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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

W&L

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NLRB TO SEEK RESCISSION OF PAST DISCIPLINE IMPOSED UNDER OVERBROAD EMPLOYER WORK RULES

In a memo issued during April, NLRB General Counsel Jennifer Abruzzo announced that when the NLRB seeks to rescind overbroad and thus illegal employer work rules, the NLRB will also address the effects of their enforcement, wiping away past discipline imposed under the policies. She stated that otherwise, "As a result, the chill caused by an employer's maintenance of an unlawful provision is left unremedied because of lingering effects of its enforcement being in place." Abruzzo has been relentless in increasing the enforcement power of the NLRB toward employers. She contends that an employer rule is overbroad and thus illegal, even if it does not directly limit employer union and concerted activities, as the rule only has to "chill" such protected activities because of the rule's ambiguity. The doctrine applies to employers that are union and non-union.

Editor's Note - The NLRB seems to be constantly increasing its enforcement actions over employer work rules. Even standard work rules such as "walking off the job," "confidentiality," or "harassment" if not carefully worded, may be attacked by the NLRB if such rules are viewed as overbroad and thus illegal, and the NLRB will seek to rescind prior enforcement actions under those rules. In addition, such overbroad rules can be used as a basis to issue a "card check" remedy under the NLRB's new doctrine in the *Cemex* decision. Employers should have experienced labor counsel review their rules and policies to avoid these repercussions.

DO DRIVE CAM CAMERAS INSIDE TRUCKS VIOLATE EMPLOYEE RIGHTS?

As a safety measure, many employers with driver employees have installed cameras inside the cab to alert drivers and monitor their safe driving practices, and potentially furnish defenses to the driver and the employer should accidents occur. Some unions and activist groups have attacked such practices as violating employee rights, such as privacy concepts. A recent NLRB case resulted in a federal appeals court ruling addressing a claim that the company created the impression of illegal surveillance of pro-union activities when a worker was instructed to uncover his truck's camera during lunch. The federal appeals court found that the drivers knew that they could be monitored at any time, so they would have "every reason to expect to be watched while on the job" without assuming it is an attempt to weed out or suppress union activities. *Stern Produce Co. v. NLRB*, No. 23-1100 (D.C. Cir. 3/26/24). The NLRB had found to the contrary, a finding reversed by the court ruling, by suggesting that a communication to a pro-union employee referencing a generally applicable policy of employee monitoring "is an

unfair labor practice." The court said this ruling showed "just how far" the Labor Board "strayed from its statutory mandate."

AMAZON CONSIDERS RISK WHEN INVESTIGATING EMPLOYEE MISCONDUCT

In a legal conference in March, Amazon Corporate Counsel Lee Langston stated that aggressive enforcement actions of the NLRB have impacted its internal investigations, as such investigations "could theoretically touch on protected concerted activity." Langston, who heads up internal investigations for the company's one million North American employees, says that broad NLRB rulings discourage Amazon from conducting internal investigations in some situations. Problems are also created by the fact that government entities often encourage or require corporate investigations, while other laws discourage employer investigations due to privacy and protected activity considerations. If companies respond by prohibiting employees from discussing work on their own personal devices, they may run into conflict with NLRB rules on discouraging union and other protected concerted activities. Langston concludes that Amazon "struggles with" these issues. The NLRB policies sometimes even conflict with policies of other federal agencies, such as the Equal Employment Opportunity Commission (EEOC), regarding rules promoting the privacy or confidentiality of harassment investigations.

LATEST NLRB ATTACK GOES BEYOND NON-COMPETE AGREEMENTS TO REACH OUTSIDE EMPLOYMENT

An interesting article concludes that the NLRB is invalidating employer rules "one clause at a time." On January 31, 2024, the NLRB's Division of Advice said that restricting employees from holding outside or secondary employment violates the Labor Act. This position follows a May 2023 memo that said that non-compete agreements are unlawful because they adversely affect an employee's ability to change jobs. The memo would even preclude an employer from requiring employees to sign training repayment agreements that demand repayment of training costs if they left employment before a certain date.

The concept behind these positions is that employees should be able to improve their working conditions by seeking other employment opportunities, whether during their current employment or not. Further, the NLRB argues that such employment rules prohibit "salting," the practice of union agents acquiring jobs in particular workplaces for the purpose of unionizing that employer. The memo did not even provide any suggestions as to exceptions to the rule on outside employment, such as when the second job conflicts with the employer's business. The memo does offer guidance as to how employers can properly draft their confidentiality and proprietary information policies, such as by listing things that are clearly proprietary, making no reference to employee information, wage information, or anything related to working conditions.

Editor's Note - Many will ask whether these concepts, which many believe are ridiculous, are currently the "law of the land." The answer is that they are not, but they are nevertheless the enforcement position of the NLRB. These enforcement rules must be approved by the NLRB Board itself, currently operating with three former union attorneys. Employers that resist NLRB rulings still have the right to have their cases reviewed in a federal appeals court. Courts sometimes reject the NLRB's policies, as evidenced by the *Stern Produce Co.* case discussed in this newsletter.

