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EMPLOYMENT LAW BULLETIN

A Monthly Report On Employment Law Issues

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ISSUE OF EMPLOYEES PARTICIPATING IN DEMONSTRATIONS AND PROTESTS

The January 6, 2021 protest in Washington, D.C. raises questions about participation of employees in protests that may turn into riots. Unlike governmental employers, private businesses have no "free speech" obligations to their employees participating in such protests. However, other legal issues can arise as to subsequent actions against those protesting.

First, some states and localities have laws that provide protection for lawful off-duty conduct. In some cases employees may have protections against terminations or discipline not for "just cause" such as those covered by a collective bargaining agreement. Some employers would discipline or terminate protestors who engage in criminal conduct or display hate symbols. A hate symbol might include carrying a noose, for example. But the situation gets much more cloudy if the protestor merely marches next to someone carrying a noose.

Sometimes the protests are not off the job, but on the job. A particular application of this concept may occur when someone wears a face mask or other attire bearing Black Lives Matter or some similar messaging. A recent federal district court ruling addresses policies of Amazon and Whole Foods Market that prohibit workers from wearing face masks or other attire bearing Black Lives Matter messaging. *Firth v. Whole Foods Mkt., Inc.*, D. Mass., No. 1:20-cv-11358, 2/5/21. The decision dismissed race discrimination allegations of 28 lead plaintiffs in a proposed class action under Title VII, because being disciplined for wearing such clothing does not describe a violation of job discrimination law because Title VII "does not protect free speech in a private workplace." Further, the plaintiffs did not allege that either Amazon or Whole Foods would have treated their BLM-mask wearing more favorably if they had been of a different race. In contrast, in a case involving a public employer, a federal court in Pennsylvania ruled that a ban on employees wearing COVID-19 face masks with political messages, including support for the Black Lives Matter movement, are likely unconstitutional. *Transit Union Local 85 v. Port Auth. Of Allegheny Cty.*, W.D. Pa., No. 2:20-cv-01471, 1/19/21. The public employer port authority prohibited its employees from wearing uniform adornments like buttons and stickers with "political or social-type protest" messages. The fact pattern revealed that when several employees started wearing the "Black Lives Matter" slogan, an employee complained, asking management how it would feel if he wore a "White Lives Matter" mask in response. The Port Authority said it feared allowing employees to wear BLM masks would cause disruption, likely from employees wearing "competing" masks.

OSHA ISSUES NEW AND STRONGER VIRUS GUIDANCE

The Occupational Safety and Health Administration (OSHA) announced on January 29, 2021 new and stronger workplace guidance on the Coronavirus. Implementing a Coronavirus Prevention Program, according to OSHA, is the most effective way to reduce the spread of the virus. The guidance recommends several essential elements in a prevention program:

Conduct a hazard assessment;
Identify control measures to limit the spread of the virus;
Adopt policies for employee absences that do not punish workers as a way to encourage potentially infected workers to remain home;
Ensure that Coronavirus policies and procedures are communicated to both English and non-English-speaking workers; and
Implement protections from retaliation for workers who raise Coronavirus-related concerns.

The guidance is not a standard regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of existing mandatory safety and health standards. The recommendations are advisory in nature.

REPUBLICANS USING SAME TYPE OF LEGAL CHALLENGES OF BIDEN POLICIES DEMOCRATS USED AGAINST TRUMP

Republicans have taken a playbook that the Democrats used against Trump in going to federal court to seek nationwide injunctions against policy changes. In late January 2021, a federal judge in Texas blocked the Biden Administration's 100-day pause on deportations. Judge Tipton of the Southern District of Texas granted a temporary restraining order after the Texas Attorney General sued the new Administration to ensure deportations would continue to be carried out. The judge ruled that the Administration's January 20 memorandum to unilaterally stop deporting immigrants already with final orders of removal likely violated federal law. Further, he said the Biden Administration's move likely violated the Administrative Procedures Act that requires federal agencies to act reasonably in adopting new policies.

NEW ADMINISTRATION BEGINS PRO-UNION AGENDA BY CONTROVERSIAL FIRING OF THE NLRB GENERAL COUNSEL

On the same day of President Biden's swearing-in, the new White House delivered to National Labor Relations Board (NLRB) General Counsel Peter Robb an ultimatum to resign by 5:00 p.m. or be fired. No President in U.S. history had taken such a bold move as the NLRB General Counsel position is a four-year appointment at an independent federal agency. The White House provided no cause for the action.

This move may be the most controversial one ever made by any administration regarding the NLRB. It is not only unprecedented, but many believe it is illegal. Even President Trump never fired President Obama's NLRB General Counsel who served nine months of the end of his term in 2017.

Mr. Biden campaigned that he would become the most pro-union President in history, and the Robb firing proves that to be true. The NLRB General Counsel position is extremely powerful in that it unilaterally determines which cases are to be brought before the NLRB and what policies to argue. The five-member NLRB itself currently has three Republicans and one Democrat, but Mr. Biden will quickly fill the vacant position with another Democrat and in August of this year the term of Republican Member William Emanuel expires, and the Democrats will then control a majority of the five-Member Board also.

