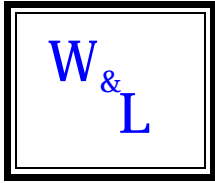


EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues



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WHAT MID-TERM ELECTIONS MEAN FOR LEGISLATIVE AND REGULATORY AGENDA

Most predictions were for Republicans to gain over 20 seats in the U.S. House of Representatives, and polls just prior to the elections suggested that they could even regain the Senate. The polls got it wrong again, and this time the actual result favored the Democrats. Democrats have won 50 seats in the Senate, and thus can control the outcome there with the Vice President's deciding vote, and Republicans are projected to have an only extremely narrow margin in the House. The last Congress had a 220-212 Democrat majority with three vacancies, while the new Congress is expected to have around the same margin but with a slight Republican majority. As of the time this article went to press, Republicans had secured 218 House seats to the Democrats' 212, with 218 necessary for a majority. President Biden can claim the best mid-term performance for an incumbent President's party in 20 years.

The results were surprising since some 70% of voters indicated they were unhappy with the state of the nation. Democrats had to deal with an unpopular President, 8% inflation, falling real incomes, rising crime, and chaos at the border. Many blame the adverse results for Republicans on the "election denial" of candidates promoted by former President Trump, and a greater interest in voting in some liberal groups due to the Supreme Court abortion ruling.

But perhaps the biggest winner of election night was a Republican, Florida Gov. Ron DeSantis, who won a second four-year term by almost 20 points. Further, Gov. Brian Kemp in Georgia won a significant re-election victory again defeating Democrat Stacey Abrams, even though he was opposed by Mr. Trump who attacked him for his refusal to challenge the 2020 election results in Georgia. Georgia again faces a Senate election run-off between Democrat Raphael Warnock and Republican Herschel Walker.

In many ways, it is more important to win the Senate than the House, as the Democrat victory in the Senate allows President Biden to select judicial and executive appointments. In today's environment, judicial appointments and the so-called "administrative state" are critically important to changes in policy.

Some say there is a threat to Democrats in their win should they ignore voter unhappiness with their policies. Further, two-thirds of the voters indicated in exit polls that President Biden should not run for President again. In this year's mid-terms, Republicans led the aggregate vote in the 435 House races by about 52% to 48%, improving the margin by almost eight points from the 2020 election results. Republicans face similar challenges, in that many believe that Gov. DeSantis would make a stronger Presidential candidate for the Republicans, but Mr. Trump may wage a crippling primary battle with him.

So what can the two political parties work together on over the next two years? Since no one likes high gas prices, some say there are opportunities to compromise on energy issues, and possibly even expansion of temporary immigrant workers. It is believed that compromises will be reached on the Farm Bill, aid to Ukraine, and defense spending.

In the employment area, perhaps the best chance for bipartisan legislation would be workplace retirement policies. Potential compromises may be reached on creating incentives for employers who don't offer workplace retirement benefits, as well as other measures to expand retirement access and allow more efficient retirement plan administration. A significant retirement issue would be whether 401(k) and 403(b) plans should automatically enroll new workers.

In particular, although a recession exists based on the historical definition, economists are forecasting a recession within the next year. If a recession continues, it may be necessary for the two parties to compromise to bring about needed recovery.

RECENT ADMINISTRATION EFFORTS SUPPORT MORE UNION POWER

President Biden, the most pro-union President in history, continues his agenda at the National Labor Relations Board (NLRB), both in NLRB decisions, proposed decisions, and proposed new regulations.

Many employers believe the most important union goal is the collection of union dues from represented employees. There is an express provision in the Labor Act that explicitly limits the effect of union-security clauses to active contracts, the provision that supports union membership obligations. For over 50 years, except for a brief period beginning in 2015, the Board held that union dues check-off provisions requiring employers to deduct dues from workers' checks and remit them to the union, did not survive the expiration of the agreement. In other words, because the dues check-off provisions were the implementation of union-security clauses in the bargaining agreement, and were created by the contract, such provisions lapse with the expiration of the contract. In a decision issued in early October, the NLRB reversed those precedents, and held that employers' obligations to withhold union dues from employee paychecks survives the expiration of the bargaining agreement. *Valley Hospital Medical Center*, Case No. 28-CA-213783.

In early November, the NLRB released a notice of proposed rulemaking that would rescind earlier federal rules implemented in 2020. The rules which the NLRB now seeks to rescind include: (1) allowing representation elections to proceed despite pending unfair labor practice charges; (2) allowing challenges to the representative status of a union that has been voluntarily recognized based on a showing of majority support before there has been a reasonable period for collective bargaining; and (3) permitting election challenges to the representative status of unions representing construction industry employees, where the union's majority is set forth in language in a collective bargaining agreement making clear that the employer voluntarily recognized the union based on a showing of majority support.

