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The HOSPITALITY LAW CONFERENCE

NLRB Update

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The Board's Recent Decision in *McLaren Macomb*

- Severance agreements pre-*McLaren Macomb*
  - The Board's stance was that there was only a violation of the NLRA where there was an additional, independent showing of animus or coercion that was separate from the overly broad language at issue in a severance agreement.
- In precedent set by *Baylor University Medical Center*, the Board held that the medical center lawfully offered separating employees severance agreements that required them to waive claims against the employer and not to use confidential information that was made available to them during their employment.
  - Employees were not required to sign the agreements, thus the Board ruled that the proffering of the agreements was not unlawful because the "proffers were not made under any circumstances that would tend to infringe on the separating employees' exercise of their own § 7 rights or those of coworkers."

The Board's Recent Decision in *McLaren Macomb*

- Later, in *IGT*, the Board found that the employer had lawfully maintained a non-disparagement provision in a separation agreement, and as in *Baylor*, the mere proffering of the agreement with such a provision was not in itself unlawful.

The *McLaren Macomb* Decision

- The severance agreement at issue in *McLaren* contained a confidentiality and non-disparagement provision that prevented the employee from making statements that were harmful to the employer.
- The Board returned to its previously longstanding precedent that employers may not offer severance agreements to employees that have broad confidentiality agreements that require employees to waive their Section 7 rights.
- It does not matter if the employee signs the agreement – the mere proffer of the agreement violates the NLRA because it interferes with or restrains the employee's prospective exercise of those rights.
- What about settlement agreements?
  - The decision is consistent with GC Memo OM-7-27, which says that confidentiality clauses that prohibit an employee from disclosing financial terms of a **settlement** to anyone other than the person's family, attorney, or financial advisor, are normally acceptable. However, any prohibition that goes beyond the disclosure of the financial terms should not be approved, absent compelling circumstances.

What Now?

- Severance agreements are not banned, but there are restrictions
  - Non-disparagement provisions are not allowed. The new standard is “no defamation” clauses.
    - ❑This allows employees to still say what they want within their Section 7 rights, as long as the statement against the employer is not “maliciously false.”
  - Employees can still release their employment law claims, but being required to release claims that would allow them to improve their terms and conditions of employment are not allowed. This indicates that a release of claims that contains a release under the NLRA, is unlawful.

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Does *McLaren* Apply to Supervisors?

- Generally not. Although supervisors are not covered under the NLRA, the NLRA does protect supervisors from retaliation. So, the GC has taken the position that offering a severance agreement to a supervisor that prevents him from participating in a NLRB proceeding, for example, would be unlawful, as would retaliating against a supervisor who refuses to enter into an unlawful severance agreement.
  - You can generally have broader confidentiality terms in an agreement with a supervisor/manager.

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- Increased rate of ULP Filings
  - The number of employees seeking representation and the number of ULP charges against employers has increased over the past year at a rate not seen since the 1950s.
  - NLRB took in 1,317 more ULPs from 10/2022 to 3/2023 than it did the previous year (a 16% increase).
  - NLRB saw 1,200 election petitions this year, as opposed to 1,174 last year.
  - In the last 6 months, workers have filed almost 400 ULPs against Starbucks, Amazon, and Apple – a trend that could indicate these charges and petitions against employers in general are here to stay for the foreseeable future.

The Hospitality Industry in the Labor News

This past December, the Board ruled that a New York hotel had unlawfully refused to bargain with the union, where it refused to bargain economic issues until all non-economic issues were resolved. Parties cannot unilaterally impose bargaining terms such as these.

In March, the Board found that a hotel in Hawaii violated the NLRA when it refused to respond to the union's information request concerning housekeepers' cleaning schedules. The hotel knew the purpose for the request, and it was obligated to meaningfully respond.

