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The Road Ahead: Top 10 Labor Issues to Watch in the Back Half of 2015

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Throughout 2015 to date, the National Labor Relations Board (NLRB) has continued to advance its ambitious agenda, checked only by Congress and judicial review. Drastic new NLRB election rules to facilitate union organizing, prosecution of new doctrines to reverse decades of precedent, and game-changing regulatory proposals from the Department of Labor, all continue to unfold. Against this backdrop, we submit this mid-year summary of the most important labor law issues to watch as we head into the last six months of another active year in labor-management relations.

1. Will the courts uphold the new expedited election rules?

The NLRB's new expedited election rules took effect on April 14, 2015, but not before two lawsuits could be filed seeking to invalidate them in January 2015. The first lawsuit was filed by business groups, including the U.S. Chamber of Commerce, in the U.S. District Court for the District of Columbia. The second, by the National Federation of Independent Business (NFIB) Texas, Associated Builders and Contractors (ABC) of Texas and the Central Texas Chapter of ABC, was filed in the U.S. District Court for the Western District of Texas. The lawsuits assert that the NLRB provided no adequate justification for overruling decades of NLRB and judicial precedent balancing employer, employee and union rights in the election process.

On June 1, 2015, the NLRB notched an important victory as the Texas court dismissed the lawsuit by ABC and NFIB. In dismissing the complaint, U.S. District Judge Robert L. Pitman emphasized the great deference that must be accorded to government agencies, as well as the "significant deference to the Board and the Regional Directors in applying the very provisions Plaintiffs challenge."

> Plaintiffs suggest the deference is illusory as the standards under which the Regional Directors may exercise that discretion are "extraordinary" and thus effectively unavailable. However, as discussed above, Plaintiffs are bringing a facial challenge to the New Rule. As a result, they are required to establish there is "no set of circumstances exists" under which the New Rule would be valid.

Judge Pitman also explained that since employers have "almost unfettered ability to rapidly disseminate their election position after an election petition is filed," the rule could not be found to violate employer speech rights, either. On June 2, 2015, ABC and NFIB appealed Judge Pitman's decision to the Fifth Circuit Court of Appeals where it remains pending. Meanwhile, no ruling has been issued yet in the U.S. Chamber-led lawsuit pending in Washington, D.C., but a decision should be issued before the end of the year.

2. Will the NLRB adopt a new joint-employer standard?

In May 2014, the NLRB invited interested parties to submit amicus briefs in *Browning-Ferris Industries*, a case involving the routine application of the NLRB's decades-old standard for determining whether two or more businesses may be found to be "joint employers." Under the existing standard, two or more employers must "share or co-determine matters governing essential terms and conditions of employment." Predictably, unions and their allies submitted briefs proposing that a much broader standard be adopted, and the NLRB's Office of the General Counsel's brief argued that the NLRB should abandon its current joint-employer standard in favor of an amorphous "totality of the circumstances" test.

> Under that standard, the Board finds joint employer status where, under the totality of the circumstances, including the way the separate entities have structured their commercial

> relationship, the putative joint employer wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence. This approach makes no distinction between direct, indirect and potential control over working conditions and results in a joint employer finding where "industrial realities" make an entity essential for meaningful bargaining.

The briefing *period* for amici closed on June 26, 2014, but the NLRB has yet to issue a decision.

With *Browning-Ferris* still pending, the NLRB Office of the General Counsel set its sights on the franchising model and filed a number of unfair labor practice complaints against franchisees and franchisors as joint employers under the General Counsel's preferred "totality of the circumstances" test. At a hearing of the House Subcommittee on Health, Education, Labor & Pensions on June 24, 2014, Andrew Puzder, the CEO of CKE Restaurants, expressed his concerns about the NLRB's shift in approach:

> If franchisors are considered joint-employers with their franchisees, the cost of increased staff and increased risk will most likely translate into franchisors charging higher royalty rates and fees, perhaps significantly higher. Franchisor control over a franchisee's labor force, and the risk and higher royalty rates and fees associated with it, have the potential to chill the desire of franchisors to franchise and of franchisees to acquire a franchise or to develop new units, at a time when the country desperately needs economic growth.

