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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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NEW NLRB RULING REQUIRING CARD-CHECK UNION DESIGNATION IF UNFAIR LABOR PRACTICE COMMITTED

Employers' "worst nightmare" has just occurred in the *Cemex Construction* National Labor Relations Board (NLRB) ruling on August 25, 2023. In that ruling, the NLRB necessitates an NLRB order requiring the employer to recognize and bargain with the union, assuming the union can show a majority of employees have signed union authorization cards or otherwise indicated desire for union representation. The result is almost the same as the "card-check" legislation, such as in the PRO Act, that Congress has repeatedly rejected. It is also in spite of the United States - Mexico - Canada agreement, confirming the right to a "secret ballot vote" for union representation in Mexico, which passed by overwhelming bipartisan majorities in Congress. It is hard to believe that secret ballot elections are required in Mexico, but not in the U.S.

The dissenting NLRB member in the *Cemex Construction* case states that it is "virtually impossible" for a bargaining order not to issue, particularly in light of the hard position taken by the NLRB General Counsel against ordinary employer work rules, against non-competition agreements, and against mandatory meetings by employers about the pros and cons of unionization and/or the voting process in a secret ballot election.

Admittedly, this ruling is going to be contested in the courts, and litigation may take several years. In the meantime, employers are confronted with a dilemma. It is very difficult if not impossible to go through a union organizational campaign without some type of minor unfair labor practice being committed, particularly if the union is looking for every opportunity to file unfair labor practice charges. While the union must still prove its majority in litigation, the employer may be faced with a choice of recognizing the union or expensive litigation.

There are also requirements in the *Cemex Construction* ruling as to when and how an employer should respond to a union demand for recognition, including the employer's own filing of an RM election petition within two weeks (unless the union has already filed an election petition).

The problem for employers is magnified by the fact that union organizational campaigns are often conducted in secret, and in some cases the employers do not even know such a campaign in underway until it receives a petition from the union. Unions commonly do not take action until a majority of eligible voters have signed union authorization cards or some other evidence of majority status. Employers are then confronted with the litigation dilemma outlined above, or the "quickie" election procedures outlined in the next article.

In either case, employers must be prepared, and hopefully have put into place a good communications program addressing employee complaints, and prior education of the workforce about issues of unionization and the significance of signing a union authorization card. This author has written some papers of the implications of the *Cemex Construction* ruling and appropriate employer strategy going forward which is available free of charge at jww@wimlaw.com.

QUICKIE ELECTION RULE MADE EVEN QUICKER BY NEW NLRB REGULATION

The NLRB issued a final rule pertaining to its election procedures on August 18, 2023, to become effective December 26, 2023. The new regulation, promulgated without opportunity for comments, sets forth 10 amendments to NLRB procedures, substantially returning those procedures to those in a 2014 rule issued during the Obama Administration. The changes expedite the conducting of the election itself. Thus, a pre-election hearing will generally be scheduled to open eight calendar days from service of the notice of hearing, rather than 14 business days. The rule regarding disputes concerning eligibility to vote or inclusion in an appropriate unit will not be litigated or resolved prior to an election, allowing the election to be held earlier. The NLRB Regional Directors will specify the election details (dates, times and locations of the election, etc.), in the decision and direction of election rather than conveying them in a later-issued notice of election. Finally and perhaps most importantly, the Regional Directors must schedule elections for "the earliest date practicable" after issuance of the decision following the representation hearing. Management calls the rule the "ambush" election rule because employers have only a couple of weeks or less to campaign and educate voters on election issues.

NLRB EXPANDS "CONCERTED" PROTECTIONS FOR INDIVIDUAL JOB ACTIONS

Section 7 of the National Labor Relations Act (NLRA) establishes the federally-protected right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." To be protected under Section 7 of the Act, employee conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection."

For many years, the NLRB struggled with the concept of how far these definitions go. In an important 1984 ruling in *Meyers Industries*, the Board held that an employee's activity is concerted when it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." 268 NLRB at 497. In its second *Meyers* ruling in 1986, the Board clarified that concerted activity under Section 7 "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." 281 NLRB at 887.

During the Trump Administration, in *Alstate Maintenance*, 67 NLRB No. 68 (2019), the NLRB attempted to bring clarification to the concerted activity concept by adopting a checklist of factors the determination. In its August 2023 ruling in *Miller Plastic Products, Inc.*, 372 NLRB No. 134, the current Board reverses *Alstate Maintenance* and determines that its criteria effectively imposed "a minimum threshold for a concerted activity in place of the fact-sensitive approach required under *Meyers*." The current ruling finds that the *Alstate* ruling risks leaving certain concerted activities unprotected, such as "spontaneous, informal" protests, and questions, which are "frequently an indirect way of criticizing and drawing others to oppose a new policy," according to the current NLRB majority. For this reason, the current NLRB overrules *Alstate Maintenance* and returns to what it states as a fundamental principle of *Meyers* that "the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence."

