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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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NLRB JOINT EMPLOYMENT RULE INVALIDATED BY TEXAS FEDERAL COURT

Congress passed a law in both Houses under the Congressional Review Act to reject the new National Labor Relations Board (NLRB) Joint Employer Rule, but President Biden vetoed that bill. However, on March 8, 2024, just days before the effective date of the new rule, a district court in Texas found the rule to be arbitrary and capricious, and thus invalid. The court went so far as to say that: "it would treat virtually every entity that contracts for labor as a joint employer," and would "likely promote labor strife rather than peace." It said such a rule would also exceed the common law definition of a joint employer. On May 7, 2024, the NLRB filed a notice to appeal the district court's decision to the Court of Appeals for the Fifth Circuit. Chamber of Commerce of United States v. NLRB, 2024 U.S. Dist. LEXIS 43016 (E.D. Tex. Mar. 8, 2024), appeal filed NLRB v. Chamber of Commerce of United States, No. 24-40331 (5th Cir. May 8, 2024). The District Court declared the rule invalid and vacated the rule, which means that the prior version of the joint employer rule adopted during the Trump administration remains in effect.

In related developments, Google has become involved in the joint employer debate when a union won an election among the workers jointly employed by Google and Accenture. Google previously lost a challenge to the joint employer finding requiring it to bargain with the union of YouTube workers hired through the staffing agency Cognizant Technology Solutions. NLRB prosecutors are pursuing a case alleging that the University of Southern California jointly employs USC football players along with the NCAA and the PAC-12 Conference. The NLRB claim is that the three entities violated the federal labor law by failing to treat the college football players as employees.

It should be noted that in the case of job temps, often unions do not attempt to bring them in to the collective bargaining unit because such issues can delay the NLRB voting process under the "quickie" election rule. Unions do not like temp workers, and commonly seek their ouster, giving employers a reason to seek support among temp agency employees should they be deemed a part of a voting unit.

CONFUSION OVER EMPLOYMENT AND CAMPUS GAZA PROTESTS

While the death of George Floyd ignited one round of protest, the Gaza situation has created another such round of protest. As a general rule, it is often said that "political" protests by employees do not implicate the discrimination

laws, but the situation is far from clear. For example, a current case is pending appeal before the Fifth Circuit Court of Appeals as to whether an employee could be fired for opposing a union's attendance at the 2017 Women's March on Washington, an event sponsored by Planned Parenthood dealing with abortion-related issues. The issue is whether this employee's protest is protected under Title VII as related to religious freedom or crossed the line into abusive harassment. *Carter v. Southwest Airlines*, No. 23-10536, Oral Argument 6/3/24. This newsletter has addressed numerous cases raising the issue of whether wearing Black Lives Matter (BLM) masks or insignia are protected conduct under the discrimination rules of Title VII, or the protected conduct rules of the Labor Act. More recently, applicants or employees have been denied employment over such activities regarding Hamas issues in Gaza. Unfortunately for employers, the answer to these issues is not clear.

Nationally known employers have defended their recisions of job offers to protesters on the basis of defending core values, stating that some of the rhetoric veers into being anti-Semitic and anti-American. Some civil rights lawyers are arguing that the heightened scrutiny amounts to discrimination. It should be noted that some states and localities have laws protecting employees from discrimination based on political activity, and/or lawful activities outside the workplace. A few judges have gotten into the act in an unusual way, sending a letter to the President of Columbia University stating that they had "lost confidence in Columbia as an institution of higher education," and would not hire law clerks from the University until it expels students and fire faculty who "participated in campus disruptions," and hire faculty with a more diverse array of views.

While it is difficult if not impossible to come up with a simple formula to explain what employers can and cannot do regarding these issues, a few general principles will be mentioned. First, competent experienced employment law counsel is needed to assess the fine lines involving these difficult issues. Second, the specific reason for the adverse employment action is critical, as often parts of a "protest" are quite legitimate while other parts cross the line, and specificity is needed to base the action only upon the "unprotected" portion of the protest. The most recent EEOC Harassment Guideline suggests to look at the potential harassment from the perspective of the person experiencing it, such as a Jewish person, if there is a genocidal quality to a protest, but it is very difficult to determine where an employer can draw the line.

PENDULUM SHIFTING AS TO WHETHER EMPLOYERS SHOULD TAKE POSITION ON POLITICAL/SOCIAL ISSUES

Some polls suggest that many employees desire their employers to take public positions on political/social issues. As a result, employers in recent years have increasingly taken such positions. However, employees, customers, shareholders and the public often take different views on such issues.