However, a recent advice memo issued by the Office of the General Counsel does evidence at least some restraint in how far it seeks to stretch the joint-employer standard. In *Nutritionality, Inc. d/b/a Freshii*, the General Counsel concluded that the franchisor and franchisee were not joint employers under either the current standard or the new standard advocated by the General Counsel:

> Freshii [the franchisor] does not significantly influence the working conditions of Nutritionality's [the franchisee] employees. For example, it has no involvement in the hiring, firing, discipline, supervision, or setting wages. Thus, because Freshii does not directly or indirectly control or otherwise restrict the employees' core terms and conditions of employment, meaningful collective bargaining between Nutritionality and any potential collective-bargaining representative of the employees could occur in Freshii's absence.

3. How far can the NLRB push *Specialty Healthcare* to facilitate organizing?

In July 2014, NLRB issued its long-awaited decision in *Macy's, Inc.*, in which the majority determined that the petitioned-for unit of cosmetics and fragrance employees at a Macy's retail store is appropriate under the NLRB's controversial *Specialty Healthcare* decision. Under *Specialty Healthcare*, when a union seeks to represent a unit of employees "who are readily identifiable as a group … and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit."

Once the petitioned-for unit is deemed an appropriate unit, the proponent of a larger unit must show that the employees it wishes to include share "an overwhelming community of interest with the petitioned for employees, such that there is no legitimate basis upon which to exclude certain employees from the larger unit because the traditional community of interest factors overlap almost completely."

The *Macy's* decision is significant because it is contrary to longstanding NLRB precedent setting forth a presumption for a storewide unit in the retail industry, thus demonstrating the NLRB's intent to apply its new "micro-unit" standard in all industries – not simply to the non-acute healthcare facilities at issue in *Specialty Healthcare*. Despite being a victory for the employer, the NLRB's July 28, 2014, decision in *Bergdorf Goodman* confirms that the NLRB is "all-in" with *Specialty Healthcare*, as the NLRB's decision provides a roadmap for establishing a valid micro unit. Not only is *Specialty Healthcare* being applied to all industries, but its impact is dramatic. For example, in *Northrop Grumman Systems Corp.*, Case No. 31-CA-136471 (Oct. 20, 2014), a regional director found the union's petitioned-for unit was not appropriate – but directed an election in a unit even smaller than that sought by either party based upon the NLRB's holding in *Specialty Healthcare*.

The Macy's case is not yet settled as Macy's engaged in a technical refusal to bargain with the union in an effort to seek judicial review of the NLRB's decision. The case is now pending before the Fifth Circuit Court of Appeals, with briefing wrapping up this summer.

4. Will the Department of Labor revive its efforts to restrict employer response to union organizing by revising the persuader rule?

The Department of Labor (DOL) has been mulling for several years a final rule regarding the "advice exception" to the so-called "persuader rule" in the Labor-Management Reporting Disclosure Act of 1959 (LMRDA). The LMRDA currently provides that employers must report to the DOL each time they engage a consultant to persuade employees directly or indirectly regarding employees' rights to organize or bargain collectively (i.e., "persuader activity"). An employer who fails to comply with any of the LMRDA's reporting requirements could face jail for a year and a $10,000 fine. However, the LMRDA carves out from the reporting requirements an "advice exception," which consistently has been interpreted to exclude an employer's engagement of labor counsel to assist with organizing campaigns so long as counsel has no direct contact with employees and the employer is free to accept or reject its counsel's recommendations.

If the DOL's final rule tracks the proposed rule it released in June 2011, it will narrow the advice exception significantly. As a result, employers who engage attorneys to assist in organizing campaigns will have to file publicly available reports with the government detailing all the labor work, regardless of whether it is considered persuader activity or not, that the law firm performs for the employer.

