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NEWS & ANALYSIS

"Persuader Rule" change delayed again – The on-again, off-again history of the Obama Administration's plan to change the well-publicized and controversial persuader regulations under the Labor Management Reporting and Disclosure Act, **which began in 2011**, and was **once expected in April 2013** and **then March 2014**, was further delayed according to an announcement by the U.S. Department of Labor on March 6, 2014. The DOL attributed the delay to the new Secretary of Labor's coming on board, the huge number of comments (approximately 6,000) submitted during the rulemaking notice and comment period, and the government shutdown late last year. No new date for issuance has been given.

NLRB holds public comment meeting on its latest proposal for "quickie elections" rules – The National Labor Relations Board held public comment meetings on April 10 and 11 to hear from parties affected by its February 6 proposal to issue new rules for elections. **As we have previously reported**, the NLRB's proposed rules tracked a proposal from 2011 that was issued invalidly and struck down in a court challenge. The current proposal appears to have been validly issued and would change the playing field for representation elections to condense the pro-

ceedings and give an employer little time to communicate with workers about the election. As anticipated, speakers at the meeting advanced their side's agenda. Organized labor representatives contended that the rules were needed to prevent delay in representation cases and level the playing field, and that employers' objections were baseless or should not be of concern. Employer advocates contended that the current rules have worked well and allow employees more time to consider the important issues in advance of their votes. The comment period closed on April 14, and the Board is now expected to issue some version of new election rules in the coming months.

Court refuses to rehear *D.R. Horton* decision on arbitration agreements – On April 16, the Fifth Circuit **refused to rehear** *D.R. Horton, Inc. v. NLRB.* In December 2013, the majority on a three-judge panel **refused to enforce** an **NLRB order** in which the Board found that a non-union employer's "mandatory" arbitration agreement, which permitted only individual claims and not class claims to be arbitrated, violated the Act's protection of concerted activity. The Board had petitioned on March 13 to have the case reheard by the panel or by the full Fifth Circuit, calling the issue exceptionally important and arguing that the panel had misapplied Supreme Court arbitration decisions and failed to recognize the distinctive character of the NLRA and its protection of concerted activity. Now that the Fifth Circuit has rejected the petition for rehearing, the Board is expected to seek review by the Supreme Court and has until July 15 to do so. Although the Board will have deal with the Fifth Circuit precedent in Fifth Circuit states (Louisiana, Mississippi, and Texas), it has refused to follow the decision nationally and elsewhere has continued to aggressively advance its position that class and collective action waivers in mandatory arbitration agreements violate Section 8(a)(1) of the NLRA.

Confidentiality agreement could be perceived as having "chilling effect" on employees' Section 7 rights, court finds – On the other hand, the Board scored a "win" from the Fifth Circuit in ***Flex Frac Logistics, L.L.C., v. NLRB***, in which a three-judge panel of the court enforced a Board decision finding that an employer's confidentiality agreement, which restricted employee disclosure of "confidential information" to outsiders and defined "confidential information" as including "financial information" and "personnel information and documents," interfered with employees' Section 7 rights. The Board had found (and the Court agreed) that the terms "financial information" and "personnel information" could be reasonably interpreted to include information about wages, thus chilling employees' exercise of Section 7 rights. *Flex Frac Logistics* serves as a useful reminder for employers to remain cognizant of the NLRB's position on policies, contracts and agreements of all sorts. A Board finding that a policy is unlawful can result in a Board order for rescission of the offending provision or for something as severe as revocation of discipline or a discharge. If you have not already done so, **this is a good time to review your handbook, policy or contract**. The Board is aggressively pursuing these types of cases and making a big effort to get the word out. And the goal appears to be not to educate employers, but to generate more publicity for the Board and improve its statistics, all at employers' cost.

THE GOOD, THE BAD AND THE UGLY

Teachers' union unfair! – The New Mexico affiliate of the American Federation of Teachers maintained an employment policy that prohibited its employees from "lobbying" AFT officials and participating in "internal politics." The policy was contained in a collective bargaining agreement between the AFT and the International Association of Machinists, which represented the AFT's union employees. Two employees asserted that the policy interfered with the union employees' exercise of Section 7 rights under the NLRA. A majority of a three-member panel of the NLRB **agreed with the employees**, and held that the Machinists did not have the right to waive

employees' Section 7 rights by way of a collective bargaining agreement. Republican Member Harry Johnson dissented, agreeing with the AFT that it had a legitimate interest in preventing interference in selection of AFT officers and that employees would know that the policy did not restrict their Section 7 rights.

Philly T.H.U.G.s charged with burning down Quaker meeting house (!!) because of non-union labor – Ten officials and members of Ironworkers Local 401 **have been indicted** under the Racketeering Influenced and Corrupt Organizations Act for an alleged conspiracy to commit arson, destruction of property, extortion, and assault, in connection with the construction of a Quaker Friends Meeting House in Philadelphia. The alleged conspiracy was an effort to force construction contractors – who employed non-union workers – to hire the local's employees, according to the indictment, issued by Zane Memeger, U.S. Attorney for the Eastern District of Pennsylvania. In addition to allegedly setting the Meeting House on fire while it was under construction, the individuals are charged with threatening and assaulting contractors and their employees, and damaging construction equipment and other job sites. The indictment charges that the conspirators relied on a reputation for violence and sabotage, and had "goon squads," one of which was called "The Helpful Union Guys" ("T.H.U.G.s").

Teamsters stall Sunday "growler" sales in Minnesota, and beer lovers are growling – Minnesota, which prohibits all off-premise use package sales of alcohol on Sundays, was close to enacting a compromise law allowing the Sunday sales of "growlers" by craft brewers – half-gallon refillable containers that customers could have filled with beer, and take home and consume there. The Teamsters, who also oppose opening liquor stores on Sundays, **objected to the legislation** after an unidentified alcohol distributor allegedly told the union that enactment of the legislation would give the wholesaler the right to reopen a collective bargaining agreement for mid-term bargaining. As a result, the "growler" legislation may not make it out of Committee. Although groups like the Minnesota Beer Activists don't intend to take the Teamsters action lying down, for now it may be better to simply buy extra beer on Saturday nights.

Will Northwestern football players, er, *employees*, vote for union representation? – The Northwestern University Wildcats full scholarship football players voted last Friday on whether to be represented by the College Athletic Players Association union, but we may not know the results for a while. The University and the Union filed briefs with the NLRB, seeking review of the Regional Director's decision that the scholarship players were "employees." The day before the election, the Board granted the request for review and invited *amicus* briefs on the issues raised in the case. Meanwhile, the ballots from the April 25 election will be impounded and not counted until after the review, if at all. If the Board finds that the players are not employees, then the votes may never be counted.

Right to Work Foundation kicks UAW while it's down, and UAW kicks another neutral employer – The dust is still settling from the UAW's last-minute **withdrawal of its objections** to **the NLRB election at Volkswagen's Chattanooga, Tennessee, plant**. The UAW and Volkswagen now have to defend against a **lawsuit** filed by the National Right to Work Legal Foundation on behalf of several VW Chattanooga employees. The suit, brought under Section 302 of the Labor Management Relations Act, alleges that the company gave unlawful assistance that was of value to the UAW in the failed organizing effort. Meanwhile, the UAW has its eyes on a Mercedes-Benz workforce in Vance, Alabama, where – despite a neutrality agreement – the union filed unfair labor practice charges with the NLRB in an effort to get more in-plant access to employees. The UAW may be better advised to spend its time trying to figure out why it can't attract the employees of neutral or even sympathetic employers.

About Constangy, Brooks & Smith, LLP

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946.

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