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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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DEMOCRATS LAY OUT THEIR AGENDA AT LABOR BOARD

In late July, two well-known union attorneys were confirmed by the Senate as members of the National Labor Relations Board (NLRB), David Prouty and Gwynne Wilcox. Prouty replaces Republican member William Emanuel, whose term expires in late August, and Wilcox will fill a vacant seat, giving the Democrats a 3-2 edge. Wilcox is best known for suing McDonald's on behalf of the Fight for $15 worker advocacy group.

Around the same time, Jennifer Abruzzo, another former union attorney, was confirmed as General Counsel of the NLRB, and wasted no time issuing a document called Mandatory Submissions to Advice Memorandum, which lays out a clear agenda for all field offices of the NLRB addressing unfair labor practice charges. The first section of the memo identifies subject matter areas where she considers Board precedent to have been overruled, and thus wants her office to review. Those areas are as follows:

1. Employer handbook rules - To review handbook rules developed during the Trump Administration and their applicability to confidentiality rules, non-disparagement rules, social media rules, media communication rules, civility rules, respectful and professional manner rules, offensive language rules, and no camera rules.

2. Confidentiality provisions - separation agreements and instructions - To address separation agreements that contain confidentiality and non-disparagement clauses as well as those prohibiting the departing employee from participating in claims brought by any third party against the employer in return for severance monies, and also confidentiality rules or instructions given to employees pertaining to workplace investigations.

3. What constitutes protected concerted activity - To review cases addressing what rises to the level of concerted activity and what constitutes mutual aid or protection, mentioning a case involving a bathroom conversation as not involving working conditions, and cases involving the applicability of the inherently concerted doctrine, such as issues involving employees' health and safety. Other priorities in this area including rules governing employees' rights to use an employer's email system as well as use of other electronic platforms in the workplace, and cases distinguishing no-solicitation policies from mere "union talk."

4. Wright Line/General Counsel's Burden - To review a variety of theories dealing with the burden of proof in unfair labor practice prosecutions.

5. Remedial Issues - To review cases involving unfair labor practice settlements where the employer offers significantly more back pay than is owed in return for a waiver of the employee's reinstatement, and other standards for the acceptance of settlement agreements.

6. Union access - To review cases involving access to a property owner that tries to exclude off-duty contractor employees seeking access to the premises as well as excluding union representatives from access to public spaces on employer property.

7. Union Dues - To review cases dealing with the issue of whether the employer may lawfully cease checking off union dues following the expiration of the collective bargaining agreement, as well as cases involving objections to union dues and the type of disclosures necessary that show that lobbying costs were not included.

8. Employee status - To review the burden of proof of establishing independent contractor status.

9. Employer duty to recognize and/or bargain - To review how broadly management rights clauses in bargaining agreements can be interpreted; circumstances where a successor employer refuses to hire a certain number of the predecessor's workforce to avoid a finding of successorship; whether an employer stating a "competitive disadvantage" to a union in negotiations has to furnish financial records; limiting unlawful implementation of a last and final offer in negotiations; and whether pay or benefit increases are required post-contract expiration, and a number of other listed situations.

The second part of the memorandum sets forth other areas in which Abruzzo would like to carefully examine (and possibly change):

1. Employee status - To review whether it is an unfair labor practice where an employer has misclassified persons as independent contractors; whether someone not generally interested in seeking employment is nevertheless an employee; a wide variety of issues pertaining to whether an employee is entitled to representation in a disciplinary interview in both union and non-union situations; whether an employer has engaged in so-called "surface" collective bargaining and thus in bad faith; whether the so-called "contract bar" to union decertifications should extend beyond three years; circumstances of whether an employer can be forced to recognize a union where it presents evidence of a card majority; cases involving the permanent replacement of economic strikers; what constitutes an intermittent strike that is unprotected; legitimacy of statements that employee access to management will be limited to employees who choose a union, and a variety of other issues.