Critics of the rule claim that the proposed rule is improper because it effectively writes the advice exception out of the statute. Moreover, the American Bar Association and the Association of Corporate Counsel assert that the proposed rule is also inconsistent with the rules of professional conduct pertaining to lawyer-client confidentiality. They and others believe that the proposed rule forces lawyers to disclose privileged attorney-client information and that it will discourage employers from seeking legal assistance during union-organizing campaigns.

The DOL was set to publish its final rule in November 2013, but then delayed it to March 2014 before indefinitely postponing it in March 2014. However, in May 2015, the president's administration released its regulatory agenda identifying a possible release of the final rule in December 2015.

5. What impact will the "blacklisting" regulations have on government contracting?

On May 28, 2015, the president's administration published proposed amendments to the Federal Acquisition Regulation, and related Department of Labor guidance to implement the July 31, 2014, "Fair Pay and Safe Workplaces" Executive Order 13673. The order and these proposed changes would subject government contractors to a broad new set of recordkeeping, reporting and compliance requirements. Failure to fulfill these obligations and exhibit compliance with all applicable federal and state labor laws would expose the contractor to the prospects of disqualification, suspension or debarment.

Under this proposed regulatory scheme, offerors on contracts or subcontracts estimated to exceed $500,000 must disclose "any administrative merits determination, arbitral award or decision, or civil judgment" against the contractor under 14 enumerated federal statutes and executive orders (labor law violations), for the three years preceding the contract bid. This information will then be considered when making responsibility determinations during the contract award process.

The proposed regulations and guidance, in conjunction with the executive order, would completely transform the risks and costs of doing business with the federal government. Moreover, the standards set by the proposed regulations are grossly unfair to contractors as they are designed to base contract awards, disqualification and suspension entirely on administrative allegations – before those allegations are fairly and fully adjudicated. The proposed regulations require reporting of any "administrative merits determination" regarding these laws − including WH-56 "Summary of Unpaid Wages" forms from the Wage and Hour Division, OSHA citations, OFCCP "show cause" notices, EEOC "reasonable cause" letters, and NLRB complaints. These are not final determinations on the merits. These all are preliminary findings, against which employers have the right to defend themselves, including the rights to challenge evidence at a hearing and confront witnesses under oath. Yet the proposed regulations would allow contractors to be disqualified from contracts based on these.

Because there are serious problems with the order and proposed guidance, litigation challenging the final rules is a certainty. Contractors and employers who might want to do business with the government in the future should prepare now for these new regulations. In addition, they also should consider submitting comments in response to the proposed regulations before the July 27, 2015, deadline.

6. Will the NLRB undermine state right-to-work laws?

On April 16, 2015, the NLRB invited interested parties to file briefs in *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union International, Local 1192, AFL-CIO, CLC (Buckeye Florida Corp.)*, in which an administrative law judge (ALJ) found that the union violated the National Labor Relations Act by maintaining and implementing a "Fair Share Policy" requiring nonmember bargaining-unit employees to pay a grievance-processing fee. In excepting to the ALJ's decision, the union asked the NLRB "to adopt a rule allowing unions to charge nonmembers a fee for grievance processing, so long as that fee does not exceed the amount a union could charge nonmember objectors under Beck and California Saw." In response to that request, the NLRB invited briefs addressing the following questions:

1. Should the NLRB reconsider its rule that, in the absence of a valid union-security clause, a union may not charge nonmembers a fee for processing grievances? Should it adhere to or

overrule *Machinists, Local No. 697 (H.O. Canfield Rubber Co.)*, 223 NLB 832 (1976), and its progeny?

2. If such fees were held lawful in principle, what factors should the NLRB consider to determine whether the amount of such a fee violates Section 8(b)(1)(A)? What actions could a union lawfully take to ensure payment?

