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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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FEDERAL COURTS HAVE NOW BLOCKED NLRB PROCEEDINGS AS UNCONSTITUTIONAL

In a case in Texas brought by SpaceX, a federal judge on July 10, 2024, explained his order blocking a case against SpaceX from proceeding before the NLRB. He reasoned that the NLRB members and administrative law judges are unconstitutionally shielded from Presidential removal, relying on precedent from the Fifth Circuit and the U.S. Supreme Court. *Space Exploration Technologies Corp. v. NLRB*, 6:24-cv-00203 (W.D. Tex. 2024). In another case, also in Texas, SpaceX failed to get an injunction granted before the date of the NLRB hearing, and the denial of that injunction was reversed and the administrative case was blocked pending the company's challenge to a lower court's "effective denial" of its request for an injunction. A coalition of business groups supported SpaceX in the Fifth Circuit, including the U.S. Chamber of Commerce and Associated Builders and Contractors. This coalition, called the Coalition for a Democratic Workplace, is also arguing a different issue, that being the Agency unconstitutionally denies jury trial rights. The Supreme Court has recently affirmed on other grounds a ruling that the U.S. Securities and Exchange Commission's in-house court system is unconstitutional because of the protections from removal by the President. The case before the Fifth Circuit is *Space Exploration Technologies Corp. v. NLRB*, Case No. 474-40315(5/2/24). The Fifth Circuit in *Jarkesy* also held that the SEC proceedings violated the Seventh Amendment right to a jury trial. A second federal district court judge on July 29, 2024, issued a similar ruling blocking ongoing NLRB proceedings pending a final ruling on the Constitutionality of the Labor Act. *Energy Transfer, LP v. NLRB*, No. 3:24-cv-198 (S.D. Tex. 2024). Companies making similar Constitutional claims in defending litigation include Starbucks, Amazon, and Trader -Joe's. It is also significant that the Ninth Circuit Court of Appeals on July 29 ordered the NLRB and the union, along with the company, to explain what, if any, impact the Supreme Court June ruling in *SEC v. Jarkesy* , No. 22-839, 603 U.S. _____ (2024) has on the NLRB's remedy in the case calling on *Macy's* to pay for the foreseeable economic consequences of its unfair labor practices. The Justices focused in the *Jarkesy* decision on the Seventh Amendment issue, finding that defendants have a Constitutional right to make their case to a federal jury when the Security & Exchange Commission is seeking financial penalties. *Macy's v. NLRB*, No. 23-124 (9th Cir., order for supplemental briefing 7/29/24.)

Editor's Note: The Constitutional challenges to the Labor Act are beginning to find some support in the case law, and so employers defending Labor Board charges would be wise to assert in their answers to any complaints, the Constitutional defenses. If employers ultimately establish the unconstitutionality of the Labor Act, and the defenses are raised in ongoing proceedings, employers could take advantage of any favorable rulings that resolve the issue of the Constitutionality of the Labor Act.

LABOR BOARD GIVING UP ON NEW JOINT EMPLOYER RULE

The National Labor Relations Board (NLRB or Board) decided to withdraw its appeal in a court decision vacating the 2023 Biden joint-employer standard final rule. *NLRB v. U.S. Chamber of Commerce*, 5th Cir., Motion of Voluntary Dismissal filed 7/19/24. The Board in its motion said it believes the rule is lawful but wants "to consider options for addressing the outstanding joint employer matters before it."

Thus, the joint-employer rule from 2020 issued by the Trump Administration will remain in effect. Under that rule, the NLRB requires joint-employers: (1) actually exercise control; (2) that such control be "direct and immediate;" and (3) such control will not be "limited and routine." The NLRB had sought to overturn that 2020 rule and return to a different definition of the joint-employer when two or more entities "share or co-determine" one or more of an employee's essential terms and conditions of employment.