There is a danger in taking this unprecedented action, because if the firing is later determined to be illegal, then arguably any complaints issued by the newly-appointed Acting General Counsel may be invalid. In its 2014 ruling in *NLRB v. Noel Canning*, the U.S. Supreme Court unanimously found that the Obama Administration's 2012 appointments of three NLRB Members violated the Constitution's rules for installing officials when the Senate is not in session. The decision invalidated more than 700 reported and unreported decisions issued by the Board.

President Biden appointed Peter Ohr as Acting General Counsel, who famously ruled several years ago that Northwestern University football players could form and organize a union as employees under the Labor Act. As new Acting General Counsel, Ohr immediately directed the Agency to dismiss certain complaints (lawsuits) pending against Embassy Suites

in Seattle and a Unite Here union affiliate, concerning a "neutrality agreement" clause. The complaint considered the neutrality clause an illegal and an unfair labor practice, as illegally forcing unions on employees. Prior General Counsel Robb had sought to address neutrality agreements that go beyond establishing neutrality and cross the line into illegal employer support of unions. According to the position taken by Robb, allowing non-employee union organizers access to employer facilities, informing employees about the presence of organizers, permitting union solicitation during work hours, providing unions with workers' contact information, and making statements indicating a preference for a specific union could be considered unlawful employer support of unions. But Acting General Counsel Ohr, in contrast to Robb, stated there was no violation of current law and therefore he withdrew the complaint, so the case will never be heard. Ohr is trying to get two complaints dropped against unions for deploying large inflatable balloons often presented at labor protests, called "Scabby the Rat," directed toward neutral third parties, contending they are coercive secondary boycotts. Ohr has also quickly moved to rescind many of Robb's guidance memos and has withdrawn a brief filed in a pending case that would make it easier to decertify a union under a collective bargaining agreement. Biden also named Democratic NLRB member Lauren McFerrin to be Chairman of the NLRB, taking over from Republican John Ring, the Republican Chairman since 2018.

Ohr has already rolled back numerous directives issued by ex-General Counsel Robb, which he says he rescinded because they were "inconsistent" with the Labor Act's goal of encouraging collective bargaining and protecting workers' rights. Some of the more important memos rescinded by Ohr include: memo making it easier to prosecute unions for "negligent" behavior that prejudices worker rights; memos that increase the level of detail unions have to include in required financial disclosure filings and those advocating new rules on union collection of member dues and non-member fees; and memos designed to limit Regional Directors' use of subpoenas and other investigatory powers. It should be noted that Ohr did all these things in his first week on the job.

Editor's Note: Unions not only benefit from the more pro-union agenda of the new Labor Board officials, but also because they hope that President Biden will use his "bully pulpit" to voice support for organizing and contract situations in support of organized labor. Indeed, such support from government officials may cause unions to be more aggressive in their demands.

OTHER BIDEN ACTIONS SHOW DRAMATIC CHANGE TOWARDS LABOR ISSUES

The Biden Administration has immediately moved to freeze pending Department of Labor (DOL) regulations that would make it easier to designate workers as independent contractors. This rule was previously stated to take effect March 8, 2021. A new and finalized similar rule from the Equal Employment Opportunity Commission (EEOC) has similarly been frozen. Other important rules that are now frozen and subject to review include the DOL regulation that would allow businesses to pay tipped workers lower minimum wages rather than a standard of $7.25 for hours spent on work that does not generate gratuities, EEOC rules that would give employers more information from the EEOC during the conciliation process, a DOL initiative that encourages employers to self-report wage and hour violations to DOL in return for protection against further legal liability, a DOL rule that would have raised wage rates for specialty occupation visa holders, and a rule which would have prohibited stereotyping and scape-goating in diversity training. The latter type diversity training initiative was deemed to be unnecessary and chilling of legitimate diversity training. DOL has also announced that it will rescind a regulation broadening the defenses that religious federal contractors can use when accused of workplace discrimination.

DEVELOPMENTS FROM WORKING FROM HOME

In February of 2020, only 8% of the U.S. workforce did their job entirely from home. As the pandemic took hold, that number increased to 35% in May, and the general movement to home work resulted in home workers working in less densely populated areas.

The debate continues as to whether home work is good or bad, as some contend that remote employees are not as productive, that corporate cultures will be eroded, and that mental health could even suffer. Further, the debate continues as to how much of the shift to home work will be long-term or permanent.

Whatever develops, compensation practices are developing where home workers may be paid different compensation levels, and in some cases some companies are setting forth different home work compensation levels based on the cost of living in that particular area. Thus, an employee who no longer works in an expensive place but instead works remotely from a lower-cost area might receive a 10-20% reduction in pay. The question remains whether it is fair for people doing the same jobs to be paid different wages depending on where they live. Further issues are how to treat workers who want to come back to the office for only a day or two a week.

A further complication is that where people live may affect taxes. Thus, remote working arrangements where the employee works elsewhere may trigger state payroll tax registration and filing requirements in those areas. Generally, employers are required to register and withhold taxes on wages of employees in the location where they work. Most states tax only income earned proportional to their employment activities within their borders. However, at least six states tax non-residents working at home. There is even a possibility that if enough employees are working in other locations where an employer is not otherwise operating, it may give that jurisdiction a reason to impose corporate income/franchise tax filing obligations.

Additional complications include the fact that certain states and cities have specific wage/hour laws that apply to remote workers in that jurisdiction. Many employers send communications to remote workers to clarify remote working expectations and obligations, including specific guidelines such as duration of the arrangement, productivity and work-hour expectations, record-keeping requirements, etc.

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