Concerned by the NLRB's consideration of this issue, The House Education and the Workforce Committee held a hearing titled "Compulsory Unionization through Grievance Fees: The NLRB's Assault on Right to Work." During the hearing, Mark Mix, President of the National Right to Work Committee, explained that "the NLRB's new 'fee-for-grievance' scheme would give union officials a way to extract 'fees' from nonunion workers – fees that could in fact be greater than regular dues – leaving the right-to-work law on the books, but severely emasculated."

Briefs were due to the NLRB by July 25, 2015; however, on July 7, 2015, the NLRB announced that it was suspending its invitation for briefs as "[t]he General Counsel and the Respondent filed a joint motion withdrawing exceptions to the decision of the administrative law judge." Accordingly, this issue remains unresolved, but certainly will be revisited as unions realize that they may have the potential to create a loophole in right-to-work laws.

7. Are works councils the answer to labor's organizing woes?

The United Auto Workers (UAW) has developed its "Southern Strategy" in an aggressive effort to unionize foreign automakers in the Sunbelt. However, in February 2014, the UAW suffered a highly publicized defeat at Volkswagen's Chattanooga, Tenn., plant despite running unopposed by the employer. The union filed objections, but ultimately withdrew them. A few months later in November 2014, Volkswagen released a new labor policy providing labor groups with differing levels of access depending on the number of Volkswagen workers in their ranks. For example, the greater the number of workers in a given labor group, the more likely that group will be able to meet and confer with management officials.

"We recognize and accept that many of our employees are interested in external representation, and we are putting this policy in place so that a constructive dialogue is possible and available for everyone," said Sebastian Patta, executive vice president for human resources at Volkswagen Chattanooga. "Volkswagen has a long tradition of positive employee engagement at our plants around the world, and we welcome this in our company."

Just one month after Volkswagen announced its new labor policy, the UAW claimed that it had reached the "highest level" of recognition entitling it to meet biweekly with Volkswagen officials on campus. As of April 2015, the UAW claims to have majority support at the Volkswagen plant, and now seeks to implement a German-style works council at the factory. According to reports, the parties have laid the groundwork for a group made up of both management and bargaining-unit employees to meet and discuss wages, hours, and terms and conditions of employment in the spirit of a German-style works council. Interestingly, however, the UAW has not filed papers to hold a union election or asked for a card check. Meanwhile, Volkswagen stated that it will continue to work with the American Council of Employees (ACE), a rival union that is also seeking to organize Volkswagen's employees. ACE previously has referred to VW's labor policy as "unfair" and has warned the company not to dole out improper benefits to the UAW.

Both employers and unions are watching the developments in Chattanooga closely, and, if the UAW is successful in organizing the facility, how a works-council type representation is received by the employees. If successful in Chattanooga, the UAW (and other unions) will look to parlay that success across the South.

8. Will the rate of union representation petitions filed, and the speed of elections, continue to increase while the new election rules are in effect?

The new expedited election rules have been in place now for over two months. Early analyses generally bear out the concerns expressed during the months leading up to the effective date of the changes. Many more petitions are being filed, and elections are being held approximately two weeks earlier.

Lawyers at Vorys spoke to Susan Connelly at PTI Labor Research about her analysis of the NLRB's docket during the first month under the new rules. Her assessment:

> The first month under the new rules (April 14 to May 14, 2015) saw a whopping 266 union certification petitions filed with the NLRB ("RC" petitions). This was up 24% from the previous five years' average for the same time period. We have seen various reports of the numbers of petitions filed in recent weeks and the numbers seem to be slightly different from one source to the next, though all show an increase in activity. We were able to verify our numbers with the NLRB's website (www.nlrb.gov).

Law360 also published an Odin Feldman study of elections actually held during the first two months, which concluded that the median number of days from petition to election at a polling place dropped from 38 days in 2014 to 24 days in 2015. That's a reduction of two whole weeks – or 35 percent of the time – for employees to obtain information and for parties to communicate with eligible voters.

While the unions' win rate has not increased significantly in these early contests, one expects it will as the sample size increases and organizers adapt to the new framework. Ms. Connelly explains:

> We predict that as time goes under the new election rules that the Board will reduce the average time from a petition to election even further from what we have seen in the first month. Our historical research has shown us that the shorter the time from the petition to the election, the more likely it is that the union prevails in the election.