The gist of these rule changes would return the Board to the "blocking charge" policy, in which a union can theoretically indefinitely postpone an election due to its filing of unfair labor practice charges, thus "blocking" the election until a time more favorable to the union. The second proposed rule change would eliminate the possibility of the union being "decertified" based on majority support to eliminate the union, at least until a reasonable period for collective bargaining has passed. The third rule change would allow unions to insist upon contract language establishing recognition of a union under Section 9(a) of the Labor Act, simply by making it difficult to challenge language in a collective bargaining agreement stating that there was sufficient evidence that voluntary recognition was based on Section 9(a) of the Act.

The rescission of these Trump-era rules would make it more difficult to decertify or withdraw recognition from a union, and would give unions better opportunities of winning secret ballot elections.

In addition, the NLRB General Counsel has issued numerous memoranda that could limit an employer's right to hold captive audience meetings or discussions in a facility by management to discourage union organizing. The NLRB General Counsel has now announced a new initiative, which if implemented by the NLRB would require employers to disclose all forms of electronic surveillance of workers used in the workplace. It would also give employees the opportunity to file charges over monitoring that tends to interfere with employees working together for mutual aid and protection under Section 7 of the National Labor Relations Act (NLRA). It would require employers not only to disclose the monitoring but require an employer to state its reasons and how it is being used. While the NLRB General Counsel is basically a prosecutor who does not have a judicial role, she is urging the five-member NLRB "to protect employees, to the greatest extent possible, from intrusive or abusive electronic monitoring and automated management practices that would have a tendency to interfere with Section 7 rights." Even if the employer's legitimate business reasons outweighed the Section 7 rights, the employer would still have to notify workers about its practices.

The concept is that employees may be deterred from union activity or other activities for mutual aid or protection by an employer's surveillance program. Therefore, the General Counsel contends that employers must notify employees about the employer's surveillance program so workers can keep the organizing activities confidential and/or challenge the surveillance program as coercive.

Editor's Note: Some employers believe that the right to cease withholding union dues from employee paychecks puts pressure on the union to reach agreement on a new contract, which actually promotes collective bargaining. The decision in *Valley Hospital Medical Center* takes away this right, at least absent bargaining to impasse by the employer, in which case the employer is allowed to implement its proposals unilaterally. Employers drafting provisions on union dues collection may wish to consider an express provision limiting the dues deduction to the term of the collective bargaining agreement.

EEOC RELEASES NEW REQUIRED EEO POSTER

Employers are required to post many types of notices in the workplace, some required by federal law, and some by the various state laws. Notices are generally required to be placed in a conspicuous location in the workplace where notices to applicants and employees are customarily posted. The EEOC offers ready-to-print posters and it is important to use the EEOC poster revised and re-issued on October 20, 2022. It is known as the "Know Your Rights" poster, replacing the previous "EEO is the Law" poster. The new poster attempts to use simpler formatting and language, and notes that harassment is an employment practice that can be challenged as discriminatory, and states that sex discrimination can also encompass pregnancy and related conditions, sexual orientation, and gender identity. It provides a code that allows employees quick digital access to the EEOC's "How to File A Charge of Employment Discrimination" webpage, and includes a section covering equal pay discrimination for federal contractors.

Employers are advised to replace their old posters with the updated poster. Although the only stated penalties for not using the appropriate poster are minor fines, the failure to have the proper poster published suggests to the EEOC and complainant's attorneys, that the employer does not responsibly embrace the EEO laws. In rare cases, the failure to have the poster published suggests an opportunity for a plaintiff to argue a "tolling" of the applicable statute of limitations for filing an EEOC charge.

UPDATED CDC GUIDANCE ON COVID-19 SHIFTS
FOCUS AWAY FROM EMPLOYER

The Centers for Disease Control (CDC) has modified its guidance on preventing transmission of COVID-19. The main thrust of the guidance is to shift the emphasis to individuals. However, the CDC still recommends that organizations improve building ventilation, and include using HEPA filters, opening windows to bring in outdoor air and turning on fans to improve air flow. In one of the most significant changes, the CDC has dropped reference to 6-foot physical distancing, but warns: "The closer you are to a greater number of people, the more likely you are to be exposed to the virus that causes COVID-19."

The CDC recommends avoiding contact with people who have COVID-19. However, if someone is taking care of a sick person at home, caregivers should use "as many prevention strategies as you can," such as wearing a high-quality mask (N95 or KN95, for example), washing hands and improving ventilation. Instead of advising anyone who's been exposed to COVID-19 to quarantine, the CDC recommends wearing a high-quality mask for 10 days and getting tested on the fifth day after exposure. After a positive COVID-19 test, the recommendation is to stay home for five days and wear a high-quality mask around others. If the person is symptom-free and has no signs of fever for at least 24 hours after those five days, the person can stop isolating. However, still wearing a high-quality mask until day 10 is recommended.

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