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By David Phippen

Washington DC Metro Office

NEWS & ANALYSIS

Changing of the guard at the NLRB: Two steps forward, and one step back – One of President Trump’s nominees for the National Labor Relations Board, Marvin E. Kaplan, was confirmed by the Senate on August 2 and sworn in on August 10 for a term that will expire on August 27, 2020. Member Kaplan eliminates the Democratic majority on the Board, which now has two Republican (Mr. Kaplan and Chairman Philip Miscimarra) and two Democratic members (Members Mark Gaston Pearce and Lauren McFerrin). Mr. Kaplan previously served as Chief Counsel to the Chairman of the Occupational Safety and Health Review Commission, as counsel for the House of Representatives’ Oversight Government Reform Committee, and as policy counsel for the House of Representatives’ Education and the Workforce Committee on the Republican majority side. He previously also worked at the U.S. Department of Labor, Office of Labor Management Standards, and in private law practice. He received a J.D. from Washington University in St Louis and a bachelor’s degree from Cornell University. Confirmation hearings on President Trump’s other Republican nominee, management labor lawyer William Emanuel,
will take place sometime after the Senate returns from its August recess.

Press reports indicate that President Trump is likely to nominate Vermont management labor lawyer Peter B. Robb to the position of NLRB General Counsel. Mr. Robb is a partner in the firm Downs Rachlin Martin, PLLC, and previously worked as an NLRB staff attorney and as counsel to former Board Member Robert P. Hunter, who is a Republican. If confirmed, Mr. Robb would fill the position now held by former union lawyer Richard F. Griffin, Jr., whose term expires this fall. The change of the General Counsel and a shift in the Board majority are likely to be greeted as good news by employers.

Meanwhile, in the “one step back” department, President Trump’s NLRB Chairman, Philip A. Miscimarra, announced that he would not seek re-nomination to a seat on the Board when his term ends this December 17. Thus, the President will have the opportunity to nominate one more Republican Board member and make a decision about who will be the Chairman after Mr. Miscimarra is gone.

Court’s remand of NLRB “joint employer” decision may indicate which way the wind is blowing on this issue – A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit remanded a “joint employer” case involving CNN to the National Labor Relations Board. In 2014, the Board found that CNN America, Inc., was a joint employer of camera staffing company employees who were terminated from bargaining unit jobs in 2003. However, the D.C. Circuit panel said that the Board failed to follow its own precedent, which required direct and immediate control of the employees in question for a joint employer finding, or to adequately explain why it was no longer following that precedent. The Court remanded the case to allow the Board to provide a fuller explanation of its decision, which means that CNN has not necessarily won.

CNN used various technical employees who were employed by contractors and were represented by the National Association of Broadcast Employees and Technicians union. If CNN switched from one contractor to another, the new contractor typically hired almost all of the employees from the old contractor and continued to recognize the Union. However, in 2003, when CNN’s contractor was Team Video Services, CNN terminated its relationship with TVS and directly hired some, but not all, of the TVS employees. The Union asked to bargain with CNN, but CNN refused. As a result, the Union filed unfair labor practice charges against CNN. In 2008, an Administrative Law Judge found that CNN was a “joint employer” of the TVS workers, and in 2014, the NLRB issued its decision, essentially affirming the ALJ decision. The Board found that the TVS employees were jointly employed, in part, because CNN supervised them, played a role in negotiations between the Union and TVS, and “shared or codetermined” decisions for significant control on essential employment terms for the TVS employees. CNN then sought review by the D.C. Circuit.

The court panel found that the Board failed to apply its 2002 decision, Airborne Express, which required that an employer have “direct and immediate control” over the employees for status as a joint employer. The court panel noted that, on remand, the Board could explain with correct analysis why CNN was a joint employer. Whether the Board will issue a decision on remand is uncertain, though, because the Court agreed with the Board that CNN was a successor employer of the TVS employees and, as a successor employer, unlawfully refused to bargain with the Union and discriminated in hiring TVS employees based on their union status.

In any event, the D.C. Circuit ruling on the “joint employer” issue may have special importance because another three-judge panel of the D.C. Circuit has the highly-publicized Browning-Ferris case before it. As
we have reported, in that case, the Board went into great detail with respect to its basis for finding that Browning-Ferris and a staffing contractor were joint employers, even though Browning-Ferris did not have direct control over the contractor’s employees. Many expect the D.C. Circuit to reject the Board’s standard as inconsistent with the National Labor Relations Act. If not, the case may go to the U.S. Supreme Court.

Did Google violate James Damore’s Section 7 rights? – Much of the employment law commentary about Google’s termination of engineer James Damore for his so-called “anti-diversity screed” (notwithstanding the sensational headlines, it was arguably a relatively sober memorandum questioning the effectiveness of certain types of diversity efforts specific to Google) has been misdirected, focusing on the First Amendment rights of free speech and at-will employment. But Mr. Damore filed an unfair labor practice charge with the National Labor Relations Board, alleging that he was terminated for engaging in “protected concerted activity” under Section 7 of the NLRA and in retaliation for exercising his rights. He may have a case. Under Section 7, employees have the right to engage in speech or make complaints about how an employer is doing things that could have an effect on more than just the one employee complaining or speaking. As we have previously reported, the NLRB in recent years has found that individual complaints about discrimination in the workplace are protected concerted activity. Thus, it would seem that, consistent with those decisions, employee speech about an employer’s handling of diversity in the workplace could also be protected concerted activity. Google has asserted or implied that Mr. Damore violated its corporate code of conduct and that his memorandum was disruptive. Similar defenses have generally been rejected by the Board in recent years on the theory that protected concerted activity is often inherently disruptive. So, the NLRB may take Mr. Damore’s charge quite seriously, even if NLRB Regional Officials may consider his memorandum “politically incorrect.”