9. Will the NLRB finally address whether student-athletes are employees?

More than a year has passed since a NLRB regional director in Northwestern University found that the university's football players are "employees" under the National Labor Relations Act, but the NLRB still has not weighed in on the issue. The football players voted in a union election on April 25, 2014, but the votes were immediately impounded pending the NLRB's ruling. The parties submitted their final briefs to the NLRB on July 31, 2014.

Meanwhile, former student-athletes have filed a collective action against the NCAA and member institutions alleging that they are temporary employees who must be paid the minimum wage under the Fair Labor Standards Act. Similar to the allegations in the Northwestern case, the plaintiffs in the collective action assert that because student-athletes are more strictly supervised and controlled by

both the NCAA and university staff and that the NCAA and member institutions profit from NCAA sports, student-athletes should be compensated under the FLSA for the services they provided.

If the NLRB affirms the regional director's decision, it could deal a death blow to the NCAA's amateur athletic structure and start a domino effect creating significant liability for unpaid wages and benefits. Even if the NLRB overrules the regional director, a decision adverse to the NCAA in the FLSA collective action could prove persuasive to the NLRB in a future NLRB representation case.

10. Are unions becoming "cool" and will there be an app for that?

Unions are spinning a Pew Research Center survey to assert that "unions are becoming cool" as more young people view unions more favorably. The Pew Research Center reports the following:

> Across age groups, views of unions are most positive among young adults: 55% of those ages 18-29 view unions favorably, while just 29% view them unfavorably. Among older adults, favorability ratings of unions are mixed with about as many holding favorable as unfavorable views.

The Pew Research Center, however, found little recent change in overall favorability of labor unions, noting that "48% hold a favorable view of unions, while somewhat fewer (39%) say they have an unfavorable view."

Elizabeth Stoker Bruenig of *The New Republic* also comments:

> Despite recent strides in right-to-work legislation, a resurgence in union strength might just come as millennials ascend to political power. It makes sense: Young people have grown up during a massive recession and watched wages associated with middle-class jobs of yesteryear drop precipitously. Unions might be the most promising way to assure that working class people get a shot at turning their jobs into livable occupations.

Given the Pew Research Center's survey data, it is not surprising that labor organizers might be looking to create online tools for workplace organizing to target younger workers. The Century Foundation, a liberal think tank, released a report making an impassioned plea for app developers to get involved in online organizing:

> All around us, online technology has disrupted business models and entire industries virtually overnight, dramatically changing the landscape for consumers and workers alike.
>
> With just one click, you can summon a cab through Uber. At two clicks, Venmo allows you to instantly send cash to your kid away at college. At three clinks, Turbo Tax is preparing your returns, and at four clicks, you are on LegalZoom drafting your last will and testament. What if with five clicks, you and your coworkers could petition the National Labor Relations Board (NLRB) to schedule a union election?
>
> Due to a little-known, but far-reaching change made by the NLRB last year, virtual labor organizing by employees is now sanctioned by law in many situations and could possibly be transformative in the workplace.

> Many employees want more clout at work − to leverage better pay and benefits, but also nonmonetary things, such as more predictable work schedules, or a stronger voice in workplace safety or procedures. And it is a good bet that many would join a union, if signing up were easier for workers to do, and harder for employers to stop.
>
> The problem today is that joining a union at work is decidedly last century − clunky, contentious, confusing − and companies such as … want to keep it that way.
>
> But virtual labor organizing could change that.

Even a moderately successful app could cause union organizing to undergo a sea change. As *BuzzFeed* notes, "That kind of low-cost organizing could address one of the biggest contradictions of the modern labor movement: that its most energetic and high-profile campaigns, to organize fast food and other minimum-wage workers, are unlikely to result in dues-paying members, and are funded primarily from the membership fees of workers in other industries."