Nevertheless, wise employers will have their policies reviewed by experienced labor counsel to address blatant situations and lower the risk. Sometimes disclaimers can be added to a work rule to improve its enforcement potential, by indicating that such rules or policies shall not be interpreted or applied to activities protected by Section 7 of the National Labor Relations Act. Such disclaimers may work in certain situations, but are unlikely to be universally upheld and special drafting considerations are necessary.

NLRB BOARD ADDRESSES BLM INSIGNIA AT WORK

In a February 21, 2024 ruling, the NLRB reversed an administrative law judge's conclusion that writing "Black Lives Matter" (BLM) on aprons was not protected, concerted activity, because it did not relate directly to the terms and conditions of employment or implicate concerted or group action among employees. *Home Depot USA, Inc.* Case 18-CA-273796 (2/21/24). It had previously been thought that political activity or social activism was outside the scope of the Labor Act, because it concerns matters outside the workplace rather than conditions of employment. In this case, however, the Board noted that the employee's use of the BLM insignia was a "logical outgrowth" of concerted activity related to allegations of racism at the employer's store that occurred close in time to the BLM incident. However, the Board made no ruling whether BLM insignia could be banned in other circumstances.

Editor's Note - According to this ruling, it is going to be difficult for an employer to determine whether it can ban BLM insignia and the like in the workplace. One wonders why an employer would want to ban such badges, but if employees want to wear badges saying "White Lives Matter," or "Blue Lives Matter," disputes may arise and consider the ramifications of allowing political speech in the workplace. In a case currently litigated in federal court, a white manager tore down a BLM poster, and hand wrote in its place something to the effect that "According to the Lord Jesus Christ, all lives matter." He sued his employer for imposing an adverse action based on what he did.

Recently, arguments have arisen over an employer's negative treatment of an employee based upon the employee's opinions and actions on Israel and Palestine. In May 2022, in a federal court ruling, a federal district court held that "disagreements on a contentious geopolitical conflict" "do not in of themselves" form the basis of a discrimination claim. *Newman v. Point Park Univ.*, No. 2:20-cv-00204 (W.D. Pa. Mar. 31, 2022).

WALK-AROUND RULE ALLOWING UNION REPS TO ACCOMPANY SAFETY INSPECTORS TO GO INTO EFFECT

The U.S. Occupational Safety and Health Administration (OSHA) released its "Walk-Around Rule" in April, to take effect on May 31, 2024. The final Rule states that "workers may authorize another employee to serve as a representative or select a non-employee." The Rule says that the non-employee must be "reasonably necessary" to conduct an effective and thorough inspection in order to join an OSHA inspector. Such an employee representative could qualify "based upon skills, knowledge or experience," according to OSHA. In OSHA's separate Guidance Policy, the Guidance says there are no set requirements on how workers would determine their inspection representative, and final approval to participate rests with the particular OSHA inspector. The Guidance also allows union-affiliated representatives to wear clothing with union names and logos. Supposedly, an employee representative who discusses matters unrelated to the inspection may be barred from accompanying the inspector.

Various strategies have been suggested as to dealing with the issue of these third-party representatives. One idea is to ask the inspector what skills the person brings to the inspection, and why they are necessary for the inspection. Since federal rules prohibit OSHA from notifying employers in advance of inspections, except in a few specific situations, it seems the same restriction should apply to workers and their "representatives," so the outside worker representative should not know of the inspection in advance, and is thus unlikely to be present. The rule seems to limit the third-party representative's participation to the walk-around portion of the inspection, and not other aspects like document reviews. Wimberly Lawson partner Larry Stine suggests that employers who want have the right to use an aggressive approach since the employer has Fourth Amendment rights during OSHA inspections. If OSHA allows an unwanted guest on site, the employer could consent to the entry as to OSHA and deny entry to the unwanted guest. If the unwanted guest insists on a right to stay under the rule and will not leave, they could be given a criminal trespass warning. In doing this, it leaves OSHA with the choice to go to court to get warrants solely for the unwanted guest or to proceed on a consent inspection without the unwanted guest.

CONGRESS REJECTS JOINT EMPLOYER RULE, BUT VETO EXPECTED

Opposition to the new National Labor Relations Board (NLRB) Joint Employer Rule, which went into effect in March, continues to mount. In April, the U.S. Senate joined the House and, in a 50-48 vote, rejected the Joint Employer Rule under the Congressional Review Act. Sen. Joe Manchin (D - W. Va.) and independent Sens. Kyrsten Sinema (Ariz.) and Angus King (Maine) joined Republicans in rejecting the NLRB rule. Eight Democrats in the House joined Republicans in rejecting the measure also. However, President Biden is expected to veto the bill, and there won't be sufficient votes in both chambers to have a two-thirds majority to overturn the veto. A federal judge struck down the regulation in March, but the decision may not be applicable outside of the Eastern District of Texas. The Rule would make it more likely for one entity to be held liable for labor practices of another entity with whom it has some relationship affecting the working conditions of the second entity's employees.

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