MOST EMPLOYERS CONTINUE NON-COMPETES DESPITE CURRENT LEGAL ATTACKS

The Federal Trade Commission (FTC) rule scheduled to go into effect on September 4, 2024, banning the most common forms of non-compete agreements, was invalidated by a federal district court ruling on August 21, 2024. *Ryan, LLC v. Federal Trade Commission*, No. 24-cv-00986, U.S. District Court for the Northern District of Texas. The ruling blocks the FTC non-compete rule from taking effect on September 4, 2024, but the FTC has indicated it still might bring specific cases without having a rule. At the same time, the National Labor Relations Board (NLRB) General Counsel and one administrative law judge find common non-compete provisions to be overbroad, and thus unenforceable, by limiting protected concerted and union-related activities. The NLRB in Washington, however, has not yet ruled on the issue.

Editor's Note: Most employers are awaiting definitive opinions and guidance as non-competes may ultimately still be enforceable, and employers know if they send revocation notices on the non-competes, it will be hard to get them back.

DEI CONCEPTS BECOMING EVEN MORE CONTROVERSIAL

Many employers and other institutions are scaling back or modifying their DEI programs, a current example being the Society for Human Resources Management. It is now adopting the term "I&D" or Inclusion and Diversity, and removing the "E" from its previous "IE&D" terminology. In making the change, it announced that it wanted to emphasize inclusion first, addressing the current shortcoming of DE&I programs, which it says has led to societal backlash and increasing polarization. The American Bar Association (ABA) is also proposing to change its Diversity, Equity and Inclusion Standards for law schools, suggesting the striking of language that instructs schools to provide opportunities "for members of under-represented groups, particularly racial and ethnic minorities." Instead, the ABA suggests broader language to encourage access for "all persons, including those disadvantaged on the basis of race, . . . and socioeconomic background." Another ABA option states that schools should take steps to provide access to " all persons, including those with identities that historically have been disadvantaged or excluded from the legal profession." Many other institutions have revised their diversity initiatives, as companies like BestBuy and Johnson & Johnson are removing or downplaying DEI from corporate filings. Microsoft has reportedly disbanded its DEI team. John Deere announced that it will modify its DEI policies in favor of an equality-

based workplace. Elon Musk has announced a new concept known as "MEI," short for merit, excellence and intelligence. The idea is not to pick winners and losers based on the right or wrong race, gender, and so on. Those more supportive of DEI policies say plans to diversify companies are sometimes articulated poorly or carried out in ways that appear to go beyond leveling the playing field, such as when businesses pledge to hire more people of one race. It is generally considered that targets amounting to quotas may inappropriately disqualify other applicants based on race or gender. It is important to remember, however, it not the DEI programs per se that causes the problems, it is inappropriate implementation of them. The problem has particularly been exacerbated in circumstances where a manager explains to a rejected White male candidate that he was not selected because of a DEI initiative. This statement is not only inflammatory, but likely illegal.

LAWFULNESS OF EMPLOYEE-ACCESS RULES FOR OFF-DUTY EMPLOYEES

A common problem or issue with surprising legal complications is the extent to which an employer can keep off-duty employees from returning to the premises. The issue has gotten more complicated due to the current NLRB's policy that if an employer rule is overbroad and thus unenforceable, any discipline administered under that rule may also be deemed illegal. While application of these rules normally comes up in situations involving a type of union activity, some concepts could apply to activities not involving union activity.

The NLRB evaluates employer access rules for off-duty employees in a case precedent that will find an access rule valid only if it: "(1) limits the access solely with respect to the interior of the plant and other working areas; (2) it is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity." *Tri-County Medical Center*, 222 NLRB at 1089. Thus, "[E]xcept where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside non-working areas will be found invalid." In theory, however, it might be possible to have such a rule with variations as to whether the activity involved is union or other concerted protected activities under the Labor Act.