Employers should watch this situation closely and learn from it. The current NLRB General Counsel has indicated in a memorandum that he views political activity and speech as inherently protected concerted activity. Private sector employers should also be aware that certain states and localities — including California, Colorado, the District of Columbia, New York, and North Dakota — have laws that may protect, through various means, political speech or affiliation, political activities, and lawful activities outside of work. With the publicity being generated by the Google situation and employment terminations in the national news flowing from the recent demonstrations in Charlottesville, Virginia, and elsewhere, this type of claim may become more common. (However, unlike Mr. Damore, who was writing about his employer’s diversity initiatives, political protesters in all likelihood would not have Section 7 claims against their employers because their activity does not relate to terms and conditions of their employment.)

Public sector employers should also be aware of First Amendment and other legal protections and restrictions applicable to their employees.

The UAW loses big at Nissan in Mississippi – In a spectacle seldom seen because many unions withdraw election petitions when they see a loss coming, voters at Nissan’s plant in Canton, Mississippi, voted overwhelmingly (2,244-1,307) against representation by the United Auto Workers union on August 3 and 4. The Union had defeats at the plant in 1989 and 2001, and the recent defeat demonstrates a continuing lack of success in wall-to-wall units in manufacturing facilities of foreign automobile manufacturers in the South. Some commentators have attributed the loss to perceptions of an “outsiders’ campaign” by the UAW, which brought in celebrities such as Sen. Bernie Sanders and actor Danny Glover, who knew little about the area and the people. Other commentators noted that, in a state such as Mississippi where lucrative jobs are at a premium, the UAW faces an uphill battle trying to persuade employees to put those earnings at risk on the
mere hope of getting “UAW” wages and benefits. In any event, according to one news report, the wages at Canton are only slightly lower than UAW wages, and the retirement plan is comparable.

The UAW leadership has filed objections and unfair labor practice charges with the NLRB, alleging that Nissan engaged in an unprecedented campaign of corporate threats and intimidation. How it all plays out at the Board remains to be seen. Again, as the Board majority shifts, so may the likelihood of any ultimate change in the outcome. In the meantime, observers may want to keep an eye on the UAW’s attempt to organize workers at Tesla in Fremont, California.

THE GOOD, THE BAD, AND THE UGLY

Federal Office of Special Counsel finds U.S. Postal Service unlawfully colluded with union in support of Hillary Clinton campaign – The Office of Special Counsel issued a report in July finding that management of the U.S. Postal Service violated the federal Hatch Act by coordinating with the National Association of Letter Carriers to allow postal workers time off without pay to campaign on behalf of the Clinton for President Campaign and other Democratic Party candidates. The workers were then paid by the NALC’s political action committee. The NALC endorsed Hillary Clinton for President, and its political action committee supported her campaign financially. The Hatch Act is intended to keep federal government agencies neutral and out of politics, and generally makes it unlawful for federal government employees to participate in certain federal election campaign activities.

Ex-exec at Fiat-Chrysler, ex-officials of UAW, and widow of UAW official are indicted on unlawful payments and bribery conspiracy charges – In late July and August, one former labor relations executive of Fiat-Chrysler and two individuals who held leadership positions in the UAW were indicted for a conspiracy involving more than $1.2 million in unlawful payments and bribes related to a scheme involving payments from accounts of the UAW-Chrysler National Training Center in Detroit. In late July, Alphons Iacobelli, formerly Fiat-Chrysler’s Vice President of Employee Relations, and Monica Morgan, a well-known photographer in Detroit and the widow of a UAW Vice President, were both charged with violations of the Labor-Management Relations Act. Mr. Iacobelli was also charged with income tax evasion. Ms. Morgan was charged with using several of her businesses to hide payments made to various UAW officials as part of the scheme. Mr. Iacobelli and Ms. Morgan have both pleaded not guilty. In addition to the charges filed against Mr. Iacobelli and Ms. Morgan, the UAW’s former financial analyst, Jerome Durden, was charged with interfering with the IRS investigation and failure to file a tax return. Mr. Durden pled guilty on August 8. Then, on August 18, Virdell King, formerly Assistant Director of the UAW’s Chrysler Department, was indicted for taking more than $40,000 in payments from the training center through the use of credit cards.

Robots were bad enough, but now workers are being replaced by – goats? – Local 1668 of the American Federation of State, County and Municipal Employees has filed a grievance about goats that are allegedly taking jobs away from human workers. The grievance alleges that Western Michigan University in Kalamazoo violated its collective bargaining agreement with the AFSCME by subcontracting landscaping work to goats belonging to Munchers on Hooves, LLC, while nine Union-represented employees are on layoff. The goats have been employed by the university the last two years to clean up underbrush.

According to the university, the goats can “landscape” without resort to weed-killing chemicals and human exposure to the dangers of the woods, including poison ivy. One of the owners of Munchers said that the goats are taking care of areas that have not been touched for years. At last report, the goats were clearing...
15 acres of woods and leaving natural fertilizer. The goats will go on “temporary layoff” about one week before the WMU students return for the fall semester. If the AFSCME grievance goes to arbitration, the arbitrator will certainly have to take this case by the horns.

Too much “passion” at erotica stores results in union win – The Retail, Wholesale, and Department Store Union won an election at The Pleasure Chest, two erotic boutiques in Manhattan. Issues spurring the employees to seek union representation included the need to feel safe in the job and the belief that management had not done enough to protect the employees from overly aggressive customers. The employee demands apparently include proposals for management to create safety protocols and to provide employee education on de-escalation tactics.