Unionization Efforts in the News

- Amazon workers' efforts to unionize in New York.
  - In January 2023, an Administrative Law Judge ruled that Amazon had violated the NLRA in its efforts to resist unionization in two of its New York facilities where it threatened to withhold wage increases and benefits if workers chose to unionize.
  - At this time, the ALJ rejected the GC's arguments to overrule precedent because ALJs can only apply existing case law/precedent.
  - NLRB GC says captive audience speeches must be voluntary – overturning years of precedent.
  - What's a captive audience speech?

Unionization Efforts in the News (cont'd)

- The Amazon case was transferred to the Board, with the GC's brief filed with the Board on 3/31/2023.
  - The GC urges the NLRB to overrule longstanding precedent set forth in *Babcock & Wilcox* (dealing with "captive audience meetings," which allows employers to address employees as to why unionizing would not be beneficial to their interests).
    - ❑ Note that even though captive audience meetings may not be addressed in the pending Amazon case, it will likely be addressed in *Cemex Construction Materials Pacific*, which has been pending before the NLRB for more than a year.
    - ❑ Significant ruling that could limit employer rights to educate workforce during a campaign.

Unionization Efforts in the News (cont'd)

GC also seeks in the pending Amazon case that the Board:

- Overturn precedent set forth in *Tri-Cast,* which deals with captive audience meetings, and gives employers some leeway to make statements about the impact of unionization on workers' ability to pursue workplace grievances. For example, the Board determined that an employer's comments about how "informal and person-to-person dealings with management" would change after the union is brought in, and that "if we have to bid higher, or customers feel threatened because of delivery cancellations, we lose business," were not threats under the LMRA and did not interfere with the union election.

Unionization Efforts in the News (cont'd)

GC also seeks in the pending Amazon case that the Board:

- Overrule the precedent set forth in *The Guard Publishing d/b/a the Register Guard,* which provides the standard for determining discriminatory restrictions on the use of company equipment.
  - What is the current standard of discriminatory enforcement of rules concerning the use of equipment under *Register Guard*?
- Replace the *Register Guard* standard with the one set forth in *Fleming Co.,* which states that an employer violates the NLRA when it allows employees to use its equipment/resources (like bulletin boards) for nonwork-related purposes while prohibiting uses related to § 7.

Unionization Efforts in the News (cont'd)

GC also seeks in the pending Amazon case that the Board:

- Overrule *AT&T Mobility*, which provides that employers do not have to rescind lawful workplace rules that they've used to restrict workers' protected activities. In this case, the employer used its rule that prohibits recording of conversations to discipline an employee who had engaged in protected activity under § 7.
- Main takeaway:
  - The Board ruled that it was not unlawful to continue to maintain the rule, as it did not have a vast impact on the exercise of § 7 rights.

Unionization Efforts in the News (cont'd)

The 5th Circuit recently issued a decision in *Tesla, Inc. v. NLRB.*

Elon Musk had tweeted that employees would lose stock options in the company if they chose to unionize. This violates § 8(a)(1) as it was found it to be a threat to unilaterally rescind stock options, which is a coercive statement towards an employee's right to unionize.

To avoid such a finding, "an employer's prediction of the effects of unionization 'must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.' If the employer's statement instead carries 'any implication that an employer may or may not take action solely on his own initiative' in response to unionization, then it may be a 'threat of retaliation.'"

What does that mean?

Employers are not necessarily precluded from making these kinds of statements as unionization looms, but there are guardrails that need to be followed.

An employer's statement that implies that unionization will result in the loss of benefits, without some explanation or reference to the collective bargaining process, economic necessity or other objective facts, is considered a coercive threat in violation of the NLRA. However, such a statement is not a threat if it is made in the context, for example, of explaining that existing benefits may be traded away during the bargaining process.

- *Tesla, Inc. v. NLRB*

UNIONIZATION EFFORTS IN THE NEWS (CONT'D)

- Ben & Jerry's employees at the brand's flagship store in Vermont have begun engaging in unionization efforts with Workers United.
- If successful, it would be the first union to represent Ben & Jerry's retail workers.

