EXECUTIVE LABOR SUMMARY

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NEWS & ANALYSIS

NLRB "quickie election" rule takes effect – On April 6, President Obama vetoed a joint resolution of Congress that sought to block the "quickie election" rule issued by the National Labor Relations Board. Because there were not enough votes to override the veto, the rule took effect on April 14. The **"quickie election" rule** changes the petition, election, and hearing process, tilting the "R-case playing field" further in favor of unions, leaving them largely in control of the timing of elections and targeting of election groups. On the same day as the President's veto of the Congressional resolution, the NLRB General Counsel issued a **Memorandum** that addresses ambiguities and gaps in the rule. Meanwhile, court challenges to the rule filed by employer groups and others are pending in federal district courts in the District of Columbia and in Texas. A hearing in the Texas case is was held April 24, and a hearing in two consolidated D.C. cases is scheduled for May 15. Will the courts step in?

Machinists Union cries foul in Boeing campaign, asks for delay in NLRB vote – Apparently, the International Association of Machinists union also does not care for "quickie elections." The IAM, which has been trying to organize a unit of some 3,000 employees at **Boeing's manufacturing plant in North Charleston, South Carolina**, has **withdrawn** its petition for an election that had been scheduled to take place on April 22. The union contends that Boeing created an "atmosphere of threats, harassment and unprecedented political interference [that] has intimidated workers to the point that [the union does not] ... believe a free and fair election is possible." The union also filed an unfair labor practice charge against Boeing, alleging that Boeing interfered with union activities and deliberately encouraged anti-union harassment, assaults, and threats of violence against union supporters. **Two IAM organizers making home visits were threatened by the homeowners at gunpoint, the union says**. Under NLRB policy, the union can seek an election again in the same unit after six months.

Ironically, **"The Management Playbook,"** IAM's description of employer tactics used to defeat organizing, says, "Unionbusters [sic] often attempt to delay union representation elections by legal maneuvers so they have more time to implement other tactics needed to increase tension, dissention [sic], and the employer's chance of winning the election." Looks like, here, while seeking a high-profile union win in the South, the union needed more time for its legal maneuvers and Boeing was ready for the planned vote.

Walmart battles NLRB, UFCW, and Our Walmart on multiple fronts, with no end in sight – Walmart announced in February that it was increasing its starting hourly wage to $9, which took

effect earlier in April, and would be increasing the starting wage to $10 next year. But there is no sign that the wage increase is giving Walmart relief from organized labor groups.

Can Walmart workers have it both ways? A labor "tactic *du jour*" is intermittent one-day strikes. Historically, employees can work or strike, but they can't lawfully do both: so-called "intermittent" strikes have not been legally protected. But one-day protests have been the hallmark of a campaign by Our Walmart, which is affiliated with and funded by the United Food and Commercial Workers union (one-day protests are also a hallmark of the "Fight for $15" and affiliated campaigns against retailers and fast food chains). Walmart allegedly warned its would-be strikers in advance of their walkouts that it considered their activity to be "unprotected," and then disciplined or discharged some of the employees for attendance policy violations. Not surprisingly, Walmart is now defending against an **NLRB complaint**. According to Walmart (and prior case law), the workers have a right to strike, but they don't have the right to intermittently strike and "come back" to disrupt the business. On the other hand, Our Walmart and the Board General Counsel apparently contend that the walkouts are protected Section 7 activity, regardless of length and frequency, thus setting up a test case before the Board in somewhat uncharted waters. Unions and worker centers like the tactic because it can, as a practical matter, effectively prevent the replacement of economic strikers. The current NLRB majority will no doubt be receptive to the union argument, as its effort to increase the power of organized labor has been anything but intermittent. How a federal circuit court will view the tactic is less clear.