The third section in the memo identifies other case handling matters that should continue to be submitted to her. Some 16 different areas are listed, including cases involving employer lock-outs; injunctions during the pendency of unfair labor practice charges; cases involving where an employer could be ordered to bargain with the union because of its unfair labor practices; discharges during union organizing drives; first contract bargaining; and settlement agreements.

Editor's Note: President Biden is proud of his position as the "most pro-union President in history." While the above memo from the new General Counsel only indicates areas in which she intends to "review," the purpose is quite obvious, that she intends to consider changing all those doctrines to a more pro-union position.

TRUMP BUSINESS-FRIENDLY JOINT EMPLOYER RULE OFFICIALLY OVERTURNED

The current Administration has completed its rejection of the Trump-era joint employer rule by issuing a final rule in late July rescinding the 2020 joint employer rule. The Trump regulation would have limited the circumstances under which multiple businesses share liability for wage or other violations. These issues concern major cases such as the "poster child" case at McDonald's, which contended that McDonald's corporate and its franchisees were for certain purposes the same defendant. A new policy takes effect on September 28, 2021.

CDC GUIDELINES ON INDOOR MASKS CHANGES

In late July, the Centers for Disease Control and Prevention (CDC) recommended that vaccinated people resume masking indoors in certain parts of the country. In May, the CDC had issued guidance that vaccinated people no longer need to mask or physically distance in most indoor and outdoor settings. According to CDC data, about 46% of U.S. counties are considered high-transmission areas in which the new policy would be applicable. The Occupational Safety and Health Administration (OSHA) also recommends that fully-vaccinated workers who come into close contact with people who have COVID-19 to wear masks indoors for up to 14 days unless they have a negative COVID test three to five days after the contact.

IMPORTANT FEDERAL RULING DEMONSTRATES INTERPLAY OF INTERMITTENT LEAVE, ADA AND FMLA

Few problems vex employers as much as figuring out the interplay of leaves of absence required by the Family Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA), particularly when they involve intermittent leave, irregular and unreliable attendance. A recent case from the federal appeals court for the Eighth Circuit addresses these issues in a number of favorable rulings for employers, in connection with the termination of an employee for violating a "no-fault" attendance policy. *Evans v. Cooperative Response Center, Inc.*, No. 19-2483 (5/4/21). In this particular case, a plaintiff with reactive arthritis contended that her employer violated the ADA by discriminating and retaliating against her because she is disabled and by failing to accommodate her disability, and that the employer violated the FMLA by denying leave to which she was entitled and by discriminating against her for exercising FMLA rights.

Without going into the detailed facts and arguments, the court essentially sets forth the following principles in ruling for the employer on all issues.

1. Regular and reliable attendance is an essential job function and intermittent leave does not excuse an employee from essential functions.
2. If an accommodation would leave the employee unable to perform an essential job function, including regular attendance, the accommodation fails at least for ADA purposes.
3. It is the employee's responsibility to formally request an ADA accommodation.
4. FMLA permits the employer to require adequate notice of FMLA leave on each occasion, and also to meet the employer's internal and customary reporting procedures, even if the employee has to make separate reports to a supervisor, Human Resources, and/or a third-party administrator.

5. The plaintiff lawfully got attendance points where there was no record of evidence she ever mentioned her illness was related to her certified FMLA leave and the symptoms she mentioned were not listed as symptoms in her FMLA certification forms.

6. The FMLA requires the plaintiff "must specifically reference either the qualifying reason for leave or the need for FMLA leave."

7. The employee's request for FMLA leave was beyond the days certified in her FMLA certification and yet she never attempted to increase the amount of intermittent FMLA leave requested, and re-certification by employers are discretionary, not required.

8. Where absences are not attributable to a serious health condition, the FMLA is not implicated, and the employer's normal disciplinary policies apply.

9. Plaintiff's past successful use of FMLA leave at her employer is strong evidence of a lack of discrimination or retaliation by the employer in the case of subsequent absences.

10. The employer's discretion to terminate an employee based on the mistaken belief that an absence was not FMLA eligible, standing alone, does not establish a prima facie case of discrimination.

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