THE STATUS OF THE PROPOSED JOINT EMPLOYER RULE

The Rule in the News

- On September 6, 2022, the NLRB proposed a new rule, stating that two or more employers would be considered joint employers if they share or codetermine matters governing employees' essential terms and conditions of employment such as wages, benefits and other compensation, work and scheduling, hiring and discharge, discipline, workplace health and safety, supervision, assignment and work rules.
  - The Board accepted comments until December 7, 2022 and will likely implement the rule sometime this year.
- The proposed rule seeks to rescind the 2020 joint employer rule and "ground the standard in established common-law agency principles," making it easier for entities to be deemed joint employers.
  - What was the rule previously?
  - What will change?

The Rule in the News (CONT'D)

Under the new rule

- Any evidence of an entity's potential, unexercised and indirect control over any working condition could be deemed sufficient to find joint employer status
- The proposed rule's list of terms and conditions of employment to be considered is now non-exhaustive
- As of now, the Board has not issued a final rule

What does the joint employer rule mean to you?

More than one employer at the bargaining table?

More than one employer being organized?

More ULPs against more employers

- The General Counsel is looking for cases that could implicate the Board's current stance on work rules, including confidentiality rules, and rules concerning civility, offensive language, or professionalism in the workplace.
- *The Boeing Co.* sets forth the current standard, which analyzes facially neutral work rules (which previously was the "reasonably construe" standard that provided that work rules that have not been applied to restrict protected activity may still be unlawful if employees would reasonably construe the language to prohibit § 7 activity), and looks at the nature and extent of the rule's potential impact on rights under the Act and legitimate justifications associated with the rule, where, among other things, the "reasonably construe" standard does not allow for any consideration of legitimate justifications that underlie the rule.

- Overall, employee handbooks and workplace policies will need to be revised in order to take out language pertaining to the aforementioned rules in *Boeing.*
- Rules covering civility, respect, and professionalism rules can be drafted to cover employees' values, cultural backgrounds, etc., but they cannot be generally covering respect of each other.

General Counsel Agenda Items: What constitutes concerted protected activity?

What is the current standard under § 8(a)(1)?

- § 8(a)(1) covers a broad range of conduct that can be considered protected concerted activity. The general definition is when two or more employees take action for their mutual aid and protection regarding terms and conditions of employment.

What does that look like?

- For example – a group of employees addressing management about improving wages, discussing safety concerns amongst themselves, or an employee talking to management on behalf of one or more employees about working conditions

What is the GC looking for?

- The GC is looking for cases that involve narrowly construing what rises to the level of concerted activity and what constitutes mutual aid and protection (as set forth in *Alstate Maintenance, LLC*), as well as urging the Regions to submit cases that deal with the "inherently concerted doctrine," which provides that an employee engages in protected concerted activity if he engages in discussions about "vital terms and conditions of employment" (e.g., wages or job security) even if those discussions do not have the express object of inducing group action.

What is the GC looking for?

- The GC is also looking for cases that deal with concerted activity in an electronic forum (*i.e.*, email, Slack, Groupme, Teams, or any other employer communication system)
  - The current standard under *Rio All-Suites Hotel and Casino* is that employers have a property right to control the use of their communications systems and employees have no statutory right to use employer equipment, including IT resources, for § 7 purposes, with the exception that there are rare cases where an email system furnishes the only reasonable means for employees to communicate with each other

Concerted Activity in the Solicitation Context

- There is a distinction between solicitation and mere "union talk."
- Currently, that standard lies under *Wynn Las Vegas, LLC*, which holds that solicitation for or against a union also encompasses the act of encouraging employees to vote for or against union representation.
    - In the context of a union campaign, solicitation is not just limited to asking someone to join a union and tendering them a union authorization card. Solicitation via encouraging employees to vote for or against union representation is solicitation because the employee is selling or promoting the services of the union, or urging employees to reject those services.

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