The NLRB recently addressed this concept case involving Amazon, where the rule read: "During off-duty periods (that is, on their days off and before or after their shifts), employees are not permitted inside the building or in working areas outside the building." Further, the rule also had a provision that got Amazon in trouble, as follows: "[t]his policy may change time to time, with or without advance notice and Amazon reserves the right to depart from the policy when deemed appropriate."

The NLRB ruling stated that the "reserv[ation of] the right to depart" from the off-duty access rule "when deemed appropriate" was unlawful because it granted the employer discretion to decide when and why off-duty employees may access its facilities. The court cited a case in which the employer's policy prohibiting employees from remaining on its premises after their shift "unless previously authorized" by their supervisor, was similarly found unlawful.

Editor's Note: This case is another example as to how strictly the NLRB regulates employer work rules, particularly during the current administration. Even if the rule had been written lawfully in the eyes of the

NLRB, the employer can still run into trouble should it discriminate against union activities or other concerted activities even under the lawfully written rule. These concepts are important to remember as many employers routinely allow off-duty employees to return to the plant interiors, creating discrimination issues should the employer attempt to later apply the rule to union or other concerted activities.

EMPLOYER SAVES $365 MILLION BY ADDING ONE SENTENCE TO JOB APPLICATION

Employers are known to have tendencies to seek "quick fixes" to employment-related issues. For example, almost every employer has "at-will" statements in its employment policies (except as limited by the terms of any applicable union contract). However, employers often overlook other useful measures that can save money.

In a recent decision, a federal appeals court enforced an employer's language in its employment policies shortening the statute of limitations period on a claim under 42 U.S.C. § 1981, to six months, similar to the period for filing a discrimination charge with the Equal Employment Opportunity Commission (EEOC). *U.S. v. FedEx Corporate Services*, 92 F. 4th 286 (5th Cir. 2024). A jury had awarded the plaintiff $120,000.00 for past pain and suffering, and $104 million for future pain and suffering, and an additional $365 million in punitive damages. These type of claims and damage awards can be made under Section 1981. Further, Section 1981 claims are generally subject to longer state statutes of limitations, some four years, six years, or potentially even longer.

On the other hand, Title VII claims for discrimination are subject to a statutory cap of $300,000.00 for compensatory and punitive damages. In contrast, Section 1981 has no limits on potential monetary exposure for employers with discrimination claims.

Because of the limitation in the employment agreement with the plaintiff in the *FedEx* case, the Third Circuit reversed the district court's denial of the motion to dismiss the Section 1981 claims, recognizing that courts allow contractual agreements to limit the time period for bringing an action, just as long as the limitation is reasonable. The court found that the six-month period in the agreement was reasonable, and plaintiff's award could not exceed $300,000.00, thus allowing the employer to avoid over $365 million in damages.

Similar issues arise as to whether an employer can shorten the statute of limitations as to various state law claims, either breach of contract or tort claims. The courts have enforced an employer's right to contractually limit to a six-month limitations period the filing such state law claims, so such claims should be included in the waiver. It is much less likely, however, that a court would enforce a six-month limitation period for filing Title VII discrimination claims, wage-hour claims, and Family Medical Leave Act (FMLA) claims. However, results in cases may vary from state to state, due to fact-specific and other considerations. Consideration might be given to include a choice-of-law clause in the waiver determining which state's law would be applicable. Consideration should also be given to highlighting the waiver as some states may consider to be a prerequisite to contractual shorter limitations period.

If an employer chooses to have current employees execute such a waiver, some type of consideration may be required in many states in exchange for the employee's waiver.

In addition to shortening the statute of limitations, another type waiver that can be considered by employers in a job application or some other employment document, is the waiver of a jury trial. Such a waiver is enforceable in most

courts, and again is more likely to be upheld if it is considered a knowing waiver, and employees are generally bound by the documents they sign. Employers sometimes complain of a "runaway jury," in which a jury becomes angry and imposes a punitive award on an employer. Judges are generally considered less susceptible to such "nuclear verdicts."

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