Consider the recent lesson of Harvard University, which is very familiar with the history of student, faculty, and alumni controversies over political/social issues. This past April, an "Institutional Voice Working Group" was established to consider whether and when Harvard should issue official statements on publicly salient issues. The report concludes that: "[t]he university and its leaders should not . . . issue official statements about public matters that do not directly affect the university's core function" as an academic institution. It reasons that when the University "speaks officially on matters outside its institutional area of expertise," such statements risk compromising the "integrity and credibility" of our academic mission and may undermine open inquiry and academic freedom by making "it more difficult for some members of the community to express their views when they differ from the university's official position."

This writer submits there have been certain trend lines, and while a few years ago the trend was for employees to speak out on social issues, but the trend today is probably to do the opposite. In any event, if an employer is to truly be inclusive, the philosophy of inclusiveness should consider the viewpoints of the members of the employer community, including those who might be opposed to whatever position the employer might take on a certain political/social issue.

EEOC SUES EMPLOYERS FOR FAILING TO FILE EEO-1 REPORTS

In a new "first," the EEOC has sued more than a dozen employers for not filing required reports that include the racial and sexual makeup of their workforce. So far, the EEOC has brought at least 15 lawsuits in a number of federal courts alleging that the defendant employers failed to file the mandatory EEO-1 reports in 2021 and 2022. Private sector employers with 100 or more employees must annually file such reports. Previously, there was no or minimal liability for failing to file such reports.

A similar development has occurred in recent years in which employers with federal contracts failed to prepare written affirmative action plans, required by applicable federal contractor regulations. All federal contractors must certify they have prepared written affirmative action plans annually or otherwise their failing to so certify increases the likelihood of a federal audit.

The EEO-1 Component 1 data correction date for 2023 is currently underway with a deadline of June 4, 2024. If an employer misses the reporting deadline, the EEOC will issue a "notice of failure to file," which will instruct the employer to submit their data no later than July 9, 2024. After the second deadline passes, the EEOC will no longer accept data from the 2023 reporting period. The EEO-1 form must be submitted annually by: (1) private sector employers with more than 100 employees; and (2) government contractors and first-tier subcontractors with more than 50 employees and more than $50,000.00 in federal contracts or subcontracts.

UAW UNION LOSES MOMENTUM BY LOSING SECRET BALLOT ELECTION AT MERCEDES ALABAMA PLANTS

The United Auto Workers (UAW) was once arguably the most powerful union in the U.S. Each of the "Big Three" U.S. car manufacturers were UAW. Subsequent developments changed that picture. First, unionized auto manufacturers began subcontracting more of their operations to non-union facilities. Second, foreign auto manufacturers began to build plants in the U.S., particularly in the South. The UAW has been unsuccessful in organizing the workers at any foreign auto manufacturer in the U.S., until winning its first such election at Volkswagen in Chattanooga, Tennessee, in April of this year. It took the UAW three elections in over 10 years to organize that plant, even though Volkswagen remained "neutral" as to the union issues. Foreign auto manufacturers, particularly those in Europe, are generally unions, and auto makers there have been allegedly pushed into a policy of "neutrality" in union organizing campaigns.

In the last 12 months, unions won elections and/or contracts at the Blue Bird school bus plant in Georgia, and the New Flyer electric bus plant in Alabama. At the same time, the UAW has attempted to expand its organizing success

at Volkswagen by petitioning for NLRB elections at the Mercedes Benz plants in Vance and Woodstock, Alabama. Unlike the situation at Volkswagen in Chattanooga, the Mercedes Benz plants in Alabama conducted one-on-one and group meetings regarding union-free status, and also texted workers a video in which a local pastor and city council members suggested workers should preserve their ability "to go directly to the company" for grievances. Alabama Governor Kay Ivey called the UAW campaign a threat to "the Alabama model of economic success."

Apparently, the strategy worked as employees voted 2,642 to 2,045 against unionization at the two Alabama plants. As usual, the union announced that the company had engaged in "union busting" and that the election was thus not fair. This is a standard operating procedure of unions that lose elections. The union intends to continue its efforts. The UAW has committed $40 million to support organizing efforts of non-union auto and battery plants, especially in the South. The UAW has filed objections to the election in Alabama and continues its organizing activities there as well as elsewhere.

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