The NLRB seems to be saying that it must conduct a thorough review of all the record evidence in order to determine whether an individual employee's conduct has "some linkage to group action." For example, to be considered concerted activity, an individual employee's statement to a supervisor must either bring a truly group complaint regarding a workplace issue to management's attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action. Particularly in a group meeting, the Board might reasonably infer that a protest was intended to induce group action.

In a related development, the NLRB also ruled in August that the concept that employees who take group action in the workplace for "mutual aid or protection" applies to actions supporting non-employees when those actions can benefit the employees who undertake them. *American Confederation for Children*, NLRB No. 28-CA-246878, 8/26/23. In a statement announcing the decision, NLRB Chair McFerran stated: "Standing in solidarity can be a protected act regardless of the employment status of those you stand with - the question is simply whether, in helping others, employees might help themselves and get help in return." This means that employers may not retaliate against employees for signing petitions or taking other group actions to improve working conditions for non-employees, like independent contractors, supervisors, and agricultural workers who are excluded from the Labor Act's definition of "employee."

Editor's Note: These cases are additional examples that the current NLRB is attempting to stretch the Labor Act in every possible way to provide protections to employees and labor organizations.

AN EMPLOYER'S FIDUCIARY RESPONSIBILITIES REQUIRE INVESTIGATION OF HEALTH PLAN CLAIM EXPENSES

An employer with a large number of employees usually offers health care coverage to its employees using what is called "self-insurance". When an employer self-insures the cost of health care coverage for its employees, the employer usually engages a third party administrator (like Aetna or United Healthcare) to negotiate acceptable fees with health providers, to manage the claims process, and to pay claims and, in exchange, the third party administrator is paid for its services. Even though the employer relies on the third party administrator to handle these matters, the employer has a fiduciary responsibility to ensure that the health care costs are reasonable not only for the employer but also for its employees who may bear premium, co-pay, deductible and other costs.

An employer is now expected to ensure that claims paid and fees charged are reasonable. The Consolidated Appropriations Act of 2021 and the transparency in coverage rule issued in 2020 require hospitals and insurers to provide this data to a requesting employer.

Some employers have found that insurers are unwilling to provide the information and that, when the information is made available, the claims and expenses charged to the employer and its employees are not reasonable. For example, Kraft Heinz Co.'s employee benefit plan filed a suit against Aetna in federal court accusing the insurer of mismanaging the employer's health and dental plans by pocketing undisclosed fees and paying millions of dollars in claims that should not have been approved.

Each employer should consider what it should do to ensure that its self-insured health costs are reasonable not only for its own bottom line, but also to avoid breach of fiduciary claims from employees. For example, one plaintiff's law firm appears to be scouting on LinkedIn for plaintiffs against Target, State Farm, and PetSmart.

The bottom line is that an employer has a fiduciary responsibility to protect its employees from excessive health plan costs by investigating the reasonableness of the amounts that are paid for health claims and fees.

NLRB TIGHTENS INDEPENDENT CONTRACTOR STANDARDS

In the Trump Administration, the NLRB issued a ruling for determining whether a worker is an employee or an independent contractor. In the 2019 ruling in *Super Shuttle*, the Trump-era NLRB indicated that entrepreneurial opportunity for gain or loss should be the "animating principle" of the independent contractor test. In a decision issued on June 13, 2023, the NLRB overruled *Super Shuttle* and returned to an earlier standard that its independent contractor analysis will be guided by a list of common-law factors. The Board further explained that entrepreneurial opportunity would be taken into account, along with the traditional common-law factors, as to whether the evidence tends to show that a supposed independent contractor is, in fact, rendering services as part of an independent business. *Atlanta Opera, Inc.*, No. 10-RC-276292. The Board found in *Atlanta Opera* that the makeup artists, wig artists and hair stylists who work at the Atlanta Opera - who filed an election petition with the NLRB seeking union representation - are not independent contractors, excluded from the Act, but are rather covered employees.

The traditional common-law standard comes from a legal guide known as Restatement (Second) of Agency, and considers whether a worker is an independent contractor using a non-exhaustive list of nine factors, including the employer's control over the worker, the worker's skill, and whether their work is part of the employer's regular business.

Editor's Note: Although the current *Atlanta Opera* ruling is important, it does not dramatically change the common-law standard that has generally been followed over the years. The ruling will bring about, however, more legal disputes over employment classification. The case will be likely appealed to the federal courts of appeals, and the controversy will continue going forward. Much of the history of litigation in this area is with delivery drivers like those of Federal Express and Uber.

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