest the President with authority to impose vaccination requirements when it passed the Procurement Act: "Nothing in the [Procurement] Act contemplates that every executive agency can base every procurement decision on the health of the contracting workforce." The Procurement Act is all about economy and efficiency – not health.

The Administration has not yet announced whether it intends to enforce the government contractor mandate outside the scope of the parties securing the injunction, ABC members and the coalition of southern states. The seven states are Alabama, Georgia, Idaho, Kansas, South Carolina, Utah, and West Virginia.

NLRB ISSUES PROPOSED RULE ON JOINT EMPLOYMENT

The long-awaited proposed rule from the National Labor Relations Board (NLRB) addressing joint employment was published on September 6, 2022. The rule proposes to rescind the Trump-era 2020 final NLRB rule. The new rule rejects the Trump-era rule provisions requiring: (1) that a putative joint employer "actually" exercise control; (2) that such control be "direct and immediate;" and (3) that such control not be "limited and routine."

The terms of the new proposed rule address joint employer status by defining the terms "share or co-determine those matters governing employees' essential terms and conditions of employment" to mean "for an employer to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both), one or more of the employees' essential terms and conditions of employment." Section 103.40(b). The new tests would make it appropriate to give determinative weight to the existence of a putative joint employer's authority to control the essential terms and conditions of employment, whether or not such control is exercised, and without regard to whether any exercise of such control is direct or indirect, such as through an intermediary. For example, evidence that a putative joint employer communicates work assignments and directives to another entity's managers or exercises its ongoing

oversight to ensure that job tasks are performed properly may demonstrate the type of indirect control over essential terms and conditions of employment that is necessary to establish a joint-employer relationship.

Editor's Note - Comments regarding the proposed rule must be received by the NLRB long before November 7, 2022. Hints in the proposed rule suggest changes that employers should consider making in their contractual arrangements to avoid joint employment status. For example, comments in the proposed rule suggest that a worker is not an employee of an entity where the contract provided the "company reserves and holds no control over [worker] in the doing of such work other than as to the results to be accomplished." Other comments indicate that contractual terms limited to "dictating the results of a contracted service," and aim "to control or protect [the employer's] own property," or to "set the objective, basic ground rules, and expectations for a third-party contractor" would generally not be relevant to the inquiry. In addition, the comments agree that "routine components of a company-to-company contract," like a "very generalized cap on contract costs," or an "advanced description of the task to be performed under the contract," are generally not material to the existence of an employment relationship under common-law agency principles.

The proposed rule is carefully drafted as a legal attack is likely. It is designed not only to rescind the Trump-era joint employment rule, but also to greatly expand circumstances in which joint employment status will be found by the NLRB. Joint employment status is often litigated in subcontractor situations and in franchisor-franchisee relationships, where the union attempts to expand the parties responsible for bargaining and monetary damages to include other entities to whom the primary employer has a close relationship.

THE WIMBERLY LAWSON LABOR AND EMPLOYMENT LAW UPDATE CONFERENCE IS BACK!

Wimberly Lawson will be presenting the "On the Frontline" conference on November 17-18, 2022, at the Sevierville Convention Center in Sevierville, Tennessee. We hope you will join us for our day and a half conference as we cover the latest labor and employment law updates affecting employers, managers, and HR professionals, presented by the attorneys at Wimberly Lawson. Registration is now open. An Early Bird Discount is good through October 7, 2022. Please go to this link to register: https://www.wimberlylawson.com/online-registration/. We hope you will join us in November!

Be sure to visit our website at http://www.wimlaw.com often for the latest legal updates, Alerts, and Firm biographical information!

WIMBERLY, LAWSON, STECKEL,
SCHNEIDER & STINE, P.C.
Suite 400, Lenox Towers
3400 Peachtree Road, N.E.

Atlanta, GA 30326-1107

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