Retaliatory renovations? Walmart is fighting another battle with some overlap to the intermittent strike dispute. On April 13, Walmart announced that it was closing five stores in four states for up to six months to make major plumbing repairs and other in-store changes to improve the customer experience. As a result, approximately some 2,200 employees were given "immediate" layoff notices, with 60 days of layoff pay and some unspecified possibilities of transfer to other stores. The UFCW and its Our Walmart campaign group were blind-sided by the announcement. The **UFCW announced** on April 20 that it was filing unfair labor practice charges with the NLRB and asking the NLRB to seek a Section 10(j) injunction to prevent the closings and order reinstatement or transfer of the affected employees. The UFCW claims the closings are in retaliation for the Our Walmart protests. According to news reports, one of the stores being closed is in **Pico Rivera**, California. Pico Rivera is near Los Angeles, where the Our Walmart group claims to be strong and where its first protest action occurred in 2012.

SEC joins NLRB assault on confidentiality – The U.S. Securities and Exchange Commission seems to be following in the NLRB's footsteps. On April 1, the SEC announced that it had settled a civil enforcement action against KBR, Inc., for requiring employees who participated in internal corporate investigations to sign confidentiality agreements prohibiting them from discussing the investigations with outside parties unless they had prior approval of the corporate legal department. **The settlement included a $130,000 fine**. The SEC asserted that the confidentiality agreements violated whistleblower protections implemented under the Dodd-Frank Act applicable to publicly traded entities, specifically Rule 21F-17. **As we have previously reported**, the NLRB is aggressively scrutinizing employer policies and agreements on confidentiality. The NLRB will generally find a violation of the NLRA if employees by policy, agreement, or directive are subject to a confidentiality rule that the NLRB believes has a reasonable chance of interfering with the rights of employees to engage in any Section 7 activities, including the right to make reports to co-workers and third parties and to participate in government agency investigations. This trend in federal agencies' enforcement might lead some employers to ask, "What's confidential?" The answer seems to be, "not much." Employers are advised to review all non-disclosure and confidentiality policies, agreements, and forms, and to consider the possibility that these documents may be subject to increased agency scrutiny, especially if the employer is a publicly traded entity, a government contractor, or an entity that is subject to the whistleblower provisions of the False Claims Act or similar law.

Board hints it may let unions charge non-members for grievance processing – The NLRA prohibits interference with an employee's right to engage in concerted activity or to "refrain" from it. An important exception in the NLRA that allows interference with an employee's right to "refrain" is application of a lawful union security provision in non-right-to-work states. Such a provision allows an employer and union to take adverse action against an employee who refuses to join the union or pay an amount equal to a fair share of dues and fees. This safe harbor to interfere with Section 7 rights and "discriminate" against non-union members generally is illegal in right-to-work states, and as we have reported, the number of right-to-work states is growing, most recently including Wisconsin, Michigan, and Indiana, which had traditionally been union strongholds.

Now, the NLRB has indicated that it may want to start letting unions charge non-dues-paying employees for grievance processing services. Under nearly all collective bargaining agreements, the union controls the grievance and arbitration process, theoretically on behalf of an employee, and the employee must use the union to process any covered dispute the employee has against the employer even if the employee is not a union member. The Board's current rule is that a union cannot charge such fees unless there is a valid union security clause, which generally would be illegal in a right-to-work state. **The Board is requesting *amicus* briefs on the subject** in a case from Florida (a right-to-work state) involving the United Steelworkers Union and a subsidiary of

Georgia-Pacific. Commentators and observers of the Board have seen that a request for briefs usually signals the Board's intent to change the current rule.

The National Right to Work Committee and its National Right To Work Legal Defense Foundation view the anticipated change in position as **a "frontal attack"** on the freedom against discrimination that right-to-work laws are intended to protect. According to a statement on the Committee's webpage, "the NLRB wants to force non-members to pay for this forced unionism power." One thing is certain: if the Board does change the rule, the change will be challenged in court.

THE GOOD, THE BAD AND THE UGLY

Feds gone wild? NLRB challenges Postal Service for failure to bargain over handling of cyberbreach – Is the government feeding on itself now? The NLRB on March 31 **issued a complaint** against the U.S. Postal Service over a cyberbreach of employee records – including names, Social Security Numbers, dates of birth, and addresses – that occurred in 2014. The American Postal Workers Union contended that the USPS failed to promptly inform employees of the breach or to bargain over its response. The breach was the subject of a Congressional hearing in 2014, and at the hearing, a representative of the Postal Service testified that employees were notified of the breach promptly after it was confirmed and that the agency had acted with guidance from the FBI and the U.S. Department of Homeland Security.

In its complaint, the NLRB seeks an order for the Postal Service to post a remedial notice and bargain for at least 15 hours a week over the subject of handling of cyberbreaches until the USPS and the union reach agreement or impasse. According to an article in the ***Washington Post***, the union president said that "[b]y issuing this complaint, the NLRB is recognizing employee rights in the information age." But many might view it as wasteful, if not ludicrous, for one independent U.S. government agency, the NLRB, to be litigating against another, the Postal Service, before an Administrative Law Judge employed by the NLRB itself. (Under special legislation, the Postal Service is subject to the jurisdiction of the NLRB, unlike other federal, state, and local government agencies.) In any event, private sector employers should be aware that the Board is treating "cyberbreach response" as a mandatory subject of bargaining, like wages, hours, and other terms and conditions of employment.

More social media madness – On March 31, **the NLRB upheld an ALJ's recommended decision** that an employee had been discharged in violation of the NLRA for protected concerted activity when he was discharged for making the following comments about a supervisor on Facebook:

> Bob is such a NASTY M***ER F***ER don't know how to talk to people!!!!!! F*** his mother and his entire f***ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!

(Asterisks added.) The majority of the Board panel found that the employee's comments were protected by the NLRA, and ordered that he be reinstated.

Meanwhile, American workers in the United Arab Emirates not only don't have NLRA rights, but they also may face jail for what they post on social media. A Florida man who was employed by a UAE company and had quit in a dispute over sick leave, called his supervisors "backstabbers" on Facebook while he was on vacation in Florida. Upon his return to the UAE to get his property, his employer initiated criminal prosecution because he allegedly violated a UAE law that prohibits slandering an employer. The employee apologized, and **the charges were dropped**, but he could have received up to five years in prison and a fine of up to $50,000.

"Joint" employer in Garden State escapes growing legal conundrum – In a case involving an interesting intersection of states' rights, federal law, and state bar legal ethics rules, the NLRB had scheduled a representation case hearing with the Compassionate Care Foundation, a medical marijuana dispensary in southern New Jersey, and a UFCW local, which had filed a petition to represent employees of the dispensary. The NLRB expressly and strongly encouraged the dispensary to retain counsel to defend itself against alleged labor law violations, but the dispensary could not. According to the dispensary, the attorneys it contacted believed that state bar rules of professional conduct prohibited them from assisting a client in activity that the attorney knows is "criminal or fraudulent." Medical marijuana is legal and regulated under New Jersey state law, but it is illegal under federal criminal law.

The owner of Compassionate Care was not happy that the federal government (through the NLRB) was holding the dispensary subject to federal labor law while federal criminal law prohibited the marijuana business altogether. According to **one news report**, he said of the controversy, "I don't think the federal government should be able to enforce the issue without taking a responsible position to [sic] medical marijuana. . . . If there is harm being done they should close the door on [medical marijuana]. They shouldn't have this conflict between state and federal law because it is wreaking havoc on good meaning [sic] people."

The whole case and all of its fascinating legal issues became moot on Income Tax Day, when the union dismissed its NLRB petition. The withdrawal deprived the Board of jurisdiction, and marijuana business owners, as well as their would-be legal counsel, will have to wait for further guidance.

"Joint" employers aside, employers continue to wait for answers from the NLRB on the "joint employer" questions at issue in the ***Browning-Ferris*** **and McDonald's cases**.

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